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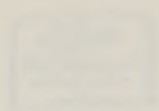
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CALIFORNIA REPORTER

Containing Cases Reported in
PACIFIC REPORTER



23 P.—N. E.

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PEOPLE *ex rel.* MORGAN *v.* HAYNE *et al.*
(No. 13,660.)

(*Supreme Court of California.* Feb. 6, 1890.)

SUPREME COURT COMMISSIONERS—CONSTITUTIONAL
LAW.

1. Act Cal. Feb. 15, 1889, (St. Cal. 1889, p. 13,) to provide for the appointment by the supreme court of five commissioners of the supreme court, to relieve the court, and which provides that they shall be appointed by the court, to "assist" in the performance of its duties, is constitutional.

2. Such commissioners do not exercise judicial functions, or usurp those of the judges of the supreme court, by receiving from the secretaries of the court the briefs and transcripts assigned to them by the court, and reporting the result of their examination thereof and of the authorities cited by counsel, with their opinion thereon, to the court; such reports and opinions never reaching the clerk of the court, nor being of any legal efficacy until approved by the court.

3. An objection that the reports and opinions of the commissioners may unduly influence the court in the rendition of judgments does not affect the constitutionality of the act.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

George A. Johnson, Atty. Gen., for the People. S. M. Wilson and John Garber, for respondents.

FOX, J. This case comes to us on appeal from the superior court of the city and county of San Francisco. It is one of such commanding public importance, involving, as it does, the course of procedure in, and validity of, many of the judgments rendered by this court, that upon motion it has been advanced on the calendar, and is given precedence in the order of determination. It is a proceeding against the defendants, R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson, and P. Van Clief, the commissioners of this court, to inquire "by what authority they claim to exercise any judicial powers within the state of California, and particularly of considering and determining cases on appeal to the supreme court of said state." The complaint charges: (1) That the defendants are exercising the office of judges of the supreme court of the state of California, and as such claim

the right to and do pass upon cases appealed from the superior courts of the state to the supreme court, and decide the same by virtue of their appointment as supreme court commissioners; (2) that the act of the legislature creating the commission, approved March 12, 1885, and the acts amendatory of and supplementary thereto, are contrary to the provisions of article 6, §§ 1-4, of the constitution of the state of California, and are null and void; (3) that the only authority of the defendants to consider and pass upon appeals to the supreme court is by virtue of their appointment as commissioners, and the authority conferred under and by virtue of said acts; (4) that they and each of them are usurping the office of supreme judge of the state of California, and exercising the judicial powers of the state, vested solely in the supreme court by the constitution and laws of the state; and (5) that their only claim so to do is by virtue of their appointment under the acts of the legislature aforesaid.

The defendants answer, denying that they or either of them claim, or have ever claimed, or that they or either of them have ever exercised, or are now exercising, the office of judges of the supreme court; that they or either of them, as such or otherwise, claim the right to or do pass, or have ever passed, upon cases, or any case, appealed from the superior court to said supreme court, or to decide, or have decided, the same, by virtue of their appointment as supreme court commissioners or otherwise; deny that they or either of them claim, or have ever claimed, the right or authority to hear or determine causes, or any cause, on appeal from the superior court to the supreme court; deny that they or either of them do claim, or have ever claimed, the right to exercise any judicial power within the state; and deny that they or either of them are or ever have been usurping the office of supreme judge of the state of California, or exercising any judicial office or function whatever. They further aver that they are commissioners appointed under the act of the legislature approved February 15, 1889, to provide for the appointment by the

supreme court of five commissioners, to be known as "commissioners of the supreme court," etc., and that the only work which they or either of them perform, or claim the right to perform, or have ever performed, or claimed the right to perform, by virtue of their appointment or otherwise, consists in the preliminary examination of the records and briefs in cases referred to them by the supreme court, or the justices thereof, and of the authorities cited in such briefs, and in the making to the court, and the justices thereof, of written suggestions and opinions of the defendants, or some of them, as to the proper disposition of said causes, so referred as aforesaid, for the consideration of the said court and justices in the determination and disposition of said causes by said court and the justices thereof; that said suggestions and opinions have no force or effect whatever as judgments or decisions, nor are they filed or recorded as such; that neither of the defendants or any of them ever enter or direct any judgment or decision whatever in any case whatever, or ever have entered or caused to be entered any judgment, order, or decision whatever, in any case whatever, or ever claimed the right so to do; that neither they nor any of them do perform or exercise, or ever have performed or exercised, any other function than as above stated. They further deny that they or either of them hold or claim to hold their positions as such commissioners under the said act of March 12, 1885, or any act amendatory thereof or supplementary thereto.

On the issues thus framed trial was had, resulting in a judgment in favor of the defendants, and dismissing the action. Motion for a new trial was made, and heard upon a statement of the case, and denied, when plaintiff appealed from the judgment, and from the order denying the motion for new trial.

Upon the record, and as the case is presented in this court, there are but two questions for consideration: (1) Is the act under which it is conceded that these defendants were appointed—the act entitled "An act to provide for the appointment by the supreme court of five commissioners, to be known as 'commissioners of the supreme court,' and to appoint a secretary therefor, to relieve said court from the overburdened condition of its calendar, and to provide for the compensation of said commissioners and secretary, and to appropriate money therefor," approved February 15, 1889, (St. 1889, p. 13)—in conflict with the constitution? (2) Are the defendants usurping powers not conferred by the act?

1. The first section of the act is the only one which needs to be considered in the discussion of either of these questions. It reads as follows: "Section 1. The supreme court of the state of California shall immediately, upon the expiration of the term of office of the present supreme court commissioners, appoint five persons, of legal learning and

personal worth, as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the constitution of the United States and the constitution of the state of California, and to faithfully discharge the duties of the office of commissioner of the supreme court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time, by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner."

This section contains all that there is in the entire act on the subject of the powers or duties of the commissioners. Every presumption is, as is the case with all legislative enactments, in favor of the constitutionality of the provision. It was enacted by a senate and assembly, every member of which was sworn to support the constitution, and is presumed to have passed his judgment to the effect that it is not in conflict with that instrument. It was approved by the chief executive, who was under like obligation, and whose judgment is usually exercised with even more deliberation than can be had in the hurry and confusion often attending upon the action of legislative bodies. The judgment of these two great departments of the government is not to be lightly disregarded or turned aside. Yet it is the province of the judicial department to finally determine the question of the constitutionality of this or any other statute law, whenever a litigant shall challenge the judgment of the other departments, and appeal to this for that final determination. It is also the duty of the judicial department, of its own motion, to pass upon and determine this question for itself, whenever it is called upon to act, in the exercise of its own jurisdiction, under a statute like the one under consideration. This court was so called upon to act when, on the 13th day of May, 1889, it appointed these commissioners, under and in conformity with the provisions of said act of February 15, 1889. By the very act of appointment it, by necessary implication, if not by direct ruling, held the act to be a valid law under the constitution; and this holding was not without direct precedent, even in this state and under the present constitution. Under a similar act, approved March 12, 1885, this court as then constituted appointed a commission for a like purpose, and with like powers, consisting of three members, and by such appointment

recognized the act as a valid law under the constitution. From that time until the creation of the present board, under the act of 1889, the commissioners so appointed exercised all the functions that are authorized to be exercised, or are in fact exercised, by these defendants under the said act of 1889. That commission and the present one have, unchallenged, assisted the court in the examination and preparation for decision of over a thousand cases wherein the judgments were *coram non iudice*, if it be true, as claimed by the relator, that the act authorizes the commissioners to exercise functions, and they have exercised functions, judicial in their character, and which, by the constitution, are conferred alone upon the justices of this court. To reverse a construction which must of necessity have been given to these statutes before or at the time of the appointment of these commissioners, and which has been acquiesced in for so long a time, and thereby produce such a result as would follow such reversal, is a thing which ought not to be done by any court, unless there is found the gravest necessity for doing it. If the question of the constitutionality of the act was even doubtful, after such a lapse of time and such a practice under the act, the doubt ought to be resolved in favor of its validity, and the case be left to rest on the doctrine of *stare decisis*.

But to our minds there is no doubt about the validity of the statute. In the language of the court below: "The act in question is not open to objection of a constitutional character. In order to bring it into conflict with the constitution, a strained construction of its words becomes necessary, as well as an utter disregard of the natural import of those words. * * * The phrase 'assist the court' must, for the purpose of creating a conflict, be understood not merely to facilitate the court, which is the natural import,—to lessen its labors,—but, beyond this, to assume the exercise of, or a participation in the exercise of, the appropriate function of the court to decide causes; that the commissioners are to take part in that decision as the members of the court themselves take part in it; in short, it is necessary to say that 'assistance' means 'supersession.'" Nothing in the language used, or in its context, will justify any construction which will bring the provisions of this act in relation to the powers or duties of the commissioners in conflict with any provision of the constitution. If the language employed was capable of two or more constructions, any one of which would be in harmony with the constitution, it would be our duty to give it that construction. But, fortunately, we are not driven to the selection of one of several possible constructions. There is but one "warranted by the natural import of the language employed." One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but he must show that, by the

natural and necessary import of the language, it is clearly in conflict with the supreme law. That has not been and cannot be done in this case. Not only is there an entire failure to confer judicial power upon these commissioners, but there is also an entire absence of an attempt to interfere with the exercise of the power conferred by the constitution upon and belonging to the judicial department of the government. The legislature has provided for the appointment and compensation of these commissioners. They are given no power except to "assist the court," under such rules and regulations as it may adopt in the performance of its duties. The great burden of the work of this court is that which is necessarily done in sifting the causes, to ascertain, from the mass of matter brought here in each case, the truth and the law bearing upon it, preparatory to the processes of adjudication and judgment. To say that the court cannot be assisted in this preliminary work by men sworn to fidelity, learned in the law, unconnected with and unbiased in the causes, is to deny us unbiased assistance in the very direction in which we are bound to receive it, and do receive it, in every cause that comes before us, from counsel not equally free or likely to give us unprejudiced opinions and statements; and to deny us such assistance as courts of every grade have been accustomed, time out of mind, to receive, without objection, in this country and in England. It is no more unconstitutional for this court to receive such assistance from commissioners designated by itself, or from *amici curiæ*, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause. As well might it be said that section 266 of the Code of Civil Procedure, which provides that the secretaries and bailiffs of this court shall hold their offices at the pleasure of the justices, and "shall perform such duties as may be required of them by the court or the justices thereof," is unconstitutional, and conferred upon those officers judicial power. "The power to hear (examine) causes, and report facts or conclusions to the court for its judgment, is not judicial, within the meaning of the constitution." *Shoultz v. McPheeters*, 79 Ind. 378. "No action which is merely preparatory to an order or judgment to be rendered by some different body can be properly termed judicial. * * * It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it." *Underwood v. McDuffee*, 15 Mich. 361.

The only case cited by the relator in support of his argument against the constitutionality of this act is that of *State v. Noble*, decided by the supreme court of Indiana, and reported in 21 N. E. Rep. 244. While this

case, or that of any other state court of last resort, is not binding as authority upon this court, it would be strongly persuasive, if the act of the legislature under consideration was not so unlike our own as entirely to defeat the purpose for which it is cited here. There, as here, the legislature provided for the appointment of a commission to assist the supreme court in the performance of its duties. But there it provided that the legislature should appoint the commissioners, and in case of vacancy in the commission the same should be filled by appointment made by the governor; thus taking away from the judicial department the power to select its own assistants, and thrusting upon the court men selected by the political and executive departments of the government. Chief Justice ELLIOTT, who wrote the opinion, is widely and favorably known, not only for his legal learning and ability, but for the tenacity with which he insists upon the independence of the several departments of the government, and resents any encroachment upon the powers and rights of the judiciary. The only question which he was called upon necessarily to decide in the case was as to the right of the legislature to appoint, or to provide for the appointment of, by any other officer than the court itself, commissioners who should act as assistants to the court in the performance of its duties. This question he discusses ably, and finally declares: "It cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners. * * * As the judicial power embraced the authority to select 'assistants and ministers' at the time the constitution was adopted, that right was sanctioned and confirmed, for it was the power then existing that was so carefully and fully vested in the courts. It was, as we have shown, a well-known and fully recognized principle that courts should, as part of the judicial power, have the right to choose their own assistants, and the constitution has secured and confirmed that principle beyond the power of the legislature to shake it." The court then discusses other features in the act, not found in our own, conferring upon the commissioners certain powers not conferred by our act, and which in their nature constitute a part of the judicial power of the court; and, in view of these several features, holds the act to be unconstitutional. But, as we read it, there is nothing in the decision to indicate that the act here under consideration would have been held by that court to be in conflict with the constitution, or that the legislature might not provide for the court itself appointing commissioners to assist it or its justices in the preliminary and preparatory work necessary to the final adjudication and determination of the causes before it.

2. In the investigation of the second question involved, one of the justices of this court longest in commission,—one who has been upon this bench ever since the organization of the court under the present constitution,—and one of the commissioners longest in service, were called and examined as witnesses, and it was agreed that the other justices and commissioners would testify substantially the same way. From the testimony thus elicited it was distinctly and clearly shown that the answer of the defendants was and is true; that they do not usurp the functions of judges of this court, and do not exercise any judicial power whatever. They receive, not from the clerk—for they have no communication with him,—but from the secretaries of the court, such of the transcripts and briefs as the court shall have assigned to them, and make a critical examination of the transcripts, briefs, and of the authorities cited by counsel, and report to the court the result of such examination, with their opinion thereon, accompanied with a citation of the authorities, and also with frequent references to folios of the transcript, to aid the court in its investigations. These reports and opinions have no force or effect whatever as judgments of the court, do not go to the clerk, but through the secretaries come back to the judges, and they never reach the office of the clerk of the court, or become in any manner public, unless, upon examination by the justices themselves of the record, the briefs, and the opinions so furnished by the commissioners, they are approved and adopted by a constitutional number of the justices, and the judgment of the court is ordered in conformity therewith. Many of these reports and opinions are never approved and never see the light. Others of them are used in part, and only in part. In every case, when the judgment is rendered, it is the judgment of the court, and not of the commissioners. Nothing originates before these commissioners, and nothing terminates with their labors or their opinion. The conclusions to which they arrive are but opinions submitted for our adoption, if we think they are founded in reason and law. Hence their reports and opinions are neither decisions nor infallible guides, but they are serviceable instrumentalities to aid us in performing our functions. The commissioners exercise no power *proprio vigore*. The court acquires the jurisdiction, and the court renders the judgment upon the controversy. Therefore the whole exercise of the judicial power is by the court, the commissioners acting only in an intermediate capacity, as auxiliary to the court in the ascertainment of certain facts and law necessary to its enlightenment in giving the proper decision and judgment.

Another objection urged against this commission is that the reports and opinions of the commissioners are likely to or may have an undue influence on the court, or the justices thereof, in their subsequent considera-

tion of the cases, and in the rendition of judgments thereon. A complete answer to this, so far as this action is concerned, is that, if it has any force as an objection, it is not the fault of the act, but of the court. It does not go to the question of the constitutionality of the law, nor does it tend to show that the commissioners are usurping judicial power. Neither do we see any good reason to apprehend that a careful and impartial collation of the facts and points in a case, with references to the transcript for the verification thereof, made by men skilled in that service, and entirely unbiased and uninterested in the cause, accompanied by an expression of opinion as to the law and reference to the authorities to sustain it, as well as a reference to the authorities claimed to be adverse to such opinion, is any more likely, or even as likely, to improperly influence the court in arriving at a judgment, as a similar service rendered by retained counsel, acting under the spur of retainer, and in the direct interest of their clients. And such assistance the court is constantly bound, under the law, to receive, and give to it most careful consideration. If this objection has any foundation in fact, it addresses itself to the legislature, and not to the court. The judgment and order appealed from are affirmed, and it is further ordered that the *remittitur* herein issue forthwith.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

BEATTY, C. J. I concur in the judgment of affirmance, and in most of the reasoning of Justice FOX's opinion, but I do not think that a determination now that the act in question is unconstitutional would have the effect of invalidating judgments heretofore rendered in cases referred to the commission, and based upon their opinion or report. Therefore I do not rely at all upon the doctrine of *stare decisis* as a ground of my conclusions. And I do not agree that there is nothing in the opinion of Judge ELLIOTT, in the case of *State v. Noble*, to indicate that he would have held our act unconstitutional. On the contrary, he expresses views from which, in my opinion, such a conclusion must follow, but I do not assent to his views. It seems to me that the point at which he goes wrong is where he declares that the duty of writing its opinions is specifically imposed upon the supreme court by the constitution. If I held to this view, I confess I could see no escape from the conclusion that the duties we assign to our commissioners, and which are performed by them, involve a delegation by us, and a usurpation by them, of judicial functions. But I see nothing in the language of the Indiana constitution, as quoted by Judge ELLIOTT, and nothing in the language of our own constitution, to warrant the conclusion that the writing of opinions is specifically imposed upon the members of the court. The pre-

cise language of our constitution is as follows: "In the determination of causes, all decisions of the court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated."

Article 6, § 2. In order to comply with this injunction, it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion; but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance, or may be properly delegated to others. It not infrequently happens that the judge of the superior court prepares an opinion fully covering every proposition involved in a case, and that his opinion is found to be in all respects correct. In such cases there is certainly no necessity for the preparation of a new opinion here, which could differ in form only from the opinion of the trial judge. On the contrary, this court may, and frequently does, adopt the opinion of the trial judge as its own, and for the reasons therein stated affirms the judgment or order appealed from. *Burrell v. Haw*, 48 Cal. 223; *Meredith v. Supervisors*, 50 Cal. 433; *Williams v. Williams*, 73 Cal. 101, 14 Pac. Rep. 394. Many similar instances might be cited from the reports of this and other states, and in this case we might well have adopted the opinion of Judge WALLACE of the superior court as the grounds for affirming his judgment. Sometimes a proposition covering the whole or one or more branches of a case is found to be so aptly and correctly stated in the printed argument of counsel that the court can do no better than to adopt it as the ground of its decision. *Sneath v. Griffin*, 48 Cal. 438; *Brown v. Burbank*, 64 Cal. 101. Can it be said that this is a violation of the constitution? I certainly think not. The object of the constitutional requirement is not to compel the judges to formulate opinions in their own language, but to put upon record the grounds of their decisions, for the guidance of the public in their business transactions. The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record, and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified, or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which

the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it makes it its own. "But," it is asked, "if the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission? It saves the court no labor, and does nothing to facilitate the disposition of causes." This a wholly mistaken assumption. The examination of the record of a case and the argument of counsel, for the purpose of ascertaining the material facts and the law bearing upon them, is a very large part of the labor of decision, but it is by no means all. There are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task, but I apprehend that, according to the experience of most judges, the putting of their opinions in form, even after their minds are fully made up, is a very serious labor, requiring the expenditure of a large portion of the time at their disposal. By the labors of the commission this time and much serious labor is saved to the court in a large proportion of the cases referred to them, without any abdication or delegation by the court of its constitutional functions.

82 Cal. 96

MORAN v. GARDEMEYER *et al.* (No. 12,197.)

(*Supreme Court of California.* Dec. 18, 1889.)

EXECUTORS AND ADMINISTRATORS—MORTGAGES—ATTORNEY'S FEES.

1. Under Code Civil Proc. Cal. § 1497, providing for the filing and allowance of claims against decedents' estates; and section 1500, providing that no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except that an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint,—the presentation to, and allowance by, the personal representatives of a deceased mortgagor of a claim founded upon the note which the mortgage was given to secure does not bar the right to proceed on such mortgage by foreclosure suit.

2. Where a mortgage is conditioned as security, in addition to the principal sum named, "for all further advances to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof," a subsequent note, indorsed by the mortgagor, and by him transferred to the mortgagee, is not secured by the terms of the mortgage.

3. Where a mortgage provides for counsel fees in case of foreclosure, it is in the discretion of the court to make a reasonable and just allowance therefor without regard to the amount specified in the mortgage.

Department 1. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action in foreclosure against the executors of a mortgagor. Plaintiff had judgment, from which defendants appeal. Code Civil Proc. Cal. § 1497, provides for the filing and allowance of claims against decedents' estates; and section 1500 provides that "no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or adminis-

trator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

Naphtaly, Friedenrich & Ackerman, for appellants. *George M. Shaw* and *A. M. Rosborough*, for respondent.

Fox, J. This is an action by a mortgagee against the executors of a mortgagor for foreclosure. December 29, 1882, Johanne C. F. Gardemeyer, otherwise called and usually writing his name Christian Gardemeyer, made to plaintiff his promissory note for \$3,000, due two years after date, with interest at the rate of 9 per cent. per annum, payable semi-annually, and, if the principal or interest was not paid at maturity, then the same was to bear interest at the rate of 1 per cent. per month until paid. To secure the payment of this note according to the terms thereof, he at the same time made and executed to plaintiff a mortgage of certain real estate situate in the county of Alameda, which was duly acknowledged and recorded. This mortgage expressed on its face that it was to be security, not only for the promissory note aforesaid, but also "for all further advances to the mortgagor by the mortgagee, and other indebtedness to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof, such further advances and indebtedness not to exceed the sum of \$500, exclusive of interest." Nothing was ever paid on the said promissory note, except the interest to December 28, 1884. According to the allegations of the complaint, on the 11th of October, 1884, one P. D. Gardemeyer made his promissory note payable to the order of the mortgagor above named, for the sum of \$750, due one day after date, with interest at 7 per cent. per month from date until paid; that on the 22d of November, 1884, the mortgagor, holder of said note, indorsed and transferred the same to plaintiff; and that no part thereof, principal or interest, has been paid. It further appears that on the 25th day of May, 1885, the mortgagor died, and in due course his will was admitted to probate, and three of the defendants herein were appointed and qualified as executors thereof. The other defendants are minor heirs of the deceased, and devisees under his will. In due course the plaintiff presented his claim upon both these notes to the executors for allowance, and both were allowed and approved by the executors, and by the court in probate. The claim as presented particularly specified that the first-named note was secured by the mortgage above referred to, reciting it by date and place of record; but as to the second-named note the claim so presented did not make any pretense that it was secured, or that any part of it was secured, or claimed to be secured, by said mortgage or otherwise. The mortgage provided, among other things, that in case of

foreclosure there should be allowed, and secured by the mortgage, a counsel fee of \$100, and 5 per cent. upon the amount found due. The complaint was in two counts,—the first upon the note for \$3,000; and the second upon the note of P. D. Gardemeyer, so indorsed to plaintiff as aforesaid, and claiming that as to \$500 of said last-named note, and the interest on said \$500 at the rate of 7 per cent. per month, it was secured by said mortgage. Each count was full and complete as to form, and each count averred that \$100 and 5 per cent. upon the amount of the judgment was a reasonable amount to be allowed to plaintiff as counsel fee in the case. The prayer was that plaintiff recover judgment for the sum of \$3,000, with interest thereon at the rate of 1 per cent. per month from December 28, 1884, interest payable semi-annually, with interest upon unpaid installments of interest at 1 per cent. per month; also for the sum of \$500, with interest thereon at the rate of 7 per cent. per month from October 11, 1884; and for the sum of \$100, and 5 per cent. upon the amount of the judgment as counsel fee, and costs of suit, and for a decree of foreclosure in the usual form, directing that the mortgaged property be sold for the payment of such judgment, etc. To this complaint, and each count thereof separately, the defendants demurred. The demurrer was overruled. The executors made default for want of answer. The minor heirs answered by their guardian *ad litem*, denying all the allegations of the complaint except as to their own *status* to the case and relations to the property. The case was submitted to the court upon the pleadings, the default of the executors, and the proofs made in open court, and decree entered declaring that there is now (March 16, 1887) due to the plaintiff, upon the debts and mortgage set forth, the sum of \$3,500 principal, with the further sum of \$728.74 interest, \$300 counsel fees, and \$31.50 costs of suit, and ordering foreclosure and sale of the property to satisfy the same, and that judgment be entered against the estate for deficiency, if any there be. It will thus be seen that the judgment was for the principal sum claimed in both counts of the complaint. Presumptively interest is allowed upon the sums claimed in both counts as prayed, as no point is made on that subject. The appeal is from the judgment, and the case comes up on the judgment roll.

The point made against the first count of this complaint is that the plaintiff is not entitled to maintain this action to foreclose, for the reason that he had already presented his claim against the estate for the amount of the indebtedness represented by the said \$3,000 note and interest, and the same had been allowed and approved, and stood as an admitted claim against the estate, to be paid in due course of administration, and he, therefore, no longer had a right to proceed for the collection of the same by foreclosure, and to subject the estate to the costs and counsel fees in foreclosure. Counsel contend that,

having filed his claim under section 1497, Code Civil Proc., a mortgagee is, under the present constitution and statutes, thereafter barred of the right to proceed by foreclosure, unless the right is given by section 1500, and that under that section it is only given where he declines to file his claim under section 1497, and elects to look to the mortgaged property alone for the recovery of his money, and expressly waives all claim against the estate for deficiency and all claim for counsel fee; also claiming that when his claim is once filed and allowed he is amply protected by the provisions of section 1569, Id. We cannot concede, as counsel contend, that this is now an open question in this court. The point made was directly decided, against the position taken by appellants here, in *Society v. Conlin*, 67 Cal. 180, 7 Pac. Rep. 477. This case was followed by *Society v. Hutchinson*, 68 Cal. 52, 8 Pac. Rep. 627, and *Wise v. Williams*, 72 Cal. 544, 14 Pac. Rep. 204, both of which were cases of foreclosure after presentation and allowance of the claim, and where, but for the presentation and allowance of claim, the debt would have been barred by the statute of limitations, and mortgage extinguished; and in both cases the court held that the action could be maintained, and that the debt, by reason of the fact that it had been presented and allowed, did not and would not become barred pending administration. On the authority of these decisions, we must hold that this point is not well taken, and under the statute we see no reason to doubt the correctness of this conclusion.

To the second count of the complaint the defendants made the same point, under the cause of demurrer that the same did not state facts sufficient to constitute a cause of action, and specially demurred for that it affirmatively appeared on the face of the complaint that the indebtedness therein set forth was not secured by the said mortgage, that it was not presented to the executors as a claim secured by said mortgage, and did not rank as a secured claim against said estate. The court overruled this demurrer, and in its decree, as already shown, allowed \$500 of this note, with the interest thereon, as secured by this mortgage, and ordered foreclosure therefor. In this we think the court erred. By no fair construction of the terms of that mortgage can it be held that the plaintiff could go out and buy up the notes of third parties, upon which his mortgagor was a simple indorser, and hold the same as secured by that mortgage. Besides, in presenting his claim thereon to the executors, and to the court sitting in probate, he did not present it as a secured claim, but it was presented and allowed as an unsecured claim against the estate, to be paid in due course of administration. Respondent, however, claims that it was averred in the complaint, and admitted by the demurrer, that the claim, to the extent allowed in this decree, was secured by that mortgage, and that consequently the decree in that regard is in accordance

with the admissions of the pleadings. We have looked in vain for any such allegation in the complaint, and, if there was such an averment in one part of the complaint, it was contradicted by the copy of the sworn claim, as presented to the executors, which copy was annexed to and made a part of the complaint.

The mortgage having provided for counsel fee in case of foreclosure, it was and is in the discretion of the court below to make such allowance as in its judgment was reasonable and just, without regard to the amount or percentage specified in the mortgage. The court seems to have acted on this understanding of the law, and we cannot say that there was any abuse of discretion in the allowance made. The judgment and decree must be reversed as to so much of it as is based upon the cause of action set out in the second count of this complaint, and the cause remanded for further proceedings in accordance with this opinion. So ordered.

We concur: WORKS, J.; PATERSON, J.

(82 Cal. 102)

MORAN v. GARDEMEYER *et al.* (No. 12,198.)

(Supreme Court of California. Dec. 18, 1889.)

MORTGAGES—DEBTS SECURED.

A mortgage containing the condition that, in addition to the principal sum secured, it shall be security for "all further advances to the mortgagor by the mortgagee that may exist, arise, or be contracted before the satisfaction hereof," does not cover a subsequent note given to the mortgagee, containing this clause: "This note is secured by crop mortgage," so that the holder may sue the mortgagor's executor without presenting the claim, as provided by Code Civil Proc. Cal. § 1500, in case of claims secured by mortgage.

Department 1. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Naphtaly, Friedenrich & Ackerman, for appellants. *George M. Shaw and A. M. Rosborough*, for respondent.

FOX, J. With the exception that the amounts are different, and the mortgage is upon different property, this case is exactly like No. 12,197, ante, 6, between the same parties, (decided this day,) in all that relates to the cause of action set out in the first count of the complaint, and in all that relates to the course of procedure in the cause, and the judgment and decree therein rendered. Without repeating the history of the case in detail, on the authority of the decision in said No. 12,197, we hold that the objection to the judgment and decree is not well taken, so far as the same relates to the cause of action set out in the first count of the complaint. The mortgage was exactly the same as the other on the subject of future advances and indebtedness. Long after the date of the mortgage and of the note therein set out (the subject-matter of the first count) the mortgagor made and executed to the mortgagee, plaintiff herein, his promissory note for the sum of \$1,303, payable on the 1st of September, 1884, with interest at the rate of 1 per cent. per month, which note contained these

clauses: "In case of suit to collect this note, or any part thereof, I agree to pay attorney's fees and costs of court, which shall be included in the judgment. This note is secured by crop mortgage." In due course plaintiff presented his claim against the estate of the mortgagor, upon this note, asserting that it was secured by crop mortgage, as shown upon its face, but making no pretense that it or any part of it was secured by the mortgage now in suit, or otherwise than by such crop mortgage. It was regularly allowed as presented. Now, in this foreclosure, he sets it up as a separate cause of action, in a second count to his complaint, and prays that it be decreed that as to \$500 of the amount, with the interest thereon, it is secured by this mortgage, and that it be included in the judgment of foreclosure, with judgment docketed against the estate for the deficiency, if there be any. As before, there is no direct averment in the complaint that this note was secured by this mortgage to any extent, and the note itself, and the claim as presented to the executors, negative the proposition that it was so secured, by showing affirmatively that it was otherwise secured. If the note had been silent on the subject of security, under the well-established rule in regard to mortgages given to secure future indebtedness we should have been constrained to hold that it was secured by the mortgage in suit to the extent of the limitation therein prescribed. But as to this note the plaintiff has accepted it, expressing upon its face that it is otherwise secured as to its entirety, and with no expression indicating that it is secured by this mortgage, either in whole or in part. He has failed anywhere to advise the executors that it is so secured. We must hold that, if he could resort to this security at all upon that note, it could only be for the deficiency, after exhausting the other security. And it is by no means certain that he could do that; that as to such deficiency, if there should be one, he would not be remitted to his established claim against the estate, to be paid in due course of administration. It is unnecessary to decide that question here, for in this case he has made no attempt to show that he has exhausted the direct security given for the payment of that note. It follows that the judgment and decree in this case must be reversed, so far as it is based upon the cause of action set out in the second count of the complaint, and the case be remanded for further proceedings in accordance with this opinion. So ordered.

We concur: WORKS, J.; PATERSON, J.

(82 Cal. 104)

MILLER v. PRENTICE. (No. 12,239.)

(Supreme Court of California. Dec. 18, 1889.)

SCHOOL LANDS—CERTIFICATE OF PURCHASE.

A certificate of purchase of state school lands, issued under Pol. Code Cal. § 3495, requiring an applicant to make affidavit whether the land is or is not suitable for cultivation, and, if it is, that he is an actual settler thereon, is only *prima facie* evidence of the purchaser's title, and

may be impeached by proof showing that he was not legally entitled to purchase the land.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Geil & Morehouse, for appellant. *Webb & Sherwood*, for respondent.

SHARPSTEIN, J. Ejectment. Complaint in the usual form, all the allegations of which are denied by the answer. The demanded premises were state school lands. Plaintiff relies on a certificate of purchase as establishing his title and right to the possession of said premises. The court found for plaintiff, entered judgment in his favor, and denied defendant's motion for a new trial. From the judgment and order denying his motion for a new trial defendant appeals. His contention here is that he proved on the trial that the land is suitable for cultivation, and that plaintiff had never been an actual settler on it, and that plaintiff is not a citizen of the United States.

That the plaintiff was never an actual settler on the demanded premises is shown by evidence free from conflict; and by evidence likewise free from conflict it is shown that the defendant was an actual settler on said premises, and that he had applied, in the proper mode, to purchase the same from the state. One of the requirements of the Code is that any person desiring to purchase any portion, not less than the smallest legal subdivision of any of the sixteenth and thirty-sixth sections, make an affidavit stating "whether the land is or is not suitable for cultivation; and, if it is, that the applicant is an actual settler thereon." In this case the plaintiff did not state in his affidavit whether the land was or was not suitable for cultivation, and the evidence on the trial, we think, without material conflict, shows that it was suitable for cultivation. The plaintiff states in his testimony "that the land is what you would call grazing land. Some of it could be plowed, but not more than the smallest legal subdivision at any one place. I don't think you could find more than eighteen or twenty acres at any one place, if you could find that, which you could plow. The land is hilly, and, in my judgment, not fit for agriculture." We do not think that this materially conflicts with the testimony of witnesses who testify that they are well acquainted with the land in controversy, and that it is suitable for cultivation. The evidence as to the citizenship of plaintiff is clearly insufficient to establish that fact. He swears that he was born in France, and was naturalized in the city of New York, but has lost his naturalization papers. We do not doubt that the defendant, who is in the actual occupation of the premises, is in a position to show, when his right of possession is assailed, that his assailant has no title or right of possession in and to the premises. The plaintiff's certificate is only *prima facie* evidence of his title, and may be impeached

by proving that he could not legally purchase the land. As we have before stated, his affidavit is defective, in omitting to state whether the land was or was not suitable for cultivation; and the evidence shows that it was, and that plaintiff was not an actual settler upon it. Therefore, the finding of the court that the plaintiff is the owner of, and entitled to the possession of, the demanded premises, is not justified by the evidence. Judgment and order reversed.

We concur: THORNTON, J.; MCFARLAND, J.

82 Cal. 174

RICHARDSON *et al.* v. BUTLER *et al.* (No. 12,454.)

(Supreme Court of California. Dec. 23, 1889.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND—PROCEEDINGS OF PROBATE COURT—COLLATERAL ATTACK.

1. A petition for a sale of land by an administrator, aided by an inventory which was made part of it, described the land as an undivided half interest in the Sharp and Sproul tract, situate in San Francisco, and then gives metes and bounds, excepting certain parcels heretofore conveyed, which are delineated and marked on a map or diagram "on file herein." This map, at the time of trial, could not be found. It further stated that under certain legislative acts all of said land was reserved and appropriated by the public for a park, except that portion described in Schedule B, and another portion assigned to S. under a decree for partition, which was referred to; that the only real property to which the estate was entitled was that described in Schedule B, and that the condition and value of the same are set forth in said schedule. Schedule B contained full descriptions of all the lands belonging to the estate. *Held*, that the description was sufficient, under Code Civil Proc. Cal. § 1537, requiring the petition to contain a description of the property, and the condition and value thereof.

2. The designation of a city lot as "unimproved" is a sufficient description of its condition, as required by section 1537.

3. In a petition by an administrator to sell land, simply to provide for the family allowance and future expenses of administration, where the prior accounts of the administrator have been settled, an averment that there are no debts or expenses accrued and unpaid is a sufficient statement of the debts, expenses, and charges of administration required by Code Civil Proc. Cal. § 1537.

4. Where it appears from the petition that the amount necessary to be raised is between \$10,000 and \$11,000, and the property consists of several lots and parcels, a provision that the sale shall cease when an amount not less than \$10,000, and not more than \$11,000, shall be obtained, does not invalidate the order of sale.

5. An adjudication by the probate court that a notice of sale had been posted in three public places cannot be attacked collaterally.

6. Where certain schedules were annexed to and made part of the petition, a verification placed before the schedules is not improper.

Department 2. Appeal from superior court, city and county of San Francisco; G. MAGUIRE, Judge.

Jarboe, Harrison & Goodfellow, for appellants. *J. C. Bates*, for respondents.

MCFARLAND, J. Action to quiet title. Judgment for plaintiffs, from which, and from an order denying a new trial, the defendants Kate Dunne and Alice Dunne appeal. Plaintiffs claim title to the disputed

premises as heirs at law of their deceased father, John Sproul. Defendants claim title under a probate sale made to their grantors in the course of the administration of the estate of said Sproul, deceased, upon the petition of his administratrix, Mary Ann Sproul. The court below ruled said sale to be void, and practically the only question in the case is whether or not that ruling was correct. The court below merely found, generally, that "said sale was void in law, and passed no title to said Moxley and Kingwell, (plaintiff's grantors,) or either of them;" and does not find any specific facts upon which that conclusion was based. But the brief of respondent's counsel—waiving, for the present, appellant's objection to the findings for insufficiency—discloses the grounds of the finding, and the main one is that the petition for the sale did not contain a description of the real property of the estate, and a statement of its condition and value, as required by section 1537, Code Civil Proc.

It is no doubt the settled rule here that the application of an administrator for the sale of lands belonging to the estate is an independent proceeding; that the jurisdiction of the probate court over it does not come from its general jurisdiction over the administration of the estate, but from the petition for the sale; and that the petition must comply with the requirements of the Code. *Pryor v. Downey*, 50 Cal. 398, and cases there cited. And we apprehend that this rule is not changed by the provisions of the present constitution, which gives jurisdiction of probate business to a court of general jurisdiction; or by the fact that the Code no longer requires a deficiency of personal property to be shown, before there can be any valid sale of real property. But, as was said in *Stuart v. Allen*, 16 Cal. 501: "In order to the exercise of jurisdiction, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough." A court, keeping in view the interests of both heirs and purchasers in good faith for value, (as in this case,) ought not to consider the provisions of the Code as presenting an intricate verbal puzzle which must be worked out minutely, and with extreme exactness, in the petition. Such a view would make grave rights of property dependent upon the doing of mere trifling tricks. Looking at the purposes of the Code provisions on the subject,—gathered, of course, from their language,—a petition should be considered sufficient if it fully and fairly answers those purposes; and the main purpose, clearly, is to inform the court about the condition of the estate, so that it may pass upon the necessity and propriety of the sale. And, with these views, we think that the petition involved in this case was sufficient.

John Sproul died in January, 1869; and the petition was not filed until November, 1874,—nearly five years afterwards. It is quite lengthy, and covers 16 pages of the

printed transcript. With respect to the real property as it stood when the deceased died, the petition states that on March 28, 1870, she returned to the court "a true inventory and appraisement of all the estate of said deceased which came to her possession or knowledge, which inventory and appraisement is hereby referred to, and made a part hereof." It then states that "the only property which came into the possession of your petitioner, as appears by said inventory and appraisement, was" (after mentioning personal property) "an undivided one-half interest in and to the tract of land described in said inventory, and known as the 'Sharp and Sproul Tract,' and owned in common by said deceased and George F. Sharp, appraised as of the value of \$35,000." This tract is further described in the petition as "situate in said city and county of San Francisco, and known as 'Outside Lands.'" The petition further states that, under certain acts and ordinances of congress, the state of California, and the city and county of San Francisco, all of said land was reserved and appropriated by said city and county for the purposes of a public park, the owners being compensated, "except that portion thereof hereinafter described in Schedule B, and another portion thereof assigned to George F. Sharp under the decree of partition hereinafter referred to." It is then stated that, after the administration had commenced, the said Sharp brought an action against petitioner and the heirs of said deceased for partition of all of said remaining land, except that part described in the second subdivision of said Schedule B; and that on April 21, 1874, by a decree in that action, the lands described in the first subdivision of said Schedule B were set apart in severalty to the estate of said Sproul, deceased. Said Schedule B contains—*First*, descriptions of all the various blocks, lots, and parcels of the land thus set off to the estate, and there is no pretense that such descriptions are not full and sufficient; and, *second*, descriptions of the lots and parcels in which the estate and said Sharp were still co-tenants, and these descriptions are also sufficient. And the petition alleges "that the only real property to which said estate is entitled, or which your petitioner, as administratrix of said estate, is in or entitled to the possession, is that described in Schedule B, and that the condition and value of said real property are set forth in said schedule." It is clear, therefore, that the petition set forth full and clear descriptions of all the real property of the estate at the time the petition was filed; and, as it gave the court complete information on that subject, it certainly complied with the main purpose of the Code in that regard.

But it is urged by respondents that the sale, and all proceedings of the probate court with respect to it, should be held absolutely void on this collateral attack, because, as they contend, there is no sufficient descrip-

tion in the petition of the land of the estate as it was when Sproul died; that is, "the real property of which the decedent died seized." The petition, with the inventory which is a part of it, describes the land first, generally, as the undivided one-half of the "Sharp and Sproul tract," situated in San Francisco, and then gives a description by metes and bounds, excepting certain parcels heretofore conveyed, which are delineated and marked with certain specific names on a map or diagram "on file herein;" that is, on file with the inventory. But at the time of the trial—about 17 years afterwards—such map or diagram could not be found on file, or among the papers of the estate, and it is argued that without this map the description is so defective as to upset the jurisdiction. The land, however, down to the decree of partition, was always described as the half of the Sharp and Sproul tract. Now, the averments of the petition are (and the jurisdiction depends on the averments, not upon their truth or falsity) that all of the said land not mentioned in the second subdivision of Schedule B was divided by the partition decree; and the parcels set off in severalty to the estate by that decree are fully described in the first part of said schedule. And the second part of said schedule fully describes all the lots and parcels of said tract in which the estate and Sharp were still joint owners. It seems to us, therefore, that the averments of the petition sufficiently showed to the court what the interest of the deceased in the "Sharp and Sproul tract" was at the time of his death, and contained a full description of all the real property of the estate at the time the sale was asked, and gave to the court all the information upon that subject contemplated by the Code, and that the sale was not void for want of sufficient description of real property in the petition. *Stuart v. Allen*, 16 Cal. 501; *Fitch v. Miller*, 20 Cal. 352.

The other objections made by the respondents are untenable. The designation of a city lot as "unimproved" is, we think, a sufficient description of its "condition," at least, to give jurisdiction to the probate court.

The statement that there were no debts or expenses of administration accrued and unpaid was, we think, sufficient to vest jurisdiction, so far as that point is concerned, where, as in this case, the prior accounts of the administratrix had been settled, and the petition sought a sale, not to pay debts and past expenses, but to provide for family allowance and future expenses of administration.

It appears that the amount necessary to be raised was between \$10,000 and \$11,000; and, the property consisting of several separate lots and parcels, the order of sale provided that "such sale shall cease when an amount not less than \$10,000, and not exceeding \$11,000, has been obtained;" and respondent contends that the part of the order just quoted

makes the whole void. We are unable to see any good reason for that contention.

The probate court, in its order confirming the sale, declared that the notice of sale was posted in three public places. Respondent introduced evidence, against the objection of appellants, with intent to show that one of the places was not a "public" place within the meaning of the Code. But surely the court, having jurisdiction of the proceeding, could, within that jurisdiction, find the fact that the place was a public place; and such finding cannot be attacked collaterally.

The position of respondent that the petition was not properly verified, because the certificate of verification is placed before the schedules which were attached to it, is not tenable. The schedules were a part of the petition, and were as fully included in the verification as were the parts which preceded the certificate.

We see no other attacks upon the jurisdiction of the probate court to order the sale which require special notice. It may be remarked that there is no pretense that the sale under which appellants claim was in fact fraudulent, or without adequate consideration or in any way unfair. To the objections made to it, may well be applied that often abused word "technical;" and we do not think that they are sufficient to overturn, for want of jurisdiction, the solemn judgment of a court, or to destroy a title to realty honestly acquired.

Appellants plead as a defense to the action section 1573, which provides that "no action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator." Counsel on both sides, in discussing the issue made by this defense, deal mainly with the question whether this section applies to actions to quiet title, and whether, to make the defense good, it must not appear that the purchasers were in the actual adverse possession for three years. We are inclined to hold (although we do not here undertake to definitely settle the question) that section 1573 intended to have settled within the time mentioned all questions about the validity of probate sales; and that the words "recovery of any estate" were intended to and do include all actions which involve an "estate" in the land sold, and therefore include an action to quiet title. But in the case at bar we are not able to see, from the transcript, that the action was not brought within three years after plaintiffs attained their majority, (see section 1574;) nor does the record show the date of "the settlement of the final account" of the administratrix. The point, therefore, cannot be raised on the record which is before us.

These views lead us to the conclusion that the findings of the court below, "that the

proceedings on said administratrix's sale of said estate of said John Sproul, deceased, were irregular, invalid in law, and no title passed under said sales;" that "the claims of said defendants, and each of them, are without any legal right," etc.; that "the plaintiffs are the owners in their own right, as their separate property, of the parcels of land described in the amended complaint herein;" and "that defendants have not, nor have either of them, any right, title, estate, or interest" therein,—are erroneous. This being so, it is unnecessary to inquire if the findings are sufficiently full. But the case is not one where judgment can be ordered for appellants on the findings. All we can do is to order a new trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

Hearing in bank denied.

(82 Cal. 548)

SILVERMAN v. GUNDELFINGER *et al.* (No. 13,330.)

(*Supreme Court of California.* Jan. 14, 1890.)

SALE OF REAL ESTATE BY ADMINISTRATOR.

The petition of an administratrix to sell decedent's real estate showed that the inventory and appraisal were made some five months before the petition was filed, and alleged "that the condition and value of the said real estate are set forth in the schedule marked 'D,' hereunto annexed, and made a part of this petition." *Held*, that it was such a compliance with Code Civil Proc. Cal. § 1537, providing that the petition of an administrator to sell the real estate shall set forth the value thereof, that a sale made thereunder would not be declared void in an action by decedent's heirs to recover it.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

W. D. Grady and D. S. Terry, for appellant. Tupper & Tupper and Jarboe, Harrison & Goodfellow, for respondents.

McFARLAND, J. Action to recover possession of an undivided interest in real property described as lots 30, 31, and 32, in block 61, in the town of Fresno. Judgment went for defendants, and plaintiff appeals. Plaintiff claims title as heir of H. D. Silverman, deceased; and defendants claim under probate sale made during the administration of the estate of said deceased. Appellant contends that the probate sale was void because the petition upon which it was based was too defective to give the probate court jurisdiction; and the particular defect of the petition which he specifies is its alleged failure to state the value of the property sought to be sold, as required by section 1537 of the Code of Civil Procedure. The petition, which was made by the administratrix, shows that the inventory and appraisal were made September 25, 1887,—but a little over five months before the petition itself was filed. The language of the petition which bears upon the question here involved is as follows: "That a full description of all the real estate of which the said decedent died seised, or in which he had any interest, or in which the

said estate has acquired any interest, and the condition and value of the said real estate, are set forth in the schedule marked 'D,' hereunto annexed, and made part of this petition." And the property in contest in the case at bar is described in the schedule D as "one undivided half of lots Nos. 30, 31, and 32, in block 61, situated in the town of Fresno, with brick and frame buildings thereon, which is partnership property of the former firm of Silverman & Reinsteins. The said one-half interest was appraised at \$7,000." And the point of appellant is that the court was utterly without jurisdiction to order the sale, and the sale entirely void, because the petition does not clearly state that \$7,000 was the value of the property at the time the petition was made. But to hold this point good on a collateral action would be to enforce a strictness of literal compliance with the statute beyond all reason. Substantial compliance has always been held sufficient. *Stuart v. Allen*, 16 Cal. 474; *Richardson v. Butler*, ante, 9, (No. 12,454, filed December 23, 1889.) Upon a special demurrer, perhaps, a court might require a little more certainty; but there surely was not such a total want of a statement of values as renders the petition defenseless against the attack made here, which is in the nature of an objection, in an ordinary civil action, that the complaint does not state facts sufficient to constitute a cause of action. The averment in the body of the petition may fairly be taken as an averment that the amount named in the schedule was the present value of the property. And at all events, as was said in *Richardson v. Butler*, supra, the petition, on this point, fully and fairly answers the purpose of the provisions of the Code. With these views, it is not necessary to notice the other points discussed by counsel for respondents. Judgment and order denying a new trial affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(82 Cal. 193)

WAINWRIGHT v. WESKE. (No. 12,436.)

(*Supreme Court of California.* Dec. 27, 1889.)

CONTRACTS—ACTIONS—RESCISSION—PLEADING.

1. A complaint alleged that for 10 shares of corporate stock at the value of \$1,400 a share, and \$2,500 cash, plaintiff transferred to defendant one-half interest in a liquor business, and notes amounting to \$10,000. That, discovering fraud in the representations as to the stock, he tendered back an assignment of the stock, and \$300 received in dividends, and demanded \$14,000 in money, as value paid for stock. He made no offer to return the \$2,500, nor did he demand a transfer of the business interest, or of the notes. *Held*, that it was insufficient as a complaint to rescind a contract.

2. As the complaint neither alleged the value of the thing assigned, nor damages sustained, it was insufficient to recover on affirmation of the contract.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by James Wainwright against Adolph Weske to recover \$14,000 paid to de-

fendant, in value, for stock in the Golden Age Mill Company. The complaint alleged fraud. The court overruled defendant's demurrer to the sufficiency of the complaint. Plaintiff obtained a verdict, and defendant appealed.

John Desbeck, for appellant. *Dunne & Davidson* and *Eugene N. Deuprey*, for respondent.

THORNTON, J The complaint herein sets forth this state of facts: That on or about the 21st of April, 1884, the plaintiff was the owner of one-half interest in a certain liquor business carried on in the city and county of San Francisco under the firm name of Wainwright & Hey, and the holder of \$10,000 in promissory notes against said firm. The Wainwright of this firm was the plaintiff. That on or about said 21st of April the defendant was the owner of 10 shares of the capital stock of a corporation, the Golden Age Mill Company, doing business in the city and county aforesaid. That on or about said 21st of April defendant procured the plaintiff to purchase from him said 10 shares of capital stock through fraud. That the facts constituting the fraud are the following: The defendant desired to purchase of plaintiff the said interest of plaintiff in the liquor business mentioned, and the promissory notes aforementioned. That defendant was unable to pay ready money for the said interest and notes, but proposed that, if plaintiff would accept for this interest and notes, in lieu of cash, 10 shares of the Golden Age Mill Company, he (defendant) would transfer the stock to plaintiff. That plaintiff asked defendant what the stock was worth, and whether it was a good investment; on which the defendant, fraudulently contriving to deceive and defraud plaintiff, did falsely and fraudulently, and knowing the same to be false and fraudulent, represent to plaintiff that the stock was as good as the bank; that it was worth every dollar of \$1,500 a share; that it was as sure a thing as plaintiff could put money into; that his (defendant's) only reason for parting with the stock was his anxiety to redeem a promise which he had made certain persons (naming them) to buy the plaintiff's interest; that the mill of the company was in thorough condition mechanically and financially, and was paying 1 per cent. a month dividend on \$1,500 a share, and that the stock was as good as gold. That before accepting the stock plaintiff made further inquiries concerning it, and found that it had never been on the market, and that there were no quotations as to its value. That he (plaintiff) believed in and relied on the false and fraudulent representations of defendant, and, so believing and relying, agreed, on the 21st day of April, 1884, to transfer to defendant plaintiff's said interest and notes for \$2,500 in cash and the 10 shares of stock at \$1,400 a share. That defendant agreed thereto, and on or about said 21st day of April defendant transferred to plaintiff the 10 shares of stock,

and paid him \$2,500 in cash; and plaintiff thereupon, in consideration of the same, and at the direction of defendant, assigned the said notes and interest to Grauerholz and Fautz. That when the said representations were made by defendant he was a director of said company. That the company was then financially embarrassed, and in a sinking condition. That 70 days after the representations were made the company suspended operations, and closed its mill, because of its inability to meet its financial obligations. That in order to resume operations it was obliged to compromise with its creditors, and did levy upon its capital stock an assessment of \$100 per share. That, as such director, the defendant was cognizant of the affairs of the company, and knew when he made the representations that the company was in pecuniary straits, and in a sinking condition. That the plaintiff, immediately on discovering that the said representations were false and fraudulent, and that he had been duped and defrauded by defendant, demanded of him the sum of \$14,000, "being ten shares of said stock at \$1,400 a share," and at the same time tendered to defendant, and offered to make to him, an assignment of the 10 shares of stock, together with all the dividends received by plaintiff thereon, amounting to \$300, and now offers and tenders into court the stock and dividends; but defendant has ever since refused, and still refuses, to pay said \$14,000, and accept the stock and dividends. The complaint closes with a prayer for relief, as follows: "Wherefore plaintiff prays judgment against defendant, Weske, for fourteen thousand dollars, United States gold coin, with interest and costs of suit."

This can only be regarded as a complaint to rescind the contract above set forth, and to recover on such rescission, or a complaint to recover damages on a contract affirmed by plaintiff. Regarded as a complaint to rescind the contract, it is manifestly insufficient, inasmuch as it does not appear that there was any offer to return the \$2,500 in cash paid to plaintiff by defendant. That this was necessary to a rescission, see *Gifford v. Carvill*, 29 Cal. 592, 593; *Morrison v. Lods*, 39 Cal. 385. Nor does it appear that any demand was made on defendant to retransfer to plaintiff the interest in the firm, and the notes assigned by plaintiff at defendant's request. As an action to rescind and recover of defendant the property sold him by plaintiff, it was clearly demurrable.

Regarding it as a complaint to recover damages for fraud or deceit on defendant making the sale of the 10 shares of stock to plaintiff, it is also insufficient. In such an action plaintiff does not seek to rescind the contract. He affirms it, and seeks to recover damages by reason of the fraud arising out of the circumstances accompanying the entering into the contract. *Gifford v. Carvill*, 29 Cal. 592, 593. The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reason-

able time, to rescind the contract, and restore the parties to their former condition, or to affirm the contract, and claim compensation or damages for the injury he has sustained by reason of the fraud. The rule is so stated in *Gifford v. Carvill*, supra, quoting the language of the court in *Herrin v. Libbey*, 36 Me. 357. 29 Cal. 592. See, also, *Burton v. Stewart*, 3 Wend. 239, and other cases cited on page 592 of 29 Cal. It is well settled that a party cannot recover damages for a false representation without showing by averment and proving damage. *Morrison v. Lods*, 39 Cal. 385, and cases there cited. The plaintiff here does not aver that he has been damaged at all. The words "damage" and "damages" cannot be found in the complaint. The complaint seems to be framed on the idea or hypothesis that, by reason of the false and fraudulent representations made by the defendant in regard to the 10 shares of stock, the plaintiff, on offering to return the stock and the dividends recovered on it, is entitled to recover the sum of \$14,000, the amount for which, it may be inferred from the complaint, though there is no express averment of such a fact, he received it.

But, conceding it is averred in the complaint that the plaintiff was damaged by reason of the false representations to the amount of \$14,000, there is an entire want of averment showing that plaintiff has sustained any such damage, or any damage at all. There is no averment of the value of the interest in the concern which plaintiff assigned by defendant's direction in exchange for the stock, nor is there any averment of the value of the notes which were assigned by plaintiff as part of the consideration for the stock. It does not appear by averment that the firm was solvent, or that the notes were of any value whatever. *Non constat*, but that the firm was insolvent and the notes worthless. As the complaint shows that the plaintiff received of defendant on the transaction \$2,500 in money, for which he transferred the interest and notes, which do not appear to have had any value, conceding that the shares of stock were of no value, it appears that plaintiff, instead of suffering any damage, was benefited to the amount of \$2,500. It does not appear in any way that defendant warranted the stock to be worth \$14,000; and we know of no rule of law which would justify a court in presuming or assuming or inferring that the interest and notes assigned to defendant by plaintiff were, in the absence of an averment as to their value, of any value whatever. To state it briefly, the complaint in legal effect, shows that the plaintiff exchanged property of no value for valueless stock and \$2,500. It is thus made to appear that the plaintiff, instead of being damaged, was benefited to the amount above stated. Such a mode of pleading cannot be considered as charging defendant with any damage for which he can be held responsible in law to the plaintiff, or any one else. The complaint is not made sufficient by the amendments in it.

If defendant has had to pay \$1,000 for an assessment on the stock, he is still benefited to the extent of \$1,500. The complaint, in our judgment, is insufficient, in any view that can be taken of it. The demurrer of the defendant to the complaint should have been sustained, and the court erred in overruling it. The judgment and order denying a new trial are therefore reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint, with leave to plaintiff to amend his complaint, should he be so advised. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

82 Cal. 214

HAGENMEYER v. BOARD OF EQUALIZATION.
(No. 12,428.)

(Supreme Court of California. Dec. 28, 1889.)

TAXATION—BOARD OF EQUALIZATION—PROCEDURE.

1. A rule of the county board of equalization, framed under Pol. Code Cal. § 3673, provides that, when it is proposed to increase or lower an assessment, notice of the same must be given by the clerk of the board depositing in the post-office, at his regular place of business, a circular letter, postage paid, addressed to the person whose interests are to be affected, stating the valuation placed by the assessor on the property to be raised or lowered, and the valuation to which said property is proposed to be raised or lowered, and directing him to appear before the board, within seven days from date of notice, to show cause why such change should not be made, but there was no requirement that a return on the letter mailed as ordered should be made to the board. Such notice was sent to plaintiff on July 11th, and on July 18th the board made an order increasing plaintiff's assessment. The board was informed by its clerk, at the time of making the order, that proper notice had been mailed to plaintiff, and plaintiff did not deny receiving the notice. *Held*, that plaintiff had proper notice to give the board jurisdiction.

2. Where the board makes a copy of its rules relative to giving notice to persons interested of an intention to increase or reduce an assessment a part of the return to a writ of review, it is proper to refuse, on the motion of the board, to strike the same from the return.

3. It was not error for the court to strike from the return a copy of the notice and affidavit of proof of mailing, etc., when the same were not considered by the board at the time it made its order raising plaintiff's assessment.

4. As the rules of the board did not require a prescribed manner of proof of giving such notice, any legal testimony, at the time of making the order, was competent to establish the fact.

5. Where a party has notice of the intended action of a board of equalization in regard to the assessment of his property in time to have a full and fair hearing during the session of the board, such notice is sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board.

6. When the record of a board of equalization does not show affirmatively that the board did not act on evidence before it in raising an assessment, its order in the premises is conclusive that it did act on such evidence as was necessary.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Application by G. Hagenmeyer for a writ of review to annul an order of the board of equalization of Mendocino county raising his

assessment of taxes. There was a judgment for plaintiff, and the board appealed.

J. M. Mannon, J. Q. White, and Atty. Gen. Geo. A. Johnson, for appellant. T. L. Carothers, for respondent.

FOOTE, C. This was an application for a writ of review, the purpose of which was to annul an order of the board of equalization of Mendocino county, increasing the assessment of taxes upon the property of Mr. Hagenmeyer, the plaintiff. The court below seems to have been of the opinion that the board had exceeded its jurisdiction, and ordered that its action in the premises be annulled. From the judgment rendered this appeal is prosecuted.

One question upon which the determination depends, as it appears, is whether or not the plaintiff had due notice that the board proposed to increase or lower his assessment. The return to the writ of *certiorari* showed that, according to a rule made by the board, notice as to such matters was to be given by the clerk of that board, "by depositing a circular letter in the U. S. Post-Office, addressed to each of the persons whose interests were to be affected, at his regular place of business, with the postage thereon prepaid." "Said notice to state the valuation placed by the assessor upon the property to be raised or lowered, and the valuation to which said property is proposed to be raised or lowered by said board, and a direction that the owner of such property appear before the board, within seven days from the date of the notice, and show cause why such change should not be made." It further showed that, according to the minutes of the board, such a notice was sent to the plaintiff on the 11th of July, 1887. The order increasing his assessment was made on the 18th of the same month and year. The affidavit of the clerk of the board showed that such notice had been mailed and sent to the plaintiff on that day by the clerk; but, according to his evidence as a witness on the trial, such notice and affidavit, proving mailing, etc., were not before the board at the time it made the order; and that he appended his affidavit of proof of mailing, etc., some days after the order was made. He also testified that he had told the board, on the day when the order was made, that such a notice had been duly mailed on the 11th of July, 1887. And he thought then, and still thinks, from his memory of the matter, that he had done so as a matter of fact. It is a significant circumstance in this connection that the plaintiff does not appear and testify that he did not receive such a notice.

It is contended that the court erred in not striking out, on the appellant's motion, the copy of the rules of the board with reference to giving notice. As this was made a part of the return, so far as the appellant could make it so, even although it was not properly a part thereof, (*Water-Works v. Schottler*, 62 Cal. 69-100,) it ought not to be allowed to prevail in its contention that the court

abused the discretion vested in it as to such a matter; since the return was made by the appellant's order, and was, so to speak, its pleading in the cause. Besides, as we shall presently perceive, it was to the advantage of the appellant that such was the rule of the board, and it was not prejudiced by the action of the court.

Again, the appellant urges that the action of the court was erroneous in striking out of the return the copy of the circular letter or notice, and the affidavit of proof of mailing, etc., of the clerk of the board. The part of the return thus stricken out was, according to the clerk's evidence, not before the board when the order was made; and the action of the court in striking it out was not prejudicial error. But after it was stricken out it still appears, by the testimony of the clerk, in support of the recitals of the minutes of the board, that such a notice, complying with the rule of the board, was, according to his recollection, mailed on the 11th of July, 1887, the date of the notice, to the plaintiff's address, at his regular place of business.

The rules of the board (framed under the authority conferred by section 3673 of the Political Code) did not require that any return upon the circular letter mailed as ordered should be made by any one to the board that such notice had been given, nor that any affidavit of proof, or any other action, should be taken, of a prescribed character, to inform the board that such notice had been mailed, and when. That proper notice was given by mailing was left to be shown to the board at the time when it might take action as to the raising or lowering the assessment. This fact could be established by any proper legal testimony, either oral or in writing. It seems that the board was by the clerk informed that the notice, as required by the rule, had been mailed; and his evidence on this trial shows that it was so mailed. So that it is clear the proper notice was mailed to the plaintiff, to his address, on the day of its date, the 11th of July, 1887.

But the respondent argues that, as the order sought to be annulled was made on the 18th of July, 1887, it did not comply with the rule, *supra*, as to notice; that it was made before the seven days had expired within which the plaintiff was cited to appear before the board and "show cause," etc. The view entertained by the respondent seems to be that he had all of the time intervening between the 11th and the 18th, and including the whole of the 18th, and up to and on the 19th of July, in which to show cause; and that, as the order was made on the 18th, it was made too soon. This contention is declared to be without merit in *Misch v. Mayhew*, 51 Cal. 516, where section 12 of the Code of Civil Procedure is construed. The rule as to the matter of notice in such cases as that in hand is well stated in *Water-Works v. Schottler*, 62 Cal. 103, as follows: "In our opinion, as intimated in *Patten v. Green*, 13 Cal. 330, such tribunals as the boards of

supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein, and if, under a rule or an order of such boards, a party has notice of the intended action of a board of supervisors, sitting as a board of equalization, in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the board, we shall hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board. Of course, the rule as to time here laid down is not intended to apply to a case where the law requires a notice of a definite number of days to be given, and no such notice has been given." Taking the view that the rule of the board in such a case as this is to be regarded as a law upon the question of the kind of notice to be given, and the time within which the party to be affected may appear and be heard, it is clear that the plaintiff had such notice as the law required, and the board had jurisdiction of his person.

The further point is made in favor of the judgment of the court below that the record does not show that the board took any evidence by which to be guided in raising the assessment, and that, under section 3676 of the Political Code, it could not, without any evidence, raise an assessment. The record does not show by affirmative proof that the board did not act upon evidence before it. Therefore its order in the premises is conclusive that it did act upon such evidence as was necessary. *Humboldt Co. v. Dinmore*, 75 Cal. 604, 607, 608, 17 Pac. Rep. 710. For the reasons stated we advise that the judgment be reversed.

We concur: BELCHER, C.C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(82 Cal. 351)

COLTON v. STANFORD *et al.* (No. 11,983.)

(Supreme Court of California. Jan. 2, 1890.)

DEALINGS BETWEEN TRUSTEE AND CESTUI QUE TRUST—FRAUD—COMPROMISE.

1. Where a beneficiary, in negotiating with her trustees for a settlement, renounces all confidence in them, and acts exclusively on the advice of her own personal friends and advisers, specially selected by her to make investigations, and counsel her, a contract of compromise entered into between her and the trustees, who during the investigation acted in good faith, and disclosed everything within their knowledge, will not be set aside on the ground that the trustees did not impart all the knowledge which they might have acquired by diligent and skillful search.

2. Where the trustees furnish a statement of the assets of a company, in which they and the beneficiary are interested, believing such statement to be correct, and stating that they know nothing except what is shown by their books and vouchers, and the beneficiary, not relying on such statement, employs counsel to look into the affairs of the company, and experts to examine the books and vouchers, the trustees offering every facility

for a thorough investigation, and such an investigation being had, the beneficiary cannot have a contract of compromise, entered into on the faith of such investigation, rescinded on the ground that the statement of assets was false.

3. The fact that such company, a few days after the compromise, paid a large indebtedness to another company with bonds of a third company at 90 cents on the dollar, while before the compromise these bonds were represented to the beneficiary to be worth only 60 cents, is not fraud on the part of the trustees; nor does it constitute an equitable estoppel, preventing the trustees from denying that the bonds were worth more than 60 cents at the time of the compromise, where the trustees owned the stock of all three companies, and fixed the value of the bonds arbitrarily.

4. Under Civil Code Cal. § 1568, providing that consent to a contract is deemed to have been obtained through fraud, mistake, etc., only when it would not have been given had such cause not existed, a contract of compromise will not be rescinded on the ground of misrepresentation, where it appears that it would have been executed notwithstanding such representation.

5. In an action to rescind a contract of compromise, it appeared that plaintiff's testator had been associated with defendants in the building of railroads on a large scale, their transactions involving many millions of dollars, and that at the time of his death defendants were much in need of money to carry on their operations. Plaintiff, not wishing to share the risks and continue with defendants in her testator's place, insisted on a settlement, and against the wishes of defendants, who urged her to remain with them, a compromise was made, whereby she was allowed to draw out testator's share. Before making the compromise plaintiff employed able counsel and experts, who thoroughly investigated the affairs and accounts of testator and defendants; the latter doing all they could to aid them in their investigation. At the time of his death testator owed large sums of money in the schemes in which he and defendants were interested, and the railroad securities owned by him were such that they would have brought little had defendants chosen to sell him out, instead of buying his interest, as they did under the compromise. *Held*, that the facts do not show that the compromise was obtained through any fraud or undue influence on the part of defendants.

In bank. Appeal from superior court, Sonoma county; JACKSON TEMPLE, Judge.

Stanly, Stoney & Hayes and *E. W. McKinstry*, for appellant. *Creed Haymond* and *Garber & Bishop*, for respondents.

PATERSON, J. From the 5th day of October, 1874, down to the time of his death, David D. Colton was associated with defendants in the ownership, control, and direction of certain corporations. Prior to that time defendants and Mark Hopkins had been the principal owners of the stock of the Central Pacific Railroad Company, the Southern Pacific Railroad Company, and of various other subordinate and connected railroad companies, and also of the Contract & Finance Company. They had associated themselves together for the purpose of securing the cooperation and assistance of all in the furtherance of certain railroad enterprises, and of such others as they should from time to time agree upon. In pursuance of the terms of their association and agreement they had invested, respectively, large sums of money, and were giving their time and labor to the management and direction of the corporations above named, and to the acquisition

and control of other corporations which they desired to operate in furtherance of the general schemes they then had and might thereafter have in view. Being desirous of securing the aid and co-operation of another associate, negotiations were opened with Mr. Colton, whom the defendants had known for several years prior thereto, which ended in an agreement between him and them that he should become associated with them in like manner as they had theretofore been associated with one another. By the terms of this agreement with the defendants and Mark Hopkins, Mr. Colton was to have 20,000 shares of the capital stock of the Central Pacific Railroad Company, and 20,000 shares of the capital stock of the Southern Pacific Railroad Company, in consideration of the sum of \$1,000,000, for which sum he gave his promissory note, with interest at 6 per cent. per annum, payable on or before October 5, 1879. All dividends on the stock were to be applied as payments on the note. It was agreed that Colton was to share, in the proportion that his stock bore to the stock issued, in all responsibilities, damages, penalties, etc., and to share in all the liabilities, of the Central Pacific, Southern Pacific, and Contract & Finance Companies, the same as if he had been associated and connected with them from the time of their organization. On the 15th of December, 1874, they organized the Western Development Company, the affairs of which cut a most important figure in the controversy. The capital stock of this company was fixed at \$5,000,000, of which Stanford, Huntington, Crocker, and Hopkins each took two-ninths, and Colton one-ninth. Gen. Colton's interest in all other properties acquired by the associates came to him through this corporation, except that which he held in the Ione Coal & Iron Company,—which had a capital stock of \$4,000,000, divided equally between the associates,—and that which he held in the Colorado Steam Navigation Company, and in the Occidental & Oriental Steam-Ship Company. He was also one of the original incorporators of the Southern Pacific Company of Arizona, organized in 1873, and held 30,000 shares of the capital stock thereof. In 1876 the parties made and executed a new agreement, which they antedated as of October 5, 1874. This agreement differs in some material respects from the original. A copy of it is annexed to the complaint, and is set out in the statement of facts. By the terms of this modified agreement the stock sold to Mr. Colton was pledged as collateral security for the payment of the \$1,000,000 note, and it was agreed that neither party should sell his interest in the contract without the written consent of all parties thereto. The enterprises entered into and carried on by these associates during the life-time of Mr. Colton were of stupendous magnitude, involving face values amounting to hundreds of millions of dollars. The success of their schemes depended upon many things. In the midst of their most important

operations both Mr. Hopkins and Mr. Colton were taken from the association by death,—the former on March 29, 1878; the latter in October following. The bond of friendship which had bound the five associates together was of the strongest kind, and the confidence which one reposed in another had no limit.

Soon after the death of her husband, Mrs. Colton (this plaintiff) began to make inquiries as to the interest of the estate in the various corporations with which Mr. Colton had been connected. In his last will and testament Mr. Colton had recommended that, if his wife should desire the assistance of any one in the settlement of his estate, his friend S. M. Wilson, and his secretary, Charles E. Green, should be called in as co-executors. Mrs. Colton, being the universal legatee, and entirely ignorant of her husband's affairs, called upon and secured the services of Mr. Wilson to aid her. Negotiations were entered into between plaintiff and defendants for a settlement. During these negotiations the plaintiff became suspicious of the motives and conduct of the defendants, believed that they had manipulated the books to deceive her, and that they were unworthy of trust or confidence. Nevertheless, after a thorough examination of the books and many interviews with defendants, a compromise agreement was entered into on the 27th day of August, 1879, by the terms of which certain stocks, including 408 shares of the Rocky Mountain Coal & Iron Company, were assigned to defendants, the \$1,000,000 note was canceled, and all the liabilities of the Western Development Company and other corporations were assumed by them, and the estate of Colton was released therefrom. About two years after the execution of the compromise agreement plaintiff discovered many errors in the calculations upon which the compromise had been made. She thereupon served a notice of rescission, and demanded a new accounting. A complaint was drawn up charging the defendants with misrepresentation, concealment, etc., and after several interviews, to-wit, on May 24, 1882, plaintiff commenced this action for a rescission of the compromise agreement of August 27, 1879, (referred to as "Exhibit F,") on the ground that said agreement had been procured through false and fraudulent representations made by defendants during the course of the negotiations which resulted in the execution of the compromise. The answer denies the charges of fraud; alleges that whatever statements were made by defendants were made by them in good faith, believing them to be true; and avers that Colton, during the time that he was connected with the Western Development Company, fraudulently appropriated to his own use certain large sums of money belonging to said company and to these defendants. After a trial, lasting nearly two years, before Hon. JACKSON TEMPLE,—who was at that time judge of the superior court of Sonoma county, and who has recently left this court on account

of illness,—findings and judgment were rendered in favor of defendants. From this judgment, and an order denying the motion for a new trial, the plaintiff has appealed.

Although the record herein covers about 12,000 pages of printed matter, there is no substantial conflict in the evidence. The questions involved in this appeal have been debated by counsel upon the assumption that the facts found by the learned judge of the court below are unassailable, and that the decision is correct, except as to the legal deductions drawn from the specific facts found. It is not contended by the appellant that the defendants knowingly made any false statements, or intended to deceive plaintiff in the negotiations, but it is claimed that the facts found show the existence of a fiduciary relation between plaintiff and defendants; that in dealing with plaintiff it was the duty of the defendants to make a full and correct disclosure of the condition of the business in which Colton held an interest, whether the plaintiff was relying upon their advice or upon her own investigation, and the advice and judgment of Wilson and other friends; that it is immaterial whether the parties believed there was in fact any such duty resting upon the defendants, or whether the plaintiff did actually rely upon and confide in them; that, where the negotiations begin in peace and confidence between trustee and *cestui que trust*, it matters not that suspicion, distrust, and fears may lead the beneficiary to make independent investigation during the negotiations, and rely upon independent advice and her own judgment in finally concluding the compromise; that the trustee can shake off the duty referred to, if at all, only by a clear and unequivocal dissolution of the trust relation before the negotiations commence; that the business relation between Colton and defendants was a partnership, and that the surviving partners were bound to know the condition of the business, and impart full information thereof to plaintiff; that in cases of this kind the surviving partners must show affirmatively that the settlement was fair and the consideration adequate, the contract being *prima facie* void; that the court erred in ignoring this principle, and in holding that it was for plaintiff to prove fraud; that the findings show both actual and constructive fraud and threats, and that the representations made by defendants with respect to the ownership of the 408 shares of Rocky Mountain Coal & Iron Company stock are sufficient of themselves to call for a reversal of the judgment; that the judgment should be reversed, and a judgment entered in favor of the plaintiff on account of undue influence, concealment, and fraudulent misrepresentations, although it be conceded that the parties making the contract herein sought to be rescinded dealt as strangers, and that the findings do not cover the material issues; and that the court erred in its conclusions of law, and as to the effect of certain evidence.

Many of the topics discussed by counsel

are involved in the question whether there existed such a fiduciary relation as called for a full, fair, and accurate statement by defendants of the condition of the affairs of the several corporations in which Mr. Colton, in his life-time, had been interested; counsel for appellant contending all the time that such relation did exist, and that by virtue of their superior knowledge and means of information, the duty of making a full disclosure and truthful statement by defendants became imperative and absolutely essential to the validity of any compromise based upon negotiations between the parties. The respondents have claimed at all stages of the litigation that the business relation of the several associates was not that of partners, and that upon the death of Mr. Colton the defendants owed plaintiff no duty other than that which arises from the relation of stockholders in a corporation. In this branch of the controversy the learned judge of the court below sided with the respondents, and upon this subject he expressed his opinion in the following language: "At no time were the defendants Leland Stanford, C. P. Huntington, Charles Crocker, and Mark Hopkins copartners, or associated in any business or enterprise as copartners. Nor did they at any time carry on any business as copartners," etc. "At the death of Colton the association between him and the defendants and Mark Hopkins entirely ended and ceased. There was no property belonging to the associates as such. After his death the plaintiff was merely a stockholder in the various corporations. * * * After the death of Colton the individual defendants had no other power over the affairs of the plaintiff, and occupied towards her no other relationship, than as controlling the corporations in which she was a stockholder, and as creditors and pledgees." "But, if a trust relation of this character existed between these associates, what was the relation of the survivors, upon the death of Colton, to his representative? At his death the association was entirely ended. It was a case where confidence was given for confidence; service for service. There was no property belonging to the associates as such. No power over the affairs of Mrs. Colton or the estate of D. D. Colton survived his death. His position was one of great power over many things, through this mutual confidence. She was merely a stockholder in various corporations. It is true they continued to be virtual directors of these corporations, as they and Colton had previously been. But this no longer depended upon any confidential relations with the holders of Colton's stock. * * * The previous relations with Colton did not affect the question. They and Colton had no vested interests in any new projects not yet begun. * * * There was not then, after Colton's death, any further active duties, as trustees, due from defendants to the estate of Colton." Supp. 8 West Coast Rep. 31. It must be admitted, however, that the arguments of the

appellant upon this question are most persuasive, and make the business relation which existed between the associates look like a partnership for the purpose of organizing, controlling, and operating railroad and other corporations; but, in view of the manner in which the compromise was effected, and of all the circumstances surrounding the settlement of the dispute, we deem it unnecessary to determine this particular question. There is no doubt that the associates occupied towards one another relations of the greatest confidence and trust. This relation of trust and confidence, indeed, was one of extraordinary character,—greater than ever existed in any partnership with which we have been acquainted. The power and authority possessed by each associate over the business, property, and standing of others interested with him never was possessed, perhaps, by a member of any other concern or association. That there was a relation of mutual trust and confidence of high character between the associates, and that such relation was recognized by Judge TEMPLE, is apparent from the following extracts taken from his findings and opinion: "Some of their transactions in the payment and disbursement of money were private and confidential between said associates, the character and reason of such disbursements being known only to and by said associates, and not recorded or entered in any books or writings kept by them, or any of said corporations; and said five associates, until the death of said Hopkins, and said four associates thereafter, until the death of said Colton, had and assumed and sustained relations of intimate and peculiar trust and confidence, each towards and with the others, in regard to their said enterprises, and their management and conduct; and they acquired, obtained, and had confidential information and control each concerning and over the affairs of the property and business connected with, growing out of, and accumulated by and through the enterprises in which said Stanford, Huntington, Hopkins, Crocker, and Colton were associated together. As each new scheme was determined upon, each had his part in the work, though each party then decided for himself whether he would go into each scheme or not, and there was no power in the majority to commit any one to any new enterprise until he approved of it." "Fiduciary relations may exist between stockholders of various corporations, who have associated themselves to control such corporations and make them work in harmony; but they would not be partners. And so I conclude, although the corporations managed by these associates cannot be regarded as partnerships, nor as mere instrumentalities of a partnership, the relation between the parties was nevertheless of a fiduciary character. I think it already appears that the parties to the agreement Exhibit A intended something more than to procure situations for each other as employes in various corporations. They had designs not

stated in that paper, which were the real purposes of that association. The fiduciary relation must have existed under our Code as to these projected enterprises, and the management of the system of roads they had built and acquired. * * * Each had invested his money and expended his labor in reliance upon this fidelity of the others."

It is a nice question whether the trust relation which had existed between the associates continued to exist after the death of Colton, and imposed any active duties upon the survivors as trustees of his estate; but, if any such duties were cast upon the defendants by reason of the death of Mr. Colton, they were waived by the plaintiff herself, and the relation of trustee and *cestui que trust* was so entirely discarded and dissolved during the negotiations that they were not bound by any fiduciary relation to counsel, advise, and protect the plaintiff, or to perform any other duty than to deal fairly by her, and in good faith to disclose all facts within their knowledge material for her to know in conducting the negotiations fairly, and to enable her to make a full and unhampered investigation into the matters in controversy. We have been unable to find a case in which a lump agreement of compromise, entered into by surviving partners and the representative of a deceased partner, or by a trustee and *cestui que trust*,—the latter acting by the advice of experts and able counsel, and renouncing all confidence in the trustees,—after full, fair, and honest investigation, has been rescinded because of actual and unintentional inaccuracies discovered subsequent to the execution of the agreement; nor do we know of any universal rule of equity, or any provision of our Code, tending to establish the proposition that from the mere fact of a prior existing fiduciary relationship everything in the absence of proof must be presumed against the trustee who has entered into a contract with his *cestui que trust*, regardless of the question whether confidence has, in fact, been reposed and abused. Of course, in all trust relations the existence of confidence will be presumed, and, if it appear that any advantage has come to the trustee in dealing with his *cestui que trust*, the burden will be thrown upon him to show that confidence was not in fact abused. But it has always been held, as we understand it, that this presumption might be overcome by proof of the fact that confidence had not been abused, and that the beneficiary acted, not upon any reliance or confidence placed in the trustee, but upon the advice of an independent, professional, disinterested, and competent adviser. There is a distinction to be made between transactions occurring directly between the trustee and his beneficiary, and those transactions in which the trustee deals with himself or another party. Thus, if a trustee in the execution of his trust sells property to himself, the transaction may be set aside by the *cestui que trust* as void, without giving any reason or alleging any fraud, or any disadvantage or

inadequacy of price. In such case there are no two parties to the contract, the trustee dealing with himself alone; but where the trustee deals directly with the *cestui que trust*, the latter having for himself an independent adviser, and the trustee making no pretense of advising him, the transaction is not voidable, at the election of the beneficiary, but it will devolve upon the latter, if he would set it aside, to show some reason therefor. He must show either actual or constructive fraud. Of course, the fraud may be shown in some instances by presumptions.

Section 2219 of the Civil Code provides: "Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control." Section 2228 is as follows: "In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." Section 2229 is as follows: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Section 2235 is as follows: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

That these provisions are consistent with the rules of equity, as we have construed them, is apparent, we think, when read in connection with the following provision: "The person whose confidence creates a trust is called the 'trustor;' the person in whom confidence is reposed is called the 'trustee;' and the person for whose benefit the trust is created is called the 'beneficiary.'" Civil Code, § 2218. These provisions show that the fundamental principle of the relation of trustee and *cestui que trust* is that of confidence.

In the case at bar, Mrs. Colton not only did not rest any confidence or reliance upon anything said, done, or omitted to be said and done, by the defendants, or any of them, but she called in and secured the aid of four or five disinterested and competent advisers. Among these was S. M. Wilson, one of the leaders of the bar of this state, a man of irreproachable character, in the prime of life, for 25 years the warm, personal friend of her husband, and the man whom he had recommended on his death-bed, and she was fully informed by him as to her legal rights. She

also obtained the services of Mr. Lloyd Tevis, a skillful and successful financier, to assist Mr. Wilson in his investigations as to the business of the corporations. The investigations made by these gentlemen and the plaintiff lasted for over six months, and were most thorough, careful, and diligent. It is found, as a matter of fact, that they had sources of information other than those possessed by the defendants, and that they were, in fact, more thoroughly acquainted with, and better qualified to form an accurate judgment as to the condition of, the affairs of the company than any of the defendants. Mrs. Colton had also the advice of Mr. Steinberger, an old friend of her husband, and the advice and assistance of Mr. Green, his secretary for many years, and of Mr. Douty, who was a cousin and intimate friend of Gen. Colton, and a business man of great capacity and experience, and a skillful and expert accountant. All the claims preferred by the defendants on their own behalf were fully discussed, considered, and investigated. The subject-matters of the negotiations were of the most complicated nature, consisting in part of accounts running through many years, and recorded in many volumes of books, and thousands of vouchers and papers relating in part to the transactions, some of which had gone out of the memory of the parties thereto. The court found as a fact, and it seems practically undisputed, that during the negotiations defendants were ready and willing to answer, and did truthfully answer, all questions asked them, and submitted freely all the books and accounts in their possession, or under their control, to the inspection and investigation of the plaintiff and her agents. The plaintiff and her agents knew, partly from discoveries they made themselves, and partly from information given by the defendants before the compromise agreement was executed, that there were many inaccuracies in some of the statements furnished to the plaintiff. Among other important matters in dispute between the parties, and which were compromised, was the right to Western Development Company dividends, amounting, according to plaintiff's valuation, to over half a million dollars. At the time the negotiations were in progress the plaintiff saw no justice whatever in the transaction; her heart rebelled against the whole matter. She believed that the defendants were unworthy of any credit or confidence, and were endeavoring, by all the means in their power, to cheat and defraud her. She suspected that the defendants had made some of the charges against her husband knowing them to be false, and that they had manipulated their books to sustain those charges. No source of information was withheld from them. No means of ascertaining intelligently the true state of the accounts were covered up before they acted upon and compromised the matters upon which the controversy arose. Every fact which has since been discovered could have been discovered before

the execution of the compromise agreement, as well as thereafter. The witnesses who could throw any light upon the matters in controversy were within their reach. Mrs. Colton was most anxious to make the settlement. The defendants "insisted that they were not bound to discount the future of their securities for her, thus giving her the benefit of their contemplated enterprises and the expenditure of more millions. She was not entitled to the profits, when she would not share the risks." The property in controversy was of immense value,—chiefly speculative value. Mr. Tevis "was known as a bold, enterprising, and successful speculator. He was intimately acquainted with the railroads, and was a man of great wealth, abundantly able to pick up the burden where Colton had dropped it, and carry it along, without asking any favors from the defendants,"—all of which was known to the plaintiff at the time she acted upon his advice, and accepted the terms of the compromise.

The findings show that the defendants in good faith disclosed every fact within their knowledge. There is nothing in the findings to show that plaintiff or her agents were misled as to any matter except the statement in regard to the number of shares of the Rocky Mountain Coal & Iron Company stock, which they claimed to own, though held by Mr. Colton. Of this matter we shall speak hereafter. Here, therefore, we have a case in which—assuming the existence of a fiduciary relation, and that the presumptions as to confidence and the burden as to proof are as claimed by appellant—the undisputed facts show that there was absolutely no confidence reposed by the beneficiary, but that she acted exclusively upon the advice of several disinterested experts and professional friends, specially selected to investigate and counsel her, because of their ability and familiarity with the affairs of the trustees with whom she was dealing, and who acted towards her in the highest good faith. To hold that, under such circumstances, a contract, entered into by the parties, compromising and settling disputes of the most doubtful character and value, cannot stand, if it subsequently appear that the trustee did not impart to the *cestui que trust* not only all the knowledge of the transactions of which he was possessed, but all that he might have acquired by diligent and skillful search, would be to place an absolute embargo upon all settlements of disputed questions between parties holding trust relations, although equity favors the amicable adjustment of claims which, like those involved in this settlement, bid fair to become a fruitful source of litigation. Under such a rule it would be difficult to find men fit to be trustees who would accept such a trust. There would be no inducement to compromise doubtful matters, however advantageous the settlement might seem to be to the *cestui que trust*; and no trustee, or his sureties, who had settled with his *cestui que trust*, would feel secure in his position

until either time or circumstances had dispelled every possible chance of a successful contest, based upon new evidence or a rise in values. Such a construction of the provisions of our Code would not only place them in antagonism to all the authorities which have explained and applied the rules of equity governing such contracts between trustee and *cestui que trust*,—and the Code provisions are but a digest of these rules,—but would convert a rule intended to prevent fraud into one creating an incentive to, and a cover of, fraud; because it would afford a convenient method for a party who had repudiated any reliance upon or trust in his trustee, and who had acted upon the advice of independent, skilled, and disinterested champions and his own investigations, to turn around, when subsequent facts showed that the bargain was to his disadvantage, and say, in effect: "It is true I did not place any confidence in your statements, and told you that I should not, but should rely on my trusted agents. It is true I acted only in my own interest, being sole legatee. It is true you laid before me all the means of information, and I and my agents assumed to act upon them. We had the means of information, and might have discovered the truth, but were not fully informed. It is sufficient to say that you did not correctly represent the condition of the business. It was your duty to do so. I admit that you acted honestly and fairly; that you did not intend to misrepresent any fact, or any value; and I admit that my means of information were as good as yours were. It matters not that I gave you notice, in advance, I should not trust you in anything you said or did, but should rely upon the investigations and advice of my friends, because your representations were not correct. It was your duty to make them full, fair, and accurate. I claim a rescission upon the representations you made, although I did not believe them." If there is a case in which a court of equity has decreed a rescission under such circumstances, it has not been called to our attention. Whatever may have been said as to the presumptions arising out of proof of a fiduciary relation, the fundamental principle upon which rescission is granted is always, and under all circumstances, the claim and consideration that confidence has been reposed, and that confidence has been abused. No such claim can in reason be made where the party seeking the rescission—being of competent age and understanding, and acting only in his own interest—has undertaken to investigate for himself, called in experts, been given free and fair means of ascertaining the truth, acted upon his own judgment and the advice of friends, and repudiated any confidence in or reliance upon the parties with whom he was dealing. It matters not what the relations of the parties have been prior to, or are at the time of, the negotiations for a settlement and compromise of their disputes, the principle is one of universal ap-

plication, and it is a principle of common sense and of good policy.

It is unnecessary for us to review the authorities on this subject. They will be found, we think, to fully support the views we have expressed; and in order to make as brief as possible this opinion, which, perhaps, is already unnecessarily extended on this question, we simply cite some of the cases, without commenting upon the peculiar features of any of them. We have examined the cases cited by appellant, and find nothing in them which conflicts with what is said herein. *Kimball v. Lincoln*, 99 Ill. 578; *Gage v. Parmelee*, 87 Ill. 330; *Casey v. Casey*, 14 Ill. 113; *Farnam v. Brooks*, 2 Pick. 213; *Knight v. Marjoribanks*, 11 Beav. 324; *Morse v. Royal*, 12 Ves. 355; *Hunter v. Atkins*, 3 Mylne & K. 113; *Hager v. Thomson*, 1 Black, 80; *Courtright v. Burnes*, 2 McCrary, 532; *Geddes' Appeal*, 80 Pa. St. 460; *White v. Walker*, 5 Fla. 478; *Hall v. Johnson*, 41 Mich. 289, 2 N. W. Rep. 55; *Bowman v. Carithers*, 40 Ind. 90; *Turner v. Otis*, 30 Kan. 1, 1 Pac. Rep. 19; *Murray v. Elston*, 24 N. J. Eq. 310; *Korn v. Becker*, 40 N. J. Eq. 408, 4 Atl. Rep. 434; *De Montmorency v. Devereux*, 7 Clark & F. 188; *Hough v. Richardson*, 3 Story, 690; *Loesser v. Loesser*, 81 Ky. 139; *Motley v. Motley*, 45 Ala. 558; *Kissling v. Shaw*, 33 Cal. 425.

It is claimed, however, that the trustee cannot, after negotiations are begun between himself and his *cestui que trust*, dissolve the trust relation, "and place the parties at arms-length," and that "the rights of these parties and the rules by which they are to be investigated should be determined by the relation of the parties when their negotiations commenced." We see no reason for such distinction. Sugden's definition of the rule applicable is such cases is expressed in the following language: "It must not be understood that a trustee cannot buy from his *cestui que trust* where he is *sui juris*; the rule is that he cannot buy from himself. If the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, he may purchase; but it must clearly appear that the purchaser at the time of the purchase had shaken off his confidential character by the consent of the *cestui que trust*, freely given after full information and bargaining for the right to purchase." 2 Sugd. Vend. 417, bottom p. 693. There is nothing in this text, or any decision we have seen, requiring a contract, preceding the contract to purchase or compromise, giving the trustee permission to purchase as a basis for a second contract, in which the terms of the sale or compromise may be lawfully agreed to. If, at the time of the purchase or compromise, the trustee has shaken off his fiduciary character, and the confidence which is presumed to result therefrom, it matters not what has occurred immediately preceding or long prior to the final transaction. In other words, if the transaction is one in which the trustee may lawfully deal with his *cestui que*

trust by first dissolving the trust relation, it is not too late for him to do so at any time before the *cestui que trust* is prevented from making a full and fair investigation and consideration of the business in hand, and before he executes the contract.

Other points discussed at the bar are involved in the question whether plaintiff was induced by fraud, actual or constructive, to enter into the compromise agreement, whether there were false representations, concealments, threats, or any unconscionable advantages gained by defendants through their superior opportunities and power. Upon every material issue of fact the court below found in favor of defendants, except as to a part of the 408 shares of Rocky Mountain Coal & Iron Company stock, and its finding of fact upon that issue was, in the opinion of the court, insufficient, in view of other findings, to support a decree of rescission. Since it is claimed, however, that the specific facts found do show fraud, concealments, and undue advantage, notwithstanding the general findings of the court, which negative the charges thereof, it becomes necessary to look into the circumstances under which the compromise was effected.

So far as the exhibits of the condition of the Western Development Company (Exhibits D and E) are concerned, the facts found show that there was no fraudulent representation by defendants as to anything contained therein, and that plaintiff did not rely upon them. She relied upon her own judgment, and the advice of those who were assisting her, and entered into the compromise agreement after a careful and thorough examination of all the books and vouchers. The court finds that she was not ignorant of any fact or circumstance material to her rights; that there were no misrepresentations or concealments by defendants, but, on the contrary, they answered truthfully all questions relating to the affairs of the company, repeatedly went over the subjects under investigation with Mr. Wilson, and gave him free access to all the books, and secured for him all the assistance and information in their power. The defendants did not pretend to know anything of the condition of the affairs of the Western Development Company outside of what was shown in its records. Mr. Wilson knew this. They told him so. They gave him every facility in their power of ascertaining the true state of the accounts. They instructed their employes to aid him as best they could. With their consent and approval, he had the books carefully and thoroughly examined by experts,—men who had been trusted friends of Gen. Colton,—one of them his cousin, another his secretary. In no part of his testimony does Mr. Wilson indicate that he or the plaintiff placed any reliance upon the statements contained in Exhibits D or E, or upon any information furnished by the defendants with regard to the affairs of the Western Development Company. Mr. Wilson was active,

alert, self-reliant, and zealous in the cause of his client,—the widow to whom he had been recommended by his friend Colton as the one man worthy of entire confidence and trust in case of trouble. Spurred on by a keen sense of the trust which had been reposed in him, he devoted his entire time and energy for a period of about six months, laboring with clerks and book-keepers, until, as he says, he had exhausted and tired himself out, sacrificed his own interests, and had “abused these people to the extremity, almost, of fighting personally.” In connection with his deposition in this case, there was introduced in evidence his memoranda, taken during the investigations which he and others were making into the affairs of the Western Development Company, which show the most unmistakable care, and a painstaking and minute consideration of the subject. Upon this showing, no doubt, it was that Judge TEMPLE was induced to believe and find that plaintiff and her advisers were ignorant of no material fact or circumstance of which she ought to have been informed. The presumption would follow from the fact of investigation that everything material was discovered; but the presumption is fortified by the introduction of these memoranda, and by proof of the fact that many others had been made which at the time of the trial were lost.

Under such circumstances, is plaintiff entitled to a rescission of the contract thus deliberately entered into? We think she is not. Her counsel claim that there was actual and constructive fraud, and cite sections 1571, 1572, Civil Code. They say that defendants furnished a list of the assets of the Western Development Company; that this was equivalent to a positive assertion that the list contained all the assets,—an assertion not true, not warranted by the information of the parties making it, and therefore fraudulent, although they believed it to be true; that where a party, acting without belief or without information, makes a representation which is not true, the law imputes to him a knowledge of its falsity, and makes him as fully responsible as if he had such a knowledge. This is true, as a general proposition, where the other party has acted upon the representation, relying upon it as correct; but the rule as stated is not, upon authority or principle, applicable where such party, discarding the representation as unworthy of belief, proceeds to inquire for himself, is given full and fair facilities of informing himself, takes independent counsel, and finally acts upon his own judgment and that of his advisers. Misrepresentations cannot be predicated upon such a state of facts. 2 Pars. Cont. 770; *Percival v. Harger*, 40 Iowa, 289; *Matthews v. Bliss*, 22 Pick. 53; *Van Trott v. Wiese*, 36 Wis. 439; *Hall v. Johnson*, 41 Mich. 289, 2 N. W. Rep. 55; *Light v. Light*, 21 Pa. St. 413; *Smith v. Kay*, 7 H. L. Cas. 775; *Development Co. v. Silva*, 125 U. S. 258, 8 Sup. Ct. Rep. 881, *Bigelow*, *Frauds*, 7, 8.

We do not find anything in the authorities

cited by the appellant which is in conflict with the views we have expressed. Extracts from a few of them will show this to be the case. Thus, in *Taylor v. Fleet*, 1 Barb. 475, the court said: “If the purchaser has acted upon his own judgment, and has not been influenced by the misrepresentations, however untrue they may have been, he has no right to be released from his bargain. But I cannot concur with the counsel for the vendor in his position that the purchaser examined the land with a view to test the accuracy of the representations made by Fleet. On the contrary, all the witnesses agree that no personal examination of the land would enable any person, not previously acquainted with its capabilities, to determine whether the statements made by Fleet were true or not. The only means of knowledge within his reach was information to be obtained from those whose experience enabled them to speak from actual observation with respect to the material question which constituted the object for which the purchase was made.”

In *Rawlins v. Wickham*, 3 De Gex & J. 312, the books showed so plainly the fraud that any man of ordinary capacity could have detected the fraud. The court there says: “During the negotiations for the partnership a paper was produced, which has been kept by Mr. Rawlins from that time, giving an account of the assets of the concern. The amount due to the customers of the bank was there stated to be £11,000 and a fraction. Upon examination of the books it appears that the real amount exceeded this by many thousand pounds,—a fact which an examination of the books by any person of the most ordinary competency would have shown. * * * Was there any excuse for such a misrepresentation? As regards Mr. Bailey, there was none. He was a professional man, taking an active part in the affairs of the bank, and it was his duty to know them, whether he did or not. Mr. Wickham was an inactive partner, knowing but little of its affairs, attending only occasionally at the bank, not meddling with the books, and probably knowing little or nothing of what they contained. * * * He joined with Mr. Bailey in producing the statement of accounts which I have mentioned, and in ascribing accuracy to it. Now, he ought not to have asserted what he did not know to be true. He ought to have said: ‘It may be true. I have a good opinion of Mr. Bailey and Mr. Gattrill, but I am not acquainted with the books, and, as far as I am concerned, you must look at them for yourself.’ He did not do so, but joined in a representation which was not true, and, for every purpose of pecuniary liability, the case is the same as if he had known that it was not true. * * * Mr. Rawlins might have inspected the books. * * * He, however, did not examine them, and, improbable as it may appear, I must hold that Mr. Rawlins entered into the partnership in complete ignorance of the contents of the books, and continued so for four

years. * * * He was entitled to believe their representations to be accurate without looking at the books. He was entitled to continue in that belief until ground for suspicion arose, or information was given him by one of the partners. No such information was given. They did not complain that he did not look at the books, and there is reason to believe that they would not have liked him to examine them." The difference between this case and the case at bar is too apparent for comment.

In *Higgins v. Samels*, 2 Johns. & H. 467, the language of the court shows the distinction between that case and the one at bar. It is there said: "It is not necessary to show that the defendants knew the facts to be untrue, if they stated a fact which was untrue, for a fraudulent purpose, they at the same time not believing that fact to be true. In that case it would be both illegal and immoral fraud. * * * What weighs upon my mind is the circumstance that the quality of the lime was not a mere subject of speculation, but a fact which the plaintiff, without any special familiarity with the business, could have made himself acquainted with."

In *Carpmael v. Powis*, 10 Beav. 44, the court uses this language: "Mr. Powis offered to procure the information. He did obtain and communicate it to the plaintiff, who relied upon it, and entered into the agreement on the credit of it. It turned out to be erroneous; but before the agreement, and till long after the agreement, Mr. Powis appears to have had no reason whatever to suspect that there was any error. He adopted it implicitly, on the authority of Mr. Cuthbert, and very innocently produced it to the plaintiff as a true statement of that upon which the amount of the annuity was to be calculated. If the plaintiff was guilty of any error or laches, it was in giving too much credit to the statement which had been adopted and communicated to him by the defendant's agent as true."

In *Millar v. Craig*, 6 Beav. 437, it appears that the plaintiffs, who lived in Scotland, never had an opportunity of examining the accounts. The court said that there was no proof whatever that the plaintiffs relied on Miller as their agent in the treaty with the other executors. On the contrary, they employed their own solicitor or law agent in Scotland. The release was signed in confidence, in the belief that the accounts had been truly stated.

In *Reynell v. Sprye*, 1 De Gex, M. & G. 709, the court says: "It was said that during the whole of the negotiations Captain Sprye not only left Sir Thomas Reynell at perfect liberty to consult his friends and professional advisers, but even on several occasions recommended him to do so. To a great extent this certainly was the case, and if the relief sought in this suit had rested on mere mistake; if Captain Sprye had not, by misrepresentations of fact, which I cannot treat as unintentional, led Sir Thomas Reynell to

believe that his rights were different from what in truth they were,—it may be that the argument to which I am now adverting would have prevailed. In such a case, perhaps, this court might have considered that it was the folly of Sir Thomas Reynell to have acted without advice, and might have refused to assist any person who was so singularly little alive to his own rights. * * * But no such question can arise in a case like the present, where one contracting party has intentionally misled the other by describing his rights as being different from what he knew them really to be."

In *Doggett v. Emerson*, 3 Story, 732, it appeared to the court that the purchase of the plaintiff was made upon an entire credit given to the representation of Williams as to the quantity and quality of the timber. The plaintiff resided in Boston, and confessedly had no knowledge of timber lands, and had never seen the township in which they were situated. He must, therefore, have placed implicit reliance upon the statements of Williams. It appeared, also, that Emerson not only knew the contents of the certificates upon which the plaintiff relied, but corroborated the statements therein contained.

In *Lewin on Trusts*, cited by appellants, the author says: "Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust*, must be actually or virtually dissolved. * * * The parties must be put at such arms-length that they agree to stand in the adverse situations of vendor and purchaser; the *cestui que trust* distinctly and fully understanding that he is selling to the trustee, and consenting to waive all objections upon that ground, and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information. * * * Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved, the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, * * * Lord ELDON said that if, in any instance, the rule was to be relaxed by consent of the parties, this was the case. * * * Again, a *cestui que trust* had urged the purchase upon the trustee, who at first expressed an unwillingness, but afterwards agreed to the terms, and the sale was supported. So, where the trustee had endeavored in vain to dispose of the estate, and then purchased, himself, of the *cestui que trust* at a fair and adequate price, and there was no imputation of fraud or concealment, Lord NORTHINGTON said: 'He did not like the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole he did not see any principle upon which he could set the transaction aside.' * * * If it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may file a bill in chancery, and apply by motion to be

allowed to purchase, and the court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particular sale, and allow the trustee to bid." Star paging 463.

In *Boyd v. Hawkins*, 2 Dev. Eq. 208, we find this language: "The prohibition of the trustee to purchase from the *cestui que trust* himself is not found to be so absolute. * * * Bargains between them are viewed with anxious jealousy. It must appear that the relation has ceased, at least that all necessity for activity in the trust has terminated, so that the trustee and *cestui que trust* are two persons, each at liberty, without the concurrence of the other, to consult his own interest, and capable of vindicating it; or that there was a contract definitively made, the terms and effect of which were clearly understood, and that there was no fraud or misapprehension, and no advantage taken by the trustee of the distresses or ignorance of the other party. The purchase must also be fair and reasonable.

Mr. Pomeroy, in his work on Equity Jurisprudence, at section 855, uses this language: "When parties have entered into a contract or arrangement, based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction,—one in which they intentionally speculated as to the result,—and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement or transaction was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact, and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief, either by way of canceling the contract and rescinding the transaction, or of defense to a suit brought for its enforcement. In such classes of agreements and transactions the parties are supposed to calculate the chances, and they certainly assume the risks, where there is no element of bad faith, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud."

In *Brooks v. Martin*, 2 Wall. 73, it appears that Brooks took advantage of his position as partner, agent, and brother-in-law of Martin intentionally to conceal from the latter the prosperous condition of the concern, and purchased his interest for a price totally disproportioned to its real value. So, also, in *Addington v. Allen*, 11 Wend. 383, there appeared an actual intent to mislead and defraud the plaintiff.

In *Safford v. Grout*, 120 Mass. 25, the character of the representations was not disclosed by the record. No objection was made that they were mere expressions of opinion, judgment, or estimate, or that they were intended to be understood as expressions of belief only. The court said: "We must presume that they were legally sufficient to support the action; that is to say, that they were statements of facts susceptible of knowledge, as distinguished from matters of mere opinion or belief; and that they were calculated to have, and did have, material influence in deceiving the plaintiffs as to the maker's means and ability to pay, and in inducing them to part with their property."

All that is decided in *Redgrave v. Hurd*, 20 Ch. Div. 24, is "that, where a false representation has been made, it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to show that, although he made the false representation, the defendant, the other party, did not rely upon it. The *onus probandi* is on him to show that the other party waived it, and relied on his own knowledge. Nothing of that kind appears here."

In *Wells v. Millet*, 23 Wis. 67, the court assume that, if the defendant had been careless or indifferent to ordinary and accessible means of information as to the truth or falsehood of the representation which had been made, he would have had no right to rely upon that.

In *Rohrschneider v. Insurance Co.*, 76 N. Y. 218, the court said that "the fraud was really undisputed. The managers of the defendant had made the false representations, and they knew them to be false, as the dividends of the company never had paid the notes thus given for the one-half of the annual premiums. But, on the contrary, such dividends had always fallen far short of making such payments; and they must have known that they generally, if not always, would fall short. There was, in fact, no foundation or excuse whatever for making the untrue representations. * * * It is said on behalf of the defendant that the plaintiff did not rely upon these representations, and was not induced by them to take the policy. But there was sufficient evidence from which the jury could have found that she did thus rely, and was thus induced."

In *Baker v. Spencer*, 47 N. Y. 564, the court said that the appellant's claim that the settlement of the action by the giving of a 300-dollar note operated as a compromise of the alleged fraud, and was a bar to the action, might have been well taken, if it had appeared from the pleadings or the findings that at the time of the settlement the defendant had knowledge of the facts constituting the fraud alleged, but that such claim was not well founded, being based entirely upon the statement that after giving the note the plaintiff began to suspect that the defendant had not the right to sell and transfer the agency.

The court said: "It does not appear from the complaint or findings that the plaintiff had any grounds for his suspicion, or any information on the subject, nor what defense was interposed on the trial before the justice in the action on the \$500 note." The court then proceeds to distinguish the case before it from the case of *Adams v. Sage*, 28 N. Y. 103. In the latter case the court held that "where a party to whom representations are made has the means at hand of determining their truth or falsehood, and resorts to such means, and, after investigation, avows his belief that the statements are false, and acts upon such belief by bringing an action to recover money obtained from him by means of the fraudulent representations, he is not entitled to credit when he alleges that, upon reiteration of the truth of the same statements by the same party, he was induced to enter into an agreement to settle the suit, and was thereby defrauded. Such investigation and ascertainment of facts, and belief in the falsity of the representations made, exclude the idea that any reliance could have been placed upon the repetition of the falsehood; and the verdict of a jury, or finding of a referee, to the contrary, should be set aside, as unsustained by the evidence. Indeed, upon such evidence, it would be error to submit to a jury the question whether reliance was or was not placed upon the reiterated false representations. Under the circumstances assumed, the law presumes that the party relied in making the agreement upon his own investigation, and not upon the representations of the party with whom he is dealing. This conduct, in acting in opposition to the knowledge acquired by inquiry from one who knows the facts, is attributable, and is set down by the law, to his own indiscretion and recklessness, and not to any fraud or surprise of which, under the circumstances, he has any right to complain. * * * In 2 Pars. Cont. 270, the rule is laid down, in relation to defenses to actions on the ground of false representations, that it must appear that the injured party not only did in fact rely upon the fraudulent statement, but had a right to rely upon it, in the full belief of its truth; for otherwise it was his own fault or folly, and he cannot ask of the law to relieve him. Many of the cases cited by the author to sustain this rule hold that, if the truth or falsehood of the representations might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglect to do so, and he is remediless."

In *Perkins v. Gay*, 3 Serg. & R. 331, the court said: "It is a principle of equity that the parties to an agreement must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, else they will not be bound. The reason is that they proceed under an idea that the fact which is the inducement to the agreement is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event. [Citing cases.] But where the parties treat

upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract. * * * Every compromise of a doubtful right depends on this principle. * * * There is an express mutual abandonment of their former rights upon an agreement that, whether they be good or whether they be bad, neither is to recur to them on any pretense whatever, or claim anything that he does not derive from the terms of the agreement. Each takes his chance of obtaining an equivalent for everything he relinquishes; and, if the event turn out contrary to his expectations, so much the worse for him. If there be no intention of fraud, no unfair dealing, and neither party has more knowledge of the fact misconceived than the other had, the contract will bind."

In *Peek v. Derry*, 37 Ch. Div. 577, while the court did not attribute to the defendants any intention to commit a fraud, it found that they had made a statement which was incorrect to induce the plaintiff to act upon it, without any sufficient reason for making that statement, or any sufficient reason for believing it to be true.

Kerr on Fraud and Mistake thus states the proposition: "If a man to whom a representation has been made knows at the time, or discovers before entering into a transaction, that the representation is false, or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation. * * * If the party to whom the representations were made, himself resorted to the proper means of verification before entering into the contract, it may appear that he relied on the results of his own investigation and inquiry, and not upon the representations made to him by the other party. * * * If the subject is in its nature uncertain, if all that is known is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, it is not easy to presume that the representations made by the one would have much or any influence upon the other." Pages 75-78. Speaking of fiduciary relation, the author says: "A transaction between them [trustee and *cestui que trust*] will be supported, if it can be shown to the satisfaction of the court that the parties were, notwithstanding the relation, substantially at arms-length, and on equal footing, and that nothing has happened which might not have happened had no such relation existed. The burden of proof lies in all cases upon the party who fills the position of active confidence to show that the

transaction has been fair. If it can be shown to the satisfaction of the court that the other party had competent and disinterested or independent advice, or that he performed the act, or entered into the transaction, voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise, the transaction will be supported." Page 151.

In *Shaw v. Stine*, 8 Bosw. 159, it is held that the true test in cases of false representations may be found in the inquiry whether the plaintiff would have entered into the contract if the false representations had not been made. If he would, then the false representations did not contribute to the sale.

In *Matthews v. Bliss*, 22 Pick. 53, it is held that, where one of the parties has an advantageous knowledge, if he exercise a studied effort to prevent the other from coming to the knowledge of the truth, or if there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude, and alike contrary to the rules of morality and of law.

In *Gilbert v. Endean*, 9 Ch. Div. 268, there was a material fact intentionally concealed, namely, that the son was without means because the father was still alive, and was still refusing to assist him.

Some of these cases, it will be observed, involved transactions between trustee and *cestui que trust*, and are applicable to the first proposition discussed herein.

After the execution of the compromise agreement, the Western Development Company paid an indebtedness of over \$3,000,000, with interest, to the Central Pacific with Southern Pacific bonds, at 90 cents on the dollar. These bonds were represented to plaintiff to be worth 60 cents on the dollar. It is now claimed that the transfer to the Central Pacific, a few days after the compromise, at 90 cents on the dollar, is conclusive evidence that they were worth 90 cents on the dollar at the time they were represented to be worth 60 cents, and that this was a fraud on the plaintiff; at least, that there is an equitable estoppel preventing defendants from claiming that they were not worth 90 cents at the time of the compromise. The transaction seems to have been one in which the defendants practically dealt with themselves. They paid off the debt of the Western Development Company to the Central Pacific Company with bonds of the Southern Pacific Company; and themselves fixed the value of the bonds at what they supposed they would be worth when they should be called on to pay the Central Pacific bonds. Equitable estoppels must be mutual. If the defendants, in attempting to pay off some debt similar to that of the Western Development Company, about the time the compromise was effected, had rated the Southern Pacific bonds at 25 cents on the dollar, would their act fix irrevocably the market value of the bonds, so that Mrs. Colton would have been bound by their act, and forever there-

after estopped from proving that in fact they were worth more? The transaction was but a temporary mode of setting up a corporate obligation. The court weighed it as evidence; and, as the intrinsic value of the property did not enter into the questions involved in the compromise, we do not perceive any ground upon which plaintiff can complain. *Fitz v. Bynum*, 55 Cal. 461; 2 Suth. Dam. 374; *Kountz v. Kirkpatrick*, 72 Pa. St. 389. Furthermore, the values set opposite to the names of the stocks mentioned, the court finds, were not relied upon; and in fact the controversy was chiefly over this very matter, Mr. Wilson insisting all the time that they were too low, and the defendants contending that they could not afford to allow more for them. The charge that Mrs. Colton was induced by threats to enter into the contract is unequivocally denied by Mr. Wilson, in the following testimony: "*Question*. Now, in the course of these negotiations, did the defendants, or any of them, make any threat in reference to aspersing the memory of Gen. Colton unless a settlement was made, or anything of that kind? *Answer*. No, sir; nothing of the kind."

Counsel for appellant rely with much confidence for a reversal of the judgment upon the twentieth finding of the court, which is as follows: "That the individual defendants, prior to the execution of the contract, Exhibit F, and during the negotiations which preceded and led to that contract, stated and represented to the plaintiff that D. D. Colton had in his hands, and standing in his name on the books of said company, 408 shares of the capital stock of the Rocky Mountain Coal & Iron Company, which were in truth and in fact the property of, and belonged to, Stanford, Huntington, Crocker, and the estate of Mark Hopkins, in equal proportions, and which were held by said Colton in trust for them and said estate of Mark Hopkins; and that upon paying the plaintiff, as successor of said D. D. Colton, the cost price of said 408 shares of stock, which they represented to be \$6,625.92, they were entitled to have said 408 shares assigned, transferred, and delivered to them. That the plaintiff relied upon said statement and representation, and accordingly did assign and transfer said shares of stock by and in said agreement and contract sought to be rescinded by this action. That said representation was not true, and was made by said defendants without due circumspection, and was unwarranted by the facts within their knowledge. That in truth and in fact said Colton did have in his possession, and there were standing in his name on the books of the company, only 240 shares of stock, which he held as trustee of said defendants and the estate of Mark Hopkins, and to the extent of 168 shares said representation was a false representation. That said representation, however, was not made with any actual fraudulent intent, but through inadvertence, and lack of due circumspection; and that said contract would

have been executed by the plaintiff, had she known the truth in regard to said stock, if the defendants, upon being made aware of the facts, had still insisted upon it. That during the negotiations which resulted in the making of the compromise expressed in Exhibit F, Mr. S. M. Wilson knew precisely what the claim of defendants was as to the aforesaid 408 shares of said Rocky Mountain Coal & Iron Company stock; had the books of last-mentioned corporation before him, including the dividend book; knew that Colton had collected dividends for several years on said 408 shares of stock; knew that the claim of defendants to said 408 shares of Rocky Mountain Coal & Iron Company's stock was supported by no written evidence. Defendants also claimed from the estate of Colton the dividends on the stock of the Rocky Mountain Coal & Iron Company, which they asserted he held in trust for them."

It is contended that this finding conclusively establishes the fact that plaintiff was induced to enter into the contract by a false representation as to a material fact; that it is immaterial whether the representation was the result of an innocent mistake, it having been made without due circumspection, which is the equivalent of a positive assertion of a fact without knowing it to be true, or being warranted by the information of the person making it; that it is not necessary that the false representation should have been the sole or controlling inducement to the making of the contract, it being sufficient to defeat the contract if it appear that it was one of the inducements, and a motive, of her action; that the court could not say, as a matter of fact or matter of law, if she had known the truth in regard to the stock, she would have executed the contract, provided the defendants, upon being made aware of the facts, had still insisted upon it. There are cases in which it could not be said, in view of the evidence, that the party would have entered into the contract if the false representation had not been made; and there are many cases reported in which the courts have said that it was error to apply the rule referred to. But, where it clearly appears from the evidence that the contract would have been made if the truth had been known, we see no reason why the court may not find the fact, and act upon it. If, as a matter of fact, the contract would have been made without regard to the character or force of the representation relied upon for a rescission, the plaintiff cannot complain. As said by Judge TEMPLE: "The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution, nay, I may say, with great reluctance, unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the business interests of the country. In general, the parties must look out for

themselves." Our Code provides that a contract may be rescinded, "if the consent of the party rescinding * * * was given by mistake, or obtained through duress, menace, fraud, or undue influence." Section 1689, Civil Code. Section 1565, Id., says: "The consent of the parties to a contract must be (1) free; (2) mutual; and (3) communicated by each to the other." Sections 1566, 1567, and 1568, Id., read as follows: "1566. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on 'Rescission.' 1567. An apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake. 1568. Consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed."

The most that can be said in support of appellant's contention is that there is a conflict in the decisions on the subject; but the sections of the Civil Code above quoted are clear and unambiguous in language, and they seem to establish the rule, beyond all controversy, that the contract cannot be rescinded when it appears that consent would have been given; and the contract entered into, notwithstanding the duress, menace, fraud, undue influence, or mistake relied upon. A misrepresentation as the basis of rescission must be material; but it can be material only when it is of such a character that if it had not been made the contract would not have been entered into. The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that the court can say, "without it the contract would not have been made." That the Code commissioners recognized the fact of a conflict of authority upon this subject, and desired to settle it in accordance with what seems to us to be the plain meaning of the language used in section 1568, Civil Code, is apparent, we think, from the authorities quoted by them in a note to that section. Thus, in *Flight v Booth*, 1 Bing. N. C. 376, the court said: "It is extremely difficult to lay down from the decided cases any certain, definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this: that where the misstatement is willful or designed it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But, with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; whilst other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud,

will vitiate the contract of sale. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation." In *Shaw v. Stine*, 8 Bosw. 159, a case also cited by the Code commissioners, the court said: "A true test in such cases may be found in the inquiry whether the plaintiff would have sold the goods if the false representations had not been made. If he would, then the false representations did not contribute to the sale; for he would have made the sale without them." They also cite article 1819 of the Civil Code of Louisiana, which reads as follows: "The error in the cause of a contract, to have the effect of invalidating it, must be on the principal cause, when there are several. This principal cause is called the 'motive,' and means that consideration without which the contract would not have been made." See, also, the cases cited by appellant, and reviewed herein on another topic. Here the court found that plaintiff never intended, after the death of her husband, to go on with the enterprises in which he and the defendants had been interested; that she did not intend to take any further risks in the business ventures; that the transaction was a lumping settlement, all parties understanding it to be such, and that no accurate adjustment of the accounts could be had; that the representation as to this stock was made without any actual fraudulent intent, but through inadvertence, and the plaintiff would have executed the contract sought to be rescinded, had she known the truth in regard to the matter, if defendants had insisted on it; that Wilson knew exactly what defendants' claim as to the stock was, had the books of the company, including the dividend book, examined them, knew that Mr. Colton had collected dividends, and that defendants' claim was not supported by any written evidence; that Wilson made a thorough investigation into the affairs of the Rocky Mountain Coal & Iron Company, and had many sources of information other than those possessed by the defendants, and was more thoroughly acquainted with, and better qualified to form an accurate judgment as to, the condition of the affairs of that company than were the defendants, or either of them; that Mr. Dou-ty, cousin and friend of Mr. Colton, and book-keeper of said company, Mr. Green, secretary of Gen. Colton in his life-time, and Mr. Steinberger, an old friend, frequently consulted with plaintiff and Wilson with regard to the business in hand; that plaintiff placed no reliance upon the defendants, and had no confidence in them; and that before

consummating the agreement, she had discovered many inaccuracies in the statements they had presented. At that time there was one error in the account of the Western Development Company, which would, if known, have shown the liabilities of that company to be \$1,000,000 greater than they were represented. In a transaction involving such vast properties and values as we find here, the amount involved in this particular transaction is comparatively a small item, only about \$10,000. But, if the defendants had relied upon their strict rights in regard to this stock, they would have been entitled to receive back the dividends on the 240 shares wrongfully appropriated, with interest on each one from the time it was so taken, and plaintiff would have been entitled to receive the purchase price of the 240 shares, and interest upon it from the time it was paid. So that if the truth had been stated, and the controversy as to this particular stock had been settled upon a fair accounting, plaintiff would not have been more than \$1,000 or \$2,000 better off than the settlement left her. From all the circumstances of the case, Judge TEMPLE concluded that this representation as to the 168 shares had no material influence. It is true, the judge states "that the plaintiff relied upon said statement and representation, and accordingly did assign and transfer said shares of stock by and in said agreement and contract sought to be rescinded in this action." Plaintiff believed, at least assumed, the statement of defendants as to this stock to be true, and therefore assigned it. This is entirely consistent with the finding that she would have executed the compromise agreement had she known the truth in regard to the stock. From all the circumstances, especially the testimony of Mr. Wilson, it is made very clear that this representation was not an inducing cause of plaintiff's action. Speaking upon this subject, the court, in its opinion, said that "Wilson concluded it would do no good, unless he could satisfactorily explain away charges of appropriating \$181,000. In comparison with these figures, the sum involved in this unwarranted assertion is small. But, I think, on general principles, in a matter of such magnitude as this, such a mistake or misrepresentation would not justify setting aside the agreement, especially where, as here, expenditures have been made by the defendants on the faith of the agreement which have materially enhanced the value of the property involved in the litigation." In these observations of the learned judge we fully concur.

It remains only to consider whether there was any unconscionable advantage taken of plaintiff. This question must be determined, not in the light of subsequent events, but upon the circumstances existing at the time of the negotiations and the execution of the contract. The court found that defendants did not obtain great advantage, or any advantage, over plaintiff, and that the agreement was fair, just, and equal. The question

whether there has been an undue advantage, an unconscionable exercise of a superior power, depends largely upon the situation of the parties at the time of the negotiations. The immediate cause of the trouble between the parties arose from the fact that after the death of Gen. Colton, who had been president and treasurer of the Rocky Mountain Coal & Iron Company from January 1, 1871, until the time of his death, the books and papers of that corporation showed that he had used large sums of money belonging to that company, for which he had never accounted. He had also taken large amounts, which he designated as "salary," in contravention of the terms of his agreement with Mr. Crocker, and with the other associates. There were also some serious irregularities in his account with the Western Development Company, of which he had been manager from its organization, in December, 1874. The latter company was heavily in debt. It owed at that time, to Stanford, Crocker, and the estate of Hopkins, over \$10,000,000. Its assets consisted chiefly of railroad stocks and bonds which had no market value. Mrs. Colton concluded before the commencement of the negotiations that she could not go on with the enterprise in which her husband had been interested. These facts are found by the court. In one of the preliminary interviews with Mr. Crocker, when asked whether she wished to pay for the stock purchased by Mr. Colton, and continue along in the execution of the corporate schemes which her husband had helped to advance, she replied that "she was in no condition or state to build railroads." And her chief adviser, Mr. Wilson, said in his testimony: "Very early in the conversations that I had with Mrs. Colton, it was agreed and understood between us that she was to sell out her interest there, and not to remain in the railroad. That was our leading proposition from the beginning of my relation with the business, and we never swerved, or never wavered, on that. * * * We had made up our minds that she should not go ahead. * * * We had already determined that she should not go ahead, and would get out, if she should get a certain sum of money." It must be remembered that the plaintiff herself first sought a settlement,—a fact which deserves attention. As was said in *Morse v. Royal*, 12 Ves. 375, by Lord ERSKINE: "This is not a trustee, looking around him and fixing his eye upon this property, as increasing in value. It is in evidence that Morse was determined to sell it, and, if he could not get what he wanted, that he would put it up at Garraway's; that he frequently teased Vanheylin to purchase it, who was reluctant, but at last said he would go the length of giving £5,000." So, in the case at bar, Mr. Huntington, in his deposition, says that he was teased into making the settlement. In many cases we have examined, the fact that the party endeavoring to rescind the compromise agreement made the first proposal, and persuaded the other party

to enter into the agreement, has been adverted to and considered by the court as an important factor in determining the rights of the plaintiff to a rescission of the contract. *Harrison v. Guest*, 6 De Gex, M. & G. 433; *Montesquieu v. Sandys*, 18 Ves. 311. The evidence before us shows, without conflict, that the defendants did not want to make the settlement with plaintiff which was made, or any settlement, at that time. The circumstances were so unfavorable for the prosecution of the plans which had been laid out that the surviving associates believed they required more help, financial and executive, rather than more property in the hands of, and to be managed by, the survivors. Mr. Wilson, in his deposition, referring to this matter, says: "Several times during our later negotiations they had stated that they did not care about buying her out. They would do it at certain prices, and at this rate; but they would prefer she should go on, and meet her obligations, and be enabled to meet her advances for the needs of the building of the railroads, if they would be called for, from time to time; that they would prefer that she should stay in. They wanted money. They had not any money to pay out, and they wanted money. They preferred to get money in rather than to pay it out." The court also found that the defendants, at the time they requested plaintiff to continue along with them in the corporation, offered to manage her interests for her as well as they could their own, and promised that she should receive the full benefit of their knowledge and experience, and that they would get every dollar they could, and "share with her to the last cent."

The Southern Pacific Railroad was finished to the Colorado river, at Yuma, in September, 1877. Mr. Hopkins had always been opposed to building the road east of the Colorado; and for that reason the work of construction stopped at that point. After the death of Mr. Hopkins, which occurred on March 29, 1878, Mrs. Hopkins was very unwilling, in fact was probably unable, before the distribution of the estate, which was in process of administration, to furnish any money, and for that reason opposed the Western Development Company engaging in any new schemes. As stated before, that company was at the time heavily indebted to various parties, and its assets consisted of unmarketable stocks and bonds. After the death of Mr. Hopkins, the surviving associates concluded that they would build the road east. The organization of a new construction company had been agreed upon during Gen. Colton's life-time, and but a short time before his death the Southern Pacific of Arizona was incorporated, and he became a member thereof, with 30,000 shares of the capital stock in his name. The associates had lost the aid and encouragement of both Mr. Hopkins and Gen. Colton, in whose executive ability and good judgment they had unlimited confidence. On May 5, 1879, the

supreme court of the United States affirmed the validity of the Thurman act, which took from the defendants 25 per cent. of the net earnings of the Central Pacific to secure the government. At that time the Central Pacific was apparently the source of all income and credit to the defendants. The debt of the Central Pacific was over \$100,000,000. The affirmance of the validity of this act threw the associates, especially Mr. Colton, into great despondency. He declared that the construction plant should be sold, and that no more road should be built until they had money laid up in bank. He declaimed bitterly against the communistic tendency of the times. It was a year of remarkable political excitement. There was a general business depression all over the country, and in fact the whole commercial world, for a year or more preceding the time of these negotiations. In the midst of these negotiations there was in session in this state a constitutional convention, which formulated and promulgated the constitution ratified in May, 1879. Into this constitution there were incorporated many new and novel features, especially those relating to the taxation of railroad property and the fixing of freights and fares. The outlook for the parties was very dark. Of course, it is easy to say, in the light of subsequent circumstances, that their fears as to the evil effects of the provisions of the new constitution were largely groundless; but there was a real panic in railroad affairs at that time. True, confidence was soon restored, and their fears have not been realized. It certainly is not the fault of these defendants that they became despondent during that period, or that the transactions, unfortunately for this plaintiff, were consummated during such gloomy times. It was impossible for them to discontinue their operations without utter disaster to all their enterprises. Their road was built several hundred miles into a desert. To make it useful at all, it was necessary to connect it with the eastern systems of railroads. There was actual danger of active competition. To make the road a success, this competition had to be headed off. The value of the assets of the Western Development Company depended almost entirely upon the completion of the road which had been projected. It is important, we think, that these facts should be remembered in determining the fairness of the transaction between the parties. It is the misfortune of the plaintiff that she had not the means or disposition to accept and act upon the proposition made by the defendants to continue on with them in their operations. It is an important fact to remember, too, that the demand for the rescission of the compromise agreement came from the plaintiff over two years after the execution of the contract, and at a time when the gloom and depression had given way to an active "boom" in railroad business,—a time when there was a most unprecedented demand for railroad securities, owing to which the de-

fendants found themselves in a most prosperous condition. The court below evidently considered the matter of delay in bringing this action an important factor, especially as the plaintiff had successfully forced a settlement upon the defendants, at a time when many of their securities had no market value, when they were all subject to great fluctuation, and when the question of the solvency or insolvency of their concerns depended solely upon the market value of such securities, and had deliberately entered into the settlement with full means of information, and upon full advice of many competent friends. The failure of plaintiff to inform herself as to the facts upon which she relied, and to proceed to rescind the contract, until the property had, under fortuitous circumstances, become immensely enhanced in value, is an important circumstance to be considered. *Nicholson v. Janeway*, 16 N. J. Eq. 285; *Murray v. Elston*, 24 N. J. Eq. 310; *Oil Co. v. Marbury*, 91 U. S. 587; *Kitchen v. Railway Co.*, 69 Mo. 224.

Mrs. Colton was determined to get out of the enterprises without waiting and taking her chances on creating a market. Her one-ninth of the indebtedness due from the Western Development Company to Stanford, Huntington, Crocker, and the estate of Hopkins amounted to over \$800,000. If defendants had desired to take any advantage of plaintiff, their opportunities were unbounded. If they had simply refused to pay her any money, what would have become of her? They had a perfect right to refuse to buy her out, or furnish her with money with which to meet her outside obligations. The estate was indebted to defendants to the extent of three-quarters of a million of dollars, and was pressed with claims amounting to over \$175,000. These claims could not have been met if defendants had not supplied plaintiff with money to pay them. They paid a note of Colton to Michael Reese which alone amounted to over \$75,000. From October, 1878, to the time of the settlement, plaintiff had been allowed to draw about \$175,000 for her own use, and to pay off the debts of the estate. The situation of the plaintiff at that time is best expressed in her own language. In a letter to Mr. Hunt, dated May 8, 1879, she says: "Now, I have managed wonderfully well. The railroad people agreed to let me draw for my household expenses. * * * I have paid a note, bearing interest at 8 per cent., of \$25,000. I have paid a note on call (no interest) in Europe of \$9,000. I have paid \$18,000 on a call note bearing 8 per cent.; a note of \$25,000, held by the National Gold Bank, of which David was a director. I held 100 shares of this bank stock, and I sold it for 85 cents to the bank, so I still owe them \$7,000, which I am paying them interest on. They have treated me very nicely, but I wish to pay them as soon as possible. Then there were about three thousand dollars of bills coming in, owing on our country place, for labor and lumber for improvements, other

immediate obligations, of a sacred nature, of about three thousand dollars. Now we have cut down at every turn and corner. * * * They have once or twice asked if I was making investments, and the last time they drew they declined to allow me any more until we had made a settlement. This settlement I am anxious to make, and am waiting their moves. Now, you will see that I am not idle. I have had a hard struggle. I have lain awake nights, wondering how I was going to pay a note coming due. I do not believe the railroad people will settle squarely with me. I am afraid I shall have trouble." "I talk business with no one except my lawyer. I have had a sale of thoroughbred stock from the farm. I have sold the carriages and horses, except just such as we positively needed. I will send you a catalogue. While I have no business experience, I am learning that I have good judgment in many things, and when I depend upon myself I do far better than when I depend on others." As stated before, the defendants were under no obligations to purchase from the plaintiff. All parties were in great distress. Plaintiff was in need of money; so were the defendants. If defendants had desired to take an unfair advantage of Mrs. Colton, all that was necessary to accomplish their aim was the enforcement of their claims against the estate. No purchaser other than defendants for the securities in which the estate was interested could be found. Defendants were not to blame for that circumstance. If plaintiff had been put to a forced sale, and defendants had seen fit to take advantage of their position, and had purchased the interest of the estate at even nominal figures, could plaintiff have complained, except from a moral stand-point? Mr. Tevis was a man of great wealth, familiar with railroad matters, and the affairs of the companies in which the parties were interested. Defendants' statements as to values were mere matters of opinion, and they were so understood by everybody concerned. Mr. Wilson and Mr. Tevis were as competent to judge as to the value of the securities as were the defendants. The defendants did not deny that the stocks would be worth more in the future. They expressly so declared. They had confidence in their own ability, and the eventual success of their enterprises; but plaintiff had no confidence in them or their schemes. It is the misfortune of the plaintiff, not the fault of defendants, that the prospect of success was so poor. We must be careful not to judge a transaction of this kind in the light of subsequent events. There is a natural inclination to do so. It must be remembered, too, that Mrs. Colton was not destitute of coercive power. Mr. Tevis told defendants they could not afford to have litigation with plaintiff, the widow of their old associate; that it would be prejudicial to themselves as individuals, and to all their enterprises; that she would have the sympathies of the public, etc. Staggering as

they were under heavy burdens, litigation meant disaster. Their securities would be injured, and the expense of a protracted trial, such as would follow a full investigation into the affairs of the company, would seriously cripple them. Concessions had to be made on both sides, or ruin would fall upon both. Concessions were made, and they were honestly and fairly made. All parties acted upon their best information as to the amount and character of the property in controversy, and according to their best judgment as to the value thereof. Mr. Colton had undertaken to carry a burden which was beyond his strength, and for Mrs. Colton to attempt to carry it was a proposition which was entirely discarded as an impossibility before the negotiations began. The inability of plaintiff to go on was as embarrassing to defendants as it was to her. By the terms of the compromise plaintiff was released from corporate liabilities amounting to millions of dollars.

How can unfairness or inadequacy be predicated upon such conduct and such facts? The statement of the circumstances is sufficient, we think, to demonstrate the truth and justice of the finding of the court that defendants were guilty of neither threats, concealments, nor undue exercise of a superior position and power, but that the negotiations which culminated in the contract, Exhibit F, were fair, just, and equal.

Other points are made by appellant, which we do not deem necessary to consider at length. It is said: That the findings do not cover the issues. That the court adopted an erroneous theory as to the relation of the parties; tried the case on one theory, and decided it on another; drew erroneous conclusions of law from the facts found, proved, and admitted; found conclusions of law where facts should have been stated. That the evidence is insufficient to justify the findings of the court in certain particulars,—the most important of which are, the evidence shows that Mr. Wilson was not an independent adviser; that Mr. Tevis was not possessed of information in regard to the affairs of the corporations to enable him to give reliable advice. That plaintiff would not have entered into the contract, had she known the truth as to the stock. That many of the items set forth in that portion of Exhibit D, after the heading therein, "General D. D. Colton in Account with the Western Development Company," were true or correct. And that Mr. Wilson was not informed how the account had been made up, or that the defendants had no personal knowledge of the correctness thereof. Many of these points were not referred to on the argument, and most of them are apparently abandoned by at least a majority of appellant's counsel in this court. Nevertheless, we have given careful attention to each and all of the points made in all the briefs. Some of those last referred to are involved in the questions we have considered at length in this opinion. The

others, we think, are without merit. The judgment and the order denying a new trial are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; WORKS, J.

FOX, J., not having heard the argument, and THORNTON, J., deeming himself disqualified, did not participate in the decision.

(82 Cal. 57)

McRAVEN *et al.* v. DAMERON. (No. 12,023.)
(Supreme Court of California. Dec. 13, 1889.)

ATTORNEY AND CLIENT—CONTRACTS.

An attorney who has agreed to sue for certain land at his own expense, in consideration that he should receive one-half of whatever interest he might recover therein, cannot, in an action for money received by him as a compromise of the suit, allege as a defense that he recovered no interest in the land.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

James P. Dameron and Aylett R. Cotton, for appellants. *William W. Porter*, for respondents.

GIBSON, C. Suit against defendant for an accounting of money received by him as an attorney for plaintiffs, and to recover the same. Judgment passed for plaintiffs, from which, and an order denying a new trial, defendant appeals.

The plaintiffs alleged, in substance, in their complaint, that the defendant, as their attorney, prosecuted two actions, in two of the late district courts in and for the city and county of San Francisco, for the recovery of a one-fifth interest in certain real estate situated in said city and county. The first was against one John Norton and about 203 others, and the second was against one David Worcester and others. That the plaintiffs were the same in both actions, and substantially so in the present suit. That, during the pendency of said actions, the defendant, as the attorney of the plaintiffs in this suit, and without their authority, in consideration of certain sums of money paid to him as such attorney by said defendants, made dismissals of said actions as to a large number of them. That plaintiffs, who reside in Mississippi, upon information and belief, allege that defendant, as their attorney, received about the sum of \$8,000 on account of said dismissals. That, although often requested so to do, he has never paid the same to any of them, except the sum of \$50, nor rendered any account of the amounts received by him for such dismissals. That the said acts of defendant were fraudulent, and that plaintiffs were not informed of them, or of the receipt of said money by him, until within two years before the commencement of this action.

Defendant answered by denying each and every allegation in the complaint, and ad-

mitted that he was the attorney for the plaintiffs, as alleged in their complaint, and averred that the actions were tried as alleged, and in one of said actions judgment was rendered against the plaintiffs regarding the premises sought to be recovered, and that the defendants recovered of them their (defendants') costs and disbursements, amounting to \$600 in gold coin; that upon an appeal from said judgment to the supreme court of the state it was affirmed. Defendant also admitted that he dismissed one of the actions as to divers of the defendants therein, deeming it for the best interests of said plaintiffs so to do, and that he received from such defendants certain sums of money, amounting to about \$4,000, which amount, he avers, he placed to the payment of costs of said suits, and that the said suits were expensive, and that he paid out for the cost thereof over \$7,300, and that not less than \$3,300 remains due on account thereof from defendants to him, no part of which has been paid; and further avers that his professional services rendered in said actions were worth the sum of \$5,000, and that he has received no compensation whatever for them; that plaintiffs were well aware of all these facts, as he (the defendant) had rendered them a statement of the same; and that more than two years had elapsed since he received any money, and all claims and demands, if any ever did exist, were barred by the provisions of sections 338 and 339 of the Code of Civil Procedure. Subsequently, by a supplemental answer, defendant averred that since the commencement of this action four of the plaintiffs, viz., W. J., M. B., and R. D. McRaven and Emma D. Collins, died intestate, without issue, and left surviving them their brothers, D. J. and G. H. McRaven, as sole heirs of the said decedents; that after the death of all of the said decedents he obtained, for a valuable consideration, from the said D. J. and G. H. McRaven a release of all demands they then had against the defendant, as well as all demands on account of the interest in the estate of said decedents inherited by them; and that the said D. J. and G. H. McRaven, in and by the same writing, consented and agreed to the dismissal of the said action so far as it concerned their interest, including that inherited by them from said decedents; and, further, that as to said decedents said suit should be dismissed.

The cause was referred to S. W. Holladay, who found and reported that the defendant, an attorney of this court, discovered and brought to the knowledge of the plaintiffs, who were residents of Mississippi, their supposed interests in a certain tract of land in San Francisco, descended to them as heirs of one W. B. Dameron, deceased, who, at the time of his demise, was the owner of a certain undivided interest in the land referred to. That defendant believed, and represented to plaintiffs, that their recoverable interests in the land were worth at least \$1,000,000. That defendant prosecuted the suits mentioned in

the complaint "under his promise, made to his said clients, in which they acquiesced, that he would, as their attorney, commence, conduct, and manage the necessary suits and litigation to recover their rights in the property, and that he would pay all expenses without recourse to them, and that for his services and expenditures he should have one-half the land, and divide the property recovered. Those terms were fair and reasonable." That he commenced and conducted said suits to the best of his ability and judgment, and on or before October 10, 1877, he stipulated with about 70 of the defendants in said suits, claimants of parcels of the property therein in litigation, that they should have judgments against the plaintiffs therefor; upon which judgments were accordingly entered, he receiving therefor \$4,008, which he appropriated to his own use, except \$50 paid to plaintiffs. That he made the said stipulations and dismissals solely on his own responsibility and volition, not fraudulently, but in the proper exercise of his discretion as attorney and sole representative here of the plaintiffs, his clients, who were all in Mississippi, the state of their residence, but without their knowledge or special consent. That "defendant never informed plaintiffs, and they did not know, either of the stipulations or of the respective amounts so received by him, nor of the total sum received by him on account of said dismissals or stipulations for judgment against his clients in said suits, or either of them; nor has he disclosed the same at the present trial. Said stipulations are all silent as to the sum paid on them, or any of them." That the only account or statement defendant ever rendered plaintiffs was that he had paid out \$7,000 for expenses, and had received \$4,008, on account of said suits, which statement was not made until about October 10, 1877. That D. J. McRaven released all of his demands against defendant, as alleged in the latter's supplemental answer, but that G. H. McRaven made no release. That said released interest was one-eighth of the whole interest in this suit, and is without prejudice to whatever right or claim said D. J. may have, by succession as heir or otherwise, to the estate of his deceased co-plaintiffs, who died without issue since the commencement of this suit, viz., W. J., M. B., and R. D. McRaven and Emma D. Collins. That one W. W. Porter, the administrator of the estates of all of said decedents except R. D. McRaven, was regularly substituted as plaintiff herein in place of his intestates; and that there is no personal representative yet appointed of said R. D. McRaven, deceased. That, of the \$4,008 received, one-half (\$2,004) should be allowed for defendant's compensation, and \$50, paid plaintiffs, deducted, leaving \$1,954 due plaintiffs, with interest thereon from November 10, 1877, to November 16, 1885,—\$1,107.90; aggregating \$3,061.90. From this last sum the one-eighth interest of D. J. McRaven, which he released to defendant November 16, 1885, should be deducted,

leaving a remainder of \$2,679.17, to which is added the interest thereon from November 16, 1885, to August 16, 1886, \$140.65; making a total of \$2,819.82 due to the plaintiffs other than said D. J. McRaven. From this total the sum of \$352.48 should be deducted, it being the share that R. D. McRaven, one of the deceased plaintiffs, unrepresented, would have been entitled to; said deduction being made without prejudice to the rights of his heirs or legal representatives, and in accordance therewith. That at the trial it was expressly stipulated that the statute of limitations had no application in the suit. Upon this report, and in accordance with it, the court entered judgment for the plaintiffs. The defendant preserved, in a bill of exceptions, his exceptions to the ruling of the court denying him a trial by jury, and referring the cause to a referee, but must have properly concluded that his exceptions were not well founded, as they are not urged upon this appeal.

The principal point urged upon this appeal is that the findings are not sustained by the evidence, and that the findings that are within the issues are not sufficient to sustain the judgment. This suit, as we have seen, is to recover money received by the defendant while acting in a fiduciary capacity under a certain contract between himself and plaintiffs; and the findings complained of as not being within the issues relate to this contract. We think that the findings are within the issues tendered by the pleadings. The complaint may not be as specific with regard to the contract as it might be; but as there is sufficient in the complaint from which it may be gathered, in the absence of a special demurrer on the ground of any defect in the statement regarding the contract, it is sufficient according to a number of decisions of this court. The complaint shows that defendant was the attorney for plaintiffs in certain litigation, and that he received as the fruit thereof certain money, which he failed to deliver or account for to the plaintiffs. This, we think, is a sufficient statement of the contract, under the above rule. A statement of the contract under which the defendant received the money claimed by plaintiffs was plainly necessary to enable the court to ascertain the amount of money received for, and how much there might be due, the plaintiffs. It was therefore necessary for the referee to find upon it.

Regarding the sufficiency of the evidence to sustain the findings, we think the evidence, in connection with the admission of the defendant in his answer, viz., that he, while acting as the attorney for plaintiffs, as alleged in their complaint, received certain sums as the result of the litigation, amounting to \$4,008, is amply sufficient to sustain the findings; and as the evidence consists wholly of the testimony of the defendant himself, and certain documentary evidence, no good purpose would be subserved by setting it forth.

One of the arguments of the defendant as to his liability seems to be that even if he did undertake to and did prosecute the actions mentioned in the pleadings, for and on behalf of the plaintiffs herein, at his own expense, in consideration of receiving one-half of whatever interest in the land he might recover, that, as he failed to recover any interest in the land, there was nothing for him to divide with his clients, and that he was not accountable to them for any money received as the result of certain stipulations made by him in the said litigation. It is almost needless to say anything in disposing of this argument in addition to the statement of it, but we will add that such fine distinctions between what may be the fruit of a litigation, when prosecuted to a final determination, and what may be realized by the exercise of the best judgment of an attorney in the way of a compromise, have never obtained anywhere, so far as we are advised, and probably never will. There are some other points stated, but not argued, and, as we discover no prejudicial error in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

(82 Cal. 119)

MURRAY v. WHITE. (No. 12,411.)

(Supreme Court of California. Dec. 19, 1889.)

TRIAL—INSTRUCTIONS.

1. An assignment of error because of unnecessary instructions, or that the instructions placed too prominently before the jury the law on any point, cannot be sustained when there is considerable evidence to support the theory or fact on which they were based.

2. In an action by the assignee of an insolvent debtor to recover personal property conveyed by the insolvent to defendant by an alleged fraudulent bill of sale, an objection to a charge of the court as to the effect of a lease from defendant to the debtor, which was followed by the alleged fraudulent bill of sale of the same property from the insolvent to defendant of all the insolvent's "right and interest" in the property, on the ground that the charge was inapplicable, because defendant must be held as claiming the property under the bill of sale, cannot be sustained when the jury find what the debtor's interest in the property was, and give plaintiff a verdict for its value.

Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

Action by John S. Murray, as assignee of D. T. Woodman, against George E. White, to recover certain personal property and damages. Plaintiff appeals. The charge in regard to the lease referred to in the opinion is as follows: "Now, there was a lease by White to Woodman, made June 19, 1884. The lease was to run two years. There is no question but what that lease might have been surrendered by the consent of White, and, if Woodman surrendered the lease, White had a right to the possession of the property. In other words, I may say that he—that each

party—had a right to the possession of the property. There was no impropriety in White taking possession of it after the lease was surrendered."

Horace L. Smith and J. A. Cooper, for appellant. T. L. Carothers, for respondent.

McFARLAND, J. The plaintiff, Murray, brought this action as assignee of Daniel T. Woodman, an insolvent debtor. The complaint avers that within one month before the filing of the petition (in involuntary insolvency) against Woodman, he did, in contemplation of insolvency, etc., assign, transfer, etc., to the defendant White, certain personal property, consisting principally of sheep, with a view of giving a preference, etc. The value of the property is alleged to have been \$15,815, for which sum, with damages, judgment is prayed. The jury found a verdict for \$2,250; and plaintiff, being dissatisfied with the amount, appeals from the judgment, and from an order denying a new trial. For several years prior to the alleged fraudulent transfer, the said Woodman and the defendant, White, had been engaged in the business of sheep-raising. There were several distinct flocks of sheep kept on several different ranges in Humboldt and Trinity counties, in some of which Woodman and White were jointly interested. Others were owned by one or the other individually. Their business affairs and accounts, as between themselves, were very much confused, and the evidence was conflicting as to what their real relations were with respect to those sheep in which they were, in some way, jointly interested; and the main point made by appellant is that the court erred in giving certain instructions to the jury on the subject of partnership. The objection urged is not that the instructions do not state the law correctly, but that there was no evidence to support the theory or fact on which they were based; that is, that there was no evidence on the subject of partnership. But an examination of the record certainly does show that there was considerable evidence tending to show a partnership relation between the parties as to some of the sheep. Indeed, the appellant himself asked the court to give an instruction on the subject of partnership; and the court, at his request, did give instruction No. 7 on that subject. And it is apparent from appellant's brief that his main objection to the instructions of the court on this point is that they "placed too prominently before the jury the law applicable to partnership relations." But that would be an unsubstantial ground for the reversal of a judgment, unless in a case much more extreme in that respect than the one at bar. We think, therefore, that the judgment should not be reversed on account of the instructions about partnership.

We do not think that there was any error in the charge about a lease by White to Woodman. The objection seems to be that it was not applicable, because White, in appellant's view, must be held as claiming all the prop-

erty under a bill of sale from Woodman to him, dated August 3, 1885. But that bill of sale purported to sell and transfer only the "right and interest" which Woodman had in any or all of the sheep; and the jury evidently found what that interest was, and its value, and gave plaintiff a verdict therefor. We see no objection to any of the other instructions. They were full; and, considering them all together, we think that they stated the law of the case very clearly and correctly, and certainly not unfairly to plaintiff.

There are two or three points alluded to in appellant's brief about alleged errors committed in admitting evidence; but the references to the transcript are too general and vague to point out where the rulings complained of may be found. From a general examination of the transcript, we discover no material errors on this score. It was, no doubt, somewhat difficult for the jury in this case to discover the real facts; but the case was fairly put to them, and we see no reason to disturb their verdict. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

82 Cal. 132

SAUNDERSON v. BROADWELL et al. (No. 12,323.)

(Supreme Court of California. Dec. 19, 1889.)

FRAUDULENT CONVEYANCES—EVIDENCE—TRUSTS.

1. A deed by an insolvent debtor to a creditor, in consideration of a pre-existing debt and a promise by the grantee to pay a debt of the grantor to another creditor, the two debts being equal to the value of the property conveyed, is not in fraud of the rights of creditors, and especially when the grantee in fact pays the other creditor.

2. The promise by the grantee to pay the debt of another creditor does not create a trust for the benefit of creditors.

3. The grantee was absent from the state at the time the deed was signed and recorded; but it was delivered to him on his return, which was in a short time. The grantor testified that the consideration of the deed was \$1,500; that he owed the grantee \$800; and that the grantee promised to pay a debt of \$688, which he owed another creditor. *Held*, that a finding that the deed was made in good faith, and for a valuable consideration, was supported by the evidence.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action by David Saunderson against William B. Broadwell and another to set aside a deed on the ground of fraud. Plaintiff appeals.

Aylett R. Cotton and *W. H. H. Hart*, for appellant. *Ham & Hull* and *Spencer & Henning*, for respondents.

HAYNE, C. This was a suit to set aside a deed made by the defendant William B. Broadwell to the defendant C. E. Broadwell, upon the ground that it was in fraud of the rights of plaintiff as a creditor. The trial court gave judgment for the defendants, and the plaintiff appeals from the judgment, and from an order denying a new trial. The court found that the deed "was in good faith,

for a valuable consideration; that it was an actual sale, without reservation, and not in trust; that said deed was not fraudulently made, and was not made or executed or recorded or received, either on the part of said W. B. Broadwell, or on the part of said C. E. Broadwell, or any one else, to hinder or delay or defraud any creditor or creditors of said W. B. Broadwell." In addition to the general finding the court found specifically that the value of the property was "about \$1,500," and that the consideration was a pre-existing indebtedness of the grantor to the grantee of \$800, and a promise by the latter to assume and pay an indebtedness of \$688 of the grantor to a third person, which indebtedness was paid by the grantee within a reasonable time.

The indebtedness of the grantor to the grantee was a valuable consideration for the conveyance. *Jamison v. King*, 50 Cal. 132; *Schluter v. Harvey*, 65 Cal. 159, 3 Pac. Rep. 659. The promise to pay the debt due from the grantor to the third person was also a valuable consideration, (*Gladwin v. Garrison*, 13 Cal. 332;) and especially so when this payment was in fact made.

It is argued, however, that, inasmuch as part of the consideration was a promise to pay another creditor of the grantor, the transfer must be held to have been for the purpose of creating a trust for the benefit of creditors, and that it was invalid, as such, because all the creditors were not provided for. But we do not think that there was an attempt to create a trust for the benefit of creditors. The promise was not to pay the debt which was assumed out of the property transferred. The creditor for whose benefit the promise was made could not have fastened a trust upon the property if his debt had not been paid. The most that he could have done, in such case, would have been to bring a personal action against the grantee upon a promise for his benefit. And any creditor of the grantee could proceed to make their debts out of the property, which would not be the case if it were trust property. In other words, the transfer was absolute, and not in trust. The case of *Dana v. Stanford*, 10 Cal. 275, goes further than is required here and the doctrine of that case has been several times approved. *Lawrence v. Neff*, 41 Cal. 569; *Wood v. Franks*, 67 Cal. 34, 7 Pac. Rep. 50. Doubtless, if the entire consideration of a transfer consisted of promises to pay the debts of the grantor, and it could be seen that such promises were made without any ability or intention of performance, the transaction would not be allowed to stand. But that is not the case here.

It is contended, however, that the findings above quoted are not supported by the evidence. But we think that the testimony of W. B. Broadwell is sufficient to sustain the findings. He testified, in substance, that he owed the grantee the sum above mentioned, and that he owed W. H. Broadwell the other sum referred to. It would seem that at first

the grantor "had offered the land as security," and that subsequently a sale was effected. The witness testified as follows: "The consideration for that deed from me to my brother was \$1,500. That was what we named in the deed,—the consideration of that deed in settlement with my brother. The consideration was in settlement with my brother for debts due him at the time he took the deed. * * * Well, the agreement was that I should transfer the land to him in settlement of the bills I owed him, and he was to assume those that my father held against me. * * * The only agreement was that I was to make him the deed, and he was to cancel the obligation he had against me at the time, and pay those items of indebtedness that my father had against me."

The appellant lays stress upon the fact that the grantee was absent from the state at the time the deed was signed and recorded. But it was handed to him on his arrival in California, which was within a short time, and he then accepted it, and on his return to the east performed his part of the agreement.

It seems plain that the grantor intended to prefer his brother and his father to his other creditors. But the evidence must be held sufficient to sustain the finding that there was a valuable consideration for the transfer, and that it was an absolute, and not a colorable, one. Under such circumstances, a debtor has a right to give such a preference. Civil Code, § 3432. No question as to such inadequacy of consideration as to show fraud arises in this case.

It is contended that the findings are inconsistent with the answer, and with each other; but we do not see any material inconsistency.

The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(82 Cal. 110)

In re SPENCER. (No. 20,550.)

(Supreme Court of California. Dec. 19, 1889.)

DIVORCE—ALIMONY—SEPARATE PROPERTY.

Civil Code Cal. § 141, which prescribes that in executing the provisions of section 139, providing for the maintenance of the wife in case of divorce, the court shall resort first to the community property, and then to the separate property of the husband, embraces the earnings of the husband after divorce.

In chambers. Petition for writ of *habeas corpus*.

Franklin P. Bull, for petitioner. Dorn & Dorn, for respondent.

PATERSON, J. The petitioner is before me on a writ of *habeas corpus*. The question involved is whether, after a divorce, the husband can be required to devote his earn-

ings to the support of his former wife. On August 25, 1884, a decree of divorce was entered in favor of Josephine M. Spencer, and against petitioner herein, and the court further ordered the defendant, petitioner herein, to pay to plaintiff as permanent alimony the sum of \$50 per month. The decree also awarded to the plaintiff the household furniture, silverware, and other property in the possession of defendant. The decree was afterwards modified so as to allow the plaintiff \$25 a month, instead of \$50. Petitioner paid the regular monthly allowance down to about the beginning of the year 1887. Since the latter date he has failed to pay anything, and for such failure and neglect was adjudged guilty of contempt of court, and sentenced to be confined in the county jail until he should pay the amount due his former wife under the decree, and order amending the same, as to alimony.

Inasmuch as it is the duty of the court in granting a decree of divorce to make such disposition of the property as is just and lawful, the presumption is here that the plaintiff, Josephine, was awarded all the property, no mention being made in the decree of any other property. Furthermore, it is apparent from the affidavit upon which the court based its order for the petitioner to show cause why he should not be punished for contempt, and from the order itself, that the petitioner was adjudged guilty of contempt solely upon the ground that he had refused or failed to appropriate a portion of his salary to the payment of the sums required by the order for alimony. The question, clean cut, is whether the court has the power to compel a divorced man to devote any portion of his present earnings to the support of the woman as to whom and himself the bonds of matrimony have been dissolved by the court, and both parties released from all the obligations thereof. If it have such power, there may be this anomalous condition of domestic affairs: A man having a wife and children to support, under the obligations of the bonds of matrimony and his duty as a parent, may be compelled to devote his daily wages—that which is necessary to maintain them—to the support of a woman who owes him no duty, and who may be the wife of another man. If the power is vested in the court, it is absolute, and such a state of affairs may result. If such a power as this exists, it ought to appear clearly in the letter of the law. It certainly is not the spirit of the law. When the Code commissioners framed, and the legislature adopted, the system applicable to marriage and divorce in this state, they made divorce easy by providing an unusually large number of grounds upon which it might be based, and placed no limitation upon the right of either spouse after divorce to marry again. It never was intended, I think, to allow a man to marry as many times as he or his wives might have grounds for divorce, and compel him thereafter, subsequent to the dissolution of the

marriage obligation, to support from his daily earnings those from whom he had been divorced. With the policy of the law, however, judges have nothing to do.

Looking at the law upon which the respondent herein relies, I find nothing to support the view above referred to. Section 139 of the Civil Code provides that, when a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children, and may make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just; but, in executing this and other sections, it is expressly provided that the court must resort first to the community property, and then to the separate property of the husband. "Separate property" is a relative term. It implies the existence of the community. After the divorce there is no community, and there can be no such thing as separate property. We do not speak of a single man's separate property; yet a divorced man is a single man. Separate property, as defined by the Code, is that owned by him before marriage, and that acquired afterwards by gift, bequest, devise, or descent. "Afterwards," means, of course, after the marriage, and during the existence of the community. The earnings of this petitioner subsequent to the dissolution of the marriage are neither community property nor separate property. It would be a solecism to speak of property which had come to a divorced man from the community property of himself and his former wife—to speak of it after divorce—as his community property; and so it would be to speak of a single man's property as his separate property. I am of opinion, therefore, that the order upon which the petitioner is held in custody is void, and that the matter can be tested on *habeas corpus*, because of the facts which appear on the face of the record itself. My view of the law is supported by the supreme court of Tennessee in *Chenault v. Chenault*, 5 Sneed, 247, and *Boggers v. Boggers*, 6 Baxt. 299. Those cases review and construe statutes similar to our own on this subject. In view of the fact, however, that there is a decision of our own supreme court (*Eidenmuller v. Eidenmuller*, 37 Cal. 364) which seems to hold that the subsequent earnings of a divorced husband may be taken for the support of his former wife, and in view of the fact that the learned judges of our superior courts throughout the state differ widely as to the extent of the power of a court in such cases, I feel it to be my duty to remand the petitioner to the custody of the sheriff. I shall, however, be pleased if the petitioner make another application to me to order a writ returnable before our supreme court in bank, for the consideration and determination by the full bench of this most important question. It is one which affects a large number of people, and society generally, and one upon which, so far as the policy of the law is concerned, much can be said *pro* and

con. It is ordered that the writ be discharged, and petitioner remanded to the custody of the sheriff.

(32 Cal. 245)

Ex parte STERNES. (No. 20,480.)

(*Supreme Court of California*. Dec. 30, 1889.)

PROCEDURE IN HABEAS CORPUS—KIDNAPPING.

1. Under Pen. Code Cal. § 1487, providing that a party may be discharged where he has been committed on a criminal charge without reasonable or probable cause, it is competent for the court, on *habeas corpus*, though defendant is held under commitment by a justice of the peace, and though an information has been filed against him, to go behind the warrant of commitment, and inquire into the question of reasonable or probable cause.

2. Where it appears that defendant was a deputy-sheriff, and a deputy United States marshal, and a warrant of arrest was duly issued, directed generally to any sheriff, marshal, etc., authorizing and commanding the arrest of a certain person, and such warrant was put in defendant's hands for execution, his arrest of the person named therein in a county other than that for which he was deputy-sheriff, and that in which the warrant was issued, does not warrant his commitment on the charge of kidnapping.

THORNTON, McFARLAND, and WORKS, JJ., dissenting.

In bank. Petition for writ of *habeas corpus*.

For former opinion, see 21 Pac. Rep. 1132.

Charles W. Kitts and A. L. Hart, for petitioner. W. D. Long and C. W. Cross, for respondent.

FOX, J. On a former hearing of this cause, upon the coming in of the return, it appeared that the prisoner was held under a warrant of commitment issued by a justice of the peace of Nevada county, committing the accused to the county jail to await trial on a charge of kidnapping, and that since such commitment, and after the issue of the writ from this court, the district attorney had filed in the superior court of that county an information in due form to put the accused upon trial for the said alleged offense. Petitioner thereupon offered to prove, and to introduce competent evidence for that purpose, that he was held by the magistrate, and committed, without probable cause, and claimed that upon making such proof he would be entitled to his discharge, under section 1487 of the Penal Code. To the introduction of this proof the respondent objected, on the ground that this court was precluded from going behind the warrant of commitment, and inquiring into the question of reasonable or probable cause, by reason of the fact that an information had already been filed against the prisoner; claiming that the information took the place of an indictment by the grand jury, and had the same force and effect upon *habeas corpus*. Upon a brief consultation upon the bench, a majority of the justices then sitting were inclined to that view of the case, and the warrant of commitment being regular upon its face, and issued by a court of competent jurisdiction, it was ordered that the prisoner be remanded. Subsequently the petitioner moved the court to set aside the order so made, and allow the

parties to file briefs upon the question of the admissibility of the testimony so offered; and the court, having doubts about the correctness of its ruling, granted the motion. Subsequently the parties were heard in open court upon the subject; and the testimony, consisting of the depositions and transcript of the evidence taken by the committing magistrate, was offered and received, subject to the final conclusion of the court as to the admissibility thereof.

Upon more mature deliberation we have concluded that we have not only the right, but that it is our duty, to inquire into the question of reasonable or probable cause, notwithstanding the filing of the information, and that the evidence tending to show whether there was such reasonable or probable cause is admissible, and the same is admitted. As early as the case of *People v. Smith*, 1 Cal. 9, it was held that, upon the return of the writ of *habeas corpus*, it was proper for the court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is reasonable and probable cause to suppose that a felony has been committed by the prisoner. This has been the practice from that time to this, and we are not aware that the right to do so has ever been doubted, when it appeared that the prisoner was held upon a warrant of commitment issued by a committing magistrate, before final judgment, or indictment by the grand jury. If there was a doubt about it, that doubt has been resolved by the provisions of section 1487 of the Penal Code, where it is provided that the prisoner may be discharged "in any of the following cases: * * * (7) Where a party has been committed on a criminal charge without reasonable or probable cause." It is not pretended that this provision is in conflict with any provision of the constitution; and, if it is not, it is an established law which the court cannot disregard. Such a case is materially different from one in which an indictment has been found by a grand jury. There the charge is made by a judicial body,—a tribunal of the people, charged with judicial duties, and which has judicially investigated and passed upon the question of reasonable or probable cause. A tribunal taken from the body of the people, and consisting of so large a body as to be supposed to be beyond the influence of prejudice or passion, and whose judgment upon this question of reasonable or probable cause has for centuries been held so conclusive that, in the absence of very recent constitutional provisions, all the courts in the land have been powerless to put a man upon trial for felony except upon a charge emanating from this body, or to dismiss one without trial who had been in proper form so charged. Until the recent adoption of a constitutional provision for prosecution by information, no man could be put upon trial for felony upon the commitment of a committing magistrate alone, no matter what the grade of judicial office which

he held. The commitment only served the purpose of detaining him until the grand jury could investigate the charge made against him. While the people, by the constitution, have changed this method, and provided the alternative of a more speedy proceeding for putting a man upon his trial, they have not taken away this power of investigation by the grand jury, or reserved to themselves or the courts the right to try a man for an offense into which the grand jury has inquired, and for which it has refused to prosecute; nor has it taken from the courts the power, or absolved them from the duty, pending the prosecution by this more speedy method, of inquiring into the question of reasonable or probable cause. Nor can we perceive that the act of filing an information by the district attorney in any degree affects this right or duty. The district attorney is a mere ministerial officer. He exercises no judicial functions whatever. He does not, and has no power to, judicially inquire into the question of probable cause. As was said by Mr. Justice HARLAN in the case of *Hurtado v. California*, 110 U. S. 553, 4 Sup. Ct. Rep. 292: "The district attorney of a county is deprived of any discretion in the premises; for if, in the judgment of the magistrate before whom the accused is brought,—and generally he is only a justice of the peace,—a public offense has been committed, it becomes the duty of the district attorney to proceed against him by information for the offense indicated by the committing magistrate." The information filed by him is the mere formulation of the pleadings in the case, and not the result of any judicial investigation whatever. It does not come, therefore, with the sanctity of an indictment, and prevent the going behind it to inquire into probable cause. The duty of the court in that behalf remains the same after as before the information. We do not, however, agree with the counsel for the petitioner that the fact of filing the information after the issue of the writ from this court was in any sense an attempt to interfere with the jurisdiction or powers of this court in the premises. It was a ministerial act which the law requires that he must perform within a limited time after the commitment. The issue of the writ from this court neither stayed nor extended the time within which he was required to perform that duty, and he would have been derelict in his duty had he not filed it.

Looking into the evidence it appears that the prisoner was a deputy-sheriff of the county of Yuba, in this state, and a deputy United States marshal for this district; that a warrant of arrest was duly issued out of the superior court of the county of Yuba, directed generally to any sheriff, constable, marshal, or policeman in this state, authorizing and commanding the arrest of one Ah Fong, and the production of his body before the judge of said court at Marysville, in said county of Yuba, to be dealt with according to law; that said warrant was placed in the

hands of the prisoner Sternes to be executed, and he executed the same by arresting the said Ah Fong, in the county of Nevada in this state, and producing his body before the said judge at Marysville. This was the act, and the only act, for which he was subsequently arrested and committed upon the said charge of kidnapping. It thus appears that he was regularly acting in his official capacity, in executing a warrant regularly issued by a court of competent jurisdiction. The act was lawful, and does not constitute a public offense. The prisoner was therefore committed, and is held, without reasonable or probable cause, and must be discharged. So ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

I concur in the judgment: PATERSON, J.

We dissent: THORNTON, J.; MCFARLAND, J.; WORKS, J.

Ex parte STERNES. (No. 20,481.)

(*Supreme Court of California.* Dec. 30, 1889.)

In bank. Petition for writ of *habeas corpus*.

FOX, J. The prisoner is held upon a warrant of commitment for trial for the alleged kidnapping of one Ah Men. The case is in all respects like No. 20,480, same title, ante, 38, decided this day, and on the authority of that case it is ordered that the prisoner be discharged.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: MCFARLAND, J.; THORNTON, J.; WORKS, J.

Ex parte LEE. (No. 20,482.)

(*Supreme Court of California.* Dec. 30, 1889.)

In bank. Petition for writ of *habeas corpus*.

FOX, J. The prisoner is held under a commitment for the alleged kidnapping of Ah Fong. The act constituting the alleged offense was that of assisting George H. Sternes, a deputy-sheriff, in making the arrest mentioned in case No. 20,480, this day decided; the assistance being rendered at the command of said Sternes. On the authority of said case of *Ex parte Sternes*, ubi supra, (No. 20,481,) it is ordered that the prisoner be discharged.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.

We dissent: MCFARLAND, J.; THORNTON, J.; WORKS, J.

82 Cal. 635

WHITBY v. ROWELL *et al.* (No. 13,398.)

(*Supreme Court of California.* Jan. 27, 1890.)

FORECLOSURE OF MORTGAGE—PLEADING.

In an action to foreclose a mortgage, a complaint containing no description of the mortgaged lands, but having annexed to it a copy of the mortgage, with a full description of the land, is sufficient.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Elmer E. Rowell, in pro. per. Curtis & Otis, for respondent.

MCFARLAND, J. Action to foreclose a mortgage. Defendant Rowell demurred to the complaint. The demurrer was overruled, and, said defendant refusing to answer, judgment went for plaintiff. From the judgment Rowell appeals. The demurrer was on the general ground of a failure to state sufficient facts, and also on the ground of want of jurisdiction. It resolves itself into the point that the complaint contains no description of the land mortgaged, and does not show that it was situated in the county of San Bernardino. The complaint contains a copy of the mortgage, which has a full description of the mortgaged premises. Appellant's point is that the complaint is defective in this regard, because the copy of the mortgage is in an exhibit which is attached to and made part of the complaint. This has been held to be sufficient in a number of cases, and pointedly in *Emeric v. Tams*, 6 Cal. 156, a case precisely similar to the case at bar. The appeal was evidently for delay. Judgment affirmed, with \$200 damages, and costs.

We concur: SHARPSTEIN, J.; THORNTON, J.

82 Cal. 620

PEOPLE v. MCCONNELL. (No. 20,583.)

(*Supreme Court of California.* Jan. 27, 1890.)

DEMURRER TO INFORMATION—ARREST OF JUDGMENT.

1. Under Pen. Code Cal. §§ 995, 996, providing that an information can be set aside on motion where defendant before the filing has not been legally committed by the magistrate, such objection must be raised on motion, and not on demurrer, which, by section 1004, lies when it appears from the face of the information that the court has no jurisdiction.

2. Under Pen. Code Cal. § 1185, providing that "a motion in arrest of judgment * * * may be founded on any of the defects in the * * * information mentioned in section 1004," unless the defects appear on the face of the information the motion will not be allowed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Information for burglary. Pen. Code Cal. § 1185, provides for a motion in arrest of judgment for any defects mentioned in section 1004, providing for a demurrer for defects apparent on the face of an information or indictment.

Hugh J. & William Crawford, for appellant. *George A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of the crime of burglary in the first degree. From the judgment rendered in the premises and an order refusing him a new trial he appeals. The ground upon which his contention is based is that he was not legally committed by a magistrate, and for that reason the superior court, which has tried him, had no jurisdiction to do so. He did not make

any motion to set aside the information, but raised the question by demurrer.

In order to sustain a demurrer to the information on the ground that the trial court is without jurisdiction of the offense charged therein, the want of such jurisdiction must appear from the face of the information, Section 1004, Pen. Code. A demurrer to an information on the ground that the defendant has not been legally committed by a magistrate is not permissible under the section of the Penal Code supra. The point must be made on a motion to set aside the information. Sections 995, 996, Pen. Code; *Ex parte Moan*, 65 Cal. 218, 3 Pac. Rep. 644.

The motion in arrest of judgment made herein could not prevail, because it should have been founded upon defects in the information appearing on the face thereof. Pen. Code, §§ 1004, 1185; *People v. Johnson*, 71 Cal. 392, 12 Pac. Rep. 261. The defendant asserts, in the points and authorities filed on his behalf, that it appears from the transcript (page 1027) he interposed a motion to set aside the information when he was arraigned, but the transcript fails anywhere to show that a motion to set aside the information was ever made. We therefore advise that the judgment and order be affirmed.

We concur: VAN CLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in bank denied.

(82 Cal. 135)

DAVIS v. MCGREW *et al.* (No. 12,219.)

(*Supreme Court of California*. Dec. 19, 1889.)

CANCELLATION OF LEASE—FRAUDULENT REPRESENTATIONS—DENIAL OF LANDLORD'S TITLE.

1. Plaintiff owned an undivided interest in land, all of which was claimed by defendant, but plaintiff was in possession. Defendant obtained a writ of assistance, putting him in possession jointly with plaintiff, and afterwards a compromise was effected by plaintiff's taking a lease on the land for one year from defendant. In an action by plaintiff to annul the lease on the ground of fraudulent representations by defendant as to the effect of the writ of assistance, there was evidence that plaintiff was shown a letter from the judge, stating that the order was to put defendant into joint possession with plaintiff; that plaintiff remarked that the writ made them partners in the land, but that he did not want a partner, but would take the lease, and pay rent. *Held*, that a finding that there was no fraudulent representation was sustained by the evidence.

2. Where plaintiff enters under a lease, having been previously in possession under claim of title, he is not estopped by the lease from afterwards asserting any title which he might have by a clause in the lease whereby he waives and renounces all claim to title of any kind to the premises, other than the leasehold interest created in the lease, as the words "waive and renounce" are not words of conveyance.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

For former report, see 8 Pac. Rep. 618.

A. H. Griffith, for appellant. Moore & Reed, for respondents.

HAYNE, C. Suit to annul a lease from the defendant McGrew to the plaintiff, Davis. Davis was the owner of an undivided interest in the San Pablo rancho, and was in possession of two parcels thereof, viz., one of 320 acres, called his "home place;" and the other, 45 acres, upon which latter he had growing crops of the value of \$1,000. McGrew claimed this latter piece, and applied to the superior court, in a case pending therein, for a writ of assistance to remove Davis from possession. The court awarded the writ for the purpose of placing McGrew in possession jointly with Davis; and the parties compromised the matter by Davis taking a lease from McGrew of the 45-acre tract for one year, at an annual rent of \$500. This lease contained the following clause: "The lessee hereby expressly and absolutely waives and renounces any and all claim to title of any kind in himself in or to the premises herein described, other than the leasehold interest by this lease created." As a part of the arrangement, it was agreed (although this latter part was not reduced to writing) that McGrew should waive all claim to the tract of 320 acres. The suit was to have the lease canceled, on the ground of fraudulent misrepresentations as to the effect of the decision in relation to the writ of assistance. And upon a former appeal it was held that the complaint stated a cause of action. *Davis v. McGrew*, 8 Pac. Rep. 618. Upon the return of the case to the court below, a new trial was had, and the court found that there was no fraudulent misrepresentation, and rendered judgment for the defendants, from which the plaintiff appeals.

It is contended that the finding referred to is not sustained by the evidence. But we think that there was evidence in its support sufficient, at least, to make a substantial conflict. Before signing the lease there was shown to Davis a letter from the judge of the court stating that the order was to place McGrew "into joint possession with Davis." And one Gift, a constable, who had misinformed Davis in the first instance, testified as follows: "After seeing this letter from Judge BROWN I explained that his 320 acres was entirely free; that McGrew was to go into joint possession of the forty-five acres." And McGrew testified as follows: "I read it [the letter] out loud, so it could be heard. Mr. Davis took it, and looked at it, and Mr. Gift or Mr. Davis made the remark, 'That would make us partners in the land.' Davis said: 'I don't want no partners. If you will give me what I paid for the barley I put in, and some potatoes that I planted, I will take you right out in my buggy, and give you full possession of the land. I don't want anybody in there but myself.' I said: 'No; you are a farmer, and have farming utensils. I have nothing. I am a blacksmith, and no farmer. You just continue on the land, and pay the rent that others have offered for it, and you can have it.'" He agreed to it, and consummated the bargain. It is argued that

the circumstances and the nature of the transaction show that the testimony above referred to was not true. But, so far as the lease proper is concerned, there was nothing unnatural about the transaction. Davis states that the growing crop was worth \$1,000. McGrew was to be put in joint possession with him; and the rent was one-half of the above-stated value of the crop. Nor can we see that the effect of the transaction upon the title of parties made it unfair or improbable. Davis not having entered under the lease, but having been previously in possession, would not be estopped by the lease from afterwards asserting any title that he might have. *Tewksbury v. Magraff*, 33 Cal. 245; *Franklin v. Merida*, 35 Cal. 558; *Insurance Co. v. Stroup*, 63 Cal. 153. And the clause above quoted, and much dwelt upon by the appellant's counsel, does not operate as a conveyance of the title. The words "waive and renounce" are not words of conveyance, and, especially when inserted in a document which does not purport to be a conveyance, are not sufficient to convey any title which Davis may have had. A similar agreement was made by McGrew in relation to Davis' "home place," though this latter agreement was not reduced to writing. Possibly these agreements may be held to relate to the allotment or apportionment of the interests of the parties when a partition comes to be made. At any rate, one was evidently in consideration of the other; and we do not see anything improbable about the transaction. Upon the whole case, we do not think that the findings can be set aside as not sustained by the evidence; and we therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Hearing in bank denied.

(82 Cal. 128)

NEYLAN v. GREEN et al. (No. 12,164.)

(*Supreme Court of California.* Dec. 19, 1889.)

MORTGAGES—PAYMENT—EVIDENCE.

In an action to foreclose a mortgage for \$900, it appeared that defendant applied to D. & W., commission merchants, with whom he had dealings, and to whom he was then largely indebted, for a loan of \$133. D. & W., being unable to furnish the amount, applied to plaintiff, to whom they owed \$700. Plaintiff agreed to advance it if D. & W. would give security for the \$700. Defendant then executed the note and mortgage for \$900. Several witnesses testified that the note was made up of the \$133 for defendant, the \$700 due from D. & W. to plaintiff, and the expenses of the transaction. Afterwards D. & W. shipped to plaintiff goods worth more than \$900, which were credited by plaintiff on D. & W.'s account. *Held*, that defendant was merely a surety for D. & W., and the burden was on plaintiff to show that the shipments by D. & W. were not applicable to the note.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; JAMES F. BREEN, Acting Judge.

P. B. Ladd, for appellant. *Underwood & McCann* and *J. M. Lesser*, for respondents.

HAYNE, C. This was an action to foreclose a mortgage given the firm of Neylan & Young by the defendant Abram F. Green to secure the payment of a promissory note for the sum of \$900. The answer, among other things, puts in issue the allegation of non-payment of the note. The court found that it had been paid, and rendered judgment for the defendants. The plaintiff appeals from an order denying his motion for a new trial. The general features of the case are as follows: The defendant Abram F. Green was a settler on the public lands, and was in the habit of taking lumber, bark, "shakes," etc., from the tract, and selling it to the firm of Dingwall & Waldo, in Santa Cruz, and getting supplies, etc., in return. Dingwall & Waldo were in the habit of shipping the stuff which they received from Green and from other parties to the firm of Neylan & Young, of San Francisco, who sold it on commission, and placed the proceeds to the account of Dingwall & Waldo, who drew against it as occasion required, and frequently their account was overdrawn. While their account was so overdrawn, the defendant Abram F. Green applied to them for \$133.12, which he needed to make the last payment upon the tract upon which he had settled. They could not let him have the money, but went with him to San Francisco, where a transaction was concluded by which Neylan & Young supplied the \$133.12 to make the payment on Green's land, and he gave to them the note and mortgage in suit. The clearest account of what occurred is given by Levi K. Green, the brother of Abram F. Green. He says: "My brother, Abram F. Green, wanted \$133 to pay for the land, but he could not get it unless he gave them security for what they owed Neylan & Young. The \$900 was made up of the \$700 due from Dingwall & Waldo, the \$133 that Abram F. Green got, and the expenses in going to the city, and making out the note and mortgage." This account is confirmed by the testimony of Dingwall, by that of the plaintiff himself, and by that of Waldo, although the latter witness seems to have had very confused notions of the legal effect of the transaction, and gave testimony which is contradictory and unintelligible in many respects.

There can be no doubt that Abram F. Green received only \$133.12, and he did not receive this sum from Neylan & Young, but from Dingwall & Waldo, to whom it was advanced by the former firm. The plaintiff admits that the money was advanced to Dingwall & Waldo, and was charged to them on the books; and they so understood the transaction. We do not think that the relation between Abram F. Green and Dingwall & Waldo are material in this connection. As between Neylan & Young and Green, the latter was a surety merely. And the result is that if the debt was paid, either by Ding-

wall & Waldo or by Green, it was extinguished, and the plaintiff has no case. The court made a general finding that the note was paid. It also made a special finding that, after the date of the note and mortgage, "the said Dingwall & Waldo received from Abram F. Green merchandise to the value of \$1,000, in payment of the debts of said Abram F. Green, one of which was the promissory note in suit;" and that, "within eighteen months after the date of said note and mortgage, Dingwall & Waldo had shipped to said Neylan & Young goods, wares, and merchandise to the value of several thousand dollars, including all the merchandise received from Abram F. Green, mentioned in finding 12, and the same was received by Neylan & Young, and placed to the credit of Dingwall & Waldo in their account. The amount of goods, wares, and merchandise so shipped and received was sufficient to pay, and did pay, all of the indebtedness of Dingwall & Waldo owing to Neylan & Young on the 24th day of March, 1876, including the note and mortgage in suit." Unless this finding can be set aside as not warranted by the evidence, the order appealed from must be affirmed. We think there is evidence in its support. It seems plain that Abram F. Green's lumber and stuff was sent to Neylan & Young through Dingwall & Waldo. Levi Green testifies that a sufficient quantity to pay off the note was sent; and Waldo testifies to the same thing; and the plaintiff admits that, from the date of the note and mortgage "to March 24, 1877, Dingwall & Waldo were credited by our firm with \$7,983.89 for lumber sent us by them, sold by us for them, and placed to their credit." And Waldo testifies that, although the account of his firm was generally overdrawn, yet they had settlements every year, and that in 1877 Neylan & Young were indebted to them. It further appears in evidence that the understanding was that the note was to be taken up in a short time. Waldo told Green that "just as soon as they shipped some stuff up there the mortgage would be canceled;" and the plaintiff was informed of this arrangement. The foregoing evidence, at least, cast the burden upon the plaintiff of explaining why the payments were not, or ought not to have been, applied to the note in suit. The whole evidence is very confused and unsatisfactory upon essential matters; and we do not feel that we can say that the finding quoted should be set aside.

With reference to errors in law the appellant's counsel has the following: "Having made so clear a case for a reversal of the order denying a new trial on the facts of the case, so far as errors are concerned, we here simply point out where they are to be found in the transcript;" and a list of folios of the record is added. We do not suppose that the court will think it necessary to examine questions submitted to it in this manner. And we merely say that, while the case appears to have been very loosely tried, we have seen no

error which materially affects the finding above referred to. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 187)

ALLEN v. NAPA COUNTY. (No. 12,603.)
(Supreme Court of California. Dec. 27, 1889.)

CONSTABLES—FEES.

1. Pen. Code Cal. § 819, provides that a warrant issued by any magistrate other than a justice of the supreme court or judge of the superior court may be directed to any constable in the county in which it is issued, and may be executed in that county, or, if defendant be in another county, it may be executed therein upon the written direction of a magistrate of that county indorsed on the warrant. Held, that a constable may recover his fee for executing in another county a warrant issued by a justice of the peace, though the complaint does not allege that the warrant was indorsed by a magistrate of the county in which it was executed, as it will not be presumed that the constable acted unlawfully.

2. Under Act Cal. March 5, 1870, providing that constables shall receive such fees as are now or hereafter may be allowed by law, "and that constables shall receive mileage for "every mile necessarily traveled, in going only, in executing any warrant of arrest, subpoena, or venire, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate," a constable is entitled to mileage both for the distance traveled in going to make an arrest, and for that traveled in bringing his prisoner from the place of arrest to the magistrate.

3. Act Cal. March 5, 1870, providing that constables shall receive the same fees as are allowed to sheriffs, does not make applicable to constables of counties of the thirteenth class the provision that sheriffs of counties of the thirteenth class shall receive a salary of \$5,000 per annum, and their necessary expenses for transacting criminal business outside their counties.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action to recover fees and mileage of a constable for executing a warrant of arrest outside of his county. Plaintiff had judgment, and defendant appealed. Pen. Code Cal. § 818, provides that, "if a warrant is issued by a justice of the supreme court or judge of the superior court, it may be directed generally to any sheriff, constable, marshal, or policeman in the state, and may be executed by any of those officers to whom it may be delivered." Section 819 provides that, "if it is issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal or policeman in the county in which it is issued, and may be executed in that county; or, if the defendant is in another county, it may be executed therein, upon the written direction of a magistrate of that county indorsed upon the warrant," etc.

H. M. Barstow, Dist. Atty., and Henry Hogan, for appellant. Henry C. Gesford, for respondent.

HAYNE, C. This was an action against Napa county by the assignee of a constable

of Napa township, in said county, for official services in making an arrest under a warrant issued by a justice of the peace of Napa township. In executing the warrant the constable traveled to San Pedro, in Los Angeles county, arrested the alleged criminal there, and brought him before the justice who issued the warrant. The claim is mainly for mileage in going to San Pedro, and in bringing back the prisoner. The trial court overruled a demurrer to the complaint, and, no answer having been put in, gave final judgment for the plaintiff for the amount claimed. The only questions which have been argued are whether the constable was authorized to execute process outside of his county, and, if so, whether he was entitled to mileage in taking his prisoner before the magistrate.

1. Was the constable authorized to execute the warrant outside of his county? As will be shown below, the provisions of the present statutes in relation to this question are not materially different from those formerly in force. The construction given to the old statutes will therefore aid in the solution of the question. The definition of the duties of a constable given in the act of 1850 seems to have restricted him to acts "within his township." See Laws 1850, p. 263, § 2. And it was accordingly held under this provision that a constable could not serve a summons in a civil action outside of his township. *Lowe v. Alexander*, 15 Cal. 297. It will be observed that this case related to the service of a summons. With reference to writs of execution, however, section 601 of the civil practice act (as amended in 1854) provided that the writ, "when issued by a justice, shall be directed to the sheriff, or to a constable of the county," etc. And the construction which this seems to have received was that it meant any constable of the county; and that, consequently, it might be directed to a constable of a different township from that of the justice, or from that where the property to be levied on was situated. The inference was that a constable could act outside of his township. This was, in effect, held in *Lafontaine v. Greene*, 17 Cal. 296. The court, per COPE, J., distinguished *Lowe v. Alexander*, above cited, saying: "The question there related to the service of a summons, and the decision was based upon the language of the second section of the act of April, 1850, prescribing the duties of constables. There was no other statute affecting the point in controversy."

Soon after this decision the legislature amended the act of 1850 so as to extend the duties of a constable to the performance of acts "within his county," instead of "within his township." See Laws 1861, p. 28. If there were no other provision, it might be plausibly argued that a constable could not go outside of his county. But in relation to criminal process, at least, there were other provisions. Sections 111 and 112 of the criminal practice act (1699 and 1700, Hitt. Gen. Laws) were as follows: "Sec. 111. If a

warrant be issued by a justice of the supreme court, district judge, or county judge, it may be directed generally to any sheriff, constable, marshal, or policeman in this state, and may be executed by any of those officers to whom it may be delivered. Sec. 112. If it be issued by any other magistrate, it may be directed generally to any sheriff, constable, marshal, or policeman in the county in which it is issued, and may be executed in that county; or, if the defendant be in another county, it may be executed therein, upon the written direction of a magistrate of that county, indorsed upon the warrant," etc. Under these provisions, it was held in *Cunningham v. San Joaquin Co.*, 49 Cal. 323, that a constable could go outside of his county to execute criminal process. The opinion is short, and does not refer to any statute or authority, but the briefs show that the provisions above quoted were the ones upon which reliance was placed by counsel, and we have no doubt that the decision was based upon them.

The existing law is substantially the same as that upon which the decision last cited was based. Section 158 of the county government act is not more restrictive in its definition of the duties of constables than the act of 1861 above referred to, which latter was in force when the facts of *Cunningham v. San Joaquin Co.* occurred and were passed upon. And the provisions of the criminal practice act, above quoted, are reproduced in the Penal Code. See sections 818, 819. This being the case, we think it plain that constables may execute criminal process outside of their counties, if such process be properly issued and indorsed.

The complaint does not allege that the warrant under which the plaintiff's assignor acted was indorsed by a magistrate of the county of Los Angeles. It alleges merely that the arrest was made "under and by virtue of a warrant of arrest for the said John Williams, issued out of the justice's court of said Napa township," etc. But we think that the foregoing is sufficient in an action to recover fees. It will not be presumed in such an action that the officer acted unlawfully.

2. Was the constable entitled to mileage for bringing his prisoner before a magistrate, or only in going to make the arrest? It is agreed by counsel that Napa is a county of the thirteenth class. And by the county government act it is provided that constables of counties of that class shall receive "such fees as are now or hereafter may be allowed by law." Laws 1883, p. 342; Laws 1885, p. 174. The only provision of law regulating the charges of constables is contained in the fee bill of March 5, 1870. This act, after making provision for certain services of constables, provides that they shall receive "for all other services the same fees as are allowed to sheriffs for similar services." Laws 1869-70, p. 171. The same act has the following provision in relation to the services of sheriffs of the kind rendered by the plaintiff here: "For every mile necessarily trav-

eled, in going only, in executing any warrant of arrest, subpoena, or *venire*, bringing up a prisoner on *habeas corpus*, taking prisoners before a magistrate or to prison, or for mileage in any criminal case or proceeding: provided, that in serving a subpoena or *venire*, when two or more jurors or witnesses live in the same direction, but one mileage shall be charged,—30 cents: provided, further, that in the counties of Amador and Sacramento, for every mile necessarily traveled in any criminal case, 20 cents.” Laws 1869–70, p. 159, § 9.

Two points are made by the appellant in relation to this latter provision: (a) It is contended that it does not apply. The same act, it is said, provides that constables shall receive the same fees as sheriffs, and the county government act provides that sheriffs of counties of the thirteenth class shall receive a salary of \$5,000 per annum, (Laws 1883, p. 342,) and his necessary expenses in transacting criminal business outside the county, (section 164, County Gov. Act 1883, renumbered as section 211 in 1885, Laws 1885, p. 194.) But we do not think that this position can be sustained. The act of 1870 did not provide as much compensation for constables as for sheriffs. Similar services were to be charged at similar rates by each class of officers; but the legislature must have had in view the fact that constables have comparatively little to do. It could not have been the intention to give each constable of a township the same compensation as is given to an important and busy county officer like the sheriff. And the language does not imply this. It is not said that a constable shall receive the same salary as a sheriff, but that he shall receive the same fees for similar services. Fees are not salaries; nor do they come under the head of “necessary expenses.” The only logical result of the appellant’s argument in this regard would be that after the sheriffs’ fees were abolished the constables would receive no fees whatever. But this could not have been intended. We think, therefore, that the provision of the act of 1870, above quoted, is the one which regulates the matter. (b) It is contended that the proper construction of the provision last mentioned is that the constable was only entitled to his mileage in going to make the arrest, and not in bringing his prisoner before the magistrate. This contention is based upon the words “in going only.” But this question was decided adversely to the appellant’s view in the case of *Cunningham v. San Joaquin Co.*, above cited; and we are inclined to agree with the majority of the court in that case. The words “in going only” would in all probability prevent the officer from charging mileage for the return trip when he does not succeed in making the arrest. But where, as in this case, (and as in the case referred to,) he does succeed, and consequently has to take the prisoner before a magistrate, it would seem that the case is covered by the words, “taking prisoners before a magis-

trate.” But, however this may be, the decision does not appear to have been questioned during 15 years, and, according to the respondent, “it has been the universal practice ever since for constables to charge mileage both in going to execute a warrant and in taking the prisoner before the magistrate who issued the warrant,” and we think that, if the rule is not satisfactory, recourse must be had to the legislature. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C.C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

82 Cal. 184

GOLDEN GATE MILL & MIN. CO. v. JOSHUA HENDY MACHINE WORKS. (No. 12,382.)

(Supreme Court of California. Dec. 26, 1889.)

INTEREST ON VERDICT — TRESPASS — VERDICT AGAINST ONE DEFENDANT.

1. Under Code Civil Proc. Cal. § 1035, which provides that the clerk shall include in the judgment any interest on the verdict from the time it was rendered, it is properly allowed on a judgment entered on a verdict one year after its rendition.

2. In an action against three defendants, there was a verdict against one and in favor of another, but no reference was made to the third, and no answer was filed by him. *Held*, that the omission to mention his name in the verdict, or to take judgment by default against him, was not a thing of which his co-defendant can complain.

3. In an action to recover damages for a trespass, the possession of plaintiff is sufficient evidence of title as against a mere trespasser.

4. Proof of the existence of a corporation *de facto*, in an action by it to recover damages for injury to its property, is sufficient as against a mere trespasser.

5. A mere trespasser, who is sued by a corporation for a trespass on its property, cannot question the capacity of the corporation to take and hold property under Civil Code Cal. § 358, providing that the incorporation of a company claiming to be duly organized shall not be inquired into in any private suit in which the company is a party.

Commissioners’ decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Civil Code Cal. § 358, provides that the due incorporation of a company claiming in good faith to be incorporated shall not be inquired into in any private suit to which it is a party.

Wm. H. H. Hart, for appellant. H. W. Philbrook and Arthur Rodgers, for respondent.

HAYNE, C. This was an action of trespass, for breaking into the building of the plaintiff, and injuring and carrying away certain machinery which was affixed thereto. There was a verdict for the plaintiff for \$900, and the defendant against whom it was rendered appeals from the judgment, and from an order denying a new trial.

1. We do not think that the appellant’s criticisms upon the complaint are well founded.

2. The judgment was not entered until one year after the rendition of the verdict, and, in entering it, the clerk included therein in-

terest on the amount of the verdict from the time of its rendition. It is objected that this was unauthorized. If the point were well taken it could only lead to a slight modification of the judgment at the appellant's costs. But it is not well taken. The statute expressly provides that "the clerk must include in the judgment entered up by him any interest on the verdict or decision of the court, from the time it was rendered or made." Code Civil Proc. § 1035. This provision authorized the course taken. There is nothing to the contrary in *Alpers v. Schammel*, 75 Cal. 590, 17 Pac. Rep. 708. If there were, the decision would be in direct conflict with the statute, and would have to be overruled.

3. The action was against three defendants. The verdict was against one and in favor of another, but omitted all reference to the third. And it is argued that this is error for which the defendant, against whom judgment was rendered, is entitled to a reversal. But the record does not show that the omitted defendant put in any answer. There was no issue as to him. Consequently, the verdict properly omitted all reference to him; and the omission to enter a judgment by default against him, for failure to plead after the overruling of his demurrer, is not a thing of which his co-defendant can complain. There are other answers to the objection, but the foregoing is sufficient.

4. It is contended that the plaintiff showed no title to the property, and that there were errors in the introduction of his attempted chain of title. But the plaintiff introduced evidence to the effect that it was in possession of the property. And this was sufficient as against a mere trespasser. The appellant seems to be under the impression that this evidence was overcome by certain other evidence. But if it be assumed that such would be the effect of the latter evidence, it is sufficient to say that it was stricken out, and the ruling in this regard was, in our opinion, proper. The evidence of the witness was by deposition, and the answer he gave was not responsive to the interrogatory. The evidence as to plaintiff's possession renders it unnecessary to consider the questions raised in regard to its chain of title.

5. The allegation of the corporate existence of the plaintiff was denied, and it is contended that there was no sufficient proof on the subject. But the evidence showed that the plaintiff was at least a corporation *de facto*, claiming in good faith to exist. And, this being so, a mere trespasser could not raise the question of its corporate existence in an action by it to recover damages for injury to its property. Civil Code, § 358; *Rondell v. Fay*, 32 Cal. 361. Neither could such a trespasser raise the question of its capacity to take and hold property.

6. The deed from Nevin was properly excluded. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

82 Cal. 219

In re McEACHRAN. (No. 12,225.)

(Supreme Court of California. Dec. 28, 1889.)

DISCHARGE IN INSOLVENCY—FRAUDULENT DEBTS—EVIDENCE.

1. On the trial of an application for discharge of an insolvent debtor under Act Cal. April 16, 1880, § 50, providing that an opposing creditor may file specifications of the grounds of his opposition, which the debtor may answer, and section 49, specifying the grounds on which a discharge may be opposed, and section 52, providing that a debt fraudulently contracted shall not be discharged, a judgment for a debt so contracted is not a ground for opposing a discharge.

2. On such trial, a deed of land by the debtor to his wife for the consideration of natural affection, made more than two years before he instituted the insolvency proceedings, and her declaration of homestead thereon, are inadmissible in evidence, where there is no proof that they were made with fraudulent intention.

3. An order discharging the insolvent in the language of section 51, and excepting "such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency," does not release the insolvent from debts fraudulently contracted.

4. An objection that the oath required to be taken on obtaining the discharge under section 49 was taken in one year before the discharge was granted, comes too late on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Trial of an application by C. T. McEachran, an insolvent debtor, for a discharge from his debts under the insolvent act of 1880. The discharge was opposed by William Matheson, a creditor. Act Cal. April 16, 1880, § 50, provides that an opposing creditor may file specifications of the grounds of his opposition to the discharge, which the debtor shall answer, and the issues thus raised shall be tried by the court, with or without a jury, as in civil actions. The court granted the discharge of the debtor, from which decision the opposing creditor appealed.

Spencer & Henning, for appellant. *Wallace & Johnston*, for respondent.

BELCHER, C. C. On the 18th day of February, 1885, the respondent, C. T. McEachran filed his petition in the superior court of Napa county, praying that he be adjudged an insolvent debtor. On the same day he was adjudged insolvent; and in March following an assignee of his estate was appointed. On the 31st of October, 1885, the appellant, William Matheson, filed his claim against the estate of the insolvent, and therein set up that the insolvent was indebted to him, in the sum of \$3,351.11, upon a judgment rendered in the superior court of Napa county on the 26th day of October, 1883. On the 27th of March, 1886, the respondent filed in court his petition for a discharge from his debts. The appellant opposed the discharge, and filed specifications in writing of the

grounds of his opposition; and thereupon the respondent made and filed the oath required, by section 49 of the insolvent act, to be taken and subscribed before any discharge can be granted. Thereafter, on the 16th of June, 1886, the appellant filed amended specifications of the grounds of his opposition to the discharge. The specifications set up that from the year 1870 to the 26th of October, 1883, a partnership existed between respondent and appellant; that on the day last named this partnership was dissolved by a decree of the superior court of Napa county; that the court found and determined that respondent was indebted to appellant, in a sum named, for money advanced and delivered to respondent by appellant for their joint benefit, and which respondent fraudulently misapplied and appropriated to his own use; and that respondent was also indebted to appellant, in another sum named, for money received by respondent in the partnership business, and which sum of right belonged to appellant as his share and interest in the partnership, but which the respondent fraudulently misapplied and appropriated to his own use; that thereupon judgment was duly given and rendered in favor of appellant and against respondent for the aggregate of these sums, being \$3,049, with costs of suit; and that only \$195.50 had ever been paid on this judgment. The specifications further set up that a short time prior to the commencement of the action before mentioned the respondent transferred and conveyed to his wife, Emelie McEachran, the undivided one-half of the lands and premises then and theretofore owned in partnership by respondent and appellant; that the conveyance was without consideration, and was made for the sole purpose of defrauding appellant, and to prevent him from recovering the amount due him out of said partnership; that the said Emelie McEachran, immediately after such transfer, caused to be filed and recorded a declaration of homestead upon the premises so conveyed to her; and that this was done at the instigation of respondent, and in furtherance of a plan on his part to cheat and defraud appellant, and to prevent a recovery of such sum of money as might be found due him out of the said partnership. The respondent filed an answer to the objections of appellant to his discharge, and therein fully denied all the charges of fraud made against him.

The matter came on for trial before the court without a jury, on the 22d day of April, 1887, and the appellant offered in evidence the judgment roll in the case before referred to. The respondent objected to the offered evidence on the ground that it was irrelevant, immaterial, and incompetent; and the court sustained the objection. The appellant then offered in evidence a deed made by respondent to his wife under date of June 28, 1882, and purporting to convey to her, in consideration of love and affection, the undivided one-half, and all the right, title, and interest of respondent of, in, and to certain

real property, and also a certificate of homestead made by the wife upon the property conveyed to her, which was in proper form, and was duly acknowledged and recorded on August 29, 1882. The same objections were made to these offers as to the judgment roll, and sustained. The appellant reserved an exception to each of the rulings. At the conclusion of the trial the court granted the prayer of respondent, and gave him a certificate of discharge from his debts, in the language provided in section 51 of the insolvent act. Act Cal. April 16, 1880. The appeal is from this order, and the action of the court in excluding the three items of evidence above mentioned constitutes the principal grounds urged for a reversal.

1. The action, the judgment roll in which was offered in evidence, was commenced by the appellant against the respondent, in 1883, to dissolve a partnership existing between the parties, and for an accounting. The court found, in substance, that in the year 1870 the parties entered into a partnership for the purpose of purchasing certain lands in Napa county, and improving and cultivating the same for their joint benefit; that the plaintiff was to advance the money necessary to purchase, improve, and cultivate the lands while they should remain unproductive, and the defendant was to give his whole time, labor, and skill in clearing, improving, and cultivating the same; that, in pursuance of the partnership agreement, the defendant purchased the lands, and went into possession thereof, and that the partnership business was continued and carried on until some time in the year 1882; that the plaintiff advanced to defendant for partnership purposes, and upon his representations that it was all necessary therefor, the sum of \$1,299 more than was necessary, and more than was in fact used by defendant for or on account of the partnership, and that defendant fraudulently kept and appropriated this last-named sum to his own use; that during the seven years next prior to 1882 crops were raised on the land owned by the partnership which were received and disposed of by defendant, and that the net profits arising therefrom were \$3,500; that all of such profits were the property of the partnership, and the plaintiff was entitled to one-half thereof, but the defendant fraudulently kept and appropriated to his own use the plaintiff's half, and refused to account for the same. The court further found that prior to the commencement of the action the real property was partitioned and disposed of by the parties. Judgment was accordingly entered that the partnership be dissolved, and that the plaintiff recover the aggregate of the sums found to have been fraudulently misappropriated, with interest thereon.

Section 49 of the insolvent act specifies the grounds upon which a creditor may oppose the discharge of an insolvent debtor, and section 52 declares what debts shall not be discharged. The last-mentioned section reads as follows: "No debt created by fraud or em-

bezzlement of the debtor, or by his defalcations as a public officer, or while acting in a fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt," etc. It is argued for respondent that appellant's judgment did not constitute a debt which was "excepted from the operation of a discharge in insolvency," and that it therefore furnished no ground for opposition; and in support of this position counsel cite *Hennequin v. Clews*, 77 N. Y. 427; *Palmer v. Hussey*, 87 N. Y. 303; *Neal v. Clark*, 95 U. S. 704; *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. Rep. 576. We do not consider it necessary to decide this point; for, conceding that the judgment debt was excepted from the operation of the discharge, still we do not think it furnished any good ground for opposition.

The provisions of the last United States bankrupt act were substantially the same as those of our statute in regard to the discharge from debts. Under that act it seems to have been uniformly held by the bankrupt courts that the fact that a debt was created by fraud was not ground for opposing the discharge of a bankrupt. In *Bump, of Bankr.* (5th Ed.) 436, it is said: "Fraud in the creation of a debt is no ground for withholding a discharge;" citing numerous cases. And in *Re Rosenfield*, (1 N. B. R., 575,) one of the cases cited, the district court of New Jersey, by *FIELD, J.*, said: "Is the creation of a debt by fraud a good ground upon which to oppose the discharge of a bankrupt? The thirty-third section of the act provides: 'That no debt created by the fraud of the bankrupt shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt.' Why, then, should a creditor be allowed to object to the discharge of a bankrupt on the ground that the debt due to him was created by fraud? So far as he is concerned, the bankrupt is not discharged at all. Such creditor is in fact a favored creditor. Like other creditors, he is entitled to receive a dividend, but this dividend, instead of being a payment in full, is only a payment on account, and the bankrupt is forever liable for the balance of the debt; and this balance is much more likely to be paid if the bankrupt is discharged from the payment of all his other debts than if he is not discharged at all. Such a creditor, therefore, has not only no right to oppose the discharge, but it is not his interest to do so. This, no doubt, is the reason why the fact that the debt was created by fraud is not by the twenty-ninth section made a ground for refusing a discharge." This reasoning seems to us correct, and to be entirely applicable to the proceedings under our insolvent act. There was therefore no error in excluding the judgment roll.

2. The deed and declaration of homestead which were offered in evidence were made more than two years before the insolvency proceedings were commenced; and the land

affected by them was partitioned and disposed of by the partners before the action was commenced to dissolve the partnership. No proof was offered, tending to show that the husband had any fraudulent purpose in making the deed, or that the wife had any in filing the homestead claim. There is certainly nothing fraudulent *per se* in the fact that a husband conveys land, which he owns, to his wife, in consideration of love and affection, and she subsequently declares a homestead thereon. Under these circumstances, we are unable to see that the offered papers had any relevancy whatever to the matter before the court; and, in our opinion, they were properly excluded.

3. It is urged that the decision is against law, and should be reversed, because it purports to discharge the petitioner from all debts, and does not except from its operation debts contracted in fraud. But the order referred to does not purport to discharge the insolvent from any debts. It is simply an order that the application be granted. The final order granting the discharge is in the language of section 51, and it expressly excepts "such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency."

4. The appellant makes the point that the oath required by the last clause of section 49 to be taken and subscribed by an insolvent before any discharge is granted was made in May, 1886, while the discharge was not granted until April, 1887. It is said that the statute intended that the oath should be taken at the time of granting the discharge. A sufficient answer to this point is that when respondent's oath was offered in evidence no objection was made to it by appellant, and the objection comes now too late. If objection had been made at the proper time, respondent could, and probably would, have taken and subscribed a new oath, and thereby have removed any question of irregularity. We advise that the order appealed from be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 523)

HITCHCOCK v. CARUTHERS. (No. 18,233.)

(Supreme Court of California. Jan. 10, 1890.)

STIPULATION—JURY—SLANDER—PLEADING AND EVIDENCE.

1. A stipulation by defendant to allow his demurrer to the complaint to be overruled, on leave to answer, does not estop him from thereafter, at any stage of the proceeding, objecting that the complaint does not state facts sufficient to constitute a cause of action, within Code Civil Proc. Cal. § 434.

2. The fact that a case is tried before 11 instead of 12 jurors, there being no objection thereto, is not ground for a new trial.

3. Under Civil Code Cal. § 46, providing that language imputing a want of chastity is actionable *per se*, a complaint which alleges that defendant

said of plaintiff, a girl of 17, that a certain man named S. "was cohabiting with plaintiff as his mistress;" that "he was keeping the girl for immoral purposes;" and that "he was using Ida as his mistress,"—sufficiently states a cause of action.

4. In an action for slander for charging plaintiff with want of chastity, defendant's witness testified to having had intercourse with plaintiff. Held, that it was competent for plaintiff, in rebuttal, to testify that he had never, at any time, offered or suggested improper liberties to her.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

R. H. Ward and Meux & Edward, (P. D. Wiggington, of counsel,) for appellant. Church & Cory and Grady & Welsh, for respondent.

MCFARLAND, J. Action for slander. Judgment for plaintiff; from which, and from an order denying a new trial, defendant appeals.

1. Appellant contends that the complaint does not state facts sufficient to constitute a cause of action. Respondent contends that this point cannot be heard here, because, after appellant had demurred to the complaint on that ground, in the court below, he stipulated that the demurrer might be overruled, and defendant allowed to answer within a certain time. It is not necessary to determine what consequence would have followed if appellant had expressly stipulated that the complaint did state a cause of action; for it is evident that the stipulation in this case did not go to that extent, and, under any view of the law, did not estop appellant from relying, at any future stage of the case, under section 434 of the Code of Civil Procedure, on the alleged failure of the complaint to state sufficient facts. But we think that the complaint does state facts sufficient to constitute a cause of action. The main objections made by the appellant to the sufficiency of the complaint are,—*First*, that there is no distinct averment that plaintiff was an unmarried woman, and therefore she may have been the wife, either of the defendant, or of the man with whom defendant charged her with having sexual intercourse; and, *second*, that the language alleged to have been used by defendant does not impute to plaintiff a want of chastity. The plaintiff named in the complaint is "Ida Hitchcock, an infant, by her guardian *ad litem*, L. W. Scronce," and she is averred to be of the age of 17 years. The slanderous language alleged to have been used by defendant about plaintiff refers to her as "the girl." He is alleged to have said, among other things, that a certain man named Scronce "was cohabiting with plaintiff as his mistress;" that "he was keeping the girl for immoral purposes;" and that he "was using Ida as his mistress." This, with other language not repeated here, shows that plaintiff was a young unmarried woman, and shows most clearly, at least, that she was not the wife of the man whose name was connected with her in the alleged slanders. That the alleged slanderous language imputes to plaintiff a want of chastity is too plain to warrant discussion. We shall not repeat the language

here; it is sufficient to say that it charges a want of chastity, not only in plain, but in most gross and indecent, terms. And language imputing a want of chastity is actionable *per se*. Section 46, Civil Code. We think that the complaint sufficiently shows that the persons to whom the slanderous words are alleged to have been spoken knew that they were spoken of and concerning plaintiff. This is particularly true of the third count.

2. Appellant asks for a new trial, because it appears that the case was tried with only 11 jurors. But we will not presume the extraordinary spectacle of a court compelling a party to go to trial, against his consent, with less than 12 jurors, upon a record which not only fails to show any objection or exception on the point, but which does state that "a jury of eleven persons was regularly impaneled and sworn to try said action."

3. There is an exception to a ruling of the court about the admissibility of evidence. One Hardwick, called as a witness for defendant, testified that the general reputation of plaintiff for virtue was bad. On cross-examination, he was asked if one Carlisle had not gone to San Benito county, where Hardwick lived, and brought him down to Fresno county, as a witness; if he had not told Carlisle that he, Hardwick, had seduced plaintiff; and if he had not told Carlisle that he would swear that he had seduced plaintiff. No objection was made by defendant to either of these questions, and the witness answered them all in the affirmative. On further cross-examination he stated, without objection from defendant, that he had seduced plaintiff about 3 years previous to the trial, at which time she must have been not over 14 years old. The defendant then took the witness again, and, upon re-direct examination, led him to give a detailed account of the circumstances under which he claimed to have had illicit intercourse with plaintiff, and to swear that he had not "seduced" her, in the ordinary sense of the word, because, as he testified, she had been unchaste with others before her alleged relation with him. Plaintiff was afterwards recalled on her own behalf, and, after having testified that she had never had any acquaintance with the witness Hardwick, was asked by her attorney this question: "Did he, at any time, offer or suggest any improper liberties with you?" To this question the defendant objected as "irrelevant, immaterial, and incompetent, and not in rebuttal of anything in the case that was brought out by the defense." The objection was overruled, and defendant objected. The witness answered the question, and one or two other questions of similar import, in the negative. The testimony was not "incompetent;" that is, if the fact sought to be proved was a proper fact to be proved, the testimony offered to prove it was not secondary, or hearsay, or not the best evidence, or not the evidence prescribed by the statute

in a particular case, or within any of the categories of incompetent evidence. And a denial of the grave charges made by Hardwick was certainly neither "irrelevant" nor "immaterial." Neither was it "not in rebuttal of anything in the case that was brought out by the defense." If the defendant had let the witness Hardwick alone when plaintiff had concluded the cross-examination, this particular phase of the objection would have presented a somewhat different aspect; but he took the witness again, and drew out new matters on redirect examination of which the testimony of plaintiff was clearly in rebuttal. Moreover, considering the things which usually and properly influence human belief, we think that plaintiff had a right to show that the witness came from a place beyond the reach of a subpoena to voluntarily testify to his own undue intimacy with a young girl; and that, in addition to the extent to which that fact alone might weaken his testimony before the jury, the plaintiff had a right to show by express testimony, if she could, that his statement was absolutely false. We think, therefore, that there was no error in admitting the evidence. Respondent contends that no alleged errors in ruling on the admission of evidence on the subject of plaintiff's character for chastity can be considered, because her character is not assailed by any averment in the answer; that the common-law rule, which allowed the character of a plaintiff in a slander suit to be attacked under the general issue, has been abrogated by section 461 of the Code of Civil Procedure; and that, under said section, there can be no proof of mitigating circumstances which are not alleged in the answer. This might be an interesting question if properly presented; but, as evidence to character went before the jury without objection, respondent cannot be heard to make the objection here for the first time. We see no error in the rulings of the court on the subject of instructions which were excepted to by appellant, and the case seems to have been correctly presented to the jury. Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(32 Cal. 502)

WARD v. CLAY. (No. 12,302.)

(Supreme Court of California. Jan. 11, 1890.)

PLEADING—EXHIBITS—FINDING—STIPULATIONS.

1. In an action on a promissory note, the complaint alleged the date of, the parties to, the consideration, and the execution of, the note; also the "principal sum" and rate of interest; that the principal sum and interest remained due and unpaid; that defendant refused to pay the same, or any part thereof; and that plaintiff still held the note; and prayed judgment for the principal sum and interest. *Held* sufficient on general demurrer, as defects of form of averment or uncertainty cannot be considered on general demurrer.

2. Under Code Civil Proc. Cal. § 447, providing that when an action is brought on a written instrument, and a copy is annexed to the complaint, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified, a copy of a note at-

tached to a complaint in a suit thereon, and which is alleged in the complaint to be a copy in "words and figures" of the note executed by defendant, may be treated as part of the complaint on demurrer to its sufficiency.

3. In an action on a promissory note, a finding that there is now due and owing from defendant to plaintiff on the note a certain balance is equivalent to finding that the balance remained unpaid.

4. Under Code Civil Proc. Cal. § 473, providing that the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by correcting a mistake in the name of a party, or a mistake in any other respect, etc., it is within the court's discretion to set aside, on proper terms, a stipulation in a pending case, entered into between attorneys, that certain facts alleged in the answer should be admitted without proof, where it is shown that the stipulation was made without plaintiff's knowledge, and that plaintiff's attorney was mistaken as to its legal effect, and that it admitted material averments which were not true, which would prevent the case being tried on its merits.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

R. Percy Wright, for appellant. J. W. Ward, Jr., and J. A. Cooper, for respondent.

VAN CLIEF, C. Action upon a promissory note for \$2,546.48, on which plaintiff recovered a balance unpaid of \$790.75 and costs. The appeals are from an order denying defendant's motion for new trial, and from the final judgment. The complaint states: "(1) That on or about the 7th day of December, 1883, the defendant, Mrs. Sadie I. Clay, and her husband, Frederic Clay, (since deceased,) were indebted to the said plaintiff, John T. Ward, in the sum of twenty-five hundred and forty-six and 48-100 (\$2,546.48) dollars, and on said 7th day of December, 1883, in consideration of said indebtedness, Mrs. Sadie I. Clay, defendant herein, and Frederic Clay aforesaid, executed and delivered to said John T. Ward their promissory note, in words and figures, which in a copy of said note annexed to this complaint, and marked 'Exhibit A,' are fully set forth." The second paragraph alleges certain collateral security "for the aforesaid note of \$2,546.48." "(3) That the principal sum of \$2,546.48 on said note of Mrs. Sadie I. Clay and Frederic Clay, and the interest thereon at 10 per cent. per annum, payable quarterly, in accordance with the terms of said note, from the 7th day of March, 1885, remains due and unpaid, and defendant, though often requested, has neglected and refused, and still neglects and refuses, to pay the same, or any part thereof. (4) That plaintiff is still the holder of said promissory note for \$2,546.48, and of the said note and mortgage for \$2,000, assigned to this plaintiff as collateral security in part as aforesaid." Attached to the complaint is a copy of the note marked "Exhibit A," as follows: "\$2,546.48. San Francisco, Cal., Dec. 7, 1883. Twelve months after date, without grace, we promise to pay to the order of John T. Ward, at his office in this city, the sum of \$2,546.48, payable in United States gold coin, with interest thereon in

like gold coin, from date until paid, at the rate of 10 per cent. per annum, payable quarterly, and, if not so paid, to compound and become a part of the principal, and bear interest thereafter at the same rate, for value received. SADIE I. CLAY. FREDERIC CLAY."

1. It is contended by appellant's counsel that, without reference to the copy of the note exhibited, the complaint does not state a cause of action; that the copy of the note forms no part of the complaint, and cannot be referred to for the purpose of supplying any deficiency in the substance of the complaint; and that the court erred in overruling a general demurrer to the complaint based solely upon the ground that it does not state facts sufficient to constitute a cause of action. I think the material substance and legal effect of the note may be read from the body of the complaint without reference to the copy exhibited, although inartificially and indirectly stated. The first paragraph avers the date of, the parties to, and the execution of, the note, for a consideration of \$2,546.48. The second paragraph refers to it as "the aforesaid note of \$2,546.48." The third paragraph states the "principal sum" and rate of interest; and that the principal sum of \$2,546.48, and the interest from March 7, 1885, remain due and unpaid, and that the defendant refuses to pay the same, or any part thereof. Fourth, that plaintiff is still the holder of the note. Prayer for judgment for \$2,546.48, and interest from March 7, 1885. Tested only by a general demurrer, this seems sufficient. Defects of form of averment or uncertainty cannot be considered upon general demurrer. *Phelps v. Owens*, 11 Cal. 25; *Slattery v. Hall*, 43 Cal. 195; *Berry v. Cammet*, 44 Cal. 352; *Reynolds v. Hosmer*, 45 Cal. 630; *Chase v. Evoy*, 58 Cal. 352. I think, also, that the copy of the note referred to in the body of the complaint, and annexed to it, might properly have been referred to by the court for the purpose of ascertaining the "words and figures" and the form of the note. *Emeric v. Tams*, 6 Cal. 156; *People v. De la Guerra*, 24 Cal. 78; *Clary v. Thomas*, 103 Mass. 44; *Hall v. Foster*, 114 Mass. 18. It was properly annexed to the complaint for the purpose of informing the defendant of its form and contents, and, unless denied by a verified answer, its "genuineness and due execution," in the form exhibited, are admitted for all purposes of the trial. Code Civil Proc. § 447.

In *Los Angeles v. Signoret*, 50 Cal. 298, cited by counsel for appellant, the plaintiff was required to state facts creating a lien upon land; but the complaint merely stated "that, in pursuance of facts set forth in a notice and claim of lien recorded in the recorder's office," which notice was annexed to the complaint as an exhibit, "the plaintiff laid out and constructed a sewer over and along the lot, and that by virtue of the premises the plaintiff acquired a lien on the lot

for the assessments levied thereon." There was no averment that plaintiff had performed any act stated in the notice and claim of lien; nor that the facts therein stated were true; nor even that plaintiff had filed the notice and claim for record. By reference to the acts of the legislature under which the lien was claimed, it will be readily seen that this court very properly said: "Several matters of substance are lacking in the averments found in the complaint, which are sought to be supplied only by reference to the recitals found in an exhibit annexed to the complaint." In the case at bar the complaint directly alleges that the defendant executed and delivered to plaintiff the promissory note a copy of which is annexed to the complaint, and referred to for the purpose of showing its form, and the exact words and figures of which it is composed, and thereby enabling the defendant to determine whether she made it or not. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327. The copy of the note thus exhibited is a part of the single count of which the complaint is composed, and is stated and referred to in the manner and form authorized by section 447 of the Code of Civil Procedure; and therefore *Loup v. Railroad Co.*, 63 Cal. 97, and other cases requiring each count to state a complete cause of action without reference to other counts, cited by appellant's counsel, have no application to this case.

2. The objection that "there is no finding of the amount remaining unpaid on the promissory note sued upon" is answered by the "ninth" finding, as follows: "That there is now due and owing from defendant, Sadie I. Clay, to the plaintiff, on the promissory note sued on in this case, a balance of \$790.75." This implied that the balance found to be due and owing remained "unpaid."

3. On October 3, 1886, two days before the commencement of the trial, the attorneys for the respective parties signed a written stipulation as follows: "It is hereby stipulated that the plaintiff admits the truth of all the facts alleged in the answer herein, and that defendant need not offer any evidence on the trial of the above-entitled action, except as to the following facts alleged in the answer, viz.: The facts alleged in said answer on page 1 thereof, and on page 2, up to and including line 14 on said page. The words 'and before,' on page 3 of said answer, line 3, are struck out, and on line 5 of said page the word 'and' is inserted between 'plaintiff' and 'said.' J. W. WARD, JR., Attorney for Plaintiff. R. PERCY WRIGHT, Attorney for Defendant." This stipulation was filed with the clerk on October 5th, the day of the commencement of the trial, and after plaintiff had rested his case was introduced in evidence by defendant's counsel. The evidence for both parties was closed, and the argument of counsel commenced on the 5th, when the court adjourned until the next day (October 6th) to hear further argument. At the opening of court, on October 6th,

counsel for plaintiff moved for an adjournment of the trial to afford him an opportunity to move the court, upon affidavits, to set aside said stipulation, and to relieve the plaintiff from the effect thereof, on the ground that it was inadvertently entered into under a mistake of fact and a misapprehension of its legal effect. The court thereupon ordered that, upon the payment by plaintiff to defendant's attorney of \$100, the case would be continued until the following November. Plaintiff paid to defendant's attorney \$100, and the case was continued until the November term. On October 20th plaintiff filed and served notice on the motion, and the grounds thereof, with the affidavits of plaintiff and his attorney, appointing November 8th for the hearing. After hearing, the court "ordered that said motion be granted, and said stipulation is hereby set aside on the ground that the plaintiff's attorney was mistaken as to the legal effect of said stipulation when he signed the same."

It is contended by appellant's counsel that this action of the court was error, for which the judgment and order should be reversed. The affidavits of plaintiff and his attorney tend to prove, and, if true, do prove, that the allegations of the answer admitted by the stipulation were not true; that the stipulation was hastily and inadvertently entered into without the knowledge or consent of the plaintiff, and by mistake as to the truth of those facts induced by representations of defendant's counsel, and also under a mistaken view of the legal effect of those facts and of the stipulation. On the part of the defendant, the affidavit of her attorney tended to disprove all the material facts stated by affiants on the part of the plaintiff, except the facts that the stipulation was entered into without the knowledge or consent of the plaintiff, and that plaintiff's attorney was mistaken as to the legal effect of the stipulation.

No doubt that his attorney had authority to bind the plaintiff by the stipulation, and the only question to be decided is, did the court, in relieving the plaintiff from the effect of the stipulation, exceed or abuse its discretionary authority? I think the learned counsel for appellant is mistaken in contending that the stipulation should be treated as an ordinary contract not relating to proceedings in a court, from the obligation of which a party will not be relieved, as a general rule, except on the ground of fraud or mistake as to matter of fact. The stipulation in this case related to proceedings in a pending action. Its sole object was to settle and limit the issues of fact to be tried; and its obligation was not different from nor any stronger than that incurred by an express admission of fact by a pleading. Indeed, it stands in the place and performs the function of an express replication to the answer in this case, and is therefore subject to be amended or set aside by the court to the same extent, and under like circumstances, as would be a plead-

ing having a like effect. The Code of Civil Procedure (section 473) provides that "the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding * * * by correcting a mistake in the name of a party, or a mistake in any other respect. * * * The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; * * * and may also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It was said by BALDWIN, J., in *Roland v. Kreyenhagen*, 18 Cal. 457: "The power of the court should be freely and liberally exercised, under this and other sections of the act, to mould and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. * * * It [the court] can also usually prevent unjust or unfair advantages, or serious injury arising from casualties or inadvertence." In *Kirstein v. Madden*, 38 Cal. 163, the original answer failed to deny material allegations of the complaint, the defendant moved to amend it by denying those allegations, and the court denied the motion. Upon appeal the appellate court, by SAWYER, C. J., said: "We think he [defendant] ought to have been permitted to amend his answer. From oversights of counsel, committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality." In *Richardson v. Musser*, 54 Cal. 198, this court, by MCKINSTRY, J., said: "There can be no doubt of the power of the trial court to relieve a party from the effects of a stipulation which admits as a fact that which is not true, if the application is made in proper time." It is true that the mistake in the case last cited was a mistake as to a matter of fact; but the general principle announced by the court is in accord with section 473 of the Code of Civil Procedure, which extends the power of the court to grant relief in this class of cases, "by correcting a mistake in the name of a party, or a mistake in any other respect."

The principal purpose of vesting the court with this discretionary power is to enable it "to mould and direct its proceedings so as to dispose of cases upon their substantial merits," when it can be done without injustice to either party, whether the obstruction to such a disposition of cases be a mistake of fact or a mistake as to the law; although it may be that the court should require a stronger showing to justify relief from the effect of

a mistake in law than in case of a mistake as to matter of fact. The exercise of the power conferred by section 473 of the Code, however, should appear to have been "in furtherance of justice," and the relief, if any, should be granted upon just terms. In this case it appears that the trial court was justified, by the showing made, in believing that the stipulation was entered into by plaintiff's attorney inadvertently and by mistake, without the knowledge or consent of plaintiff; that it admitted material averments of the answer which were not true; and that the effect of the stipulation would be to prevent a trial of the case upon its true merits, and that the trial would thereby result in injustice to the plaintiff. The terms upon which the relief was granted do not appear to have been unjust. There is no complaint that the defendant was not allowed sufficient time and opportunity to prove the allegations of her answer, and it does not appear that \$100, paid her by the plaintiff, was not sufficient compensation for all detriment suffered by the postponement of the trial. Therefore it does not appear that the setting aside of the stipulation was an abuse of the discretionary power of the trial court.

4. The finding that the deed from Marion Thompson to J. W. Ward was not made for or on behalf of plaintiff, and that J. W. Ward never held the title to the property described in said deed for plaintiff as security or otherwise, is justified by the positive testimony of J. W. Ward. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

82 Cal. 636

ADAMS v. SEAMAN *et al.* (No. 13,443.)

(*Supreme Court of California*. Jan. 25, 1890.)

PROMISSORY NOTE—NEGOTIABILITY.

Under Civil Code Cal. § 3088, which provides that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment," a promissory note containing a provision for 5 per cent. attorney's fees on the accrued principal and interest, in case suit should be brought for its enforcement, is not negotiable.

Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Hunsaker & Britt, (*Haggin, Van Ness & Dibble*, of counsel,) for appellant. *F. W. Burnett*, for respondents.

McFARLAND, J. This action was brought by plaintiff upon what he alleges to be a negotiable promissory note made by defendant Seaman to the order of one O. S. Hubbell, and indorsed and assigned by Hubbell to plaintiff before maturity. Seaman, in his answer, pleads as set-off certain debts due him from Hubbell before the assignment.

Plaintiff demurred to this part of the answer, and his demurrer was overruled. After trial the court allowed certain of these set-offs, and gave judgment for plaintiff only for the balance due on the note, after deducting the set-offs. Plaintiff appeals from the judgment. The only question presented is, was the instrument sued on a negotiable note? The instrument would be negotiable, and, in the hands of an indorsee before maturity, not subject to any equities of the maker against the original payee, if it did not contain the following clause: "Should suit be commenced, or an attorney employed, to enforce the payment of this note, I agree to pay the additional sum of 5 per cent. on principal and interest accrued as attorney's fees in such suit." The court below held that this clause rendered the note non-negotiable, and we think that the court was right in so holding.

When one man promises to pay money to another in the future, if he puts that promise in the form of a negotiable paper, he gives to the promise characteristics which do not belong at all to ordinary indebtedness. If A. merely promises, either orally or by common writing, to pay B. \$1,000 at the expiration of 10 months, and during that time B. becomes indebted to A. on other transactions in the sum of \$500, the latter sum can be set off against the former; and it can be so set off against an assignee of B. if it accrued before notice of assignment. But, if the promise be made in the shape of a negotiable promissory note, then, if B. indorse the note before the expiration of the 10 months to a third party, the latter can compel A. to pay him the whole amount of the note, no matter how many set-offs he may have against B. In order, however, for this to be so, the note must clearly comply with the requisites of negotiable paper. And one of the main requisites, in addition to negotiable words, such as payable "to order" or "bearer," is absolute certainty as to the amount of money to be paid; a certainty which must appear on the face of the instrument. No part of the amount must depend on any contingency which may or may not happen, or upon the proof of any fact other than the genuineness of the instrument itself.

There have been many conflicting decisions in other states on the question whether, at common law, a promise in a note for attorney's fees, in case suit be brought, destroys the certainty which negotiable paper must have. The point has never been conclusively determined by this court; but in *Chase v. Whitmore*, 68 Cal. 548, 9 Pac. Rep. 942, the opinion of the court contains the following language: "Besides, the note provided for the payment of a reasonable attorney's fee, and that, under our Code, destroyed its negotiability. * * * In other states the rule is not uniform upon this subject; some of them holding that such a provision does, and others that it does not, destroy the negotiable character of the instrument." It is

contended by appellant that *Chase v. Whitmore* is not conclusive authority on the point, because in that case the assignment was made after the maturity of the note, and the language quoted was not necessary to the decision, and therefore *dictum*. This is true; but, as the point appears to have been quite elaborately considered, and as the opinion was concurred in by the whole court in bank, what was said is entitled to great weight, if it be not taken as authority in the strict sense. The language there employed was directly based on the provisions of our Civil Code upon the subject; and we think that it correctly applied the meaning of the Code to the question under discussion. Section 3087, art. 1, c. 1, tit. 15, Civil Code, is as follows: "A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article." Section 3088 (same article) provides that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment." Section 3093 is as follows: "A negotiable instrument must not contain any other contract than such as is specified in this article." There are other sections in the article, not material here. These Code provisions were evidently intended to remove, and they do remove, all doubt which conflicting judicial decisions had thrown over such questions as the one arising in the case at bar. Under them an instrument is not negotiable if it have "any condition not certain of fulfillment." In the case at bar the instrument, in addition to the main sum, which is to be paid absolutely, provides for another sum, to be paid not only upon the contingency of a suit being brought, but also upon the other condition of the employment of an attorney. It makes no difference that 5 per cent. is adopted as the measure of the attorney's fee, should the contingency of the employment of an attorney happen, even admitting that a court would be absolutely bound to allow, in the event of a suit, the whole amount of attorney's fee mentioned in the instrument, which is itself a doubtful proposition. *Bank v. Treadwell*, 55 Cal. 379. An attorney's fee, no matter how estimated, was not to be paid unless "suit be commenced, or an attorney employed," each being a "condition not certain of fulfillment." We think, therefore, that the instrument sued on was not, in the sense of current commercial paper, a negotiable promissory note. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.
Hearing in bank denied.

(82 Cal. 588)

WYSINGER v. CROOKSHANK. (No. 13,287.)
(*Supreme Court of California*. Jan. 27, 1890.)

PUBLIC SCHOOLS—EXCLUSION OF COLORED CHILDREN.

Under Pol. Code Cal. § 1662, providing that "every school, unless otherwise provided by law,

must be open for the admission of all children between six and twenty-one years of age, residing in the district," etc., colored children have equal rights with white children to admission to any public school, and cannot be refused admission to the same school with white children, though separate schools have been established for each race.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

W. A. Gray and Oregon Sanders, for appellant. N. O. Bradley and W. B. Wallace, for respondent.

FOOTE, C. This is an application for a writ of mandate to compel the defendant, Crookshank, a teacher of a public school located in the city of Visalia school-district, of the county of Tulare, to admit the plaintiff as a scholar. The application was denied; and from the judgment rendered therein, and an order refusing a new trial, this appeal is prosecuted.

The only ground for the refusal of the teacher to admit the applicant to the public school as a pupil is, as stated by the former, that the father of the petitioner, "on October 1, 1888, came to me, at the public school in Visalia, with a boy about twelve years of age, named Arthur; Wysinger said he had brought his boy to put in school. He said: 'Here is my boy to put in your school.' I told him to take his boy to Mr. McAdams, who taught the colored school. I just assigned him to the colored school. I refused to admit his boy to the public school on Locust street because he was colored, and because this public colored school was established by the board of education, who had instructed me to send the colored children to that colored school. These were my only reasons for refusing to admit him to the public school on Locust street." The boy thus excluded from a public school established for white children is a person of African descent; and both he and his father are colored citizens of the state of California, and of the United States.

The sole question to be determined is whether or not, under the laws of this state touching the education of children in the public schools, it is within the power of the board of education of the city of Visalia, in the county of Tulare, to establish a public school exclusively for such children as the applicant, and to exclude them from the schools established for white children. At the date of the decision rendered by the appellate court of this state in *Ward v. Flood*, 48 Cal. 37, the statute governing the admission of children to public schools ran thus: "Sec. 53. Every school, unless otherwise provided by special law, shall be open for the admission of all white children between five and twenty-one years of age residing in that school-district; and the board of trustees or board of education shall have power to admit adults, and children not residing in the district, whenever good reasons exist for such exceptions. * * * Sec. 56. The education of children of African descent and Indian children shall be provided for in separate schools. Upon

the written application of the parents or guardians of at least ten such children to any board of trustees or board of education, a separate school shall be established for the education of such children; and the education of a less number may be provided for by the trustees, in separate schools, in any other manner. Sec. 57. The same laws, rules, and regulations which apply to schools for white children shall apply to schools for colored children." Laws 1869-70, p. 838. In pursuance of these statutes, the board of education of the city and county of San Francisco adopted a rule which provided that "children of African or Indian descent shall not be admitted into schools for white children; but separate schools shall be provided for them, in accordance with the California school law." It was held in the case *supra* that separate schools for colored children of African descent might be established, and that such establishment was not in conflict with the constitution of the state, nor with the thirteenth and fourteenth amendments to the constitution of the United States, but that the legislature could not exclude children from the benefits of a system of education provided for the youth of the state merely because such children, so excluded, were of African descent. It was there said, at page 56: "In order to prevent possible misapprehension, however, we think proper to add that in our opinion, and as the result of the views here announced, the exclusion of colored children from schools where white children attend as pupils cannot be supported, except under the conditions appearing in the present case; that is, except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the state, and have a right to registration and admission as pupils in the order of their registration, pursuant to the provisions of subdivision 14 of section 1617 of the Political Code."

If the statutes as they stood when the decision *supra* was made had remained the law of the state at the time when the petitioner made his application, there can be no question but that it might have been lawfully refused, as a separate school, in all respects like the white school in the same district, had been established for children of African descent. But, following this decision, by an act of the legislature passed April 7, 1880, (Amend. 1880, p. 47,) sections 1669-1671 of the Political Code were repealed. They were as follows: "Sec. 1669. The education of children of African descent, and Indian children, must be provided for in separate schools: provided that, if the directors or trustees fail to provide such separate schools, then such children must be admitted into the schools for white children. Sec. 1670. Upon the written application of the parents or guardian of such children to any board of

trustees or board of education, a separate school must be established for the education of such children. Sec. 1671. The same laws, rules, and regulations which apply to schools for white children apply to schools for colored children." Deer. Pol. Code, note at foot of page 290. Section 1662 of the Political Code was by the same act amended so as to omit the word "white" before the word "children," as it had stood before that time, and as amended it read: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district; and the board of trustees or city board of education have power to admit adults and children not residing in the district whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy and vicious habits, or children suffering from contagious or infectious diseases."

Following the repeal and amendment of the sections, *supra*, a Mongolian or Chinese child applied for admission to a public school for white children established in the city and county of San Francisco. Its admission was refused by the teacher of the school, and an application for a writ of mandate was made to compel admission. The appellate court, in *Tape v. Hurley*, 66 Cal. 473, 6 Pac. Rep. 129, speaking by Mr. Justice SHARPSTEIN, held that such Chinese or Mongolian child could not be excluded from a white school. And it was there said, in reference to section 1662, *supra*, as amended by striking out the word "white" before the word "children," (erroneously printed as section 1667 in the opinion:) "That is the latest legislative expression on the subject, and was passed as late as 1880. Prior to that time the first clause of the section read: 'Every school, unless otherwise provided by special statute, must be open for the admission of all white children, between five and twenty-one years of age, residing in the district.' As amended, the clause is broad enough to include all children who are not precluded from entering a public school by some provision of law; and we are not aware of any law which forbids the entrance of children of any race or nationality. The legislature not only declares who shall be admitted, but also who may be excluded; and it does not authorize the exclusion of any one on the ground upon which alone the exclusion of the respondent here is sought to be justified. The vicious, the filthy, and those having contagious or infectious diseases, may be excluded, without regard to their race, color, or nationality. * * * In this case, if effect be given to the intention of the legislature as indicated by the clear and unambiguous language used by them, respondent here has the same right to enter a public school that any other child has. * * * The board of education has power 'to make, establish, and enforce all necessary and proper rules and regulations not contrary to law,' and none other. St. 1871-

72, p. 846. Teachers cannot justify a violation of law on the ground that a resolution of the board of education required them to do so." After the rendition of the judgment in this case, the legislature, in 1885, amended section 1662 of the Political Code so as to add, after the word "diseases," "and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established, Chinese or Mongolian children must not be admitted into any other school." *Deer. Pol. Code*, § 1662. And so the law existed upon the subject at the date of the institution of this action, and so it stands now. It must appear clear, therefore, that the power to establish separate public schools for children of African descent, and to exclude them from the public schools established for white children, has been taken away from boards of school trustees and boards of education, and that the power claimed by the teacher and the board of education of the city of Visalia does not exist. If it had been intended by the law-making department of the government to invest such boards with the power claimed, it would have given it as expressly as it was taken away by the repeal and amendment of the statutes which once authorized it; and especially is this plainly to be discerned when section 1662, *supra*, as it now stands, gives the power to establish separate schools for Chinese or Mongolian children, but none other.

The whole policy of the legislative department of the government upon this matter is easily gathered from the course of legislation shown herein; and there can be no doubt but that it was never intended that, as a matter of classification of pupils, the right to establish separate schools for children of African descent, and thereby to exclude them from white schools of the proper district, should be given to such boards, under section 1617 of the Political Code, which reads: "The powers and duties of trustees of school-districts and of boards of education in cities are as follows: (1) To prescribe and enforce rules not inconsistent with law, or those prescribed by the state board of education, for their own government, and the government of schools." If the people of the state desire separate schools for citizens of African descent and Indians, their wish may be accomplished by laws enacted by the law-making department of the government in accordance with existing constitutional provisions. But this course has not been pursued, as the law now stands; and the powers given to boards of education and school trustees, under section 1617 of the Political Code, do not include the right claimed by the board of education of Visalia. For these reasons we advise that the judgment and order be reversed, and the court below directed to issue a mandate compelling the admission of the appellant as prayed for.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in

the foregoing opinion the judgment and order are reversed, and the court below is directed to issue a mandate compelling the admission of the appellant as prayed for.

(82 Cal. 631)

HANSON v. GRAHAM. (No. 13,130.)

(*Supreme Court of California*. Jan. 27, 1890.)

ATTACHMENT—NON-RESIDENT—DOMICILE.

1. A railroad contractor, who has left the state, and has gone to a foreign country for the purpose of prosecuting his business there, and who, if successful in obtaining contracts, will remain at least as long as will be necessary for their completion, and who has actually been gone four months, though he has repeatedly stated before leaving that he intended to return shortly, is "not residing" in the state within the meaning of *Code Civil Proc. Cal.* § 537, which provides that a writ of attachment may issue where the defendant is "not residing" in the state.

2. *Pol. Code Cal.* § 52, which provides that "residence" is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose; that there can only be one residence; and that it can be changed only by the union of act and intent,—was not intended to apply to the attachment law, even if it can be considered as establishing the rule that one who has a settled abode for the time being in another state, for the purposes of business or pleasure, shall be treated as a resident.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. PARKER, Judge.

F. W. Burnett, for appellant. *Henderson & McDonald*, for respondent.

HAYNE, C. This is an appeal from an order refusing to dissolve an attachment. The attachment was issued upon an affidavit that the defendant was a non-resident, and the motion to dissolve was upon the ground that the affidavit was not true, and that the defendant was a resident. The affidavits read upon the hearing consist in great part of mere conclusions and statements on information and belief. The following facts, however, appear to be undisputed: The defendant, Graham, was a contractor for the building of railroads and other similar works. In 1884 he left his former residence, and established himself in Victoria, B. C. In 1886 he left that place, and finally settled in San Diego, with the intention of engaging in business there. While in San Diego he lived in hotels and lodging-houses. After about 10 months, business became dull, and he stored his contractor's tools and implements, and in June, 1888, went to Chili for the purpose of engaging in business there. In October, 1888, the attachment was levied, at which time he had not returned from Chili. It further appears that the purpose of going to Chili was to get contracts in his line of business, of which he had heard. So much is undisputed. It does not distinctly appear how long such contracts would take to fill if he succeeded in getting them. In this regard the plaintiff states in his affidavit, upon information and belief, that the defendant had gone to Chili with the intention "of engaging in railway contracting, in-

volving millions of dollars and years of time for completion, the said work necessitating an extended residence of many years duration," and that, should it be necessary for him to return to the United States, such return would be only for the temporary purpose of arranging his business affairs in said county of San Diego preparatory to the removal of said outfit to the republic of Chili. The defendant produced many affidavits to the effect that Graham had stated before leaving that he intended to return shortly; and the affiants offer their conclusions to the effect that he always intended to return, and that he was still a resident of California. As above stated, the affidavits on each side are vague and unsatisfactory. We think that it sufficiently appears, however, that defendant went to Chili for the purpose of prosecuting his business of contractor there, and that, if successful in obtaining contracts, he would remain at least as long as would be necessary for their completion; and that he had been gone about four months without returning.

Upon these facts the question arises whether the judge of the court below was right in holding that the defendant was a non-resident. The statute in relation to attachments provides that the writ may issue when the defendant is "not residing" in this state. Code Civil Proc. § 537. In the next section it is provided that the plaintiff must present an affidavit that the defendant "is a non-resident." These two phrases seem to have been used as equivalent in meaning. Whether they are so in strictness or not need not be considered. But we think that the residence referred to is an actual, as contradistinguished from a constructive or legal, residence; and that there may be such an actual residence, notwithstanding a general intention to return to the place of legal residence or domicile. This was held in a well-considered case in Virginia, in which the facts were nearly the same as those involved here. There a person domiciled in Washington city removed to Virginia with the intention of remaining there for nine months, or for such additional time as might be required to complete certain contracts for building parts of a railroad. He rented his residence in Washington, but without any intention of abandoning his domicile there, and during his stay in Virginia he always claimed Washington as his place of residence, and declared his intention of returning there as soon as his contracts should be completed. Upon these facts it was held that, for the purposes of the attachment law, he was a resident of Virginia; and the court said: "It is apparent that the word 'residence,' like that of 'domicile,' is often used to express different meanings, according to the subject-matter. In statutes relating to taxation, settlements, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in the

statutes relating to attachments. In the latter actual residence is contemplated, as distinguished from legal residence. * * * While, on the one hand, the casual or temporary sojourn of a person in this state, whether on business or pleasure, does not make him a resident of this state, within the meaning of the attachment laws, especially if his personal domicile be elsewhere, so, on the other hand, it is not essential he should come into this state with the intention to remain here permanently, to constitute him a resident." Long v. Ryan, 30 Grat. 720. Decisions similar in principle have been made in other states. Frost v. Brisbin, 19 Wend. 11; Krone v. Cooper, 43 Ark. 547; Morgan v. Nunes, 54 Miss. 311; Burrill v. Jewett, 2 Rob. (N. Y.) 701; Haggart v. Morgan, 5 N. Y. 423; Nailor v. French, 4 Yeates, 241; Bank v. Merrit, 13 N. J. Law, 134; Stout v. Leonard, 37 N. J. Law, 495; Swaney v. Hutchins, 13 Neb. 266, 13 N. W. Rep. 282.

And the rule seems to rest upon sound principle. The reason of allowing an attachment against a non-resident was that it was one mode of acquiring jurisdiction in a suit against him. And this purpose would not be satisfied if the debtor could preserve a constructive residence in the state by virtue of a general intention to return, when he was in fact residing in another state. The rule, indeed, has not gone so far as to cover the case of a mere transient journey. But where a man has a settled abode for the time being in another state for purposes of business or pleasure, we think that both reason and authority require him to be treated as a non-resident of this state, within the meaning of the attachment law. We have not overlooked section 52 of the Political Code.¹

But, if a different rule is there provided, we think that the provision was not intended to apply to the attachment law. In the light of these principles, we think that it does not appear that Graham was a resident of California after his departure for Chili. It having been shown that he left the state for the purpose of engaging in business in a foreign country, a *prima facie* case of non-residence was made out, and we do not feel that we can say that the contrary was shown. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in foregoing opinion the order appealed from is affirmed.

¹ Pol. Code Cal. § 52, provides: "In determining the place of residence, the following rules are to be observed: (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (2) There can only be one residence. (3) A residence cannot be lost until another is gained. * * * (7) The residence can be changed only by the union of act and intent."

83 Cal. 7

HOLTON v. NOBLE et al. (No. 13,256.)

(Supreme Court of California. Jan. 28, 1890.)

ACTION FOR RENT—COUNTER-CLAIM—FRAUDULENT REPRESENTATIONS—APPEALABLE ORDER.

1. In an action to recover rents due under a lease, a plea as a defense of false representations made by plaintiff as to the number of acres planted in certain crops is no defense, where defendant failed to plead such deficit as a counter-claim, or to aver damage by the false representations.

2. Representations as to the harvest land sown in certain crops would produce are matters of opinion, and cannot be regarded as fraudulent.

3. An agreement to accept a smaller sum in discharge of a larger, and to take a note extending the time for payment, does not extinguish the larger sum, unless the agreement is executed by giving the note or making the payment.

4. An order allowing judgment on the pleadings is not appealable, but it may be reviewed on appeal from the judgment.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Grady & Austin, for appellants. *Meux & Edwards*, for respondent.

THORNTON, J. Appeal by defendants. This action was brought to recover rent due on a written lease executed by plaintiff to defendants for one year, commencing January 5, 1888, and ending the 5th of January, 1889. The lease was for two years, commencing on the day above mentioned, in 1888, and ending on the 5th day of January, 1890. The stipulated rent was \$3,200 a year for the first year, payable on the 20th day of December, 1888, and for the second year on the same day of December, 1889. The defendants went into possession under the lease, and occupied the premises until the 20th day of January, 1889. The defendants filed an answer, in which they set forth that, before the lease was entered into, plaintiff made certain false representations to the defendants as to the number of acres of the land on which there was a good stand of alfalfa; that he represented that there were 180 acres in good stand of alfalfa, while in truth and in fact there were not more than 80 acres. It is further averred that plaintiff represented that the land so sown in alfalfa would produce at least 8 tons of hay to the acre, while in fact said 80 acres would or did produce, with the best tillage and care, less than 4 tons per acre, and the balance of said 180 none; that plaintiff also represented that the 40 acres of grape vines on the land would produce at least from a ton to two tons of raisins per acre, while in fact the 40 acres produced only 6 tons of raisins; that defendants relied on the said representations of plaintiff, and for this reason, and not otherwise, leased the land; that the only reason why they did lease this land was that they believed the statements so made by plaintiff to be true.

The alleged representations of the plaintiff as to the amount that the alfalfa and grape vines would produce were clearly matter of opinion, and cannot be regarded as fraudulent. It may be conceded that the representation as to the number of acres in the land

was a fraudulent representation, and defendants, if they had properly pleaded it as a counter-claim, might have been allowed to reduce the stipulated rent by the amount of damage sustained. But they neither aver that they were damaged by such representations, nor do they set forth to what amount they were damaged. The alleged fraud is pleaded as a defense to the action, without any showing that defendants were damaged at all. Fraud, without damage, furnishes no ground for action, nor is fraud without damage a defense.

It is averred in the answer that plaintiff agreed to take \$2,400 in full payment of the \$3,200 rent sued for, and to extend the time of payment of the rent mentioned for the period of six months on a note. The answer shows that this agreement was never executed. The money was never paid, nor was a note executed, as alleged to have been agreed. Unless the agreement to accept the smaller sum in discharge of the larger was carried out, the obligation to pay the larger sum was never extinguished or discharged. There was no execution of the agreement or accord, and hence the original obligation remained unaffected. The accord may be binding on the parties, but it does not discharge the obligation if it is made to satisfy until it is executed. Execution alone is satisfaction. The averments in the answers set forth no defense to the action in whole or in part. Hence the motion of plaintiff for judgment on the pleadings was properly granted, and the judgment must be affirmed.

The defendants also appeal from the order of the court below allowing judgment on the pleadings. This is not an appealable order, and therefore the appeal from it is dismissed. This order may, however, be reviewed on an appeal from the judgment, and this has been done, as appears above. The record shows no error, and the judgment is affirmed.

We concur: **McFARLAND, J.; SHARPSTEIN, J.**

3 Cal. Unrep. 199

JUDSON v. LYFORD et al. (No. 12,032.)

(Supreme Court of California. Dec. 20, 1889.)

JUDICIAL SALE—RIGHTS OF PURCHASER.

1. D., against whom plaintiff held a judgment, succeeded, on his wife's death, to one-third of her lands, and conveyed his interest to defendant in trust to be leased, and one-half of the profits applied to his support during his life, and at his death the whole to go to his children. After the execution of the trust-deed, plaintiff levied an execution on D.'s interest in the land, and at the sale bid it in, taking a sheriff's deed. Afterwards, plaintiff received the balance due on the judgment, and entered a satisfaction in full. *Held*, that at the time of the sale under execution the legal title was in defendant, and plaintiff, under the sheriff's deed, took nothing but D.'s equitable interest therein, which ceased on D.'s death.

2. Whatever may have been plaintiff's right, as a creditor, to set aside the deed of trust because given to hinder and defraud creditors, it was lost by his purchasing the "right, title, and interest of D." in the property, and accepting the balance due on the judgment, and acknowledging satisfaction thereof, and he thereafter had no other stand-

ing than that of a purchaser at an execution sale, subject to the rule of *caveat emptor*.

Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge.

E. F. Swortfiguer, (*Walter Van Dyke*, of counsel,) for appellant. *Sawyer & Burnett*, for respondents.

PATERSON, J. On the 7th day of November, 1881, a judgment was entered in the superior court in favor of Michael Lynch, and against T. B. Deffebach, for the sum of \$9,446.74, and on the day following it was assigned by Lynch to the plaintiff herein. On September 15, 1883, Mrs. Deffebach died, and T. B. succeeded to an undivided one-third of her estate, the same being the lands described in the complaint. On October 10th following, Deffebach conveyed the property to defendant Lyford, as trustee, in trust for him (said D.) and his four minor children. By the terms of the trust Lyford, as trustee, was to sell sufficient of the interest of D. to pay off all debts of the estate of Mrs. D., deceased; lease the remainder of his (said D.'s) interest upon such terms as said trustee should think proper; and out of the rentals pay taxes, and expenses of caring for the property, render one-half of the surplus profits to said D. for his support during his natural life, and upon his death to apply the whole of the surplus to the support and education of the children; further, to convey, upon T. B. Deffebach, Jr.'s., becoming of age, or, in the event he should not live so long, then when the youngest child living should become of age, to the said children or the survivors of them, said property, share and share alike. An execution on the judgment was issued out of the superior court on the 13th day of November, 1883, and levied on all the right, title, and interest which Thomas B. Deffebach had in said property on said 13th day of November, and on December 15th, following, was executed by a sale of the property to this plaintiff for the sum of \$9,500. At the time of this levy the lien of the judgment upon this land, if any there had ever been, had ceased. No redemption having been made, a certificate and sheriff's deed were issued to plaintiff in due time and in due form. Deffebach died on June 24, 1884. The defendant Lyford is the administrator of the estate of T. B. D., deceased, and is also guardian of the minor children. After the answers of the defendants were filed herein, to-wit, on November 13, 1884, the plaintiff having received from the defendant the balance due upon the judgment in the case of *Lynch v. Deffebach*, entered a satisfaction in full of the judgment therein. This action was commenced on August 21, 1884, to set aside the deed of trust from Deffebach to Lyford as fraudulent and void, and to quiet the title of plaintiff to the premises. The court found that D. was not insolvent at the time of the death of his wife; that the deed to Lyford was without any moneyed consideration; that Lyford knew

nothing of the indebtedness of D. at the time he accepted the trust; that the trust-deed was not made in fraud of plaintiff, or of his rights, or with the intent to hinder, delay, or defraud creditors; that the equity held by D., and purchased by plaintiff, ceased upon the death of D., and that plaintiff is not the owner of the property described in the complaint, or any part of it, or interest therein. Judgment followed for defendant, and plaintiff appealed. Upon the facts admitted, proved, and found, the judgment is right and should be affirmed. The equitable interest retained by D. was subject to execution. Section 688, Code Civil Proc. Lyford, the trustee, was to receive the rents, and apply them to the maintenance of the *cestui que trust*, and after the death of D. was to convey to the children; he therefore held the legal title. *Robinson v. Grey*, 9 East, 1; *Silvester v. Wilson*, 2 Term R. 444. Plaintiff purchased, and the sheriff's deed conveyed to him, only the right, title, and interest of D. For this interest he paid \$9,500, leaving a balance of about \$1,600 due on the judgment. As an execution purchaser he can claim no more than the equitable interest left by D. on November 13, 1883. *Caveat emptor* is the rule. *Plant v. Smythe*, 45 Cal. 162; *Freem. Ex'ns*, §§ 301, 309; *Boggs v. Fowler*, 16 Cal. 564; *Abadie v. Lobero*, 36 Cal. 398. The plaintiff cannot now be heard to say that the interest he purchased was not worth what he paid for it. He must stand by his bargain. The court will not consider the fact that the interest he purchased was terminated by the death of D., soon after the sale, and that by reason thereof plaintiff has not been able to realize the actual amount due on his judgment.

But it is claimed by appellant that the purchaser here was, at the time the trust-deed was executed, a creditor of the grantor, and therefore the general rule that the purchaser takes upon himself all risks as to title does not apply. A complete answer to this is found, we think, in the facts that there was no actual fraud, that the deed was not void *per se*, and that the relation of creditor and debtor no longer exists. When the plaintiff accepted the balance due on the judgment and entered a satisfaction in full, the relation of debtor and creditor ceased, and he has no other standing in court than that of a purchaser at execution sale. Whatever may have been his right as a creditor to set aside the deed because given to hinder, delay, or defraud creditors, it was lost by reason of his own acts in purchasing, in terms, "the right, title, and interest of T. B. Deffebach," accepting the balance due on the judgment, and acknowledging that he had received satisfaction in full. The court found that, in consideration of the payment by Lyford, as administrator of the deficiency,—\$1,598.60,—plaintiff executed and acknowledged full satisfaction of the judgment. This finding is not assailed. D. did not convey all of his property to Lyford.

He retained an equitable interest. The sheriff did not sell the land. He sold and conveyed simply the right, title, and interest of D. Plaintiff paid \$9,500 for that interest, as his deed shows, and the judgment became satisfied to that extent. When the administrator paid the balance, and satisfaction was entered, D. was no longer a creditor, and the rule of *caveat emptor* became no less applicable to his case than to that of every other purchaser under execution sale. *Freem. Ex'ns*, § 340; *Abadie v. Lobero*, supra.

Judgment and order affirmed.

We concur: WORKS, J.; FOX, J.

83 Cal. 33

GRAY v. DIXON. (No. 13,411.)

(Supreme Court of California. Jan. 30, 1890.)

PUBLIC LANDS—CANCELLATION OF ENTRY UNDER DESERT LAND ACT—PREFERENCES.

The act of congress (21 U. S. St. at Large, 140, 141) providing that a person who has procured the cancellation of any pre-emption, homestead, or timber culture entry shall be notified of such cancellation, and shall have 30 days within which to enter said lands, does not embrace the case of one who has procured the cancellation of an entry under the desert land act; and the fact that defendant procured the cancellation of such an entry made by another, and at the same time filed his own application under another act, gives him no preference over the right of plaintiff, who also filed an application for entry; and plaintiff, having made the first settlement, is entitled to recover the land.

Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Charles R. Gray, pro se. Curtis & Otis, for respondent.

SHARPSTEIN, J. Ejectment. Judgment for defendant. Plaintiff's motion for a new trial overruled. Appeal from the judgment and order overruling motion for a new trial. Prior to the 4th day of May, 1877, the demanded premises were a part of the public lands of the United States. At that date one Ward applied for and made entry under the act to provide for the sale of desert lands of the section which embraces said premises. On the 19th day of December, 1881, defendant initiated a contest against said entry for abandonment and failure to comply with the law, and at the same time filed his application for said land under the soldiers' and sailors' homestead act. The contest resulted in the cancellation of Ward's entry; and he relinquished his claim to enter under the desert land act, but applied to enter said land under the timber act. His application was rejected by the local land-office. He applied to the general land-office, and the commissioner thereof decided that his application should have been allowed, subject to the preference right of the defendant herein to enter said land under the soldiers' and sailors' homestead act. From that decision Ward appealed to the secretary of the interior, whose action thereon is not stated. December 4, 1885, plaintiff settled upon and

took possession of the demanded premises for the purpose of making it his home by residence, occupation, and cultivation, and continued thereafter to reside on said land, and built a house thereon, and procured the same to be surveyed, and filed an affidavit in compliance with the provisions of an act entitled "An act to provide the mode of maintaining and defending possessory actions on public lands in this state, approved April 20, 1852." He made improvements of the value of \$200 on the land.

When plaintiff settled upon and took possession of said land, it was wholly unoccupied and unimproved public land of the United States, except that there was a small, uninhabitable house, without doors or windows, thereon, which had been erected by defendant, and about one-half of an acre of said land had been plowed. Defendant never occupied or resided on said land prior to September 9, 1886. Plaintiff, though not a party to the controversy between defendant and Ward in the land department, made a motion therein on the 24th day of December, 1886, for a review of the decision therein, and offered to prove his (plaintiff's) settlement, residence, and improvement on said land, which motion was denied by the commissioners of the general land-office; and from that ruling plaintiff appealed to the secretary of the interior, who granted plaintiff's application to be heard, and on such hearing said secretary decided: *First*, that the defendant herein had the preference right to the entry of said lands under his application made on the 19th day of December, 1881; *second*, that the application of plaintiff herein to enter said land under the homestead laws should be allowed, subject to defendant's preference right to enter the same; *third*, that, if plaintiff's claim of settlement should be found unfounded in fact, then the application of said Ward to enter said land under the timber culture law should be allowed, subject to said defendant's preference right to enter the said land under his said application of December 19, 1881.

Plaintiff, when he settled upon said land, possessed all the qualifications necessary to entitle him to make his application for 160 acres of land under the homestead laws of the United States. On the 9th day of September, 1886, defendant entered on and took possession of the demanded premises, and began the erection of a dwelling-house thereon, which was soon finished; and in October, 1886, he moved his family into it, and continued to dwell therein, claiming all said demanded premises as his own, and has prevented plaintiff from making any more improvements thereon. Defendant plowed and sowed portions of the land previously plowed and sowed by plaintiff. On the 15th of August, 1888, defendant made his final proof at the Los Angeles land-office, under the homestead laws of the United States, and paid \$400, for which he received the following: "No. 3,226. Receiver's Office at Los Ange-

les, Cal., Aug. 15, 1888. Duplicate. Received from John C. Dixon of San Bernardino county, Cal., the sum of four hundred dollars and ——— cents, being in full for the $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, of section No. 8, in township No. 2 south, of range No. 4 west, S. B. M., containing one hundred and sixty acres and ——— hundreds, at \$2.50 per acre. Commuted Home, No. 2,892. \$400. See letter 'P' of commissioner, May 12, 1886. J. H. POLK, Receiver. [Indorsed:] No. 13. Recorded at request of John C. Dixon, August 18, 1888, at 40 minutes past 9 A. M., in Book E. Mis. Records, page 337, Records San Bernardino County. LEGATE ALLEN, County Recorder. By T. I. BOLTON, Deputy-Recorder. Paid \$1."

After the decision of the secretary of the interior, May 7, 1888, plaintiff obtained from the officers of the Los Angeles land-office the following:

"Township No. 2 S., range No. 4 W., district of ———. Part of section ———. Section ———. N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$. 8 Appli. Home, Chas. R. Gray. June 9, 1888. Subject to right of John C. Dixon, authorized by Sec'y letter of P. of May 12, 1888.

"United States Land-Office, Los Angeles, Cal., June 9, 1888. I, the undersigned, register of the United States land-office at Los Angeles, California, do hereby certify that the above and foregoing is a true and correct copy of abstract of entry of Chas. B. Gray, made and entered on the books of said land-office, and as the same now appears thereon, on a comparison with said books. H. W. PATTON, Register U. S. Land-Office, Los Angeles."

The foregoing facts were found by the court below, and the principal contention of appellant here is that they are insufficient to support the judgment. If, at the time appellant built his house and went to reside on the land in controversy, it was subject to private entry, we think the findings show a sufficient compliance with the law on his part to entitle him to recover in this action. He seems to have done all that the law requires a pre-emption claimant to do to perfect his pre-emption claim to the land. But, when he offered to file his homestead application to enter said land under the homestead laws of the United States at the Los Angeles land-office, although said application was in due form, and accompanied by the affidavit required by law in such cases, and he tendered all fees and commissions required by law on his said application, the officers of said land-office rejected his said application, and he thereafter, and within the time allowed by law and the rules and regulations of the department of the interior, duly perfected an appeal from the action of said officers of the Los Angeles office to the commissioner of the general land-office, who affirmed the action of said officers of said Los Angeles

land-office; from which decision of said commissioner appellant appealed to the secretary of the interior. The court does not find that the secretary ever distinctively heard or denied that appeal, but finds that nearly a year afterwards he took up the case of the three claimants, Ward, appellant, and respondent, and decided that the application of appellant herein to enter said land under the homestead laws should be allowed, subject to respondent's preference right to enter the same.

Whether that decision of the secretary of the interior is a valid determination of the respective rights of appellant and respondent herein, in the premises, is the main question presented by the record before us. The "preferred" right of respondent, as it is denominated, is based upon the fact of his initiating on the 19th of December, 1881, a contest against the right of Ward to enter said land under the desert land act, and at the same time filing an application to enter the land himself under the soldiers' and sailors' homestead act. The act of congress entitled "An act for the relief of settlers on public lands" contains this provision: "In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: provided, that said register shall be entitled to a fee of \$1 for the giving of such notice, to be paid by the contestant, and not to be reported." 21 U. S. St. at Large, 140, 141. That act, in terms, does not mention entries under the desert land law, such as the respondent is found to have initiated his contest against, and obtained the cancellation of by the land department. Although we cannot perceive any reason for the omission of desert land entries in the above enumeration, the fact of its omission makes the rule, *expressio unius, exclusio alterius est*, applicable; and we must hold that respondent acquired no "preference right" to enter the land by successfully contesting the right of Ward to enter it under the desert land act. With the "preference right" eliminated, it is a case in which two persons have settled upon the same tract of land; and the right of pre-emption is in him who made the first settlement, and he, indubitably, is the appellant. This being so, the judgment should be in his favor. Judgment reversed, and cause remanded, with directions to the court below to enter judgment in favor of plaintiff for the recovery of the demanded premises, upon the findings of fact filed herein.

We concur: THORNTON, J.; McFARLAND, J.

82 Cal. 630

HYMAN v. COLEMAN *et al.* (No. 11,448.)

(Supreme Court of California. Jan. 30, 1890.)

JURISDICTION—STOCKHOLDER'S LIABILITY—LIMITATION OF ACTIONS.

1. Where seven defendants are sued, and the complaint demands a several judgment against five of them for less than \$300, the superior court in California has no jurisdiction as to these five.

2. In an action against the stockholders of a corporation on its renewal notes, which are claimed to have extinguished the old notes, the complaint should allege that defendants were stockholders of the corporation when the renewals were made.

3. Where renewal notes are given by a corporation, the statute of limitations begins to run in favor of the stockholders from the maturity of the first notes, and an action against the stockholders is barred in three years from the time the first notes matured, under Code Civil Proc. Cal. §§ 338, (subd. 1.) 359, which prescribe that actions against the stockholders of a corporation must be brought within three years after the discovery of the facts on which the liability was created.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Severance & Travers, for appellant. *T. M. Osmont* and *C. P. Robinson*, for respondents.

BELCHER, C. C. This is an action to recover from the defendants, as stockholders of a corporation, their several proportions of an indebtedness due plaintiff from the corporation. The complaint contains two counts. In the first it is alleged that plaintiff advanced and loaned to the corporation, on the 7th day of October, 1879, the sum of \$2,000, for which the corporation then and there executed to plaintiff its promissory note, payable in one year after date, with interest, and that "said promissory note was renewed by said corporation each year, by the surrender of all former notes given by said corporation to plaintiff, and the execution and delivery of new notes to plaintiff for the amounts found due upon the said indebtedness." It further alleges that the capital stock of the corporation was divided into 1,000 shares, and states the number of shares owned by each defendant on the 7th of October, 1879. The second count alleges another loan by plaintiff to the corporation of \$1,000 on the 16th day of December, 1879, and the execution of its promissory note for that sum, payable one year after its date, with interest, and a like surrender and yearly renewal of same by the corporation. It further states the number of shares of the capital stock of the corporation owned by each defendant on the last-named date. The complaint then alleges that on the 8th day of September, 1883, an accounting as to the amount of the aforesaid unpaid indebtedness was had between the corporation and plaintiff, and that plaintiff then surrendered the notes which he held, and the corporation executed to him for such indebtedness four new notes, dated December 16, 1883, and payable one year after date with interest. This action was commenced in April, 1885, and is based upon three of the last-named notes, one of the four having been paid. The defendants demurred to the complaint upon the

grounds that it did not state facts sufficient to constitute a cause of action, and that the cause of action was barred by the statute of limitations. The court sustained the demurrer, and rendered judgment for defendants, and the plaintiff appealed.

1. The plaintiff demanded a several judgment against five of the seven defendants, who appeared, for less than \$300. The superior court had therefore no jurisdiction of the action against these five, and as to them the judgment must be affirmed for that reason. *Derby v. Stevens*, 64 Cal. 287.

2. It is not claimed that the renewals of its notes by the corporation created any new debt or liability against the defendants; and it is clear that, if the renewals had had the effect to extinguish the old debt and create a new one, then the complaint stated no cause of action, for the reason that it did not allege that the defendants were stockholders of the corporation when any of the renewals were made.

The only question, then, is, did the renewals operate to extend the time of payment of the original indebtedness, and thereby prevent the statute of limitation from beginning to run, in favor of those who were stockholders when that indebtedness accrued, until the last notes matured, on the 16th of December, 1884? It is settled law in this state, that, under our constitution and statutes, each stockholder of a corporation is liable for his proportion of the corporate debts, contracted while he was a stockholder, as a principal debtor, and not as a surety. *Canal Co. v. Woodbury*, 14 Cal. 265; *Neilson v. Crawford*, 52 Cal. 248; *Bank v. Hill*, 59 Cal. 107; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. Rep. 354. The liability commences and a right of action accrues against the corporation and stockholders at the same time. *Davidson v. Rankin*, 34 Cal. 503; *Mitchell v. Beckman*, 64 Cal. 117. Suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders. *Young v. Rosenbaum*, 39 Cal. 646. A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders. *Larrabee v. Baldwin*, 35 Cal. 168; *Stilphen v. Ware*, 45 Cal. 110. The liability of stockholders is created by statute, and an action to enforce that liability must be brought within three years after the cause of action accrues. Code Civil Proc. §§ 338, (subd. 1.) 359; *Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167, 15 Pac. Rep. 670. In New York it has been held that the renewal of a note by a corporation does not extend the time prescribed by statute for suing a stockholder. In *Parrott v. Colby*, 6 Hun, 57, the court said: "We think the liability of stockholders in such cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation." This decision was affirmed on appeal in 71 N. Y. 597; and

in *Iron Co. v. Walker*, 76 N. Y. 521, Parrott v. Colby is cited, and substantially the same doctrine announced. In view of the foregoing authorities, our conclusion is that the plaintiff's right of action against the defendants commenced when his first notes matured, and was barred in three years thereafter. We therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed. Rehearing denied.

(83 Cal. 12)

MORA, Bishop of Monterey, v. MURPHY.
No. 13,159.)

(Supreme Court of California. Jan. 30, 1890.)

POWER OF ATTORNEY—INCORPORATION OF RELIGIOUS SOCIETIES.

1. A power of attorney to convey and sell, or to agree to convey and sell, land, is *prima facie* a power to sell for money; and, in the absence of evidence to the contrary, a tenant in common, who is so authorized by his co-tenant, but who, in his own name only, agrees to convey, and afterwards does convey, a portion of the land, in consideration of the purchaser's boring an artesian well thereon, binds only himself, and not his co-tenant.

2. In ejectment by the vendor's co-tenant against the vendee, a finding that the plaintiff knew that the deed purported to convey the whole title to the tract is matter of law, and not of fact.

3. As the vendor could convey and contract with reference to his own share, plaintiff was not estopped to deny the vendee's title to the whole tract, by his knowledge of the agreement, the well-boring, the deed, and the occupation and improvements of the purchaser, without objecting thereto.

4. Under St. Cal. 1850, p. 374, § 177, and St. 1854, p. 53, § 2, amending St. 1850, § 184, a religious corporation was required to file its articles of incorporation with the county clerk of the county where situated. St. 1853, p. 37, § 2, provided that the certificate of incorporation of manufacturing, trading, and mining corporations should be filed with the county clerk, and a copy with the secretary of state. Civil Code, § 299, provides that no corporations hereafter formed shall hold or purchase property without filing a certified copy of their articles of incorporation, filed with the secretary of state, with the county clerk of the county where the property is situated, and that every corporation "now in existence" must file "such certified copy" with the county clerk of the county where the property was situated. *Held*, that the section of the Code does not apply to the Roman Catholic Bishop of Monterey, a sole corporation formed before the adoption of the Code, and it was not necessary for it to file its articles of incorporation with the secretary of state and the county clerk before suing in ejectment.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Ejectment by Francis Mora, Roman Catholic Bishop of Monterey, a corporation sole, against Murphy. From the judgment for defendant plaintiff appeals. Civil Code Cal. § 299, provides that no corporation hereafter formed shall purchase or hold property without filing a copy of its articles of incorporation, filed with the secretary of state, with the county clerk of the county where the property is situated, and that all corporations "now in existence" shall also file such a copy

with the county clerk of any county where they hold property.

R. B. Canfield, for appellant. W. C. Stratton, for respondent.

THORNTON, J. Ejectment. Judgment for defendant. Appeal by plaintiff from the judgment. On the 8th of May, 1874, J. S. Alemany, and Thaddus Amat, Roman Catholic Bishop of Monterey, the latter a corporation sole, became tenants in common of the College Rancho, in Santa Barbara county, the interest of Alemany being three-fifths, and that of Amat two-fifths, of the rancho. On the 21st of March, 1887, Amat, as a corporation sole, appointed Alemany his attorney in fact by a letter of attorney bearing date the day just above named. By this letter Amat authorized his constituent, as his attorney, and for him, and in his name, to convey and sell his title to the land above mentioned, or to agree to convey and sell the same, giving and granting to his attorney full power in the premises, etc. On the 10th day of June, 1879, Alemany executed a written agreement, whereby he agreed to convey to defendant 640 acres of the rancho above named, in consideration of defendant's boring an artesian well upon the rancho. Defendant complied with the conditions of the agreement on his part, and on the 4th day of November, 1879, Alemany conveyed to defendant a specific tract in the rancho, which is the parcel of land involved herein. The letter of attorney was in force when the agreement and conveyance above mentioned were executed. Neither the agreement nor the conveyance was signed by Amat or the plaintiff, and Alemany did not sign the name of either Amat or plaintiff to the document aforementioned. Prior to the making of the agreement with defendant, Amat died, and was succeeded by plaintiff as bishop of Monterey.

The above facts are found by the court below. The agreement with defendant was made by Alemany alone, and did not bind Amat or the plaintiff. The same is true of the conveyance. Neither purports to be made on behalf of Amat or the plaintiff. So far as the findings show, Alemany acted wholly for himself in executing the agreement, as well as the conveyance to plaintiff. He did not sign the name of either Amat or Mora to either paper, and it is too clear to admit of argument that he acted, not as attorney under the letter of attorney, but entirely on his own account. Alemany was competent to contract. He was the owner of an undivided three-fifths of the rancho, and the ownership of this large interest was sufficient inducement to prompt him to act for his own interest and to bind himself alone. Further, the letter of attorney did not authorize Alemany to contract for the boring a well, and pay for it in land. He was authorized to convey and sell, or to agree to convey and sell. A power to sell and convey is *prima facie* a power to sell for money, usually for cash paid.

To give it any other meaning, there must appear to be some usage or custom in the country where the power is to be exercised modifying the *prima facie* significance of the power conferred. The same is true of a power to agree to convey and sell, or sell and convey. We see no difference in the meaning to be attributed to the two forms of expression, whether it is convey and sell or sell and convey. The defendant was not justified in attributing any other effect in law to the agreement and conveyance than that above stated. It was clear that he was dealing with Alemany alone, and that to Alemany alone could he look for his compensation. The only parties to the contract in fact and in law were Alemany and defendant.

It is argued that an estoppel arose and bound plaintiff because the agreement was made for the benefit of the rancho; the plaintiff was present while the well was being bored, and knew that Alemany had agreed to convey the land to defendant in consideration of his boring it; that at the time a partition was made between plaintiff and Alemany, by which the specific tract conveyed to the defendant fell into the portion conveyed to plaintiff; plaintiff knew that this land had been conveyed by Alemany to defendant for boring the well, and that it purported to convey the whole title to this trust; and that plaintiff further knew that defendant was occupying this land, and had made valuable improvements on it, and made no objections to the agreement or the deed, or to the well, or the boring of it, and gave defendant no notice of any objection to the agreement or well or deed.

The above facts are found, on which this contention as to the estoppel is based. Before considering the effect of these facts as an estoppel, it is well to notice one matter injected into the findings as a fact which is clearly matter of law. It is stated in the finding, as is quoted above, that plaintiff knew that the deed of Alemany to defendant purported to convey the whole title to the tract. This cannot be said from any fact appearing in the findings, unless it be held to be law that one tenant in common can, by conveying a specific tract, convey the title of his co-tenant. The legal character of Alemany's deed to defendant has been considered above, and it is clear, both in reason and authority, that he conveyed no more than an undivided three-fifths of the tract in suit, and intended to convey no more. It follows from what has been above said that there can be no estoppel upon the facts found. Granted that plaintiff knew of the agreement, the well-boring, and the deed, that he was further cognizant of the facts of occupation by defendant, and making improvements, without making any objection, where is the estoppel? Plaintiff knew that Alemany had a right to contract and pay for a well on his own land with his own land, and to make a deed of it. He also knew that defendant had a right to the deed made by him, and to occupy and im-

prove the land. What right had plaintiff to make any objection to such acts of Alemany and defendant, and of what avail would such objection have been? The parties were only exercising each his own rights, which rights, so acted on and exercised, plaintiff also knew did not in the least affect or impair his rights. The failure of plaintiff to object did not affect defendant's rights. Defendant was not deceived in any way. He was permitted to exercise his rights without molestation by plaintiff. How anything like estoppel can be predicated of plaintiff's conduct does not appear.

We think it clearly follows that the plaintiff and defendant became tenants in common of the land in suit, (Stark v. Barrett, 15 Cal. 363,) the plaintiff's interest being two-fifths, and the defendant's three-fifths, thereof; and that plaintiff is entitled to recover his property, (Carpenter v. Webster, 27 Cal. 524,) unless a further contention of defendant can be maintained. This contention we proceed to consider. Bishop Amat became a corporation sole in 1870. He filed his articles of incorporation in the office of the county clerk of Monterey county in the year just named, and filed a certified copy of those articles so filed in Monterey county, in the office of the county clerk of the county of Santa Barbara, before this action was commenced. The original articles of incorporation were never filed in the county of Santa Barbara, nor has a copy of the copy of the articles of incorporation filed in the office of the secretary of state, certified by said secretary, ever been filed in the office of the county clerk of Santa Barbara county. The contention of defendant is that, as a certified copy of the copy of the articles of incorporation filed in the office of the secretary of state has never been filed in the county clerk's office of Santa Barbara county, plaintiff cannot maintain this action. As the legislation of this state stood in 1870, when the corporation plaintiff was formed, the filing of the articles of incorporation was only required to be made with the county clerk of the county where the church or other religious society or association was situated. See St. 1850, p. 374, § 177; St. 1854, p. 53, § 2, amending section 184 of act of 1850. In 1853 an act was passed providing for the formation of manufacturing, mining, and trading corporations, and by this act it was provided that the certificate of incorporation (articles of incorporation) should be filed in the office of the county clerk, etc., and a duplicate of the same filed in the office of the secretary of state. St. 1853, p. 37, § 2. Religious corporations were not referred to in this act, and it had no application to them. Such corporations were not affected by this act. The law as to them remained unchanged. Has the law as to such corporations ever been changed? It is said that it has by the provisions of the Civil Code, and we are referred to section 299 of that Code. It is clear, on a perusal of the section referred to, (299, Civil Code,) that it refers only to corporations whose articles had

been required by the statute to be filed with the secretary of state. This is so evident from reading the section that it is needless to further elaborate the question. The law at no time required such corporation as is involved in this case, formed previous to the Code, to file its articles of incorporation, or a copy or duplicate thereof, in the secretary of state's office. As to such a corporation, formed since the Code went into effect, we say nothing. We are fully convinced that the contention of defendant under discussion cannot be maintained, and that the court below erred in rendering judgment for defendant on its finding of facts.

We remark, further, in relation to the partition of the rancho by Amat and Alemany, that, conceding the defendant had an equity to have the tract conveyed to him by Alemany set apart to him on a partition of the rancho, such equity may still exist and be enforced in an action for a partition. This equity, if it exists, entitles the defendant to have his interest set apart out of the share of Alemany. The partition made, certainly does not affect defendant, as he was no party to it. As the facts appear in this case, defendant can have no right to have his interest taken from the share of Mora.

The judgment is reversed, and cause remanded, with directions to the court below to enter judgment for plaintiff for his undivided two-fifths interest in the tract in controversy. So ordered.

We concur: SHARPSTEIN, J.; McFARLAND, J.

83 Cal. 126

FULWEILER v. HOG'S BACK C. M. CO. (No. 13,190.)

(Supreme Court of California. Feb. 7, 1890.)

JUDGMENT BY DEFAULT—EXCUSE.

Defendant's attorney, who did not reside in the county where the action was begun, started for the place of trial, to serve and file certain papers, and to arrange for motions and proceedings in the cause, on the last day for filing and serving papers. He had previously informed himself, both by inquiry and time-tables, of the departure of a train which would have carried him to his destination in ample time; but, on learning for the first time at the station that the train had been discontinued, he took the next freight train, and telegraphed plaintiff's attorney to detain the clerk of court. He arrived at 6:30 P. M., and unsuccessfully sought for the clerk at his residence, office, and at the places where he was most likely to be found. Plaintiff's attorney was confined to his house by illness, and the judge lived a mile out of town. It was 9:30 P. M. when the attorney finished his search, the night was dark and rainy and he was exhausted and sick. *Held*, that a default should be set aside.

Commissioners' decision. Department 1. Appeal from superior court, Placer county, B. F. MYRES, Judge.

Blanchard & Swisler and *Wallace & Prewett*, for appellant. *J. M. Fulweiler* and *E. L. Craig*, for respondent.

HAYNE, C. This is an appeal by defendant from orders refusing to set aside a default.

The defendant's first motion to set aside the default was denied. Leave was subsequently granted to renew the motion, and the motion was renewed upon additional affidavits, but was again denied. There was made also a motion to change the place of trial, but the counsel for the appellant states in his brief that this motion was abandoned; and the appeal is taken only from the orders refusing to set aside the default.

We think that the default should have been set aside. The action was commenced at Auburn, in the county of Placer, where the plaintiff's attorney resided. On January 7, 1889, service was made in Placer county upon the president of the defendant, which had its principal place of business in El Dorado county, where its officers resided. Within three days after service the defendant retained the firm of Blanchard & Swisler, who had their office in Placerville, El Dorado county, as its attorneys for the defense of the action. They prepared a demurrer to the complaint, and moving papers upon an application to change the venue; and on January 17th, which was the last day for the filing and service of said papers, Mr. Blanchard went to Auburn for the purpose of serving and filing them, "and arranging for the motions and proceedings in said cause." The first misfortune which befell the attorney was that he mistook the connection of the trains. He was informed at Placerville, "both upon inquiry and by the time-tables, etc., of the railroad company," that a train left Sacramento at 1:05 P. M., and arrived at Auburn at 3:30 P. M. of the same day, which would have given him ample time to have attended to the filing and service of the papers; and, knowing that he could get to Sacramento in time to connect with such a train, he proceeded to do so. Upon arriving there, however, he learned for the first time that the train mentioned had been discontinued three days previously. He took the next train from Sacramento to Auburn, which was a freight train, and was due at the latter place at 6:15 P. M. From one of the way stations he telegraphed to the plaintiff's attorney that he was on the freight train, and requested him to detain the clerk of the court. In compliance with this telegram the plaintiff's attorney sent word to the clerk, who promised "to be around either at his office or at his residence, so as to meet and accommodate Mr. Blanchard, up to 7 o'clock P. M. of that day." The freight train arrived at 6:30 P. M. According to the affidavit of Mr. Blanchard, "it was dark and raining at the time, but, that there might be no delay, he procured a lantern, umbrella, and the services of one Graham, and at once, through the mud and rain," went first to the residence of the clerk and then to his office, and then to the places about town where he was informed that the clerk was likely to be; but he did not succeed in finding him. He then inquired for the residence of the judge in order to get an order extending the time to plead, but

was informed that the judge resided "about one mile away from said lower town, and had not been in town since about 5 P. M." He was also informed that the plaintiff's attorney "had been violently kicked by a horse, and was unable to be out of his house." The affidavit of Blanchard further states that "by the time he had completed his searches for said clerk, judge, etc., it was 9:30 o'clock P. M. of said 17th of January, and very dark, and raining all the time;" that he was a stranger to the place; and that "after the search aforesaid he was exhausted and sick;" and that "when he gave up said search at about 9:30 P. M. on said 17th he really did not consider it decorous or proper for him to make any further exertion to save a default, but honestly, and in good faith, thought he was excusable for the default." At 8:30 or 9 o'clock of the next day the papers were served and filed, but the default was entered before 8 o'clock, at the request of the plaintiff's attorney.

The foregoing facts appear without substantial conflict. The respondent's affidavits show, among other things, that the defendant's attorney was mistaken as to some of the hours which he gives; that the clerk remained at his residence until 7 P. M., and that it was after that hour that the attorney called there. But we do not consider this material. There is nothing in the respondent's position that there was no necessity for the appellant's attorney to go in person to Auburn, and that the papers could have been sent by mail. Going in person showed extra caution; and, in addition to this, the attorney wished to arrange for the hearing of the motions, etc. It was quite proper for him to go in person. Nor can he be charged with imprudence in not taking the stage between Placerville and Auburn. It does not appear wherein the stage route was preferable to the railroad. But, assuming that it was preferable, the railroad was good enough for the purpose, if the usual train had been running, and the attorney had reasonable ground to believe that it was running. He was informed on inquiry that there was such a train, and the railroad time-tables assured him of the fact; and the discontinuance of the train within three days was a thing which may well have taken a prudent man by surprise, notwithstanding the fact that the change was published in certain newspapers. It was an accident against which ordinary prudence did not guard. After this accident the attorney seems to have used reasonable endeavor to avert the consequences. It may be conceded that after he arrived at Auburn it would have been better to have gone at once to find the judge of the court or the plaintiff's attorney instead of looking for the clerk. But the evidence seems to us to show an honest and faithful effort to comply with the law, and, although such effort was not as well directed as it might have been, we think that when the attorney, tired, cold, and sick, gave up his search in a strange

town, at 9:30 o'clock on a dark and rainy night, he had done enough to entitle him to relief under the wise and liberal rule which recognizes that there may be cases of neglect which are excusable. The sworn answer was a sufficient showing of merit. We therefore advise that the orders refusing to set aside the default be reversed, with directions to the trial court to permit the answer to be filed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order refusing to set aside the default is reversed, with directions to the trial court to permit the answer to be filed.

(32 Cal. 607)

PEOPLE v. NAYLOR. (No. 20,569.)

(Supreme Court of California. Jan. 27, 1890.)

PERJURY—INFORMATION—INSOLVENCY—FALSE IN-
VENTORY.

1. An information from which it appears that an insolvent is charged with committing perjury in this: that as part of his assignment he made an inventory in compliance with Civil Code Cal. § 3461, which requires the inventory to show all the insolvent's creditors; that the insolvent collusively and willfully omitted one of his creditors therefrom; and that he then made an affidavit, in compliance with section 3462, that the inventory was "just and true," well knowing that what he swore to was false and corrupt,—is sufficient to give the insolvent to understand that he is charged with

willfully, corruptly, and falsely swearing to a matter material in the assignment proceedings.

2. Under Pen. Code Cal. § 123, which provides that in a prosecution for perjury it is sufficient to show that the false statement might have been used to affect the proceeding in which it was made, an information for perjury which charges that an agreement was entered into between an insolvent and one of his creditors in pursuance of which the creditor's name was omitted from the insolvent's inventory, to which the insolvent afterwards swore as "just and true," is good.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Hunsaker & Britt and George A. Johnson, Atty. Gen., for the People. Luce, McDonald & Torrance and Geo. W. Hardacre, for respondent.

FOOTE, C. The defendant was accused by an information of perjury. A demurrer was interposed on the ground that the information did not substantially conform to sections 950-952 of the Penal Code; that it did not state facts sufficient to constitute a public offense. The demurrer was sustained and from the judgment rendered the people appeal.

The sections of the Code with which it is alleged the information does not comply contain a few plain rules tending to simplify the method of charging offenses by information or indictment. The information in question, taking it in its entirety, seems to charge that the defendant has committed perjury by corruptly and collusively, through an agreement with a certain creditor named Foss, omitting such creditor from the inventory which the law required him to make as a part of his assignment as an insolvent, under title 3, pt. 2, div. 4, of the Civil Code, which inventory was filed in the proper public office, and sworn to by affidavit, in due form, before the proper officer, which was attached to the inventory, and filed with it, and which affidavit was false in that the defendant swore in it that his inventory was "just and true" when he well knew it to be false and corrupt.

The law required that all creditors of the insolvent should be shown by the inventory, and that the oath that it was "true and correct" should be taken, annexed to, and filed with the inventory. If, then, such an inventory was prepared, which purported to show all the defendant's creditors, and it was sworn to as "just and true," annexed, and filed as required, and a collusive agreement had been entered into by which the creditor was omitted from the inventory, and the oath was false, it would appear that the defendant was charged properly with perjury, if it was further charged that the false oath was as to a material matter. It is charged that the matter falsely sworn to was material; but the defendant claims that the fact that Foss was a creditor, and was omitted from the inventory by his consent, would render the omission immaterial; that Foss could not profit by it as against other creditors; and that they would not suffer by reason of such omission.

It may be remarked, in passing, that this kind of argument admits that the information shows that there were other creditors named in the inventory; and this nullifies the defendant's contention, viz., that it does not appear from the information that he is charged with having made such an inventory as purported to show all his creditors, as the law requires, because from the information it does not appear that he had any other creditor than Foss. But conceding, without deciding, that the matter about which the false oath was taken is not alleged in the information as in itself alone material to affect the proceeding, yet it does appear in the pleading that it might affect such proceeding, because, if a creditor collude with the insolvent to have his name omitted from the inventory as a creditor, it would probably appear upon the trial that he did so because the debtor was concealing some of his property, which this creditor was aware of, and the agreement to omit might be shown to carry with it, and include, a promise to pay the creditor in full if he would permit the assignment as to other creditors to become effectual and the debtor released by paying them a part only of their debts; or the taking of any other such unjust advantage, might be shown to be in contemplation, the unfairness and fraud of which would defeat the assignment. In this point of view, the allegation is sufficient to be within the provisions of section 123 of the Penal Code.

In all necessary respects, we think there can be no doubt but that the information is sufficiently full in its allegations. It does not appear from it that it is not within the power of the defendant easily to understand and appreciate that he is accused of perjury, in this: that he filed an inventory which purported to comply in all respects with a certain law, (Civil Code, § 3461,) which law requires, among other things, that the inventory shall show all his creditors; that such showing in the inventory omitted therefrom a creditor, one Foss; that this omission was willfully and collusively done; that the defendant then filed the inventory containing this false statement in the proper public office, with an affidavit attached, in which he swore that the inventory was "just and true," (Id. § 3462,) well knowing that what he swore to was false and corrupt. This, we think, was amply sufficient to make him know and understand that he was charged with willfully, corruptly, and falsely swearing to a matter which was material in the proceedings of his assignment as an insolvent. We think the information was sufficient, and advise that the judgment be reversed.

We concur: GIBSON, C.; VAN CLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

(82 Cal. 183)

In re WILLIAMS. (No. 20,631.)

(Supreme Court of California. Dec. 26, 1889.)

BAIL—AMOUNT.

1. The discretion of the trial court in fixing the amount of bail will not be interfered with by the supreme court unless it appear *per se* that the amount is disproportionate to the offense.

2. Forgery, being a felony punishable by imprisonment at from 1 to 14 years, in California, \$8,000 bail for one who has been indicted for that crime will not be deemed disproportionate to the offense, as the determination of the amount does not depend alone on the sum of money involved, but rather on the turpitude of the crime, its dangerous nature to the public, and the punishment imposed.

On *habeas corpus*.

Carrol Cook, for petitioner. *James D. Page*, for respondent.

Fox, J. The return to the writ in this case shows that the petitioner is held on a bench warrant regularly issued out of the superior court of the city and county of San Francisco, upon an indictment found by the grand jury, charging him with the crime of forgery, a felony punishable by imprisonment in the state-prison not less than 1 nor more than 14 years, and upon which warrant an order has been regularly indorsed, admitting the prisoner to bail in the sum of \$8,000. The application is in form to be admitted to bail, but upon the hearing the party asks for a reduction of bail.

This court, or its justices, will not interfere with the discretion exercised by the court in which the indictment is found, in the matter of fixing the amount of bail, unless it shall appear *per se* that the amount fixed is unreasonably great, and clearly disproportionate to the offense involved. *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Cal. 410, 54 Cal. 75.

The determination of what is disproportionate to the offense involved does not depend alone upon the amount of money which may have been lost to one party, or secured to another, by means of the offense; but it depends rather upon the moral turpitude of the crime, the danger resulting to the public from the commission of such offenses, and the punishment imposed or authorized by law therefor. I cannot say that in this case there has been any abuse of discretion, or that the amount already fixed is disproportionate to the offense involved. The writ is discharged, and the prisoner remanded.

(82 Cal. 474)

SCHURTZ v. ROMER et al. (No. 13,312.)

(Supreme Court of California. Jan. 6, 1890.)

PARTNERSHIP—SALE OF INTEREST.

1. One who agrees to buy the interest of a partner in a firm business, and also the partner's interest in the leased premises occupied by the firm, is not discharged from paying the agreed purchase price by the fact that the extent of the interest which the purchaser will take under the executed bill of sale is uncertain.

2. The fact that the partnership property, at the time of the sale, was in the hands of a receiver, pending an accounting between the partners, does

not prevent one of them from selling his interest, with the consent of the other.

3. The delivery to the purchaser of the keys to the partnership premises, together with a notification by both partners to the receiver that the dispute between them had been settled, and a direction to him to turn over the property to the purchaser, followed in due time by an order of court discharging the receiver, is a "delivery" within the meaning of Civil Code Cal. § 1784, which provides that "a buyer must pay the price of the thing sold on its delivery."

Department 1. Appeal from superior court, Los Angeles county; *WILLIAM P. WADE*, Judge.

Gage & Roberts, for appellant. *Wells, Guthrie & Lee*, for respondent.

Fox, J. The action is *indebitatus assumpsit*, by the plaintiff, Schurtz, against the defendants, Romer and Kerkow. Judgment for plaintiff, motion for a new trial denied, and this appeal is taken by the defendant Romer from the judgment, and the order denying the motion for a new trial. On a separate appeal taken by the defendant Kerkow, (case No. 13,311. 22 Pac. Rep. 657,) this court held that the findings were sufficient to sustain the judgment. As to the defendant Romer there was a cross-complaint, asking for affirmative relief, to which there was an answer, raising issues not directly raised under the answer of Kerkow. But as to those issues the court has also fully found, and we are still of opinion that upon all the issues the findings are sufficient to support the judgment. The case will therefore be considered upon the question of whether the evidence supports the findings, and upon the assignment of errors of law. The facts in the case, briefly stated, are these: The plaintiff, Schurtz, and the defendant Kerkow were partners, carrying on a saloon and restaurant business at Los Angeles, known as the "Vienna Bouffet," under the firm name of Kerkow & Schurtz. The partners fell out, and a suit was brought by Kerkow against Schurtz, for a dissolution of the partnership, in which a receiver was appointed to take charge of the business and property of the partnership pending the litigation. While the receiver was in charge, the defendant Romer opened negotiations, with the approval of Kerkow, to buy out the interest of Schurtz. This negotiation was carried on through a third party, Romer not allowing himself to be publicly known in the matter until about the time of its consummation. It culminated in a parol agreement, or rather in a proposition, to buy the Schurtz interest at the price of \$4,000 cash, and to assume the payment of one-half the debts of the old firm, they being estimated at and not to exceed the sum of \$5,000. It does not appear, and the court does not find, that there was any representation or guaranty that the debts of the concern did not exceed that amount, but that was the limit of the amount for which Romer was to assume the payment of one-half. Negotiations having reached this point, the parties all met to prepare the necessary papers and complete the transaction. A bill of sale

was prepared in writing, in form running from Schurtz to Romer, but a question arose as to the liability for the other half of the indebtedness, and, as a result of the conversation then had with all the parties, the counsel of Schurtz and Kerkow, and the active agent of Romer present and participating, the paper was changed and made to read, and was executed by all three of the parties, as follows:

"Los Angeles, May 12, 1888. For and in consideration of four thousand dollars, and the assumption of the liabilities of the indebtedness of the firm of Kerkow & Schurtz to the sum not exceeding five thousand dollars, I hereby sell, transfer, and assign unto Max Romer and F. Kerkow all my right, title, and interest in and to my interest in the firm of Kerkow & Schurtz and the business conducted by them known as the 'Vienna Bouffet,' and situate at the corner of Main and Requena streets, city of Los Angeles. And I agree to assign to said Romer and Kerkow my right and interest in and to the lease of above premises, and hereby do assign the same. The schedule of liabilities of Kerkow & Schurtz hereunto attached is the basis of said settlement, and is regarded as nearly correct in the absence of the books and better evidence.

"JOSEPH SCHURTZ. [Seal.]
 "MAX ROMER. [Seal.]
 "F. KERKOW. [Seal.]"

To this instrument was attached a schedule of liabilities, amounting to the sum of \$5,248. Romer informed Schurtz at the time that his money was in Chicago, and that he would have to wait for it about 12 days, as it would take about that time to send for it and get returns; but he paid Schurtz \$100 on account, and thereupon the parties all repaired to the Vienna Bouffet, where the receiver was in charge with a constable, also claiming to be in possession under a writ of attachment. The constable was given security for his money, and departed. Counsel on both sides in the suit of Kerkow against Schurtz then informed the receiver that the matter had been settled by a sale of Schurtz's interest to Romer, settled with him as to the measure of his compensation, and directed him to surrender the possession to Romer, which was done, and in due time thereafter the receiver was discharged by order of court. The keys were given up to Romer, and, after a little time spent in drinking and congratulations, Romer handed the keys to Kerkow, it then being late at night, and the parties departed, Romer having been first introduced to the employes about the place as the new proprietor. This was late on Saturday night. On Monday, it seems, some one had told Romer that under his bill of sale he got only a one-fourth interest in the business, and thereupon he refused, and has ever since refused, to pay the balance of the purchase price, and it is for the recovery of such balance, with interest, that this action is brought.

These are substantially the facts as shown

by the pleadings and evidence, and found by the court. It may be that there is an ambiguity as to the extent of the interest which Romer will take under this paper, but it is not sought to reform the instrument, or to determine the question of the extent of such interest in this action. It will be time enough to consider that question when such a question arises, if ever, between Romer and Kerkow. There is no ambiguity as to the fact that Schurtz sold his interest for the sum of \$4,000, and no dispute that only \$100 of that sum has been paid. We think there can be no doubt that under the instrument Romer became liable for that balance, whether severally or jointly and severally with Kerkow makes no difference on this appeal. The written instrument supersedes all antecedent negotiations, and by it, rather than any conversations which preceded it, the parties are bound. Civil Code, § 1625. The evidence of the appellant conflicts somewhat with that of the other witnesses as to what occurred at the time of the delivery of possession, but we have read the entire evidence with care, and we cannot say that there is not evidence to support every finding made by the court.

It is true, as claimed by appellant, that the property was at the time in the hands of a receiver; but it was so pending an accounting between Kerkow and Schurtz, and that fact did not prevent one of the parties, with the consent of the other, from selling his interest to a third party; nor did it prevent the receiver from restoring it to the parties in interest, or to such third person as they should direct, upon a settlement of their dispute, especially when, as appears in this case, his act in so doing was subsequently approved by the court, and he was regularly discharged from further service in that behalf. Even if he had retained possession, the interest of Schurtz in the property was one which he had full power and right to sell, and a sale so made by him would not be void, as claimed by appellant. *Noonan v. McNab*, 30 Wis. 280; *Noonan v. Orton*, 31 Wis. 280. It is true that in both those cases a question arose as to the right to make such a sale, under the peculiar stipulations of the contract of partnership, but the court held that whatever the stipulations in the contract were, upon the appointment of a receiver, pending an accounting, as in this case, one of the partners had such a residuary interest as that he was then at liberty to sell the same, and the sale would be valid and binding.

It is also true, as claimed by appellant, that the purchaser was not bound to pay until delivery of possession, (Civil Code, § 1784;)¹ but the court finds that possession was delivered on the 12th day of May, and there is evidence to support that finding. Under the facts of this case, section 1753, Civil Code, cited by appellant, has no application.

¹ Civil Code Cal. § 1784, provides. "A buyer must pay the price of the thing sold on its delivery."

The court did not err in overruling the objections taken by the appellant to the examination of the witness Gottschalk. The objection was too general to avail the defendant. Besides, if there was any merit in the objection intended to be taken, the force of the objection was afterwards destroyed by the defendant himself, who twice testified while on the stand that Gottschalk was not his attorney in that matter.

We have examined each of the other specifications of errors of law made by appellant, although put to much unnecessary labor in doing so, by reason of the absence of a proper index to the testimony and exceptions, and fail to find that in any instance the court erred in its rulings. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

82 Cal. 628

SAYWARD v. HOUGHTON *et al.* (No. 13,310.)

(Supreme Court of California. Jan. 27, 1890.)

CHANGE OF VENUE—PARTIES—CORPORATIONS—TRANSFER OF SHARES.

In an action to compel a shareholder in a corporation to transfer his shares in fulfillment of an alleged agreement, the corporation, though not improperly made a defendant, is not a necessary party; and, it never having manifested any interest in the case, the shareholder is entitled to a change of venue to the county in which he resides.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Curtis & Otis and Estee, Wilson & McCutcheon, for appellant. *Kellogg & King*, for respondent.

SHARPSTEIN, J. Plaintiff appeals from an order granting defendant Houghton's motion for change of place of trial from the county of San Bernardino to San Francisco, where defendant Houghton resides. If Houghton had been the sole defendant, his right to have the place of trial changed would be undoubted. If the complaint states no cause of action against the corporation defendant, the right of Houghton to have the place of trial changed is not affected by making said corporation a defendant in the action. *Sewing-Machine Co. v. Cole*, 62 Cal. 311.

The *gravamen* of the complaint is the refusal of the defendant Houghton to transfer to plaintiff 3,000 shares of the stock of the corporation defendant, in the fulfillment of an alleged agreement to do so. The relief demanded is that said defendant Houghton be required to transfer said shares of stock, and to account for, and pay over to plaintiff, the dividends received thereon, and, incidentally, that defendants, and each of them, their attorneys, servants, and employes, be perpetually enjoined and restrained from selling, transferring, or permitting to be transferred, any of the said 3,000 shares of said capital stock of said corporation defendant. There

is nothing in the complaint showing, or tending to show, that the corporation defendant is in any sense interested in this action. So far as can be seen from reading the allegations of the complaint, the attitude of the defendant corporation towards its co-defendant Houghton and the plaintiff is one of absolute indifference. Quite as much so as any stockholder could be between conflicting claimants to a fund, in his hands, to which he had no claim himself. Not having any interest in the action which can be affected in any degree by the result of a trial, it makes no difference to the corporation defendant where the action is tried. Although not improperly made a party, the corporation defendant is not a party in interest; and it does not appear that it has ever manifested any interest in the case. We think the corporation defendant is not a necessary party to the action. The plaintiff might obtain all the relief he demands without making it a party. Order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

82 Cal. 611

YOUNGMAN v. TONNER. (No. 13,217.)

(Supreme Court of California. Jan. 27, 1890.)

OPENING DEFAULT JUDGMENT.

On motion to open a default, defendant's only excuse for his neglect was that one day after the time to answer had expired "he became suddenly and violently ill," and was forbidden by his physicians to do any business whatever, and that this condition continued until about four days after the default. He, however, showed no meritorious defense, except that he was advised by counsel that he had a "good and substantial defense, on the merits of the action, to the extent of \$450;" nor did he offer any explanation of his neglect to answer, or of his two-months delay in moving to have the default opened. *Held* that, as the court, on the showing made, had the right to deny his motion unconditionally, defendant could not complain of an order granting him leave to answer as to the \$450 on condition that he pay the balance of the judgment within 10 days.

Commissioners' decision, Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

J. R. Scott and F. D. Howard, for appellant. *Brousseau & Hatch*, for respondent.

VAN CLIEF, C. There was a judgment by default against the defendant upon a non-negotiable promissory note, the judgment being for \$1,894.07, rendered November 8, 1888. On December 27, 1888, the defendant gave notice that he would move the court on January 7, 1889, to set aside the default and judgment on the ground that his default was entered "through his mistake, inadvertence, surprise, and excusable neglect." The motion was heard on the affidavit of the defendant, and the affidavit of one of the attorneys for the plaintiff. There was no showing by the defendant of any mistake, inadvertence, or surprise; and the only excuse offered for his neglect is that on the 7th day of November, 1888,—one day after

the expiration of the time allowed him by law in which to answer,—“he became suddenly and violently ill,” and was forbidden by his physicians to attend to any business whatever, and “that he remained under the care and instructions of his physicians until about four days after his default; * * * and at the time of the entry of said default, and one day prior thereto, defendant was confined to his bed, and so ill that he was unable to appear personally, or to instruct others to enter such appearance for him, in the above-entitled cause, and during all of said time defendant was unable to act or think intelligently on business matters.” He shows no meritorious defense except that, in the stereotyped form, he states that he is advised by his counsel, and verily believes, “that he has a good and substantial defense on the merits of the action to the extent of \$450,” but does not state the nature of such defense. He further states that one Mrs. Perly claims the ownership of the note in suit, or the money secured thereby, and that he had been informed by plaintiff that he (plaintiff) had assigned said note to Mrs. Perly. All this part of the affidavit relating to Mrs. Perly is disputed by the affidavit of plaintiff’s attorney, who deposes that he is also the attorney for Mrs. Perly, and that she does not claim the ownership of the note, nor the money thereby secured, and that the only interest she has is one undivided half of the judgment rendered by assignment from the plaintiff. Defendant was served with summons within the county in which the suit was brought, yet states no reason why he did not answer within 10 days after service. Nor does any reason appear why he delayed giving notice of his motion to open the default nearly two months after the judgment. Upon the hearing of the motion the court made the order appealed from, as follows: “Upon payment within ten days from this date, by the defendant to the plaintiff, of all the said judgment over and above the sum of \$450, that he be allowed to come in and answer and defend as to the said sum of \$450; otherwise, the judgment to stand in full force and effect.” Upon the showing made, I think the court would have been justified in denying the motion unconditionally. Granting the defendant the privilege of answering as to \$450, upon the condition that within 10 days he should pay the remainder of the judgment, which he did not dispute, may therefore be regarded rather as matter of grace than of right, from which it does not follow, as contended by appellant’s counsel, that the court must necessarily have found that the negligence of defendant was entirely excusable, and that he had a meritorious defense to a part of the judgment. Under the circumstances, the terms upon which the court ordered the default to be opened cannot be said to be unjust, or to indicate an unwarrantable exercise of the discretionary power of the court; and I therefore think the order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(82 Cal. 617)

PEOPLE v. RYAN. (No. 20,555.)

(Supreme Court of California. Jan. 27, 1890.)

CRIMINAL LAW—WITHDRAWN PLEA OF GUILTY.

Under Pen. Code Cal. § 1018, which provides that “the court may, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and the plea of not guilty substituted,” a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against defendant.

Commissioners’ decision. Department 1. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Weed S. Chelf, for appellant. George A. Johnson, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of burglary in the first degree. From the judgment rendered against him, and an order denying a motion for a new trial, he has appealed. The error relied on to reverse the judgment and order is that the people were allowed, over the defendant’s objection, to introduce in evidence his plea of guilty in the same cause before the same court, after, by the permission of that court, his plea of guilty had been withdrawn, and he had been permitted to enter a plea of not guilty, according to the provisions of section 1018 of the Penal Code, which contains, among other things, this language: “The court may, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted.” The counsel for the people in his brief contends that the admission in evidence of the former plea of guilty stands upon the same rule of law as the admission of “confessions” of a defendant, and concludes in this language: “In this case there could have been no conviction without the confession,”—that is, the plea of guilty. The case stands thus, without the evidence of a withdrawn plea of guilty, for which, by authority of law and the court a plea of not guilty was “substituted,” the defendant could not have been legally proven or found guilty. Can it be that a privilege thus conceded to a defendant of substituting one plea for another is to have the inevitable effect of defeating the whole object of the “substituted” plea? We do not think that the legislature, in passing the law under which the defendant was allowed to nullify and render *functus officio* his plea of guilty, by substituting or putting in place of it a plea of not guilty, intended to say that, notwithstanding such substitution and doing away with the first plea, it may be given in evidence, and sometimes serve as the only conclusive proof of a man’s guilt under the plea of not guilty. Of what use, practically, would such a privilege to a defendant be, as that granted by section 1018 of the Penal Code, if its construction is to be such as that contended for by the re-

spondent? The counsel for the people says in his brief: "No cases are cited by appellant, and I have found none, where the question has arisen whether a plea of guilty withdrawn by permission of the court can be introduced in evidence. But on principle I see no reason why it cannot be, if shown to be voluntary." It is perfectly true that no such case can be found, but we cannot agree that, upon principle, where a plea is withdrawn and another legally substituted therefor the one withdrawn can be introduced in evidence to nullify any defense under the last plea, which would be the practical result, in this case, of such a doctrine. For these reasons we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

82 Cal. 640

BRANT v. PHILLIPPI *et al.* (No. 12,777.)

(Supreme Court of California. Jan. 27, 1890.)

EJECTMENT—RIGHT OF POSSESSION—LEASE.

Where plaintiff in ejectment leased the premises before the action was brought, and, when defendants were found in possession, authorized the lessee to sue in plaintiff's name, it will be presumed that the lease was abandoned by mutual consent, and it cannot be urged as a defense that plaintiff was not entitled to possession.

Commissioners' decision. In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. W. Mahon and C. C. Cogwill, for appellants. Allen & Miller, (B. Brundage, of counsel,) for respondent.

VAN CLIEF, C. Ejectment for a section of land in Kern county. Defense that, although plaintiff was the owner of the land in fee, he was not entitled to the possession at the time of the commencement of this action, (February 10, 1888,) for the reason that he had leased the land some two weeks before to Tyler & Bro. for the term of one year. It appears that plaintiff, who was a non-resident of this state, executed a lease of the land to Tyler & Bro. on January 26, 1888, for the term of one year, but never gave them possession under the lease. When they went to take possession they found the land occupied by the defendants, who claimed to hold it under a lease from plaintiff, through the agency of one W. T. Oden; but it appears that Oden had no authority from plaintiff to lease the land. Defendants refused to let Tyler & Bro. into possession, and thereupon the plaintiff authorized Tyler & Bro. to commence an action for him and in his name against the defendants to recover the possession. In pursuance of this authority this action was commenced and prosecuted through the agency of Tyler & Bro.

From the foregoing facts it is fairly inferable that Tyler & Bro. waived their rights under the lease, and that the lease was aban-

doned by mutual consent of the parties thereto. Camarillo v. Fenlon, 49 Cal. 207; Skaggs v. Emerson, 50 Cal. 6; Dengler v. Michelsen, 76 Cal. 125, 18 Pac. Rep. 138; Austin v. Mining Co., 72 Mo. 535; Gear, Landl. & Ten. §§ 163, 168. Tyler & Bro. were under no obligation to the plaintiff to sue the defendants for possession. It was the duty of the plaintiff to put his lessee in possession, and until he did so he could recover no rent. See authorities above cited. If Tyler & Bro. declined to sue, as they might, and apparently did, the plaintiff would not only have lost his rent for the term, but would have been deprived of the possession of his land until after the end of the term, unless he was entitled to bring this action. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 204

HEILBRON *et al.* v. CAMPBELL, Judge.

(No. 13,478.)

(Supreme Court of California. Dec. 28, 1889.)

JUDGE—DISQUALIFICATION.

Under Code Civil Proc. Cal. § 170, disqualifying judges to act who are interested in the controversy, where three parties are adversely claiming to be the owners of a certain tract of land, one of whom is the judge, and the other two adverse litigants before him, asking him to determine which of them is the owner of the land which he claims to own, and to appoint a receiver for said land, a writ of prohibition will issue to prevent him from acting further in said cause.

In bank.

S. C. Denson, Geo. R. B. Hayes, and A. L. Hart, for petitioners. Garber, Boalt & Bishop, (Craig & Meredith, of counsel,) for respondent.

WORKS, J. This is an application by the petitioners against the respondent, as judge of the superior court of the county of Fresno, to prevent him from proceeding further in an action pending in said court, in which Charlotte F. Clarke *et al.* are plaintiffs and the petitioners are defendants. The petition shows, in substance, that in 1880 an agreement was entered into by and between the petitioners and one Jeremiah Clarke by which the petitioners leased from said Clarke, for a term of years, a certain tract of land in said county of Fresno, being a part of what was known as the "Laguna de Tache Rancho," and in which agreement it was provided that the petitioners should have the option, during said lease, to purchase said property at the price and on the terms therein named; that the petitioners took possession of said property under said lease and contract, and complied with all its terms and conditions; that the said Charlotte F. Clarke, who was the wife of Jeremiah Clarke, made application for and procured letters of guardianship over

the property of her said husband on the ground of his unsoundness of mind, and before the expiration of said lease, and before the time given the petitioners by said lease and contract to exercise their option to purchase said property, she, as such guardian, brought an action in said court to set aside said contract on the ground that said Clarke was at the time he executed the same of unsound mind; that said cause was tried before the respondent as judge of said court, and findings and judgment rendered in favor of the plaintiff, and a motion for a new trial has been made, and is pending before the respondent; that a motion has also been made by said plaintiff for the appointment of a receiver to take charge of said property, which is also pending. As a reason why the respondent should be prohibited from acting further in said cause, it is alleged that during the pendency thereof before him he purchased a certificate of purchase for a certain tract of land, consisting of 257 acres, which is a part of the land included in said lease and contract, and of which the petitioners took and held possession thereunder, and a part of the land claimed by each of the parties in said action and in controversy between them, and that the respondent still holds and owns said certificate, and claims to own said property. There are also other allegations, not necessary for us to notice particularly. The respondent demurs to the petition, and also answers the same. In his answer he denies that the land purchased and claimed by him is a part of said ranch, but he does not deny that the parties to said action are claiming it to be a part thereof, or that the petitioners are in possession of it, claiming it to be within their contract, or that it is in controversy between the parties in said action.

So, putting the matter in the most favorable light for the respondent, we have a case in which three parties are adversely claiming to be the owners of a certain tract of land, one of whom is a judge of the court, and the other two adverse litigants before him, asking him, by his judgment, to determine which of them is the owner of the land which he claims to own. Not only so, but he is asked to appoint a receiver to take possession of land which he claims to own, and account to him for its management. He is called upon by the application for a receiver, or may be, to determine what lands shall go into the hands of such receiver. As he claims a part of the land, and asserts that it is not within the larger tract in dispute, the temptation to exclude it in making his order will at once arise; and, if his land is to go into the hands of a receiver, it must be of some interest to him who shall become such receiver, and take charge of and manage the land. It seems to us that neither argument nor authority is necessary to show that a judge should be prohibited from sitting in a cause under such circumstances; but we cite Code Civil Proc. § 170; *Mining Co. v. Keyser*, 58 Cal. 315; *Stockwell v. Board*, 22 Mich. 341; *Hall v.*

Thayer, 105 Mass. 219; *Cottle's Appeal*, 5 Pick. 482; *Sigourney v. Sibley*, 21 Pick. 101; *Coffin v. Cottle*, 9 Pick. 287; *Gay v. Minot*, 3 Cush. 352; *Moses v. Julian*, 45 N. H. 52; *Oakley v. Aspinwall*, 3 N. Y. 547.

It is contended that our statute only disqualifies a judge where he has a direct interest in the result of the suit, and that, as in this case a judgment for or against either of the parties, determining the controversy between them, could not bind the judge, or affect his title to the land claimed by him, he was not disqualified. But we cannot give the statute this narrow construction. It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality; and to this end he should decline to sit, or, if he does not, should be prohibited from sitting, in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other. We have shown how a judge might, and probably would, be influenced to act in the appointment of a receiver. In the decision of the action on its merits, the temptation to decide in favor of one party or the other might be equally strong. It might become very important to him to have the land go to one of the claimants rather than the other. One might be friendly to him, and his claim, and the other not. With one a compromise might be easy, and with the other difficult. One might be much more inclined, and more able, pecuniarily or otherwise, than the other, to litigate his claim against him. And, aside from what might influence the judge under such circumstances, it appears to us to be unseemly for a judge to sit in an action involving the title, as between the litigants, to a subject-matter of which he claims to be the sole owner, and must in the end litigate as between himself and the litigant who succeeds to the property by his judgment.

The question whether the taking of testimony was necessary was discussed at the argument. The view we have taken of the issues renders this unnecessary. Let the writ issue prohibiting the respondent, Campbell, from acting further in said cause.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.

3 Cal. Unrep. 202

LABISH v. HARDY. (No. 12,479.)

Supreme Court of California. Dec. 27, 1889.)

HUSBAND AND WIFE—COMMUNITY PROPERTY.

1. A husband and wife occupied a tract of land belonging to the United States from 1847 until 1856, when the wife died. The husband continued to occupy the land until 1871, when he received a deed to it from the town of Santa Cruz under Act Cong. July 23, 1866. *Held*, that the occupation by the husband and wife during her life did not operate to render the land community property, or vest the wife with any ownership whatever. Following *Labish v. Hardy*, 19 Pac. Rep. 531.

2. In an action by a daughter of the first marriage against a second wife, to whom the land had been deeded, to recover the interest claimed by plaintiff as heir of her deceased mother, the deed

will not be vacated on the ground that it was a gift, and the husband was indebted to plaintiff, and did not leave sufficient property to pay her.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Action by Isabella Labish against Jane Hardy to set aside a deed and quiet title to certain premises in the city of Santa Cruz. In 1847, plaintiff's parents went into possession of the land in dispute, which was then public land of the United States, and continued to occupy it, together with their children, as their home, until the death of plaintiff's mother, which occurred in June, 1856, at which time plaintiff was seven years old. After the death of plaintiff's mother, the father of plaintiff continued to occupy said premises as his home until his death, in 1883. In June, 1860, plaintiff's father married the defendant. In May, 1871, plaintiff's father took a deed for the premises from the corporate authorities of the town of Santa Cruz, under the act of congress approved July 23, 1866, entitled "An act to quiet title to certain lands within the corporate limits of the city of Benicia and the town of Santa Cruz;" said premises then being within the corporate limits of the town of Santa Cruz and public lands of the United States. On August 8, 1881, plaintiff's father made a deed of gift of the premises to the defendant. This deed was recorded, but is alleged not to have been properly acknowledged when this action was commenced. At the time this deed was made, the premises constituted all the property of plaintiff's father, and he never afterwards acquired any property. The defendant claims the premises under this deed. This action was commenced August 7, 1885. Plaintiff alleged that before that time she acquired and then owned any interest in said premises that might have descended from her mother; that after his first marriage W. H. Hardy received property and money in trust for the plaintiff upon the understanding and express promise on his part to invest and pay over the proceeds thereof to the children of his first wife, plaintiff being one of those children; that this trust was never repudiated by him, but was never carried out, and that at the time of his death he owed several hundred dollars to plaintiff on account of said trust property; that plaintiff did not know of the deed of gift to defendant until after her father's death, and did not know until then that her father had not left sufficient property to pay her demand, exclusive of said real property. These and other pertinent facts were set up in the complaint and amended complaint. The defendant demurred, and the demurrer was sustained. The plaintiff declining to further amend, judgment of dismissal was entered; and plaintiff appeals from such judgment.

W. D. Storey, for appellant. Henry P. Rowie, for respondent.

PER CURIAM. We have examined the rec-

ord in this case, and find no error in it. The case is determined by *Labish v. Hardy*, 77 Cal. 327, 19 Pac. Rep. 531. Judgment affirmed.

(32 Cal. 273)

In re NEUSTADT. (No. 20,602.)

(Supreme Court of California. Dec. 30, 1889.)

FALSE PRETENSES—PUNISHMENT—JURISDICTION.

1. Pen. Code Cal. § 1205, providing that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine," does not apply to a conviction for obtaining money by false pretenses, under section 532, which prescribes as a penalty "imprisonment in the county jail not exceeding one year, and by a fine not exceeding three times the value of the money or property so obtained," as the legislature did not intend by this provision to make it possible to impose a penalty of life imprisonment for a misdemeanor.

2. The police judge's court has no jurisdiction of the offense of obtaining money by false pretenses, as the fine may exceed \$1,000.

BEATTY, C. J., and THORNTON, J., dissenting.

In bank. *Habeas corpus*.

This was an application for a writ of *habeas corpus* made by one Neustadt, who was convicted by the superior court of the city and county of San Francisco of obtaining money by false pretenses.

Carroll Cook, for petitioner. J. D. Page, Dist. Atty., for respondent.

PATERSON, J. The petitioner was convicted of obtaining money by false pretenses, and sentenced on March 31, 1888, to imprisonment in the county jail for the term of one year, to pay a fine of \$2,249, and, in default of payment thereof, to be imprisoned one day for every dollar remaining unpaid, the latter imprisonment to commence at the end of the one-year term of imprisonment first ordered. The penalty provided by section 532, Pen. Code, under which the petitioner was convicted, is "imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the money or property so obtained." The legislature did not intend, we think, by this provision, to make it possible to impose a penalty of life imprisonment for a misdemeanor such as the offense named in section 532, or any other. In *People v. Righetti*, 66 Cal. 184, 4 Pac. Rep. 1063, 1185, the court in department held that section 1205 of the Penal Code applies to cases of fine, whether the fine be coupled with a sentence of imprisonment, or whether the fine stand alone as the only punishment. The correctness of that decision may be doubted. The section provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine." An adherence to the letter of this section would make it inapplicable to cases in which the court imposed a term of imprisonment, and also a fine. We do not, however, intend to express

any opinion as to the correctness or incorrectness of the decision referred to. It is sufficient to say that, taking all the provisions of the Code together, it is manifest that the legislature did not intend section 1205 to apply to cases of this kind, where the amount of the fine is not left discretionary with the court, and where the extreme penalty which may be imposed is left uncertain and dependent upon evidence as to the value of the property taken. The Penal Code provides that "all provisions are to be construed according to the fair import of their terms, with a view to effect its object, and to promote justice." Section 4. Of course, the legislature has the power to provide for the collection of fines by imprisonment at a certain rate per day, in cases where a fixed term of imprisonment is also imposed, but in such cases it should clearly appear that such is the intent of the legislature.

The petitioner claims that the superior court had no jurisdiction of the offense with which he was charged, and that under the decision in *Green v. Superior Court*, 78 Cal. 556, 21 Pac. Rep. 307, 541, the judgment should be declared void for that reason. The case referred to is not in point. The offense named in section 532 is punishable by imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the property. A fine must in all cases be imposed; there is no alternative. It must be three times the value of the property. It may be more than \$1,000. The police judge's court, therefore, has not jurisdiction of this offense. As the petitioner has served more than the term of imprisonment prescribed by the statute, he is entitled to his discharge. It is ordered that the petitioner be discharged from custody.

We concur: FOX, J.; WORKS, J.; SHARPSTEIN, J.; McFARLAND, J.

We dissent: BEATTY, C. J.; THORNTON, J.

(82 Cal. 284)

HAYNE v. JUSTICE'S COURT. (No. 13,559.)

(Supreme Court of California. Dec. 31, 1889.)

INSOLVENCY—STAY OF OTHER PROCEEDINGS—WRIT OF PROHIBITION.

Code Civil Proc. Cal. p. 686, provides that "no creditor whose debt is provable under this [the insolvency] act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor or any creditor, * * * be stayed to await the determination of the court in insolvency on the question of discharge." An action was brought against the petitioner in the justice's court on a promissory note, and an attachment levied on his property, and he filed his petition in insolvency, and the property attached was released, and he filed his answer in the justice's court, setting up the insolvency proceedings; but plaintiff obtained, from the superior court in which the insolvency proceedings were pending, an order permitting the justice's court to proceed to judgment. *Held*, that a writ of prohibition would be granted.

In bank. Writ of prohibition to justice's court, Monterey county.

This is an application for a writ of prohibition by Hayne to prevent the justice's court of Monterey county proceeding to judgment in a cause pending before it.

Gell & Morehouse, for petitioner. *N. A. Dorn* and *W. M. R. Parker*, for respondent.

WORKS, J. This is an application for a writ of prohibition to prevent the respondent proceeding to trial and judgment in a cause pending before it. An action was brought against the petitioner in the justice's court on a promissory note, and an attachment was issued, and levied on his property. The petitioner filed his petition in insolvency, and the property attached was released. He filed his answer in the justice's court, setting up the insolvency proceedings; but the plaintiff applied to the superior court, in which the insolvency proceedings were pending, and procured an order from that court permitting the justice's court to proceed with the cause. The petitioner moved the justice's court to desist from further proceedings, but his motion was denied; and, the court being about to proceed to judgment, this writ was applied for.

Section 45 of the insolvency act (Code Civil Proc. p. 686) provides: "And no creditor whose debt is provable under this act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the debtor or any creditor, or of the assignee, be stayed to await the determination of the court in insolvency on the question of discharge." There are certain provisions in the section authorizing the continuation of proceedings in certain cases, but this case is not within any of them. This is a plain and direct prohibition against any further proceedings in the justice's court; and the petitioner, having brought himself within the statute, is entitled to the writ prayed for. The respondent does not contend that it has the right to proceed, but claims that in doing so it would not exceed its jurisdiction, but would only commit an error that could be reached by appeal. We cannot agree to this proposition. A court that proceeds in the trial of a cause against an express prohibition of a statute is exceeding its jurisdiction, and may be prevented by prohibition from this court. The case of *Bandy v. Ransom*, 54 Cal. 87, is not in point. At the time it was decided the insolvency act in force contained no prohibition against proceedings in other courts after the commencement of insolvency proceedings. The provision of the statute referred to is a salutary one, calculated to prevent the swallowing up of insolvent estates in unnecessary litigation, and should be enforced. Conceding that an appeal might have been taken, it was not an

adequate remedy. It would only add to the costs of litigation, the very thing that the statute was intended to prevent. Let the writ issue as prayed for.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.

Rehearing denied.

(82 Cal. 480)

LANDERS v. LANDERS *et al.* (No. 13,464.)

(Supreme Court of California. Jan. 8, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT.

1. Code Civil Proc. Cal. § 652, which provides that "if the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same," does not apply to a case where the trial judge has refused to settle a statement or bill of exceptions, but to a case where, in settling a bill, he refuses to allow an exception that ought to be allowed.

2. Though no rules on the subject have been prescribed by the supreme court, one who applies to it under this section should set forth in his petition fully and specifically the very exception which he presented to the trial judge, and which he avers the judge wrongfully refused to put in the bill, and also the evidence on which he bases the truth of his proposed exception, so that the supreme court can see on the face of his petition what his alleged grievance is.

In bank. Application to settle bill of exceptions in superior court, city and county of San Francisco; F. W. LAWLER, Judge.

T. I. Bergin, for plaintiff. D. L. Smoot, for defendants.

MCFARLAND, J. This cause is now before this court upon a petition of defendants, in which it is set forth that the judge of the superior court, in which the cause was pending, "refused to settle and certify" a bill of exceptions presented to him by petitioners; and they pray that this court "will settle, and have certified, the said bill of exceptions in accordance with the provisions of section 652 of the Code of Civil Procedure." Plaintiff demurs to the petition upon various grounds, which present the question whether or not it is sufficient.

Section 652 was not intended to apply, and does not apply, to the case where a trial judge has refused to settle a statement or bill of exceptions. The remedy for such a refusal, if wrongful, is *mandamus* to compel him to act. The law does not impose upon the appellate court the general duty of settling a bill of exceptions. Section 652 applies to a case where the trial judge, in settling a bill, refuses to allow an exception which ought to be allowed. The language is, "If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same,"—that is, to prove the exception which the judge is alleged to have refused to allow in accordance with the facts. The section further provides that "the application may be made in the mode and manner, and under such regulations, as that court may pre-

scribe." No regulations on the subject have been prescribed by this court, for rule 29 does not apply. But, in the absence of such regulations, the petitioner should set forth fully and specifically the very exception or exceptions which he presented to the judge, and which he avers the judge wrongfully refused to put into the bill, and also, we think, the evidence upon which he bases the truth of his proposed exceptions, so that this court can see on the face of the petition what his alleged grievance is. Section 189 of the old practice act was on this subject the same as section 652 of the Code; and, referring to the former, this court said in *Wormouth v. Gardner*, 35 Cal. 228: "A motion to correct a statement or exceptions, where the court below refuses to make the same conform to the facts, is an original proceeding in this court, and must be instituted by a petition in writing, setting forth at length the exceptions which were taken at the trial, and not allowed by the judge, and so much of the evidence as may be necessary to illustrate them, * * * The fact that this court has not as yet prescribed any rules for the government of such proceedings does not relieve a party from the necessity of inaugurating them in the manner dictated by the statute." In the case at bar the petition does not contain a copy of the exception alleged to have been presented to the judge, or of any evidence. The averments are merely that a bill of exceptions was presented, and that the judge "refused to settle and certify the said bill of exceptions." The theory of the petition seems to be that this court, with a few general averments before it about the conduct, in the premises, of the judge of the trial court, will put itself generally in the place of that court, and proceed to construct for it an original and complete bill of exceptions. Such is not the meaning of the Code. We think that the petition is entirely insufficient. Prayer of petition denied, and proceeding dismissed.

We concur: BEATTY, C. J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.

(83 Cal. 83)

HYDE v. BOYLE *et al.* (No. 13,481.)

(Supreme Court of California. Feb. 1, 1890.)

In bank. Application by Thornton and others, appellants, to settle bill of exceptions in superior court, city and county of San Francisco; J. P. HODGE, Judge.

George H. Buck and Edward F. Fitzpatrick, for petitioners. T. M. Osment, for respondents.

FOX, J. This is an original proceeding in this court to settle a bill of exceptions, taken on behalf of petitioners, who are appellants in the above-entitled cause.

We have examined the petition and answer thereto, and are of opinion that on at least one of the points made on their appeal the petitioners are entitled to take an appeal, and be heard thereon; and that under the decision of this court in the case of *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. Rep. 299, the proper mode of bringing the matter up on an appeal is by bill of exceptions. They are therefore entitled to have a bill settled and allowed. But

this court, in bank, has recently held, in the case of *Landers v. Landers*, ante, 126, (No. 13,464, filed January 8, 1890,) that this is not the proper remedy in a case like the one here presented; that this court cannot substitute itself for the court below in the settlement of a general bill of exceptions. On the authority of that case this application must be denied, and the parties left to the remedy there-in suggested, if the judge below still persists in his refusal to settle the bill. So ordered.

We concur: WORKS, J.; PATERSON, J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(32 Cal. 250)

CASTAGNINO v. BALLETTA et al. (No. 11,713.)

(Supreme Court of California. Dec. 30, 1889.)

MECHANICS' LIENS—PLEADING—LIMITATION OF ACTIONS—NONSUIT.

1. A complaint in an action to enforce a mechanic's lien, in which the special contract between contractor and owner is stated, can be changed by amendment into an action on the contract, in which the contract may be counted on specially, or the common counts in *indebitatus assumpsit* may be used, and the special contract is admissible in evidence under the common counts.

2. Where a waiver of matters stated in requests for instructions may be inferred by the jury from the evidence, it is error to give the requested instructions, which omit all reference to a waiver, and ask that a verdict be rendered on the facts stated in the requests.

3. Where defendants move for a nonsuit on the ground that the claim is barred by the statute of limitations, but ask no direction to the jury on this point, and the court makes no charge in regard to it, the point as to the bar of the statute of limitations cannot be considered on the record presented to the appellate court.

4. A motion for nonsuit on the ground "that the proof shows that the claim is barred" is properly denied where the cause of action is set up in three counts, and the statute is only pleaded to two.

In bank. On rehearing. For opinion in department, see 21 Pac. Rep. 1097.

This action was originally brought by Castagnino against P. Balletta et al. to foreclose a mechanic's lien. Judgment for plaintiff, and defendants appeal.

Tilden & Tilden, for appellants. *M C Hassett*, for respondent.

THORNTON, J. This action was originally brought to foreclose a mechanic's lien for \$1,395.50 on a block of buildings in the city of San Francisco. The buildings were erected by plaintiff for defendants under a written contract which provided that plaintiff should furnish all the materials, and do the work, according to plans and specifications made by George Bordwell, architect, and receive therefor the sum of \$9,800, payable in installments as the work progressed, the last payment to be made "when the houses shall be completed, each in all its parts, and accepted by the architect." The \$1,395.50 consisted of an unpaid balance of the contract price, and \$375 alleged to be due for extra work and materials. The case was tried, and judgment rendered for plaintiff. An appeal was taken by defendants from the judgment and an order denying them a new trial, and the judgment and order were reversed on authority of *Loup v. Railroad Co.*, 63 Cal. 97. The

case came on again for trial, and the plaintiff was allowed, over the objections of defendants, to file an amended complaint in *indebitatus assumpsit*. It contained three counts. The first alleged an indebtedness from defendants to plaintiff of \$1,020.50 for work and labor done, and materials furnished, in the erection of a block of buildings in the city of San Francisco. The second alleged an indebtedness of \$270 for extra work done and materials furnished in the erection of the said block of buildings. And the third alleged an indebtedness of \$105 for putting a door in defendants' building, and constructing a sidewalk in front thereof, at their special instance and request. The prayer was for judgment for \$1,395.50, the aggregate of these amounts, with interest and costs. The defendants, by their answer, denied that they were indebted to plaintiff in the sum of money named in the complaint, or in any sums or sum whatever; and to the first two counts they pleaded the statute of limitations. They then alleged that the labor and materials sued for, except the last item of \$105, were furnished under a written contract, which was executed by the parties on the 26th of April, 1876, and a copy of which was set forth and made a part of the answer. They further alleged that they complied with all the conditions of the contract on their part, and paid plaintiff during the progress of the work the sum of \$9,104, but that plaintiff failed to comply with the conditions of the contract on his part; that he omitted to put in the buildings many things required by the contract and specifications, and that the value of the articles and work omitted was \$150; that the buildings were not completed within the time named in the contract, and defendants were damaged thereby in the sum of \$900; that the foundation was not put down to solid ground, and by reason thereof the buildings settled, to the damage of the same in the sum of over \$1,000. The prayer was for judgment against the plaintiff for \$1,500, and costs of suit. The case was tried before a jury, and the verdict and judgment were for plaintiff. Defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

When the trial commenced, the plaintiff first introduced in evidence the building contract, a copy of which is set out in the answer, and the specifications referred to therein. He then introduced evidence showing: That the terms of the contract were subsequently changed in certain respects by agreement of the parties. That he proceeded to construct and complete the buildings according to the plans and specifications; that he performed certain extra work, which was provided for by an indorsement on the contract, and for which he was to receive \$270. That he also placed an extra door in one of the houses, by direction of the architect, at a cost of \$15, and by an agreement with defendants laid a new sidewalk in front of the building, for which they were to pay him

\$90. That he was prevented by defendants from completing the whole work at the time named in the contract. That after it was in fact completed the architect suggested certain items of work which he wished to have done, saying that when they were done to his satisfaction he would accept the buildings as complete, and that he (plaintiff) did the suggested work so far as it was called for by the contract. That a few days afterwards, at a meeting of the plaintiff, defendant Ballesta, and the architect, the architect said he was satisfied with the building, and would accept it. That at this meeting the architect also said to plaintiff's attorney, who was present, that "he [plaintiff] had a hard contract, anyhow, and that he was glad that he had finished it up, and that he had advised him not to take the contract in the first place; that he knew he lost a great deal of money on it. He said he knew he lost not less than \$2,000 on the contract. He was glad it was finished." That it was then arranged that another meeting of the parties should be held at the architect's office to figure up the amount due plaintiff, and settle the whole matter, and that in pursuance of this arrangement the parties met, the amount due plaintiff was figured up and agreed to be, including the extra work, \$1,395.50, and that after that the architect called plaintiff's attorney aside, "and spoke in a low tone, and said that he wanted plaintiff to pay him \$100; that he had been to a great deal of trouble in superintending the buildings, and that the amount paid him by defendant for his services was not sufficient." That plaintiff, on being informed of this demand, refused to pay it; and the architect then said that he would charge plaintiff for lost time, and would not receive the buildings. That defendant was present, with a bag of money on the table, ready to pay plaintiff if the architect had not stopped him from doing so. The defendants objected to the admission in evidence of the contract and specifications, on the ground that they showed an entirely different contract from the one set up in the complaint, and were, therefore, irrelevant and immaterial; and to all the evidence showing that the terms of the contract were varied and changed; and to all evidence offered to excuse or explain the delay in the completion of the contract according to its terms, on the ground that it was incompetent and inadmissible under the pleadings. They also moved for a nonsuit on similar grounds. The objections and motion were all overruled, and exceptions reserved.

The above statement, which we find to be correct, is taken from the opinion of Commissioner BELCHER, filed July 1, 1889, after which a rehearing was granted. 21 Pac. Rep. 1097. The objection to the permission of the court below, granted plaintiff, to file an amended complaint, on which the cause was tried, is without merit. There is no change of the cause of action which inhibits the court from allowing the amendment. A

complaint in an action to enforce a mechanic's lien, in which the special contract between contractor and owner was stated, can be changed by amendment into an action on the contract, which contract may be counted on specially, or the common counts in *assumpsit*, in certain cases which will be hereafter pointed out, may be made use of by the pleader. That the common counts may be resorted to in actions on contracts, within certain defined limits, has been too long and too well settled in this state to be the subject of further debate or controversy. It is only necessary to refer to the cases which adjudge this to be the law, a course of decision which commenced in this court at an early day in its history, following the rulings of the courts of New York on a statute similar to our own, and which has continued to the present time. See *De Boom v. Priestly*, 1 Cal. 206, (decided in 1850;) *Reynolds v. Jourdan*, 6 Cal. 108, (decided in 1856;) *Adams v. Pugh*, 7 Cal. 151; *O'Connor v. Dingley*, 26 Cal. 20. There are many other cases which may be found by reference to the digests, and need not be cited here. The rule is stated as fully settled in *O'Connor v. Dingley*, supra, in which case it was held not applicable for the reason stated in the opinion of the court in that case. There the contract had been fully performed, on which performance money was not to be paid, but a note was to be executed, payable 12 months after date. It did not appear that the parties disregarded that stipulation in the contract, or in any manner waived the execution of the note. There was no breach of the contract set up for the non-execution of the note. The breach alleged was the failure to pay the money. The money was not due. It there appears that there was no breach of the contract in the matter alleged. The court held that an action might have been maintained for a failure or refusal to execute the note, but the use of the common count by the pleader was not available, at least until the period of credit had expired. See 26 Cal. 22, 23. The rules of pleading in regard to the employment of the common counts in actions on contracts are well stated by Prof. Greenleaf in the second volume of his work on Evidence, (section 104,) as follows: "The law on this subject may be reduced to these three general rules: (1) So long as the contract continues executory, the plaintiff must declare specially; but when it has been executed on his part, and nothing remains but the payment of the price in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially, on the original contract, at his election. If the mode of payment was any other than in money, the count must be on the original contract. And if it was to be in money, and a term of credit was allowed, the action, though on the common counts, must not be brought until the term of credit has expired. This election to

sue upon the common counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff. (2) Where the contract, though partly performed, has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant. Here the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement. But, in order to do this, it is not enough to prove that the plaintiff was hindered by the defendant from performing the contract on his part, for we have just seen that in such case he must sue upon the agreement itself. It must appear from the circumstances that he was at liberty to treat it as at an end. (3) Where it appears that what was done by the plaintiff was done under a special agreement, but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him. Here the plaintiff cannot recover upon the contract, from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which, upon the whole, the defendant has derived from what he has done." The decisions sustaining the points stated in the above extracts are cited in the notes to the section referred to. See, also 2 Smith, Lead. Cas., notes of Wallace to Cutter v. Powell, pp. 47-49, where the rules are clearly and fully stated, and cases cited. In this case there is evidence tending to show that the architect accepted the building; that all other preliminaries were complied with by the plaintiff, and nothing remained but the payment of the money. The pleader, under such a state of facts, could set forth his cause of action under the common counts adopted by him in accordance with the rules above set forth; and under such counts the special contract was admissible in evidence. See Reynolds v. Jourdan, 6 Cal. 109, where it was held that the special contract was admissible under the common counts as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. See, also, above reference to 2 Smith, Lead. Cas. pp. 47-49 et seq., and cases there cited. Such has always been the course of procedure in this state. The cases will be found in the digests. There was no error in admitting the contract.

The defendants moved for a nonsuit on five grounds. The only one urged in the points of the defendants is that the plaintiff set forth his cause of action on the common counts, and in proof of them introduced the special contract. The other grounds are not adverted to in the points, and will not, therefore, be noticed. We perceive no error in this for the reasons given above. There was evidence tending to prove a full compliance by plaintiff with the terms of the contract, and nothing remained to be done but the payment of the money by the defendants.

The court therefore did not err in denying the motion for a nonsuit.

The defendants attack several instructions given by the court below; and here it may be observed that the decision on the former appeal became the law of the case, and must be always applicable as long as the facts presented in the case appear to be the same. Jaffe v. Skae, 48 Cal. 543. The cases on this point are cited in the concurring opinion of the writer in Sharon v. Sharon, to which reference may be had. 79 Cal. 633, 22 Pac. Rep. 26, 131. On the former appeal the judgment and order were reversed on the authority of Loup v. Railroad Co., 63 Cal. 97. The opinion in the case is simply a statement of the reversal on the authority of the case cited. See 11 Pac. Coast Law J. 277. In Loup v. Railroad Co., just cited, the reversal was in consequence of a failure to aver the estimates of the engineer as provided for in the contracts, as preliminary to payment, or legal cause for the non-production of such estimates; also, on a failure of proof of the matters just referred to. In the complaint on the former appeal there was a lack of averment that the buildings when completed had been accepted by the architect, and of a compliance with other preliminaries as to receipted bills; and for this lack, we presume, the judgment and order were reversed, and the cause sent back for a new trial.

The defendants made several requests for instructions which were refused by the court, and exceptions were reserved. They specify as erroneous requests numbered 1, 2, 3, and 4. Objections are also made to the charge of the court. On examination of these objections, we are of opinion that the court did not err in refusing the requests, and that the charge to the jury was a fair exposition of the law applicable to the case as presented on the trial. In relation to the requests for instructions, we remark that there was evidence before the jury from which a waiver of the matters stated in the request might have been inferred. We refer to what occurred between plaintiff and Bordwell, in presence of defendants, at Hassett's office, a few days after the 19th of December, 1876, and the occurrence on the next day at Bordwell's office. These matters will be found in the detailed statement. As a waiver of the matters stated in the requests might have been inferred by the jury from the evidence, it would have been erroneous to give the requested instructions, which omitted all reference to a waiver, and asked that a verdict might be rendered on the facts stated in the requests in favor of defendants. This would have withdrawn the evidence bearing on the point of waiver from the consideration of the jury, and would have directed a verdict for defendants on a partial statement of the facts bearing on the points presented by the requests for their determination. This would have been error, and violative of the just rule laid down in Gallagher v. Williamson, 23 Cal. 332, approved and followed

in *Barker v. State*, 48 Ind. 167, that where a court instructs a jury upon what state of facts they may find a verdict for a party the instruction should include all the facts in controversy material to the right of plaintiff or defense of defendant. The material point as to waiver was left out in the requested instructions, in derogation of plaintiff's right to have it submitted to the jury. We think the evidence tends to show that the placing of the extra work set up in the third count in the contract was in effect waived by the conduct of the parties, and that hence the failure to put it in the contract is no obstacle to a recovery of it. The charge of the court does not in any manner violate or contravene the rule as to the law of the case.

As to the statute of limitations, which was pleaded as above stated, to the first two counts, and not pleaded as to the third count of the complaint: One of the grounds on which defendants moved for a nonsuit was "that the proof shows that the claim is barred" by section 337 of the Code of Civil Procedure, and also by section 339, Id. These sections are portions of the statute of limitations. Conceding that the cause of action set forth in the first two counts, to which the statute was pleaded, were barred, the statute was not pleaded to the third count, and therefore the bar could not, on a motion for a nonsuit, be urged against it. As the word "claim," used in the grounds, includes the whole claim set forth in the three counts of the complaint, and the statute, by reason that it was not pleaded, could not be urged against the third count, the trial court did not err in denying the motion for a nonsuit. The action, in its entirety, could not be held to have been barred; and the court would have erred if it had granted the motion.

We cannot see that the point as to the bar of the statute of limitations can be urged or presented by the defendants on the record before this court. The presentation of it on the motion for a nonsuit has already been considered and disposed of. There is no question of this kind presented on any exception to the charge of the court. The counsel for defendants asked no direction to the jury on this point to which, if refused, he might have reserved an exception. The court did not direct the jury at all in regard to it. The failure of a court to charge on a point, if not asked to do so, is not error. If counsel desire to have the direction of the court on a point, he must request it; and, if refused, he must reserve an exception to the refusal, and present the point in this court for review on a statement or bill of exceptions. This must be done, or the appellant cannot urge it for the consideration of this court as error in the ruling of the court. In such a state of the case, there has been no ruling by the court; and hence there can be no exception, and no consideration of an exception, here. Let it be conceded that in this case the evidence was insufficient to justify the verdict by reason of the fact that the causes of action

set forth in the first two counts were barred by the statute of limitations. There are not in the statement any such specifications of insufficiency of the evidence, and they cannot, for that reason, be considered here. We have examined the record, and find no error in it. The judgment and order are therefore affirmed.

We concur: FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.
Rehearing denied.

(82 Cal. 497)

THOMPSON *et ux.* v. SOUTHERN CAL. M. R. Co. (No. 13,382.)

(Supreme Court of California. Jan. 9, 1890.)

DEEDS—DESCRIPTION.

1. A deed to a railroad company of a right of way "along the line as surveyed and laid out" by the company's engineer is not void for uncertainty where it appears that when the deed was executed the line of the road had been surveyed and distinctly marked by stakes stuck in the ground, and that subsequently the road was constructed following the exact line of the survey.

2. Extrinsic evidence is always admissible to explain the calls of a deed for the purpose of applying them to the subject-matter, and thus to give effect to the deed.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JAS. A. GIBSON, Judge.

Rowell & Rowell, Curtis & Otis, and John Brown, Jr., for appellants. *H. C. Rolfe*, for respondent.

BELCHER, C. C. The plaintiffs seek by this action to obtain a decree restraining the defendant from going upon, or in any way interfering with, two lots of land, described as lots 2 and 5, in block 32, in the city of Colton, San Bernardino county, and to recover damages for past trespasses. The plaintiffs claim ownership of the lots, and the defendant claims a right of way over the same for the operation of its railroad, known as the "Motor Road." At the trial, the defendant, in support of its claim of a right of way over the lots, offered in evidence a deed made by plaintiffs to defendant, with the map attached thereto, marked "Exhibit A." That part of the deed which describes the property conveyed reads as follows: "A perpetual right of way over and across lots 2 and 5, in block 32, in said city of Colton, according to the Colton Land & Water Company's survey, for the purpose of constructing, maintaining, and operating said motor road. Such right of way to be along the line as surveyed and laid out by H. C. Kellogg, civil engineer of said corporation, being a distance in length of eleven hundred and thirteen feet, more or less, and running in a northerly and southerly direction, a map of which is hereto attached, and made a part hereof." The plaintiffs objected to the deed being received in evidence on the ground that it was void for uncertainty, and therefore irrelevant and immaterial. The defendant then proposed to introduce further evidence showing that

when the deed was executed the road had been commenced, and the line of the right of way claimed under the deed, and now occupied by the road, had been surveyed and designated by stakes stuck in the ground so that it could be easily traced. The court thereupon overruled the objection, and the plaintiffs reserved an exception.

H. C. Kellogg was then called by defendant as a witness, and, having testified that he was by profession a civil engineer and surveyor, and that he made the map attached to defendant's deed, proceeded as follows: *Question.* You may state whether a survey or line was ever laid out from which the map was made, or which that map was made to designate. *Answer.* That map was made from an actual survey on the ground. *Q.* You may state whether or not that line was marked on the ground. *A.* Yes, sir; the line was marked on the ground by the stations every 100 feet. The stations were stakes eighteen inches long and an inch square, and were brought from a definite starting-point upon the center line of the survey,—the line marked red on the plat. *Q.* You know where the road of defendant now exists, across lots 2 and 5, in block 32, of the city of Colton, the lots designated on Exhibit A? *A.* The road was constructed, and now exists, on the line indicated in red on this plat, in accordance with the survey. The center line of the railway is on the red line,—in the center of the line marked yellow. *Q.* If you were an entire stranger to this deed, Exhibit A, and the map and locality of the ground, could you, being shown this deed with the map, and being told where the line was located by H. C. Kellogg,—could you locate the right of way purported to be conveyed by this deed? *A.* Yes, sir." The witness further stated that "that survey was laid out, and the cross-sections were made, before the deed was executed." And on cross-examination the witness said: "As an engineer, I can take that deed—supposing I knew nothing in regard to the exact location, and had never seen it—from that instrument, as a civil engineer, I can locate that road under the description. *Q.* Tell me from the in which the instrument reads—mind you, you never saw it—take it from the instrument itself, and its description; take that map, not knowing anything about it, and tell me how, and by what means, you could locate the road. *A.* I certainly could locate it. The deed was made after the first station survey was made. *Q.* Suppose there were no marks on the ground to show where the survey was made,—there were no marks left of it at all that Captain Topp had made the survey,—and here was a description of the premises intended to be conveyed, and where it was to be,—that is all you knew about it. Could you take that instrument and diagram, and make a survey of the road? *A.* I could, by inquiring from parties that knew something about the survey. If the points were all out of the way, I could have nothing to

start from; but, as a matter of fact, I made the survey, and put the stakes, and if any of the stations were left I could easily make the survey."

J. F. Sublette was also called by defendant as a witness, and testified: "My business is railroading, and was such in August, '88. At that time I was constructing track,—laying the line on the Southern Motor Company road, the Southern California Motor Road Company. I am familiar with this road where it goes across the lands of plaintiffs in this action, Albert Thompson and wife, in the city of Colton. *Question.* You may state whether you ever saw anything to indicate the line of that road as laid out by an engineer. *Answer.* Yes, sir; I saw the stakes drove,—center stakes. The line of the road as now constructed, with reference to the line run out and marked by these stakes spoken of, run to the stakes that were drove there. It ran to them,—the center stakes, I mean,—ran through them. The line of stakes occupied the center of the road-bed."

At the conclusion of the trial the court found the facts, and rendered judgment, in favor of the defendant; and from this judgment, and an order denying them a new trial, the plaintiffs appeal.

The contention of appellants is that the deed was void for uncertainty, and that the explanatory evidence was inadmissible, and, if admissible, was insufficient to remove the ambiguity of the deed. We do not think this contention can be sustained. It is true that a deed must so describe the land sought to be conveyed thereby that it can be identified, but that is certain which can be made certain. Civil Code, § 3538. And extrinsic evidence is always admissible to explain the calls of a deed for the purpose of their application to the subject-matter, and thus to give effect to the deed. *Reamer v. Nesmith*, 34 Cal. 624. In construing a doubtful description in a grant, the court must assume as nearly as possible the position of the contracting parties, and consider the circumstances of the transaction between them, and then read and interpret the words used in the light of these circumstances. *Truett v. Adams*, 66 Cal. 218, 5 Pac. Rep. 96. Now, if we assume the position of the contracting parties, and consider the circumstances of the transaction, we shall see a railroad in process of construction by the defendant. The proposed line of the road extends across the plaintiff's lots. The defendant is desirous of obtaining a right of way over the lots for its road. Without objection, its engineer has gone upon the lots, and has surveyed and distinctly marked, by stakes stuck in the ground, the line of the road. A map of this survey has been made, and is before the parties. Under these circumstances the deed in question is made, granting a right of way over the lots for the construction and operation of a railroad, "such right of way to be along the line as surveyed and laid out" by the engineer of the grantee. The road was then

constructed across the lots, following the exact line of the survey. Looking at the transaction in the light of these circumstances, we think that the rulings of the court were proper, and its conclusions correct. The pleadings were sufficient, the extrinsic evidence was admissible, and the deed was not void. We therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 209)

HUTCHINSON v. McNALLY et al. (No. 12,579.)¹

(Supreme Court of California. Jan. 1, 1890.)

EJECTMENT—PLEADING—HOMESTEAD.

1. Where the complaint in ejectment simply sets forth a deraignment of title, and then alleges that "while plaintiff was the owner, and entitled to the possession, as hereinbefore mentioned and set forth, the defendant entered," the allegation as to ownership will be disregarded, as stating a mere conclusion.

2. Where the complaint alleges that the land in controversy was set off as a homestead to the widow of a deceased owner, it must state whether the land was set off in fee or for life, since an assignment of a homestead to a widow in fee out of her deceased husband's estate, though erroneous, is conclusive unless appealed from.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county. T. M. Osment, for appellant. Charles F. Hanlon, for respondents.

HAYNE, C. Ejectment. Judgment for defendants upon demurrer to the complaint. Plaintiff appeals. The complaint sets forth a deraignment of title, and then alleges that "while the plaintiff was the owner, and entitled to the possession, as hereinbefore mentioned and set forth," the defendant entered, etc. From the manner in which this statement as to ownership is put, it is evidently a mere conclusion, referring to, and limited by, the deraignment, and is therefore to be disregarded. *Turner v. White*, 73 Cal. 300, 14 Pac. Rep. 794; *People v. Reed*, 22 Pac. Rep. 475.

Then does the deraignment show a right of recovery in the plaintiff? The facts alleged are in substance as follows: In May, 1878, one Esther C. C. Hutchinson, who was the wife of Charles C. Hutchinson, declared a homestead upon the property in controversy, which was the separate property of the husband. In the following June the husband died, leaving a will, which was admitted to probate, and by which the property was devised to the plaintiff. In April, 1880, the proper court made an order "setting off said homestead to Esther C. C. Hutchinson, surviving widow of the decedent." In 1881 the widow died. The case is very like *Gruwell v. Seybolt*, 22 Pac. Rep. 938, (No. 12,072, filed December 9, 1889.) There it was held

that while it was erroneous to set off a homestead selected out of the separate property of the decedent to the widow "absolutely, as her sole and separate property," yet that the error was to be corrected by appeals, and that if the order was not appealed from it was conclusive. Under this decision it is very material to know what was the purpose of the order setting off the homestead. Did it purport to set it off to the widow in fee, or only for life, or for a less period? The complaint is silent in this respect. It simply says that the homestead was set off to the widow. This ambiguity was pointed out by special demurrer. The specification of the demurrer was that "it does not appear therefrom whether or not the order setting aside the property to E. C. C. Hutchinson set apart the property to her in fee or for life." This demurrer was sustained, and we think properly so; and, the plaintiff having elected to stand upon his complaint, we advise that the judgment be sustained.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(82 Cal. 604)

WITKOWSKI et al. v. HERN et al. (No. 13,425.)

(Supreme Court of California. Jan. 27, 1890.)

CONSTABLES—BOND—APPEAL—PLEADING—WAIVER OF OBJECTION.

1. A constable, and the sureties on his official bond, are liable to the owner of property, seized under a proper writ, for damages thereto, while in his custody, occasioned by his carelessness or negligence.

2. There is no implied exception to an order denying a nonsuit, as it is not an appealable order.

3. The objection to an amended complaint that it contains a new cause of action arising after the institution of the suit, is waived by an answer thereto.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

E. W. Holland, for appellants. J. S. Clack and W. B. Wallace, for respondents.

FOOTE, C. This action was brought against a constable, his sureties on his official bond, and two other persons, John McGinley and F. M. Shultz, for damages resulting from the carelessness of the defendant, as such officer, in not preserving and taking care of the personal property of the plaintiff, P. H. Nelson, (now dead,) so that it became damaged. The cause was revived after the death of Nelson in the name of his executors, S. Witkowski and Albert Nelson, and upon the overruling of a demurrer filed to the third amended complaint the defendant answered; and the cause was tried before a jury. A motion for a new trial was denied, except as to McGinley and Shultz, and the jury returned a verdict for the plaintiff in the sum of \$300 against the constable, Hern, and his

¹ Reversed in banc. See 24 Pac. 1071, 85 Cal. 619.

sureties. From the judgment thereupon rendered, and an order denying a new trial, this appeal is taken.

The demurrer, it is claimed, should have been sustained because, as is asserted, the complaint does not show any facts which would entitle the plaintiff to recover against the constable and his sureties. The argument is that no trespass is claimed, and that the other facts alleged do not show any violation of official duty imposed by law. The gist of the action, as brought, and the evidence in support of the plaintiff's contention, shows that the negligence of the constable in allowing the plaintiff's property, after seizure under a suit of attachment, to become damaged, was what was relied on to enable the plaintiff to recover. Conceding that the complaint shows that the defendant Hern, as a constable, seized the property in dispute under a proper writ, yet, if he soured the property in his custody as that by his carelessness or negligence it was damaged, he and his sureties were responsible for the non-performance of his official duty; and hence the demurrer was properly overruled.

The answer admits that Hern, as constable, by virtue of the writ of attachment, held possession of the property involved here until about a year after its seizure, when he returned it to Nelson, the plaintiff, but denies that during such time as he held it as an officer any damage resulted to it from his carelessness or negligence, so that the whole matter as to the claim for damages turned upon the question as to whether or not the property was so carelessly and negligently cared for by the constable while it was in his official custody, for about a year, that the plaintiff suffered the damages which he claimed and recovered. The evidence showed, as we think, that the officer was grossly negligent, and that such negligence damaged the plaintiff to the extent for which recovery was had; hence the verdict of the jury should be upheld.

The appellant makes the further point that in his complaint the plaintiff states "that said defendant Samuel J. Hern well and faithfully executed and performed all the duties of the office of constable of Tulare township, Tulare county, Cal.," and then inquires, "can the respondents be permitted to deny facts set forth in the complaint?" An inspection of the complaint at folio 99 of the transcript shows that this language was in reference to the alleged condition of the bond, and that what was meant was that the sureties were "bound in the penal sum of \$1,000 each * * * that said defendant Samuel J. Hern well and faithfully executed and performed all the duties of the office of constable of Tulare township, Tulare county, Cal." As the appellant, after the respondent's explanation in his brief, does not urge this point again in his reply, we must conclude that he perceives, after consideration, its want of force.

It is also urged that the motion for a non-

suit ought to have been granted. But the defendants did not except to the action of the court in refusing their motion, and an order refusing a nonsuit is not appealable, and, not being appealable, it is not an order which is deemed excepted to; hence the action of the court in refusing the motion cannot be reviewed here. *Schroeder v. Schmidt*, 74 Cal. 460, 16 Pac. Rep. 243; *Christie v. Christie*, 53 Cal. 27; section 647, Code Civil Proc.

The point is also taken that the third amended complaint alleges a new cause of action, arising after the institution of the suit, and this amendment is claimed not to be allowable. Even if the amendment thus made alleged a new cause of action arising after suit brought, and the amendment was wrongfully allowed, the appellants are not now in a position to object. They answered the third amended complaint. If they had any good ground of objection, they waived it by the course they pursued. *Cox v. Railroad Co.*, 47 Cal. 90; *Secor v. Law*, 9 Bosw. 163. We perceive no error in the record, and advise that the judgment and order be affirmed.

We concur: VAN CLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(S2 Cal. 595)

DURGIN v. NEAL *et al.* (No. 13,135.)

(Supreme Court of California. Jan. 27, 1890.)

SURFACE WATER—NEGLIGENCE—DAMAGES.

1. The complaint stated that defendants dug and excavated the street and sidewalk of the public street in front of and adjoining the premises occupied by plaintiff in such a manner as to allow the rain and water to accumulate and flow into the adjoining premises of plaintiff, and cover and damage his merchandise. *Held*, that there was a sufficient showing of negligence to sustain the complaint on general demurrer.

2. Judgment was rendered against defendants for the amount of damages to his merchandise caused, as the court found, by the water being turned into plaintiff's premises by obstructions placed in the street and gutter by defendants, "together with other obstructions therein placed by other parties." *Held* error, within Civil Code Cal. § 3333, which confines the measure of damages to compensation for detriment "proximately" caused by breach of an obligation not arising from contract.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Shaw & Damron, for appellant. *Brosseau & Hatch*, for respondents.

GIBSON, C. This was an action to recover damages for injury to plaintiff's merchandise caused by the negligence of defendants in flooding a cellar wherein the same was stored. At the trial, which was before the court without a jury, the defendant Neal, the owner of the premises upon which her co-defendants were erecting a building for her, and who does not appear to have either demurred or answered, moved for and obtained

a nonsuit. The trial then proceeded against the defendants McNally and Young, and resulted in a judgment against them for \$321 damages and \$53.15 costs. From that judgment McNally and Young appeal.

The first point urged by them as a reason why the judgment should not stand is that the court erred in overruling their general demurrer to the complaint, because the second allegation thereof fails to state facts showing any negligent or unlawful acts upon their part. The portion of the complaint referred to, shorn of its verbiage, in substance states that in January, 1888, the defendants dug and excavated the street and sidewalk of the public street in front of and adjoining the premises occupied by plaintiff, in such a manner as to allow the rain and water to accumulate and flow into the adjoining premises of plaintiff, and cover his merchandise, consisting of books and albums, with water and filth, to his damage in the sum of \$384. The gist of the action was not in merely making the excavation in front of the adjoining premises, for that they had a right to do, but in negligently allowing the rain-water to accumulate and flow into plaintiff's cellar. Such negligence sufficiently appearing, the demurrer was properly overruled. *Hoffman v. Water Co.*, 10 Cal. 413.

An attempt was made in the complaint to show that plaintiff was not guilty of contributory negligence, by alleging that the damage was caused without the consent of plaintiff; but as plaintiff was not required to show this, the allegation was immaterial. *Yik Hon v. Water-Works*, 65 Cal. 619, 4 Pac. Rep. 666; *Robinson v. Railroad Co.*, 48 Cal. 410.

The other point urged by the appellant is, that the findings are outside of the issues. The main issue tendered by the pleadings was as to whether, in excavating in the street in front of and adjoining the premises of plaintiff, the defendants negligently permitted the rain-water to accumulate and escape into plaintiff's premises, to the injury of his merchandise. Upon this the court found: "(5) The excavation itself was made in the ordinary way, and with ordinary care, and without any negligence, except as hereinafter found, on the part of the defendants. But in making the excavation, and constructing the said building and the elevator hole, the said defendants, McNally and Young placed obstructions in the street and gutter in front of said premises, which obstructions, together with other obstructions therein placed by other parties, caused the rain-water which fell during the night, at the date when the damage was done to plaintiff, as hereinbefore found, to overflow the street, gutter, and sidewalk, and to flow into said elevator hole, and into said excavation on the lot of the said defendant Neal, and also into the premises occupied by the plaintiff," and thereby damaged his merchandise to the extent of \$321. In *Berry v. Railroad Co.*, 50 Cal. 435, which was an action to recover for injuries to plaintiff's premises caused by the defendant cor-

poration entering upon the same, making surveys, tearing down his fences, and destroying his crops, etc., upon the trial, evidence was received from plaintiff, against the objection of defendant, that hogs had invaded plaintiff's land, because the fences were down, and damaged and nearly destroyed his wheat crop. The admission of such evidence was held to be erroneous because the damage it tended to prove was not the direct result of the trespass of the defendant. So in this case, as shown by the findings, the damage sustained by the plaintiff did not wholly result from the acts of defendants in placing the obstructions in the street, in making the excavation, so as to cause the water to flow into plaintiff's premises, and damage his merchandise, but resulted in part from other obstructions there placed by other persons. Therefore, applying the same principle that was applied in the above case, it follows that, as the defendants could not be held liable for damages not proximately caused by their negligence, the court erred in finding that they were liable for damages resulting from the acts of other persons, with whom they do not appear to have had any connection. See Civil Code, § 3333, which confines the measure of damages to compensation for all detriment, whether it could have been anticipated or not, proximately caused by the breach of an obligation not arising from contract. The trial court, in finding as it did, went beyond the issues presented; and the judgment should therefore be reversed, and the cause remanded for a new trial.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

82 Cal. 600

LANKERSHIM RANCH LAND & WATER CO. v.
HERBERGER. (No. 13,360.)

(*Supreme Court of California.* Jan. 27, 1890.)

CORPORATIONS—STOCK—UNPAID INSTALLMENTS—
LIEN.

1. A subscriber for shares of the capital stock of a corporation, who has received a transferable certificate showing his payment of all installments due on his shares, as well as his agreement to pay for installments not yet due, is the owner of the shares, subject to the unpaid installments; and, as the certificate gives him complete possession of the shares, the corporation has no seller's lien therein.

2. In the absence of contract, a corporation has no special seller's lien on shares of its capital stock for unpaid installments of the purchase price, as the only lien not dependent on possession given by statute (Civil Code Cal. § 331) is to secure the payment of assessments levied for the purpose of paying debts and expenses incurred in conducting the business of the corporation.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Action by the Lankershim Ranch Land & Water Company against Theobald Herberger for an unpaid call on defendant's subscrip-

tion to plaintiff's capital stock. A writ of attachment issued against defendant, and a levy was made on his property. His motion to dissolve the attachment was granted, and plaintiff appeals.

Scarborough & Waterman, (Brunson, Wilson & Lamme, of counsel,) for appellant. *Allen & Miller,* for respondent.

GIBSON, C. This appeal is from an order dissolving an attachment. In 1887 a syndicate known as the "Lankershim Syndicate," composed of certain persons, not including the respondent, purchased 12,000 acres of land, and agreed among themselves to organize a corporation, under the state laws, "for the purpose of dividing, developing, and selling said land." On the 2d of August, 1887, the respondent, among others, signed and delivered to the syndicate an offer and agreement in writing, in which it was set out that the syndicate was about to create a corporation for the purposes above mentioned, with a capital stock of \$780,000, divided into 7,800 shares of the par value of \$100 per share. By this instrument the respondent agreed, when the corporation should be formed, to take 25 shares of its capital stock, and pay therefor as follows: 15 per cent. cash; 25 per cent. September 10, 1887, without interest; 30 per cent. July 1, 1888, with interest at 5 per cent. per annum; and 30 per cent. July 1, 1889, with the same rate of interest; all upon condition, however, that, should the corporation not be formed, or the land not be conveyed to it, for any reason, then the amount paid by respondent should be returned to him. In September, 1887, the corporation was formed, and by a conveyance made on or about January 1, 1888, it acquired the land mentioned from the syndicate; also, the offer and agreement of respondent, together with the money paid by him to the syndicate, and 25 shares of the capital stock of the corporation, to meet the offer of respondent. The appellant thereupon accepted the offer of respondent, and issued to him a certificate which reads as follows: "Office of the Lankershim Land and Water Company, Los Angeles, Cal., Jan. 21, 1888. This is to certify that Theobald Herberger has subscribed for twenty-five shares of the capital stock of the Lankershim Ranch Land and Water Company, of the par value of \$100 each, aggregating \$2,500, payable as follows, to-wit: 15 per cent. cash; 25 per cent. on or before September 10, 1887, without interest; 30 per cent. on or before July 1, 1888, with interest at 5 per cent. per annum; and 30 per cent. on or before July 1, 1889, with interest at 5 per cent. per annum. This receipt is assignable by indorsement, upon first giving notice to the undersigned at the office of the company. Deferred payments bear interest from ———. F. C. GARBUTT, Secretary." Upon the above stock the following payments have been made, to-wit: "(1) Received of Theobald Herberger the sum of \$375, being first installment of the above

stock, this 18th day of August, 1887. F. C. GARBUTT, Secretary. (2) Received of Theobald Herberger the sum of \$675, being second installment of the stock, this 3d day of September, 1887. F. C. GARBUTT, Secretary." June 15, 1888, the appellant, by a resolution of its board of directors, called for the payment of the third installment, due July 1, 1888, on the 25 shares of respondent, amounting to \$750, together with interest thereon. Respondent having failed to respond to this call, an action was instituted, and a writ of attachment issued, and a levy thereunder made upon his property. A motion to dissolve the attachment was then made by him on the ground "that the payment of the obligation sued on was secured at the making by a retention of the evidences of title to such personal property, and the certificates of stock for which said obligation was created by plaintiff as security for said debt." The motion prevailed, hence this appeal.

In granting the motion the court below evidently proceeded upon one of two theories: *First*, that as the corporation had sold the stock to defendant, but had not issued to him a paid-up certificate of stock, it still retained the stock, and had a special seller's lien thereon for the unpaid installments of his subscription, under section 331 of the Civil Code; or, *second*, that as it had not issued a certificate for full-paid stock, whether it thereby retained possession of the stock or not, it had a general lien thereon for the unpaid installments. For if a lien existed in either case an attachment would not lie. Code Civil Proc. § 537. A corporation for profit may give credit to the subscribers to its capital stock for the stock, and may, by proper provision in its by-laws, issue certificates to such subscribers prior to full payment for the stock. Civil Code, § 323; *Mitchell v. Beckman*, 64 Cal. 117. The defendant in this case, therefore, upon paying the installments due, and receiving the transferable certificate showing his subscription to and payment of all installments due on 25 shares of the capital stock of plaintiff, thereby became the owner of such shares of the capital stock evidenced by such certificate, subject to the unpaid installments mentioned in the certificate; and such certificate gave him as complete possession of the shares evidenced by it as though it were a certificate in the ordinary form issued for paid-up stock. Hence, as the plaintiff, at the time the installments sued for became due, did not have possession of the defendant's stock, it could not have a seller's lien thereon.

Did the corporation have a general lien upon the stock of defendant not dependent upon possession? We think not. Under our statutes, the only lien given to corporations for profit upon their subscribed capital stock, and which does not depend upon the possession of the certificate of stock, is to secure the payment of assessments levied for the purpose of paying expenses, conducting business, and paying debts. Civil Code, § 331.

It has been doubted, even, whether a lien upon stock can be created by a by-law, in view of section 324 of the Civil Code, which provides that certificates of stock may be transferred by indorsement and delivery of the certificate, but that such transfer is not valid, except between the parties thereto, until the same is properly entered upon the books of the corporation. *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359. But, however that may be, a lien not dependent upon possession of the certificate of stock may, by a contract between a corporation and its stockholders, be created in favor of the corporation, to secure the indebtedness of the stockholders to the corporation. *Jennings v. Bank*, 79 Cal. 323, 21 Pac. Rep. 852.

It is claimed by the respondent that a contract was made between himself and the corporation whereby the latter was to retain possession of his stock, and have a lien thereon for the unpaid installments of the subscription; but the record fails to show such a contract. Our conclusion is that, as no lien existed upon defendant's stock in favor of the plaintiff, to secure the installment sued for, the court erred in granting the order dissolving the attachment, and it should therefore be reversed.

We concur: VAN CLIEF, C.; HAYNE, C

PER CURIAM. For the reasons given in the foregoing opinion the order dissolving the attachment is reversed.

(83 Cal. 44)

FRANKEL v. DEIDESHEIMER *et al.* (No. 13,412.)

(*Supreme Court of California*. Feb. 1, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT OF EXCEPTION.

Plaintiff and defendant, by stipulation, submitted the settlement of the proposed statement to the judge on briefs, and further stipulated that, as soon as the statement was settled, plaintiff's motion for a new trial should be deemed to be made and submitted to the judge for his decision without argument, without further notice of the settlement or hearing. The motion for a new trial was denied, and notice of the appeal from the order denying the motion was served. *Held*, that plaintiff had lost his right, provided by Code Civil Proc. Cal. § 652, to petition the supreme court to prove an exception disallowed by the judge.

In bank. Appeal from superior court, Sierra county; G. G. CLOUGH, Judge.

Wm. F. Herrin and H. L. Gear, for appellant. *Hundley & Gale, S. S. Davidson, and Smith & Ford*, for respondents.

PATERSON, J. This is an application, based upon the provisions of section 652, Code Civil Proc., to prove an exception which it is alleged the court refused to allow in accordance with the facts. It appears from the petition and from the record that the statement was served on October 23, 1888, and the amendment thereto December 28, 1888. That the statement was settled on May 9, 1889. That, under a stipulation of counsel for plaintiff and defendants, the settlement of the

proposed statement was submitted to the judge upon briefs. This stipulation provided that, as soon as the statement was settled, plaintiff's motion for a new trial should be deemed to be made and submitted to the judge for his decision without argument; and that any further notice of the time of the settlement of the statement, and of the hearing of the motion for a new trial, should be waived by both parties. On May 10, 1889, the attorneys for plaintiff filed a written motion for a new trial, stating that "this motion is made upon said settled statement, and the judgment roll in said action. * * * The above motion is submitted without argument, pursuant to stipulation on file herein." On May 10, 1889, the judge made a written order denying the motion for a new trial, which was filed on May 14, 1889. Notice of appeal from the order denying the motion for a new trial was served July 11, 1889. This application was made August 20, 1889.

The petitioner comes too late to this court with his application for relief. He was charged with notice that the judge might strike out the matter which was in fact stricken out, and, of course, had notice of the fact, when the statement was settled and filed, that the exception which he now asks to prove had not been allowed by the judge. It does not appear that any request was made of the judge below to delay the settlement of the bill, or a ruling on the motion for a new trial, until an application could be made to this court to prove the exception desired. By submitting the settlement of the statement and his motion for a new trial in the manner stated above, we think he lost his right to apply to this court for redress of the grievance complained of. It is too late after the court below has acted upon a statement, duly settled, to prove an exception in this court; certainly too late after an appeal has been perfected. If this application should be granted, the appeal from the order denying a new trial would be heard upon matters which were not in the record, and which were not considered by the court below on motion for a new trial. Motion denied.

We concur: FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(82 Cal. 647)

TRIMMER v. BODE. (No. 12,238.)

(*Supreme Court of California*. Jan. 30, 1890.)

SCHOOL LANDS—RIGHT TO PURCHASE—EJECTMENT—DEFENSES.

Pol. Code Cal. § 3495, provides that any person desiring to purchase any of the state school lands must make an affidavit that he is a citizen of the United States, or has filed his intention to become such. By the amendment of 1880 to this section, he must state that he is an actual settler on the land. *Held*, that a defendant in ejectment who is in possession of certain school lands, which he has made application to purchase, can attack plaintiff's certificate of purchase on the ground that he was not a citizen, had not declared his intention to become such, and was not an actual settler on the land, at the time of making his affidavit.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Ejectment by O. S. Trimmer, administrator of John McBride, deceased, against Charles Bode, for school lands claimed under a certificate of purchase from the state to said John McBride. Pol. Code, § 3495, provides that any person desiring to purchase any of the state school lands must make an affidavit that he is a citizen of the United States, or has filed his intention to become such.

Geil & Morehouse, for appellant. *Webb & Sherwood*, for respondent.

THORNTON, J. Ejectment for N. $\frac{1}{2}$ of section 36, township 24 S., range 10 E., M. D. M. Judgment for plaintiff. Appeal by defendant from the judgment, and from an order denying his motion for a new trial. The plaintiff bases his right to recover on a certificate of purchase for the land in controversy issued to his intestate, John McBride. The defendant assails this certificate on the following grounds: *First*, that McBride was not, when he made his application to purchase, a citizen of the United States, nor had he declared his intention to become such; *second*, that McBride never was an actual settler on the land.

If defendant can urge these grounds, and their truth, or the truth of either of them, is established by the evidence, the judgment and order are erroneous. It is clear that there is no evidence in the record that McBride was ever a citizen of the United States, or had ever declared his intention to become such citizen. Whatever evidence was admitted on this subject at the trial was before its close stricken out by the court. The evidence fails to show that McBride was at any time an actual settler on the land. McBride states in his testimony that his home for the last 10 or 12 years, which includes the time he claims to have been a settler on the land, had been at Pinkerton's. Pinkerton's place was not on the land. We cannot hold that McBride was a settler on the land when at the same time he had his home at a different place. The defendant went on the land in November, 1885, and has resided on it ever since. During this period he has erected a house on it. He has plowed about five acres, dug a well, and fixed a road to the place. He possessed all the qualifications to purchase the land when he made the application required by law to buy it, in January, 1886. When he made this application, and at the time of the trial, he owned no other land. That the land is suitable for cultivation is proved by the evidence in the case. When defendant made application to purchase this land, there was no one in occupation of it. He entered on it for his own benefit, and to make it his home. He has made no contract with any one in regard to this land. Defendant made application to purchase this land in January, 1886. His application is in all re-

spects in compliance with law. On the 29th of January 1886, the surveyor general of this state made an order referring the claims of McBride and defendant to the superior court of Monterey county, in which county the land is situate, for adjudication. Defendant has brought suit under this order, which suit was pending at the time of the trial. We are of opinion that the defendant, on his mere possession, could attack the certificate of purchase to McBride—*First*, because the land was suitable for cultivation, and McBride was never an actual settler on it, (section 3, art. 17, Const.); *second*, because McBride was never a citizen of the United States, and had never declared his intention to become such citizen. On these grounds his application and certificate are void. If defendant could not assail the certificate of purchase of McBride on his possession, his application placed him in privity with the state, and therefore in a condition to attack it. The decision of the court below, for the reasons above given, is not justified by the evidence.

It may be added that the statute in force January, 1885, when McBride made his application, requires that the applicant must be an actual settler on this land in order to purchase it of the state. Pol. Code, § 3495, amended in 1880. See amendments to Codes 1880, p. 109. By this amendment of section 3495 of the Political Code, he must state in his affidavit to purchase that he is an actual settler on the land. Actual settlement on the land is therefore a necessary qualification to purchase, whether the land is suitable for cultivation or not.

The court erred in its findings of fact in regard to McBride's qualifications to purchase, as pointed out above; therefore McBride's application and certificate must be held void, as they conferred no title upon him. The judgment and order are therefore reversed, and the cause remanded for a new trial.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(83 Cal. 461)

WOODS v. VARNUM. (No. 13,534.)

(Supreme Court of California. Jan. 30, 1890.)

OFFICER—REMOVAL—APPEAL—SUPERSEDEAS.

Pen. Code Cal. § 770, which provides that a judgment of removal from office is appealable like a judgment in a civil action, but pending appeal the office must be filled as in case of a vacancy, defendant being suspended therefrom until reversal, applies to removals of public officers by summary proceedings, under section 772. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, San Diego county.

On motion for *supersedeas*.

Luce, McDonald & Torrence and *Mulford & Hammack*, for appellant. *James L. Copeland*, Dist. Atty., and *Hunsaker & Britt*, for respondent.

PATERSON, J. This is a proceeding based upon the provisions of section 772 of the Pe-

nal Code, for the removal of the defendant from the office of tax collector in and for the county of San Diego. The judgment was entered on October 2, 1889, depriving defendant of his office, and on the same day an appeal was taken therefrom to this court, and an undertaking in due form and with sufficient sureties was filed. On October 5th following, the board of supervisors appointed Henry Weineke to fill the vacancy caused by the removal of defendant, and on October 7th the court below made an order directing the sheriff to put Weineke in possession of the office. A writ for the execution of this order was issued accordingly, and on October 7th the sheriff made return showing that he had installed Weineke in the office of tax collector. On October 21, 1889, the appellant submitted a motion in this court for an order directing the court below to stay all proceedings herein during the pendency of the appeal. The motion is made upon the ground that the appeal which has been perfected operates as a *supersedeas* of all proceedings in the court below, and that the order of the court directing the sheriff to remove appellant and deliver possession of the office to Weineke is void.

Section 770 of the Penal Code provides that "from a judgment of removal an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but until such judgment is reversed the defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy." We think that this provision is applicable to proceedings under section 772, which provides for the removal of public officers by summary proceedings. Both sections are in chapter 2, pt. 2, tit. 2, Pen. Code, which provides for "the removal of civil officers otherwise than by impeachment." If there be any provision of law in any other title of the Code, or in any statute which conflicts with or contravenes the provisions of this chapter, the latter "must prevail as to all matters and questions arising out of the subject-matter" thereof. Pol. Code, § 4481. In the case of Covarrubias v. Board, 52 Cal. 622, relied on by appellant, the statute under consideration was the act of March 30, 1874, providing for the removal of civil officers, which contained no provision with respect to appeals. The court there said that the proceeding was one "had under the provisions of the act of March 30, 1874, and not under the provisions of the Penal Code, § 772." In view of the fact that the question before the court in that case was whether the perfecting of an appeal operated a *supersedeas*, the above remark of the court is significant, and indicative of an opinion that, if the proceeding had been one under section 772, the appeal would not have operated a *supersedeas*. Motion denied.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

FOX, J. I concur in the order denying the

motion, for the reason that it would be a vain act now to grant the motion; but do not express any opinion as to whether or not the provisions of sections 770 of the Penal Code apply to proceedings had under section 772.

BEATTY, C. J. I dissent.

3 Cal. Unrep. 235

TOGNAZZINI v. MORGANTI *et al.* (No. 13,362.)

(Supreme Court of California. Feb. 6, 1890.)

PATENTS—LOCATION—OPINION EVIDENCE.

The lines described in a patent must be located by the court according to the calls of the patent. Witnesses can testify only as to the existence and condition on the ground of what is called for in the writing; and it is error to admit their opinions, speculations, or conjectures as to the location of the lines.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLAR, Judge.

W. C. Stratton, for appellant. S. E. Crow and John J. Boyce, for respondents.

THORNTON, J. Ejectment for a parcel of land in Santa Barbara county. Judgment for defendants. Plaintiff moved for a new trial, which was denied, and from this order of denial plaintiff appeals. The controversy herein is as to the location of the eastern patented line of the Casmalia rancho. The parcel litigated is triangular in shape. The base of the triangle is a portion of the southern patented line of the rancho. The plaintiff contends that the eastern line of this triangle is the true patented line. The defendants' contention is that a line further west is the line as patented. The length of the base line is 20.20 chains. The other lines start from the ends of the base line, and converge in a north-westerly course until they meet. Of these converging lines, the westerly line is and will be called the "Harris Line," and the eastern is and will be called the "Cooper Line." The plaintiff contends for the Cooper line; the defendants for the Harris line. The court decided in favor of the Harris line, and thus upheld the contention of defendants. This eastern line of the Casmalia is thus described in the patent: It commences at a post which designates a station, and is marked "C, No. 2;" "thence descending ridge south, fifty degrees east, eighty-eight chains and fifty links, enter Canada; thence down through some one hundred and fifty-five chains, leaving Canada bearing south-east; thence over low running hills three hundred and ninety-four chains and fifty links; leaves hills, and crosses road, course south-west and north-east, three hundred and ninety-five chains and fifty-five links, to old post in the entrance of the Canada Verde, marked 'T. S. No. 5 and 6, No. 3.'"

There is one very controlling call in the field-notes of the patent, and that is the road which the eastern line is described as crossing. The testimony shows this road, or the remains of an old road about where it is designated, near the entrance of the Canada Verde.

There is testimony that a surveyor's post was erected at this point corresponding with the course and distance of the field-notes. That course is south, 50 east, and the distance 395 chains 55 links from post marked "C, No. 2." We are of the opinion that the Cooper line is the true line, or near the true line, of the patent. There is evidence that there was no post found at what plaintiff contents is the true location of post C, No. 3. If this post cannot be found, the question would then be very simple. The line must be run according to course and distance, and fixing the corner C, No. 3, at the south end of that line, taking care, however, that the line so run shall cross the road called for.

The court, in trying the cause, let in a mass of evidence which had no relevancy to the matter in issue. The witnesses, most of them surveyors, seem to have been permitted to locate the line according to their opinions. This was not the proper mode of trying the issues or locating the line. In adopting the mode above mentioned, the court abdicates its functions, and turns them over to the witnesses. The witnesses should depose to facts only. The calls of the patent are admitted in evidence, and the line must be located according to these calls. The court must determine what the calls are. The evidence is admissible to identify those calls, to show their location on the ground. To illustrate: A line is called for running from a tree marked "B" to a rock on which is marked in paint the letter "A." The witness can testify only to the existence of the tree and the rock called for. When they are ascertained, the court fixes the line by running a straight line over from B to A. A line is here called for running from a fixed point, C, No. 2; a course specified, south, 50 deg. east; a specific distance, 395 chains 55 links, to a post, C No. 3, T No. 5. Before it reaches the post last mentioned, it crosses a road. That line only is correct which crosses the road referred to. A line suggested or testified to which does not cross the road must be rejected at once. If post C, No. 3, is found stuck in the ground at the end of the line, that would certainly fix it. A post found 20 chains east of this point, or 20 chains west of it, lying on the ground, should not be considered a moment. If no post is found where the line ends, a line run in accordance with the calls of the patent is the true line. In regard to the road, we wish to be understood as saying, if the road is shown to exist, the line must cross it; if no road is found, the line must end when the distance called for is measured; say, 395 chains 55 links. We repeat, a court fails to discharge its duty when it fixes a line not in accordance with the calls of the written instrument in evidence. The court must make the location. A witness should only be allowed to testify as to the existence and condition on the ground of what is called for in the writing. His opinions or speculations or conjectures are inadmissible, and should have no weight. In

this case we are convinced that the testimony shows that the Harris line is not the true line, and therefore the order denying plaintiff's motion for a new trial must be reversed. Cooper's line seems to be nearly correct. His course is a little variant from the course called for in the patent. It is, however, correct, if at the southern end of the line the post called for, C 3, T 5, is found. Order reversed, and new trial ordered.

SHARPSTEIN, J. I concur.

McFARLAND, J. I concur on the ground that the court erred in admitting the evidence referred to in Mr. Justice THORNTON'S opinion.

82 Cal. 144

JEWELL v. MCKAY *et al.* (No. 12,480.)

(Supreme Court of California. Dec. 20, 1889.)

MECHANICS' LIENS—PROCEDURE—ATTORNEY'S FEES.

1. In an action to foreclose 11 mechanics' liens, some of the notices of lien designated one of the employers as "W. F. H.," others as "Fred H.," and others as "Frank W. H.," and it was averred and proved that the employer thus designated was called and known by these several names, and was one and the same person. *Held*, that the notices of lien sufficiently showed the employer's name.

2. The complaint, in an action to foreclose mechanics' liens, is not ambiguous and uncertain, in that it does not state the nature of the alterations or repairs made, or whether the various lienholders separately or jointly contributed to the work.

3. Under Code Civil Proc. Cal. § 1187, which prescribes what a notice of mechanic's lien shall contain, the notice need not state that the owner of the soil had personal or actual knowledge that the work was being done, as that is not one of the requirements of the statute, but it is sufficient, under section 1192, providing that every building constructed on any lands with the knowledge of the owner shall be subject to a mechanic's lien, to charge the interest of the owner of the soil, if such knowledge be alleged and proved.

4. Under Code Civil Proc. Cal. § 1187, which provides that the notice of mechanic's lien filed shall contain "a statement of his demand, * * * with a statement of the terms, time given, and conditions of his contract," the notice need not state the value of the labor or materials furnished, nor give an itemized account of the labor and materials for which liens are claimed, nor state facts showing a performance of the contract.

5. The allowance of \$250 attorney's fees, in an action to foreclose 11 mechanics' liens, is reasonable.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

Action by William S. Jewell, appellee, against Charles T. McKay, W. F. Harmon, and C. S. Ricks, appellants, to foreclose 11 mechanics' liens, of which plaintiff filed one and was the assignee of the others. The court found for plaintiff on seven of the liens filed, and allowed plaintiff \$250 for attorney's fees in foreclosing the liens. Judgment thereon. Defendants appealed. Code Civil Proc. Cal. § 1187, provides that notices of mechanic's lien, when filed, shall contain "the name of the owner, or reputed owner, if known," of the premises affected; and shall also contain "a statement of his [claimant's] demand, * * * with a statement of the

terms, time given, and conditions of his contract." Section 1192 provides that "every building * * * constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with" this act, unless the owners or claimants shall give notice within three days after obtaining knowledge that they will not be responsible for the same.

John A. McQuaid and C. M. Wheeler, for appellants. *J. G. H. Weaver and E. W. Wilson*, for appellee.

HAYNE, C. This was a suit to foreclose 11 mechanics' liens, which are set forth in separate counts of the complaint. The liens claimed were for labor and materials furnished to McKay and Harmon in the alteration and repair of a building owned by them. The ground upon which the building stood did not belong to McKay and Harmon, but belonged to one Ricks, whose interest was sought to be charged on the theory that he had knowledge of the work, but did not give notice that he would not be responsible therefor, as required by section 1192 of the Code of Civil Procedure. The trial court gave judgment for the defendants upon the third, fourth, fifth, and tenth counts; and, as the plaintiff has not appealed, these counts are not before us for consideration. Judgment upon the other counts was given for the plaintiff, and the defendants appeal therefrom, and from certain orders in relation to costs.

1. The appellants base objections upon the fact that the complaint alleges that the name of one of the employers was "W. F. Harmon," while some of the notices of lien designate him as "Fred Harmon," and some as "Frank W. Harmon." The first count, however, has the following allegation: "That said defendant W. F. Harmon is the same person referred to in said verified claim as 'Fred Harmon,' and that said defendant was usually known, designated, and called 'Fred Harmon.'" Each of the other counts has a similar allegation with reference to the name stated in the corresponding notice of lien, and the court found as follows in relation to it: "That the defendant W. F. Harmon is called and known sometimes as 'Fred Harmon,' and at other times and by other persons as 'Frank Harmon;' that is to say, that he is called both by the name of 'Fred' and 'Frank' Harmon, and the evidence does not disclose of what particular Christian name the letter 'F' preceding the name of Harmon is the initial." This finding is not attacked by the specifications, and, under the circumstances, we think that the objections are not well taken.

2. It is contended that the demurrer for ambiguity, etc., should have been sustained, in the first place, because the complaint does

not state the nature of the alterations or repairs made; and, in the second place, because it does not appear from the complaint "whether each person performed a separate job, or contributed to a separate alteration or repair, or whether all contributed to the same thing." We do not think there is any merit in these positions, and the other matters in this connection do not require special notice.

3. It is objected that some of the notices of lien do not state that the owner of the soil had personal or actual knowledge that the work was being done, and that the other notices contained no statement on the subject. But, while the knowledge is to be alleged and proved in order to charge the interest of the owner of the soil, (Code Civil Proc. § 1192) it need not be stated in the notice of lien. What the notice must contain is prescribed by section 1187, which does not require the matter in question. The knowledge, etc., was alleged and established, which was all that was necessary.

4. It is contended that the notices do not give any items, and are not sufficiently particular in statement. In this regard the notices contain the following statements, respectively: Jewell, (in first count:) That said Jewell "furnished materials to be and which were actually used," etc. That said Harmon and McKay "entered into a contract with said Wm. S. Jewell, under and by which said Jewell was to furnish the materials for the construction, alteration, and repair of said building, and the following is a statement of the terms, time given, and conditions of said contract, to-wit: That said Wm. S. Jewell was to furnish said materials, and the same were to be paid for in cash, gold coin, upon the delivery thereof to said Charles T. McKay and Fred Harmon by said Wm. S. Jewell. * * * That the amount of the contract price for said materials furnished as aforesaid is \$101.27 in U. S. gold coin." Wilds, (in second count:) "That said Wilds performed certain work and labor in the construction, alteration," etc. "That on the 10th day of October, A. D. 1886, said F. H. Wilds entered into a contract with said Frank W. Harmon and Charles T. McKay, whereby he was to work on said building in making said alterations and repairs for the sum of \$3 per day, payable when he quit work. The following is a statement of the terms, time given, and conditions on which said work and labor was performed, to-wit: It was to be paid for in lawful money of the United States when he quit work on said building. * * * That said F. H. Wilds commenced said work and labor on said alterations and repairs of said building on the 11th day of October, A. D. 1886, and finished said work and labor on the 6th day of December, A. D. 1886, and on that day quit work. That said work and labor, performed as aforesaid, amounts to the sum of \$104, in lawful money of the United States." Graham, (in sixth count:) That said Graham "performed cer-

tain work and labor in the construction, alteration," etc. "That said A. W. Graham on the 9th day of October, A. D. 1886, entered into a contract with said Frank W. Harmon and Charles T. McKay, whereby said Graham was to work on said building in making said alterations and repairs. That the following is a statement of the terms, time given, and conditions upon which said work and labor was performed, to-wit: The same was to be paid for in lawful money of the United States when the work was completed. * * * That said A. W. Graham commenced said work and labor on said building in making said alterations and repairs on the 11th day of October, A. D. 1886, and finished work on the same on the 17th day of December, A. D. 1886, and on said day quit work thereon. That said work and labor performed amounts to the sum of \$232." Appleby, (in seventh count:) That said Appleby "performed certain work and labor in the construction, alteration, and repair," etc. "That on the 19th day of October, A. D. 1886, said J. W. Appleby entered into a contract with said Frank W. Harmon and Charles T. McKay, whereby he was to work on said building in making said alterations and repairs for the sum of \$2 per day, payable when he quit work. There was no agreement as to the times of payment for said work and labor, but the same was to be paid for in lawful money of the United States on demand. * * * That said John W. Appleby commenced said work and labor on said alterations and repairs on said building on the 5th day of October, A. D. 1886, and finished said work and labor on the 17th day of December, A. D. 1886, and said last-named day quit work. That said work and labor, performed as aforesaid, amounts to the sum of \$132 lawful money of the United States." Moore & Olmstead, (in eighth count:) That said Moore & Olmstead, "as tinsmiths and plumbers, performed certain work and labor upon that certain building or structure hereinafter described, in the alteration, construction, and repair thereof, in tinning and plumbing the same, and furnished certain materials, consisting of pipe, tin," etc. "The following is a statement of the terms, time given, and conditions of said contract, to-wit: Said work and materials were to be paid for in lawful money of the United States on the completion of the construction, alteration, and repairs of said building or structure. * * * That the amount of the contract price for said work so done and materials so furnished as aforesaid is \$306.83 in lawful money of the United States." Hulse, (in ninth count:) That said Hulse "furnished certain materials, consisting of bolts and iron rods and plates, which were to be used," etc. "The following is a statement of the terms, time given, and conditions upon which said materials as aforesaid were furnished, to-wit: Such materials were to be paid for when said alterations and repairs on said building were completed and finished, in lawful money of the United States. * * * That said ma-

terials so furnished as aforesaid amount to the sum of \$24.70." Hopkins, (in eleventh count:) That said Hopkins "furnished certain materials, consisting of nails, rope, cords, pipe," etc. "The following is a statement of the terms, time given, and conditions of said contract, to-wit: The same were to be paid for in lawful money of the United States on delivery. * * * That the amount of the contract price for said materials so furnished as aforesaid is \$20.90 in lawful money of the United States."

Two objections are made to these notices in the respect mentioned, viz.:

(a) It is urged that the notices do not state the value of the labor or materials. This position is based partly upon the provision of section 1184 of the Code of Civil Procedure, as amended in 1885, to the effect that the persons entitled to liens may give to the owner a notice of their claims, stating, among other things, "the amount in value as near as may be," etc.; and that it shall thereupon be the duty of the owner to "withhold from his contractors" a sufficient sum to cover the claims so notified. This notice, however, is not the notice of lien which is to be recorded. It is merely a measure of extra precaution on the claimant's part, and it is optional with him whether to give it or not. The position is further based upon section 1183, as amended in 1885, which provides that certain designated persons shall have a lien "for the value" of labor done and materials furnished. In the first place the phrase is not used in contradistinction from "price" or "agreed value." It cannot possibly have been the intention that a contractor, material-man, or laborer who agrees for a certain sum can have a lien for a greater sum upon the ground that the value of what he furnished is greater. It is probably true that where a subcontractor, material-man, or laborer agrees with the original contractor for more than he is entitled to, upon the understanding between them that it shall be made out of the property, there would be such a fraud as would vitiate the claim. But, aside from such a case, we think that the word "value" in the above provision is to be construed so as to mean "agreed value," in cases where there is an agreed value. In the second place, the provision of section 1183 merely defines the class who are entitled to liens. It does not purport to prescribe the contents of the notice to be recorded, which matter is regulated by section 1187.

(b) It is argued that the notices do not give itemized accounts of the materials and labor for which liens are claimed. But we do not understand that this is necessary, under the decisions of this state. The statute as it stood in 1858 required that the notice should give "a just and true account of the demand." Wood, Dig. p. 537, § 2. And under this provision it was held in *Brennan v. Swasey*, 16 Cal. 141, that an itemized account was not necessary, the court, per COPE, J., saying: "It was unnecessary to set out the

items of the account. Nothing more was required than a statement of the demand, showing its nature and character, and the amount due or owing thereon." See, also, *Selden v. Meeks*, 17 Cal. 131; *Heston v. Martin*, 11 Cal. 41; *Davis v. Livingston*, 29 Cal. 283. The provision under which the present liens were filed (Code Civil Proc. § 1187, as amended in 1874) required that the notice should contain a statement "of his demand," "with a statement of the terms, time given, and conditions of his contract." The word "demand" was construed in *Brennan v. Swasey*, above quoted, and under that decision it must be held that that word does not mean an itemized account. Does the other clause, viz., "the terms, time given, and conditions" of the contract, require such an account? There are many contracts which deal with details of quantity, time, value, etc. But even with regard to such contracts it seems questionable whether it is necessary for the notice of lien to set forth items. Even in a pleading, "it is not necessary for a party to set forth the items of an account therein alleged." *Id.* § 454. And we cannot think that the statements in a notice of lien are required to be made with greater fullness or formality than is necessary in a pleading. We are not prepared to say that as much fullness or formality is required. And it seems probable that even in the case of a contract which went into details of amount, etc., a general statement thereof would be sufficient in the notice of lien. But it is not necessary to express a definite opinion upon this question; for it is obvious that there are many contracts which do not go into details of amount, time, value, etc. For example, a contractor may go to the owner of a lumber yard and say: "I am building such and such a building. Will you let me have lumber for it, as I need it, at ruling rates?" If this should be agreed to, and the lumber supplied, without anything further being said, it seems plain that an itemized account would not be involved in a statement of the "terms, time given, and conditions" of the contract. So, if a laborer should be employed at a fixed rate for an indefinite period, the number of days he worked would not be a part of the contract, and consequently would not have to be stated in the notice. So, if he should be employed without a fixed rate of compensation, such compensation could not be said to be a part of the "terms, time given, or conditions" of the contract. The Code does not require the notice to state implications made by law. For example, if there was nothing but a request for labor or materials, and a silent compliance with it, we do not think that a statement of the implied promise to pay what the labor or materials were reasonably worth would be necessary. It seems to us that the statute requires only the agreement which is expressly made to be stated in the notice. This we understand to be the principle of the decision in *Hills v. Ohlig*, 63 Cal. 104, where it

was held that if no distinct time was agreed on, but the time of payment was left to the rule fixed by the law on such a state of facts, the "time given" need not be stated. Nor do we think that it is necessary to state facts showing a performance of the contract, or other facts necessary to complete the cause of action. For example, in the cases above put, it would not be necessary to state that the labor and materials were in fact furnished, as provided by the contract, or that they were reasonably worth the sum claimed. The statute does not require the notice to state anything subsequent to or outside of the contract. Tested by the foregoing rules, we think that all the notices of lien were sufficient. The only notices about which there can be any question in this regard are those of *Graham and Hulse*. And with respect to these we think that the statement that "the following is a statement of the terms," etc., of the contract, must be taken to mean the only terms which were in fact agreed upon; and upon this construction the notices are sufficient. The counsel fees were properly allowed, and we think were reasonable in amount.

We have noticed all the points of counsel which we think require special notice. There may be other objections to the notices of lien, but we do not think it is incumbent on us to raise them. We therefore advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

(32 Cal. 275)

JACKSON *v.* BROWN *et al.* (No. 12,527.)

(Supreme Court of California. Dec. 31, 1889.)

APPEAL—NOTICE—CONSENT JUDGMENT—AUTHORITY OF ATTORNEY.

1. Where a judgment, by consent of counsel of all parties, is rendered in an action of damages for trespass against three defendants, and one of them appeals from an order denying his motion to vacate it, notice need not be served on his co-defendants.

2. Where an appeal is taken from a consent judgment by one of the defendants, who swears that his co-defendants were unauthorized to employ counsel for him and consent to said judgment, but said co-defendants testify that they were authorized to employ an attorney and compromise or settle the action, and the counsel who appeared for appellant testifies that he had no personal communication with appellant, but was employed through the co-defendants, an appellate court will not reverse on the ground that the lower court erred in denying the motion to vacate the judgment.

Department 2. Appeal from superior court, city and county of San Francisco, WALTER H. LEVY, Judge.

This was an action of damages for trespass, brought by Jackson against Brown, Alexander, and Samuels. There was a judgment by consent entered, which Samuels

moved to vacate; and upon the denial of his motion defendant Samuels appealed.

Spencer & Henning and Garrett W. McEnerney, for appellant. *C. H. Jackson and Thornton & Merzbach*, for respondents.

McFARLAND, J. Motion to dismiss appeal of defendant Samuels from the judgment, and from order denying his motion to vacate the judgment, and for leave to answer. The action was brought to recover damages of defendants, Brown, Alexander, and Samuels, for a continued trespass on the rights of plaintiff, and for an injunction enjoining defendants from the continuance of the trespass. The complaint was filed on the 14th of April, 1887. The record shows an appearance for defendants by George A. Knight, an attorney of this court, who, on the 27th of April, 1887, filed a demurrer to the complaint. The summons had been served on Samuels on the 23d of the same month. On the 27th of May, 1887, the demurrer was overruled. On the same day, judgment was, by consent of counsel of all parties, rendered against defendants for one dollar damage, and costs of suit, with a perpetual injunction as prayed for in the complaint. This judgment was entered on the 31st day of May, 1887. Samuels subsequently moved to vacate the judgment, and for leave to answer, and on the 30th of September, 1887, this motion came on to be heard, and, after the court had heard counsel for each party, was on the same day denied. The motion was made on several grounds, mainly on the ground that he (Samuels) never consented that any judgment should be entered against him, and that the judgment was entered without any authority from him. The motion to dismiss the appeal is rested on the ground that there was no service of the notice of appeal on the other defendants, Brown and Alexander, who are stated in the notice to dismiss to be adverse, and opposed in interest to Samuels upon the record in this action.

How Brown and Alexander are adverse parties to Samuels herein we cannot perceive. The judgment against them will stand, though it is reversed as to Samuels. What recourse Brown and Alexander will have against Samuels, or Samuels against them, on a reversal of the judgment, we cannot perceive; nor would there be any if the judgment should be affirmed. The same is true of the order. This case comes within the rule laid down in *Randall v. Hunter*, 69 Cal. 80, 10 Pac. Rep. 130, and must be decided the same way. Motion to dismiss appeal denied.

The appeals of Samuels have also been submitted for decision. The evidence on the point of authority from Samuels to employ counsel, and to allow judgment to be entered against him, in this action, is conflicting. Samuels testified one way, and Brown and Alexander the other; the latter stating distinctly that they were authorized by Samuels to employ counsel, for him and themselves,

to defend, compromise, or settle the action with plaintiff, and that it was agreed between Samuels and them that they and their attorney should have the right and power to bind him in every step of the action, and by any entry of judgment in, or compromise of, the same; and further, in substance, that Samuels knew of the employment of Knight for him, and knew of the entry of judgment, and made no objection to any of the proceedings. Knight's testimony is not in conflict with any of these statements. It shows that he had no communication with Samuels personally, never saw him during the whole course of the business, and that his authority to appear for all the defendants came from and through Brown and Alexander. Under such a state of facts as is above set forth, we cannot say that the court erred in denying the motion to vacate the judgment. It must then be held that the judgment herein was rendered by consent of Samuels. A consent to a judgment is a waiver of errors by a party consenting thereto, and on an appeal from such a judgment it must be affirmed. *Consensus tollit errorem*. *Holmes v. Rogers*, 13 Cal. 191; *Conniff v. Kahn*, 54 Cal. 284. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.

(82 Cal. 613)

POWELSON v. LOCKWOOD, Justice of the Peace. (No. 13,326.)

(*Supreme Court of California*. Jan. 27, 1890.)

JUSTICE OF THE PEACE—JURY TRIAL—WRIT OF PROHIBITION—APPEAL—STIPULATION.

1. The denial of a jury by a justice of the peace on a trial for misdemeanor does not affect his jurisdiction; and the error, if any,—for which there is a plain, speedy, and adequate remedy by appeal to the superior court,—cannot be arrested or corrected by the writ of prohibition.

2. Where an opinion on defendant's right to a jury trial would have no bearing on any material question to be decided on his application for a writ of prohibition, nor any proper effect as an authority, a stipulation by counsel to present no points on the question of prohibition, and to confine themselves to the question of defendant's right to a jury trial, will be disregarded.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Powelson, the petitioner, was charged with vagrancy, and the justice of the peace, Lockwood, before whom he was to be tried, was about to refuse him a jury trial. An alternative writ of prohibition issued to the justice, which was subsequently discharged. Petitioner appeals. Counsel for both parties entered into the following stipulation, as appears from paragraph 2, pp. 5, 6, of appellant's brief: "Now, so that this court should not be annoyed with a useless consumption of time with collateral matters, the attorneys for the appellant and respondent have agreed upon the sole feature of the case to be considered on this appeal. We have agreed that, if the defendant is entitled to a jury trial in such misdemeanor case in the said justice's

court, the judgment and decision of the said superior court herein may be reversed, with the direction to the court below to enter an order that appellant have prohibition directed unto respondent here and his said court to desist from all further proceedings in the case of the people against Powelson, without a jury in said cause, until appellant here be allowed a trial by jury. * * * And counsel hereto have also agreed that, if appellant be found not entitled to a jury trial in such misdemeanor case, then the decision of the lower court herein shall be affirmed."

Gage & Roberts, for appellant. *Frank P. Kelly*, Dist. Atty., and *B. M. Marble*, Dep. Dist. Atty., for respondent.

VAN CLIEF, C. Alternative writ of prohibition issued by the superior court of the county of Los Angeles, on the petition of the appellant, to the respondent, a justice of the peace of Los Angeles city, to prohibit said justice from trying the petitioner on a charge of vagrancy, under section 647 of the Penal Code, without a jury. The appeal is from the judgment discharging the writ. It appears that the respondent denied the petitioner's demand for a new trial, properly made, if he was entitled to a jury trial; and that the justice proposed and was about to try him upon said charge without a jury. Upon the trial the application was opposed on two grounds: (1) That prohibition was not the proper remedy; (2) that defendant was not entitled to a jury trial.

The court sustained the opposition on the first ground, and declined to consider the second. I think the court properly sustained the opposition to the writ on the first ground above stated, and for the reasons that the justice's court had jurisdiction of the subject-matter—the misdemeanor charged—and of the parties; that in denying a jury trial, even if appellant was entitled to it, and in trying or in proposing to try the case without a jury, the justice's court did not exceed, nor propose to exceed, its jurisdiction; and that, even if this action or proposed action of the justice's court was erroneous, it was so only as to the mode of procedure in an action of which that court had jurisdiction. The commission of such an error cannot be arrested or corrected by the writ of prohibition. In *re Miller*, 22 Pac. Rep. 1113, (opinion filed January 2, 1890.) If there was any exception to this general rule at common law, which is doubtful, it has been repealed by our Code of Civil Procedure as heretofore expounded and enforced by this court. *Clark v. Superior Court*, 55 Cal. 199; *Wreden v. Superior Court*, Id. 504; *More v. Superior Court*, 64 Cal. 345. Besides, the appellant had a plain, speedy, and adequate remedy by appeal to the superior court. Pen. Code, §§ 1237, 1466, 1467.

No point has been made or argued by counsel on this branch of the case, though the decision of it seems to be well sustained by

an able opinion of the learned judge of the lower court, brought up with the record. But counsel have stipulated "that, if the defendant is entitled to a jury trial in such misdemeanor case in the said justice's court, the judgment and decision of the superior court herein may be reversed, with the direction to the court below to enter an order that appellant have prohibition directed unto respondent and his said court, to desist from all further proceedings in the case of the people against Powelson, without a jury." As to this stipulation, respondent's counsel says: "The real issue in this case being as to whether or no the defendant is entitled to a jury trial, and the people, as well as appellant, being desirous of having the question finally settled on this appeal, the respective counsel have entered into the stipulation set forth in paragraph 2, pp. 5, 6, of appellant's brief; and, in accordance therewith, present no points on the question of prohibition, but confine themselves to the question as to whether appellant is entitled to a jury trial, and respectfully ask the court to pass upon that point solely." Inasmuch as counsel have very ably argued the question which, alone, they have stipulated to submit, I regret to say that, in my opinion, their stipulation must be disregarded. I think that the lower court properly declined to consider the question as to whether the justice's court merely erred in denying a jury trial. The court exhausted its authority, on the application for the writ of prohibition, in determining, as it did, that the act sought to be prohibited was not in excess of the jurisdiction of the justice's court, and that the defendant had a remedy by appeal. It could not, on that application, arrest or review the mere errors of the justice's court about to be committed within the province of its jurisdiction, and thus make the writ of prohibition, or the application for it, serve the purpose of an appeal. The same rule must be applied to the case here on this appeal; otherwise this court must exercise mere appellate jurisdiction by means of a writ of prohibition, without any appeal, and in a case to which the appellate jurisdiction of this court does not extend. It is therefore unnecessary, for any purpose of this appeal, to decide whether or not the appellant was entitled to a jury trial in the justice's court, and the expression of an opinion upon this question would be improper, notwithstanding the stipulation of counsel, for the reasons that such an opinion would have no bearing upon any material question to be decided, and no proper effect as authority or otherwise. *State v. McGlynn*, 20 Cal. 276. I think the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(82 Cal. 585)

PEOPLE v. MAHLMAN. (No. 20,567.)

(Supreme Court of California. Jan. 27, 1890.)

EMBEZZLEMENT—INFORMATION.

Pen. Code Cal. § 504, provides that every officer of any association who fraudulently appropriates to any use or purpose, not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, is guilty of embezzlement. *Held*, that it is not necessary for the information, charging such officer with embezzlement, to state the persons composing the association, as the fact of the officer's being a member would not change the offense.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

R. Percy Wright, for appellant. *Atty. Gen. Geo. A. Johnson*, for the State.

FOOTE, C. The defendant was convicted of the crime of embezzlement. From the judgment rendered therein, and an order refusing a new trial, he has appealed. His first contention is that the information filed against him was defective, and did not state any offense, in that it did not specify the person whose property he had embezzled. That part of the information material to this discussion is: "The said Henry Mahlman on or about the 13th day of April, A. D. 1886, at the said city and county of San Francisco, was an officer, to-wit, the treasurer of Germania lodge No. 7, Order of Hermann Sons, an association existing under and pursuant to the laws of the state of California, and, as such officer, there, then, and there came and was under his control and in possession, by virtue of his trust as such officer, one hundred and ninety-four dollars and forty-five cents, in lawful money of the United States. And the said Henry Mahlman, while said money and personal property was so in his possession and under his control by virtue of his trust, as such officer, then and there, to-wit, on or about said 13th day of April, 1886, at said city and county of San Francisco, did willfully, unlawfully, feloniously, and fraudulently appropriate said money and personal property to his own use, and not to a use in the due and lawful execution of his said trust, the said money and personal property then and there being the property of said association." Section 503 of the Penal Code reads: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." Section 504 reads: "Every officer of this state, or of any county, city, city and county, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation, (public or private,) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement." The in-

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formation, it will be seen, is drawn substantially in the language of the statute, and is sufficient, unless, as the defendant claims, it was necessary to state who were the persons composing the association. The rules with relation to the framing of indictments and informations are, in this state, purely matters of statutory control, and their sufficiency is to be tested by the terms of the statutes pertaining thereto. *People v. Tomlinson*, 66 Cal. 344, 5 Pac. Rep. 509; *People v. Goggins*, 22 Pac. Rep. 207. The sections of the Penal Code just adverted to show that it was the legislative intent that "every officer, director, trustee, or agent of any association, society, or corporation, (public or private,)" who fraudulently appropriates money or property in his possession and under his control, by virtue of his trust, to his own use, and not to a use in the due and lawful execution of his trust, shall be guilty of embezzlement. It does not say that, being an officer, if he is a member of the association he shall not be guilty, if he commits the act denounced; but it makes no exception, and enacts a sweeping declaration that all "officers," etc., whatsoever, without any reserve, who do the acts described therein, shall be held as embezzlers, and punished as such. It is clear, therefore, that much of the argument of the appellant on this point must fall to the ground, because he claims, as a reason why the persons composing the association should be named, that it might then appear that the defendant was a member of the association, an owner in part of the property or money alleged to be embezzled, and therefore could not be guilty of the crime charged, because he must, to be guilty, embezzle the money or property of a person other than himself. The statute, we think, was intended to include just such officers as the defendant was, if he was guilty of the act charged, whether he was a member of the association or not. And we see no necessity for framing the information in any other way than in accordance with the statute, which was done. The association whose property he was alleged to have embezzled was fully named, and he was thereby accurately informed that it was the property or money of that association which he had embezzled. This, it seems to us, was sufficient. And this view of the matter disposes of the defendant's second contention, that is, that the evidence showed that he had been guilty of no offense, since, if he converted the property to his own use, he might do so without being guilty of embezzlement, because he was a member of the association, and a part owner of the money he converted. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Rehearing denied.

(82 Cal. 564)

BURROWS v. BURROWS *et al.* (No. 12,385.)

(Supreme Court of California. Jan. 27, 1890.)

APPROPRIATION OF WATER-RIGHTS.

Civil Code Cal. § 1415, requires a person desiring to appropriate water to post a notice thereof, and section 1416 requires work to be commenced within 60 days after the notice is posted. Section 1418 provides that "by a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted." Section 1419 provides that "a failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent complainant who complies therewith." *Held*, that one who actually appropriates water without complying with the rules acquires the right to its use as against any subsequent claimant who has not complied with the rules. Following *De Necochea v. Curtis*, 20 Pac. Rep. 563.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

R. M. F. Soto, (*Hermann & Soto*, of counsel,) for appellant. *Geil & Morehouse*, for respondents.

GIBSON, C. The parties to this suit are the owners of and cultivate separate farms in Monterey county, lying upon, and embracing a natural stream known as "Muddy Creek," and flowing into Clear creek, which has its source easterly of their farms, and, when running, flows in a westerly direction,—first through the land of respondent Olds, next through that of respondent Burrows, and then through the land of appellant. During the winter and spring of each year, and in times of great freshets, it flows in a large stream down to and across the lands of appellant, but in the summer, and during dry seasons, the waters of the stream are much diminished, and but a small quantity, if permitted to flow uninterrupted, would reach the land of appellant. The appellant acquired title to his land from the government of the United States by a patent issued to him on April 30, 1883, prior to which time the land was a part of the public domain. The respondents, from 1876, for over six years prior to the issuance of the patent, had owned, occupied, and cultivated their respective farms, and continued to own, occupy, and cultivate them until suit brought. During the year 1877, and more than six years before appellant acquired title to his land from the government, the respondents each dug a ditch from Muddy creek, above its junction with Clear creek, down to and across his own land to his residence, and thereby diverted and appropriated a small stream of water from Muddy creek for domestic and irrigating purposes. They continuously maintained their respective ditches from that time until this suit was brought, and during the dry season of each year they, through their respective ditches, appropriated, diverted, and used for beneficial purposes, upon their respective farms, a small stream of water. At the time the ditches were dug, both banks of Muddy creek were a portion of the public domain, and the appro-

priation and diversion of water from the creek were not objected to or interfered with until the commencement of this suit. The land that appellant now owns was, at the time of respondents' settlement on their separate farms, and when they dug their separate ditches, open, unoccupied, and unclaimed land; and it was not until long afterwards that appellant settled upon his said land. The flow of water in Muddy creek, notwithstanding the appropriation and diversion by respondents, was and is, during the greater portion of each year, sufficient for all the wants of appellant to which he applies the water; but during about three months of the summer of each year, viz., from July 1st to October 1st, the flow of water extends below the respondents' several points of diversion to within 100 to 150 yards of plaintiff's land, where it sinks, and is lost in the sand. A small quantity would, but for the diversions of respondents, reach the land of appellant, and would thereby, it seems, prevent appellant's well from drying up.

On this state of facts, the court decreed that all the parties had equal rights to the use of the waters of Muddy and Clear creeks for beneficial purposes, and that such waters be divided between all the parties from the 1st day of July until the 1st of October in each year, and until the setting in of the rainy season of each year, as follows: Five days each, first to the appellant, next to the respondent Burrows, and next to the respondent Olds, and thereafter, during the prescribed period, to alternate in the same manner; and that all parties be perpetually enjoined from interfering with the natural flow of the waters of said creek, except in accordance with the decree. The appeal is from all that portion of the decree that adjudges respondents to have equal rights with appellant to the use of the waters of the creeks in dispute, and that apportion the use of the waters to respondents, and enjoins the appellant from interfering with or using the waters during the periods that respondents are given the use thereof; also, from an order denying a new trial. There is no brief for respondents on file.

The first point urged by the appellant in his brief is that, although the court found that he obtained the patent to his land on April 30, 1883, and that the respondents had made their several diversions of the waters in question in 1877, the court erred because it did not find at what time he (appellant) acquired a vested interest in his land. The statement on motion for a new trial does not contain any such specification of error, nor statement of evidence upon which such a specification could be based; hence it must be disregarded.

The principal contention of appellant, however, is that, as the respondents failed to show that they had severally complied with the provisions of sections 1415 and 1416 of the Civil Code, or with the local rules and customs, (of the latter of which there is no evi-

dence in the record, and therefore needs no further notice,) the court erred in finding that their several appropriations were valid as against the appellant, a lower riparian proprietor upon the same stream, because the respondents severally failed to prove that they had posted, and caused to be recorded, in the office of the county recorder, the notices required by section 1415 of the Civil Code. The undisputed findings show that the respondents had settled upon their respective farms, and had each appropriated and diverted to their several farms portions of the waters of the streams in controversy, where they were used continuously, for beneficial purposes, for over six years prior to the time appellant settled upon his farm, and acquired title thereto from the United States government. The findings were justified without proof of posting and recording of the notice prescribed by section 1415 of the Civil Code. *De Necochea v. Curtis*, 80 Cal. 407, 20 Pac. Rep. 563, and 22 Pac. Rep. 198. There the plaintiff, who was the owner of a tract of land across which a natural stream extended, which had its source in a large spring one-half mile from his land, in 1880, in order to better utilize the water of the stream, without posting, or causing to be recorded, the notice provided for in said section 1415, constructed a ditch from the spring to his land, and diverted the water of the spring through it to his land, where he applied the water to beneficial uses. Five years afterwards, in 1885, the plaintiff, pre-emptioner, settled upon, and acquired title to, the land upon which the spring was situated, and shortly afterwards made a ditch, and thereby diverted the water of the spring upon her land for proper uses. The question thereby presented was whether the defendant took the title to her land subject to the prior appropriation of plaintiff, notwithstanding his non-compliance with section 1415. It was held that she took the title to her land from the government, subject to the right of plaintiff to divert and use the water of the spring. Mr. Chief Justice BEATTY, in considering the effect of plaintiff's failure to post the notice provided for in section 1415, said, (80 Cal. 399, 22 Pac. Rep. 198:) "In this case, it is clear from the findings that the respondent's right to purchase did not become a vested right prior to the year 1885, and that as early as the year 1880 the appellant had completed the diversion, and was in full enjoyment of the use, of the water of the spring, for the irrigation of his land. But the respondent contends that he was nevertheless not an appropriator, and had no vested right to the use of the water recognized or acknowledged by the laws of this state, because, having commenced and completed his diversion of the waters of the spring after the enactment of the Civil Code, he failed and neglected to post or record the notice prescribed by section 1415. As this is the point upon which our decision must turn, we will endeavor to state our views with respect to

it somewhat more fully and explicitly than we have hitherto done. Sections 1415 and 1416 of the Civil Code read as follows: 'Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein: (1) That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted. Sec. 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.' It may be conceded that, if these provisions of the law stood alone and unqualified, strict, or at least substantial, compliance with their requirements would be, as counsel claim, a *sine qua non* to the acquisition of any right to divert running water from its natural channel. But these provisions do not stand alone. Section 1418 reads as follows: 'Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.' In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation, upon which it had always been held, before the statute, that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was, upon its completion, to be deemed an appropriator from the date of his notice, and was therefore prior in time, and stronger in right, than an intervening appropriator, notwithstanding his diversion of the water might be first completed. We are not, however, left to any doubtful implication to be drawn from section 1418. Section 1419 reads as follows: 'Sec. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.' This language clearly and necessarily implies that there is a right to the use of running water, acknowledged by the legislature and cognizable by the courts, which is good against all the world except a claimant who has complied with the rules prescribed in sections 1415 and 1416. Now, what is this right? What can it be, except the right of one who has fully completed the diversion of running water, and applied it to a beneficial use, before the initiation of an adverse right of appropriation under the law, or the acquisi-

tion of an adverse right in the land to be affected by the diversion? And why should not such a right be recognized and enforced?"

In the case before us, as we have seen, the respondents had acquired the prior right to divert and use nearly all the waters of the stream, yet the court divided the use of the waters during the irrigating season equally between all the parties. In this, perhaps, it went too far, and awarded the appellant more than he was entitled to; but the respondents must have been satisfied, as they have acquiesced in the judgment. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

candidates, and deduct them *pro rata* from their respective scores.

2. The reception of illegal votes cannot be contested on account of the misconduct of the election boards as provided for by Code Civil Proc. § 1111, subd. 1, where it does not appear in what particular precinct they were cast.

8. The California election law, prior to its amendment by St. Cal. 1889, p. 209, provided that spurious tickets could only be counted for what they would have been if genuine, where the fraudulent names were "pasted" on the tickets. *Held*, that under such law tickets in all respects genuine, except that on them was "printed" the name of the adverse party's candidate for sheriff, were properly counted for him in a contest for his office.

4. Code Civil Proc. Cal. § 1112, which provides that no irregularity or improper conduct of the judges shall avoid an election unless it procures the election of the contestee when he has not received the highest number of legal votes, does not prevent an election from being avoided by rejecting the votes of entire precincts for disregard by the judges of mandatory requirements of the election law, or of merely directory provisions coupled with such fraud as made the true result doubtful.

5. Pol. Code Cal. §§ 1225, 1226, which provide that, in incorporated cities and towns, a person offering to vote shall give the location and number of his residence, or such description thereof as shall definitely fix the same, and require it to be announced by the inspector or judge, and recorded on the poll-list, are directory, and not mandatory.

6. Pol. Code Cal. § 1239, subd. 3, which was valid under Const. Cal. 1863, art. 2, § 1, provides that "a person must not be held, by reason of having moved from one precinct to another in the same county, within 30 days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." *Held*, that it conflicted with the new constitution, (article 2, § 1,) which requires residence in the precinct for 30 days preceding the election. THORNTON, J., dissenting.

7. The contestant proved that the number of male persons over 21 years of age who resided in certain precincts on a particular lot on the election day, and for 30 days prior thereto, was less than half the number of votes cast. *Held* that, though the proof was consistent with the supposition that a voter may have resided in different places in the precinct during that period, it was negative proof, and, there being none in rebuttal, it would be held to establish material misconduct on the part of the election boards.

In bank. Appeal from superior court, San Diego county; T. K. WILSON, Judge.

George W. Monteith and Goodwin & Goodwin, for appellant. *Hunsaker & Britt, Edwin Parker*, and *John M. Lucas*, for respondent.

BEATTY, C. J. This is an election contest. At the general election held November 6, 1888, Russell, the contestant, was the Republican, and McDowell, the contestee, was the Democratic, candidate for sheriff of San Diego county. According to the official canvass of the returns of the election made by the supervisors, the whole number of votes cast in the county was 8,203, of which McDowell received 4,010 votes, Russell received 3,844 votes, W. J. Gould (Prohibition) received 277 votes, and two votes were counted as scattering. McDowell having received a certificate of election, Russell, in due time, filed his petition in pursuance of section 1111 et seq. of the Code of Civil Procedure, contesting his right to the office. The grounds

(83 Cal. 70)

RUSSELL v. McDOWELL. (No. 13,325.)

(Supreme Court of California. Feb. 1, 1890.)

ELECTIONS—CONTESTS—MALCONDUCT OF OFFICERS—QUALIFICATIONS OF VOTERS.

1. Code Civil Proc. Cal. § 1111, subd. 4, provides that an election may be contested on account of illegal votes; and section 1114 declares that nothing in that ground is to be construed to authorize an election to be set aside unless it appears that a number of illegal votes has been given to the contestee, which, if taken from him, would give him less votes than those which were legally cast for another person for the same office. *Held* that, in the absence of proof that the illegal votes cast at an election were given for the contestee, it was not error to apportion them among the several

of contest were the first and fourth enumerated in said section, viz.: (a) Malconduct of the election boards; and (b) Illegal votes. At the trial, the sealed packages of ballots were opened and recounted; the result being, according to the findings of the superior court, that the whole number of votes cast in the county was 8,262, distributed as follows:

McDowell (Dem.).....	4,035
Russell (Rep.).....	3,865
Gould (Pro.).....	275
Scattering.....	87

But it was found that 210 votes had been cast by persons whose names were not on the Great Register, and 21 votes by persons who were not residents of the wards in which they voted; making an aggregate of 231 illegal votes. Of these, it was proved that 2 had been cast and counted for McDowell, and 1 for Russell. As to the remaining 228 illegal votes, there was no evidence as to how they had been cast. The superior court deducted 2 from the vote of McDowell, and 1 from that of Russell, on account of the illegal votes known to have been received by them, respectively; and, as to the remaining 228 illegal votes, they were deducted from the vote of each candidate, and from the total of the scattering votes, in the same proportion that each vote, respectively, bore to the total vote, with the following result; leaving

McDowell.....	3,923 legal votes
Russell.....	3,759 legal votes
Gould.....	268 legal votes
Scattering.....	85 legal votes

Upon this finding of a plurality of 164 legal votes for McDowell, judgment passed in his favor, confirming his election, and for costs, from which Russell appeals, assigning error as follows:

First. He contends that the court erred in apportioning among the candidates the 228 illegal votes, as to which there was no evidence to show how they were cast, and deducting them *pro rata* from the respective scores. But counsel does not make it very clear what other course he thinks the court ought to have taken with respect to these votes. He argues, and very justly, that such a method of disposing of illegal votes can never change the result of an election; that the different candidates must always stand in the same relative position after the *pro rata* deduction as before it, and consequently that it is a vain and nugatory proceeding to make the deduction. He also argues, with equal force, that there is but one means of proving how the illegal voter has cast his vote, that is to say, by his own testimony, which is more likely to be false than true, and consequently that the attempt to prove how illegal votes have been cast can only result in an aggravation of the fraud. But what consequence would he have us deduce from this reasoning? He does not contend that all of the illegal votes should be deducted from the vote of the candidate standing highest in the poll, and there is neither reason nor authority

to support such a proposition. In truth, a court can do nothing better, in the absence of proof as to how illegal votes have been cast, than to make the apportionment as was done in this case, or to throw out the precincts at which they have been received on the ground of malconduct of the election board. Considering such illegal votes with reference to the ground of contest mentioned in subdivision 4 of section 1111 of the Code of Civil Procedure, the second ground of appellant's contest in this case, they can avail the contestant only so far as he is able to prove, not only that they were illegally cast, but that they were cast for the contestee. This is made clear by the provisions of section 1114 of the Code of Civil Procedure. "Sec. 1114. Nothing in the fourth ground of contest, specified in section 1111, is to be construed as to authorize an election to be set aside on account of illegal votes unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person." In the absence of any proof, therefore, that any of these 228 illegal votes were cast for McDowell, the court certainly had no right to deduct from his vote more than his just proportion.

But the reception of illegal votes, votes of persons not on the registry lists, or not residing in the precinct where they offer to vote, may amount to malconduct on the part of the board of judges, and might come under the first ground of appellant's contest, based on subdivision 1, § 1111, of the Code of Civil Procedure. We do not, however, understand appellant's counsel to contend that these particular illegal votes are to be considered with reference to his first ground of contest; and, indeed, they could not avail him upon that ground, for it nowhere appears in what particular precinct or precincts they were cast, and if the malconduct of the judges who received them was such as to warrant the court in throwing out the entire vote of the precincts where they were received, we cannot tell what precincts would be thrown out. For aught that appears, the contestant may have received more votes than the contestee in the precincts where these illegal votes were given. There was no error, certainly none injurious to the appellant, in the apportionment of the 228 illegal votes.

Second. It was discovered by the recount that eight tickets headed, "Regular Republican Ticket," and in fact regular in all respects except that they contained the name of McDowell instead of Russell as candidate for sheriff, had been voted at the election. They were counted for McDowell, and the appellant contends that the court erred in not counting them for him. Under the election law, as amended since the last general elec-

tion, (St. 1889, p. 209,) these eight ballots would be counted as appellant contends they should have been counted; but that statute has no retrospective operation, and the question is whether, under the law as it stood in November, 1888, a court or board of canvassers would have been authorized in counting these spurious tickets as if they had been what they pretended to be,—regular Republican tickets. There was no express provision of law at that date to warrant such action. The general object of the law was, of course, to give effect to the real intention of the voter,—to secure the counting of his ballot in favor of the candidates of his choice; and it contained many specific provisions to that end. But the general rule for ascertaining the intention of the voter was to read his ballot as printed or written, and be guided by that. To this rule there were no exceptions save those expressly provided for. One of these, contained in section 1204 of the Political Code, related to pasters,—a fraud of the same kind, though clumsier, and more easily detected, than spurious tickets. It is surprising that the legislature did not from the beginning deal with names fraudulently printed on tickets exactly as it dealt with names fraudulently pasted on tickets. But for some reason it did not make such provision until its last session, and therefore we cannot say that the superior court erred in counting these tickets as they were printed.

Third. In support of his first ground of contest, misconduct of the election boards, the appellant introduced a large amount of evidence in regard to the manner of conducting the election in the First and Third precincts of the Third ward, and the First precinct of the Fifth ward, of the city of San Diego. In these three precincts, respectively, in the order named, there were 331, 326, and 487 votes cast, making a total of 1,144, of which McDowell received 642, and Russell 472; remainder, scattering. McDowell's plurality of 170 in these three precincts was greater than his plurality in the whole county, and consequently, if they were thrown out, his election would be invalidated. Appellant contends that the superior court erred in failing to set aside and disregard the vote of these precincts for misconduct of the election boards. His counsel makes a number of separate assignments of error under this head, but they may all be conveniently considered together. Sections 1225 and 1226 of the Political Code are as follows: "Sec. 1225. The person offering to vote must hand his ballot to the inspector, or to one of the judges acting as inspector, and announce his name, and the number affixed to it on the register in use at the precinct where he offers his vote: provided, that in incorporated cities and towns the said person shall also give the name of the street, avenue, or location of his residence, and the number thereof, if it be numbered, or such clear and definite description of the place of such residence as shall definitely fix the same. Sec. 1226. The in-

spector, or judge acting as such, must receive the ballot, and, before depositing it in the ballot-box, must, in an audible tone of voice announce the name and register number: provided, that in incorporated towns and cities the said inspector, or judge acting as such, shall also announce the residence of the person voting, and the same shall be recorded on the poll-list by the poll-clerk." San Diego was in November, 1888, an incorporated city,—laid off into blocks and lots, with its streets numbered upon a simple and definite system. But the poll-lists of precincts 1 and 3 of the Third ward show that no record was kept of the place of residence of the voters, and presumably they gave no place of residence. The poll-list of the First precinct of the Fifth ward shows that a record was kept of the streets or blocks where voters resided, but not of their street numbers, in many instances. In other words, they were so indefinitely located that it could not be told upon which of eight or a dozen lots they claimed to reside. It is very clear that in these three precincts the election boards disregarded the requirements of sections 1225 and 1226 of the Political Code, and in so doing were guilty of misconduct.

This brings us to the serious question of the case: What is the consequence of this misconduct? Must the vote of these precincts be thrown out, thus invalidating the election of the contestee, or may the vote of these precincts be counted notwithstanding the omission to require the voters to state the street and number of their residence? The answer to these questions would be very plain and easy if nothing had been shown beyond the mere fact that the election boards neglected to require the voters to give their places of residence; for it is well settled that disregard of directory provisions of election laws, in the absence of actual fraud, is no ground for rejecting the entire vote of a precinct, and the provisions quoted cannot be regarded as other than directory. It is only those provisions of the statutes relating to the time and place of holding elections, the qualifications of voters, and such others as are expressly made essential prerequisites to the validity of an election, that are held to be mandatory. All others are directory, merely, and a failure to observe them, caused by honest ignorance or mistake, and not resulting in manifest fraud, does not afford ground for rejecting the entire vote of a precinct. But, on the other hand, it is equally well settled that neglect of directory provisions of a statute designed to prevent fraudulent voting, followed by actual fraud of that character sufficient in extent to throw doubt on the result of the election, is ground for rejecting the entire vote of a precinct, if there are no means of purging the poll. We have not time to cite and review the numerous decided cases by which this doctrine is established; but we refer to *Pine on Elections*, §§ 497-509, where a full discussion of the subject will be found. See, also, Chapter 17, *Cooley, Const. Lim.* But

it is claimed by respondent that such is not the law of this state, for the reason that the statute under which this contest is made lays down a different rule. He relies on section 1112 of the Code of Civil Procedure, which reads as follows: "Sec. 1112. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes." According to respondent's construction of this section, no amount or character of misconduct of an election board will warrant the exclusion of the entire vote of a precinct, but the contestant of the election must assume the burden of showing how the illegal or fraudulent votes were cast, and can have no relief except the deduction from his adversary's score of such illegal votes as he may be able to prove were cast for him. This construction cannot be maintained. If it could, it would follow that an election held miles away from the appointed place would be valid, contrary to the decision in *Knowles v. Yates*, 31 Cal. 82, and it would follow that the votes of a precinct must be counted though the election was held on a different day from that appointed, contrary to all authority; for the language of this section is equally applicable to mandatory as to directory provisions of the election law, and it must receive a construction reconcilable with the doctrine, as to the effect of disregarding mandatory provisions. We conclude its meaning to be merely that the election of a county officer as sheriff will not be avoided unless enough precincts are excluded for malconduct of the election boards to destroy his majority and that the law of this state is, as it is everywhere else, and ought to be, that disregard of mandatory requirements of the election law, or of merely directory provisions, coupled with such actual fraud as makes the true result doubtful, is ground of throwing out the entire vote of a precinct, where there is no means of purging the poll.

This brings us to a consideration of the evidence offered to sustain the allegation of fraud. The evidence showed, beyond any doubt, that the officers of the three city precincts above named disregarded the provisions of sections 1225 and 1226 of the Political Code. The manifest object of these provisions is to prevent fraudulent voting. Compliance with them makes fraud difficult and improbable. Disregard of them makes fraud easy, difficult of detection and punishment, and therefore probable. Officers of election are, like all other persons, presumed to know the law and their deliberate omission to follow directions designed to prevent fraudulent voting certainly calls for explanation. It casts suspicion upon their integrity, and is sufficient *prima facie* to make out a case of fraud. No doubt such omission is susceptible of explanation, and we are very

willing to believe that the officers of these precincts erred through ignorance of the law, and were not actually guilty of fraudulent intent. But, as the case is presented, we cannot indulge that presumption. The officers were not called as witnesses, as they should have been, to prove that they acted as they did through ignorance, and not with fraudulent purpose; and, in the absence of any rebutting proof on this point, we feel constrained to hold that the contestant made out a case of malconduct on the part of the election boards.

But upon another point of more serious import the evidence of fraud was much stronger. The contestant called hundreds of witnesses, residents of all parts of the three precincts in question, by whom he undertook to prove the names of all those qualified by residence to vote in those precincts. These witnesses, testifying with reference to maps of the precincts showing all the subdivisions of blocks and lots, proved the names of all male residents over 21 years of age who had resided on any particular lot on the day of the election, and for 30 days previous. The names of all such persons were considerably less than half of the number of votes, 1,144, cast in the three precincts. From this, contestant argues that more than half of the votes so cast, about 600, were illegal and fraudulent votes. Respondent, on the other hand, argues that the proof, allowing it the utmost effect, was not sufficient to prove that any fraudulent or illegal votes were cast; for, he says, proof that a man did not reside on a particular lot on the day of the election, and for 30 days prior thereto, is not inconsistent with the supposition that he may have lived for 30 days prior to the election within the precinct,—part of the time in one house, and part of the time in another. Nor is it inconsistent with the supposition that he might have been living in the precinct 30 days before election, and removed to another precinct of the same county within the 30 days, in which case he would be a qualified voter of the precinct by virtue of subdivision 3, § 1239, Pol. Code, which reads as follows: "A person must not be held, by reason of having moved from one precinct to another in the same county, within thirty days prior to the election, to have lost his residence in the precinct so moved from, provided he was an elector therein on the thirtieth day prior to such election." It is to be observed, however, with respect to this provision of the Political Code, that it was adopted while the old constitution was in force, and, though perfectly valid at the time of its adoption,—the old constitution not requiring any length of residence in a voting precinct as a prerequisite to the right to vote (Const. 1863, art. 2, § 1.)—it has ceased to be law since the adoption of the new constitution, with which it is in direct conflict. By the new constitution, (article 2, § 1.) residence in his election precinct for 30 days preceding the election is just as essential a condition of the right to

vote as is residence in the county for 90 days, and in the state for 1 year.

As to the other point, however, it is true that proof that a particular person has not resided continuously on one lot, or in one house, for 30 days prior to an election, is entirely consistent with the supposition that he may have resided in the precinct the whole period,—part of the time in one house, and part in another. But it is equally true that proof of this character, with reference to more than half of the persons voting in a ward, is not consistent with the supposition that all, or any considerable number, of them have lived in the precinct 30 days. It is not in accordance with ordinary experience that men generally move so frequently; and so, notwithstanding the flaw in plaintiff's proof, considered with reference to any particular person, we cannot avoid the conclusion that in the aggregate, and considered with reference to the mass of persons affected by it, it did establish a strong *prima facie* case of fraudulent voting on a large scale in these three precincts. Moreover, it is to be considered that the contestant was assuming the difficult task of proving a negative, *i. e.*, the want of qualification of a large number of voters; and the doctrine is well established that slight proofs make out a *prima facie* case, where a negative is to be proved. In all such cases, rebuttal is comparatively easy, and is consequently of imperative obligation. Here no proof in rebuttal was offered, and the evidence for contestant stands absolutely uncontradicted.

Such being the case, we are forced to the conclusion that the superior court erred in finding no material malconduct of the election boards. For this error the judgment must be reversed. But we cannot accede to the proposition of contestant that we should pronounce a final judgment, either declaring the contestant elected, or avoiding the election of the contestee. There are no findings to sustain such a judgment, and we cannot supply findings. Besides, the contestee is entitled to an opportunity to show, as he may be able to do on a new trial, that despite the irregularities complained of there was in fact no fraud, actual or intended, on the part of the election boards, or those voting in the three precincts, whose vote the contestant seeks to exclude. Judgment reversed, and cause remanded.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.; McFARLAND, J.

WORKS, J., did not participate in the decision of this case.

THORNTON, J. I concur in the judgment, and in all that is said in the opinion except that which relates to the constitutionality of section 1239 of the Political Code. The section is not clearly opposed to any provision of the constitution, and in such case the deference due to the legislature requires that the

section be held constitutional. The constitution should not be so construed as to cut off the right to vote of any citizen who has resided in the state 1 year preceding the election, in the county 90 days, including a residence in the precinct on the thirtieth day preceding the election. The opportunity of committing fraud under such circumstances is reduced to a *minimum*, for many citizens must know of the residence of such a person who has resided in the county 90 days, and a portion of the 30 days' limits in that precinct of the county where he offers to vote. It must be observed that the person offering to vote must have resided in the county 90 days, and a portion of the 30 days, to give him a right to vote, and his removal is only from one precinct to another of the same county.

(82 Cal. 513)

BODE v. TRIMMER. (No. 12,262.)

(Supreme Court of California. Jan. 11, 1890.)

SCHOOL LANDS—CONTESTS—NATURALIZATION—EVIDENCE.

1. On a contest to determine which of two persons had the better right to purchase certain school lands from the state, the order of reference by the surveyor general, introduced in evidence without objection, recited that the register of the United States land-office had "certified that there was no valid claim adverse to the state" against the land. Held that, as under Pol. Code Cal. § 3409, this certificate could not be properly obtained until "after the survey of the township by the United States surveyor general," the recital was sufficient to show that the survey had been made before the certificate issued, especially as the pleadings of both parties stated that a survey had been made.

2. Since the naturalization of an adult alien is a judicial proceeding which must be entered of record, (2 Story, Laws U. S. 851,) an applicant for the purchase of state school land cannot prove his naturalization by parol.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Webb & Sherwood, for appellant. Geil & Morehouse, for respondent.

FOOTE, C. This action was brought to determine a contest arising in the office of the surveyor general of the state of California with respect to which of two parties had the better right to purchase certain school lands from the state. The matter was referred by the surveyor general to the superior court of Monterey county for adjudication, under the provisions of section 3414 of the Political Code. Judgment was rendered in favor of the plaintiff as having the right to purchase the land in dispute. Pending a motion for a new trial the defendant died, and the cause was revived in the name of his administrator, and the motion was denied. From the order made in the premises, and the judgment, this appeal is prosecuted.

The appellant makes the point that the eighth finding of fact is without evidence to support it, his contention being that although it is found that previous to the filing of the application of the plaintiff to purchase the land it had been surveyed by the sur-

veyor general of the United States, and the survey and plat, duly approved, were filed by him in the United States land-office, etc.; that, nevertheless, there was no evidence of such facts in the record. Both plaintiff and defendant state in their pleading that a proper survey was made, and the copy of the order of the state surveyor general, which was introduced in evidence without objection, states that "on March 24, 1869, H. C. Rollins, register of the United States land-office for the San Francisco district, certified that there was no valid claim adverse to that of the state of California for all the above-described land." Section 3409 of the Political Code provides that "the surveyor general must, after the survey of any township by the United States surveyor general, obtain from the United States land-office a statement showing whether or not the sixteenth and thirty-sixth sections therein belong to the state." This statement cannot be properly obtained until a survey of the township is made, and the sixteenth and thirty-sixth sections cannot be truthfully stated by the United States land-office to belong to the state until they are ascertained and fixed by the survey; nor can they be demanded from the United States, or listed to the state, until such survey. It is a proper presumption that officers have performed their duty. *People v. Otto*, 77 Cal. 47, 18 Pac. Rep. 869; Code Civil Proc. § 1963, subd. 15. It would seem, therefore, that it should be presumed that the certificate is truthful, and that the proper officers have performed the duties which were required of them before such statement could be made, which includes the making of the survey, and that the land belonged to the state; especially, since in this case the pleadings of both parties state that a survey was made, etc.; and there is no evidence in the record which even hints to the contrary. And this is a proceeding, too, in which, from its very nature, the order for a reference of the contest, and all proceedings prior and subsequent thereto, assume the title of the land to be in the state, certainly so far as the plaintiff and defendant are concerned. *Lobree v. Mullan*, 70 Cal. 152, 11 Pac. Rep. 685; *Taylor v. Weston*, 77 Cal. 534, 20 Pac. Rep. 62. This view of the matter disposes of the next point made by the appellant, viz., that the decision was against law, because there was no proof, as he claims, that any survey of the lands was ever made.

It is further urged by counsel for the appellant that the court erred in striking out, upon motion of the plaintiff, the parol evidence of the defendant as to his being a citizen of the United States; and also the great register of the county, introduced to show his citizenship. The defendant had testified that he was a naturalized citizen of the United States, and therefore an alien by birth. He also stated that he had been naturalized in the state of Indiana. The great register showed that he was registered as John Madigan, and he stated that he

had voted in Monterey as John Madigan. The name by which he appeared in the action was John McBride. The evidence was objected to when offered, but was allowed to go in, subject to a motion to strike out, which, as we have seen, was made and granted. There was no other evidence offered by the defendant which proved, or tended to prove, that he was a citizen of the United States, or had declared or filed his intention of becoming one. In order to purchase the land it must appear that an applicant is a citizen of the United States, or has filed his intention to become such. Section 3495 Pol. Code. Statutes of this kind confer rights upon a particular class of persons, or by reason of their possessing some special qualification or *status*, and one who desires to obtain the benefit or advantages thereby accruing "must show himself to belong to the class designated, or to possess the qualification prescribed, or the *status* mentioned, as the basis of the right." *Lee Doon v. Tesh*, 68 Cal. 45, 6 Pac. Rep. 97, and 8 Pac. Rep. 621. It being in evidence that the defendant was an alien by birth, "his original *status* is presumed to continue until the contrary be shown. *Hauenstein v. Lynham*, 100 U. S. 483. * * * It may be considered as settled that the naturalization of an alien as a citizen of the United States is a judicial act, and it follows that, to be effective, it must be done by a court of competent jurisdiction. * * * Of naturalization, then, there must be, as in other judicial matters, that judgment which is 'the end of the law.' * * * Now, how is this judgment shown? In the nature of things, it must be a matter of record. A court speaks by its dockets, minutes, or records. Where there is no record there is no judgment. *Plant v. Gunn*, 2 Woods, 378. * * * 'Proceedings of naturalization have to be recorded, "which proceedings shall be recorded by the clerk of the court," is the language of the act of congress on the subject. 2 Story, Laws U. S. 851.' * * * Nor is it competent to supply alleged deficiencies in the record by parol evidence. The record, if not correctly made up, or if lost or destroyed, should be perfected or replaced by appropriate proceedings in the court where the judgment was pronounced. *Freem. Judgm.* § 38; *Bigelow, Estop.* 34. Naturalization cannot be proved by parol. *Slade v. Minor*, 2 Cranch, C. C. 139; *Dryden v. Swinburne*, 20 W. Va. 89; 14 U. S. Dig. (N. S.) 18." *Green v. Salas*, 31 Fed. Rep. 107, 108, 109, 111. It is clear, therefore, that neither parol testimony nor the great register, as proffered, was admissible to prove citizenship, or the filing of an intention to become such. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, J., (concurring.) I concur in the judgment. No proper evidence of defendant's naturalization was offered; but I am not clear that the rule stated in the opinion of Mr. Commissioner FOOTE, about proof of naturalization, is entirely correct.

(82 Cal. 570)

PRENTICE v. MILLER. (No. 12,264.)

(Supreme Court of California. Jan. 27, 1890.)

SCHOOL LANDS—CONTESTS—NATURALIZATION—EVIDENCE.

1. On a contest to determine which of two persons had the better right to purchase certain school lands from the state, the order of reference by the surveyor general, introduced in evidence without objection, recited that the register of the United States land-office had "certified that there was no valid claim adverse to the state" against the land. *Held* that, as under Pol. Code Cal. § 3409, this certificate could not be properly obtained until "after the survey of the township by the United States surveyor general," the recital was sufficient to show that the survey had been made before the certificate issued, especially as the pleadings of both parties stated that a survey had been made.

2. Though the certified statement of the register of the land-office is the best evidence as to when the survey was made, and though the recital is not a matter required to be placed in the order of reference, yet as it was admitted without objection, it is sufficient proof of the fact to which it relates.

3. Though in land contests each party is an actor, and must both by pleadings and proofs show compliance with the law, yet, under Code Civil Proc. Cal. § 462, allegations in plaintiff's complaint, not denied by defendant's answer, must be taken as true.

4. Since the naturalization of an adult alien is a judicial proceeding which must be entered of record, (Rev. St. U. S. §§ 2165, 2167,) an applicant for the purchase of state school land cannot prove his naturalization by parol.

Commissioner's decision. Department 1. Appeal from superior court, Monterey county; **JOHN K. ALEXANDER, Judge.**

Webb & Sherwood, for appellant. *Geil & Morehouse*, for respondent.

GIBSON, C. This was a contest referred to the superior court of Monterey county by the surveyor general and *ex officio* register of the United States land-office, to determine the respective rights of the parties to purchase certain school lands. Judgment passed for plaintiff, from which, and an order denying a new trial, defendant appeals. The pleadings are conceded to be in proper form, and sufficient. The appellant urges, in support of his appeal, that there is no evidence to sustain the fifth, sixth, and seventh findings, wherein the court, in effect, found that before plaintiff filed his application to purchase the land in dispute, it had been surveyed by the United States surveyor general for California, who had filed an approved plat of such survey in the United States land-office at San Francisco, the office for the district within which the land lies, and that the register of the United States land-office had accepted the land for, and listed and certified it over to, the state, in part satisfaction of the grant by the United States to this state of the six-

teenth and thirty-sixth sections of each township for school purposes.

An application to purchase lands of the character in question cannot be made until after the township in which the same may be situated has been surveyed by the United States. Pol. Code, § 3495; *Medley v. Robertson*, 55 Cal. 396. This made it necessary for each contestant to allege and prove that the land applied for was surveyed by the United States at the time they severally sought to purchase it. *Rogers v. Shannon*, 52 Cal. 99; *Finney v. Berger*, 50 Cal. 248. The respective allegations of the parties in their pleadings in this regard are sufficient to meet this requirement. In the certified copy of the order of reference of the surveyor general, made pursuant to sections 3414 and 3415 of the Political Code, which was introduced in evidence by plaintiff without objection, is a recital which is the only evidence tending to support the above findings. It reads as follows: "On March 24, 1869, H. G. Rollins, register of the United States land-office for the San Francisco district, certified that there was no valid claim adverse to that of the state of California for all the above-described land."

While the recital, if objected to, would doubtless have been excluded, because it was not a matter required to be placed in the order of reference, and of which the certified statement of the register of the United States land-office would have been the best evidence, still it comes within the rule that inadmissible evidence, if admitted without objection, is sufficient proof of the fact to which it relates. *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. Rep. 580. It is at most but slight evidence; but, such as it is, it tends to show, and, we think, in the absence of evidence to the contrary does show, that the surveyor general had obtained the statement from the United States land-office, showing that the land in question belonged to the state, in compliance with section 3409 of the Political Code, by which it is provided: "The surveyor general must, after the survey of any township by the United States surveyor general, obtain from the United States land-office a statement showing whether or not the sixteenth and thirty-sixth sections therein belong to the state." The statement, it is apparent, could not have been obtained until after the township, containing the land applied for, had been surveyed by the United States. We are unable, then, to say that there is an entire absence of evidence of the facts found, in order to sustain this contention of appellant. But the respondent is not obliged to rely wholly upon such evidence, as the allegations of his complaint, to which the findings assailed respond, are not denied by the defendant's answer; and, as we have seen, being material allegations, they must therefore be taken as true. Code Civil Proc. § 462; *Gilson v. Robinson*, 68 Cal. 543, 10 Pac. Rep. 193. In the case last cited the general rule regarding this class of cases was well stated as follows: "In cases of this kind each party

is an actor, and must set forth in his pleadings, and show by his proofs, that he has strictly complied with the law, and by such compliance has become entitled to purchase the land. If he fails to do this, he can obtain no assistance from the courts." Citing *Woods v. Sawtelle*, 46 Cal. 392; *Cadierque v. Duran*, 49 Cal. 356; *Christman v. Brainard*, 51 Cal. 536; *Lane v. Pferdner*, 56 Cal. 122. But the rule thus stated does not change the rule applicable to pleadings declared in the Code of Civil Procedure, *supra*; for we find in that same case that one of the points presented by the appellant was that the trial court had no jurisdiction to try the case, because there was no proper and sufficient order of reference made by the surveyor general referring the contest between the parties to the court below for trial, as required by sections 3414 and 3415 of the Political Code. The plaintiff, however, alleged in his complaint that he demanded of the surveyor general a reference of the contest between himself and the defendant to the proper court for adjudication, and that thereupon that officer did refer it. A copy of the order of reference was attached to the complaint. The allegations were not denied by the answer, and it was accordingly held that a proper reference had been made so as to give the court jurisdiction of the case.

The appellant here on the trial, realizing that under section 3495 of the Political Code it was necessary for him to prove that at the time he made his application to purchase he was either a citizen of the United States, or had declared his intention to become such, offered certain evidence to prove that at that time he was a naturalized citizen of the United States. The evidence was received conditionally by the court and afterwards, upon motion of respondent, stricken out. This ruling is the only other point presented. The evidence referred to consisted of an entry as a qualified naturalized voter in the great register of the county of Monterey; and of his own testimony, as follows: "I was born in France. Came to the United States in 1850. Came to New York. Remained in New York city three months, and then went to Illinois, where I stayed two years, and then went home to France. Got my citizen's papers in New York before I went to Illinois. I got naturalized in New York. Lost my papers on my way home from France by shipwreck. * * * I came to the United States under age." This evidence was properly excluded. It was ruled in the recent case of *Miller v. Prentice*, ante, 8, (No. 12,239, filed December 18, 1889,) as follows: "The evidence as to the citizenship of plaintiff is clearly insufficient to establish that fact. He swears that he was born in France, and was naturalized in the city of New York, but has lost his naturalization papers." The naturalization of an adult alien, or one who has resided in the United States from his eighteenth year of age, is a judicial proceeding, and can only be effected in a court of record

having a seal and a clerk, and must be entered of record. Rev. St. U. S. §§ 2165, 2167. And like any other judicial record must be proved by the record itself, or a properly exemplified copy thereof, or by proof of its loss or destruction. *Green v. Salas*, 31 Fed. Rep. 107. There are, however, certain limitations to this rule, for after proper proof of the naturalization of the parents of alien children, who were under 21 years of age, and residents of the United States at the time their parents were naturalized, parol evidence may be received to prove the minority and residence of the children in order to show that they are citizens, (Rev. St. U. S. § 2172;) and proof of naturalization may also be by the parol evidence of the party, in the form of an affidavit, in proceedings concerning mining claims, by virtue of section 2321 of the Revised Statutes of the United States; but the appellant does not come within either of these limitations. See, generally, as to the two questions herein considered, the late case of *Bode v. Trimmer*, ante, 187, (No. 12,262. Filed January 11, 1890.) We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

82 Cal. 513

In re WADLEIGH. (No. 20,589.)

(Supreme Court of California. Jan. 11, 1890.)

CRIMINAL LAW—SENTENCE—DEDUCTION FROM TIME.

1. Under Pen. Code Cal. § 1205, providing that "a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied" at a certain rate per day, a sentence, on conviction of an offense punishable by fine and imprisonment, that defendant be imprisoned in the state-prison for a definite term, and pay a fine, and be imprisoned in the state-prison until the same should be satisfied, at a given rate per day, is void so far as it provides for imprisonment in the state-prison for the collection of the fine. Following *Ex parte Arras*, 78 Cal. 304, 20 Pac. Rep. 683.

2. Pen. Code Cal. § 1590, giving to prisoners certain deductions from their term of imprisonment for good conduct, is not unconstitutional, as an infringement of the right of the governor to pardon, and no order from the governor is necessary before discharging a prisoner whose term, after allowing his credits for good conduct, has expired.

In bank. On *habeas corpus*.

Carroll Cook, for petitioner. *Charles B. Darwin*, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The petitioner is confined in the state-prison under a conviction of felony, and sentenced to the state-prison for five years, and that he pay a fine of \$1,000, and be imprisoned in said prison until said fine is satisfied, at the rate of one day for each one dollar of said fine. It is alleged in the petition "that during his imprisonment the said Wadleigh has faithfully ful-

filled all the duties assigned to him, and has obeyed the rules and regulations of said prison, and has therefore earned the credits and deductions from his term of sentence allowed him by law; that, allowing said Wadleigh such deductions and credits so allowed him by law, the five years' imprisonment ordered by said judgment has fully expired; and that said Wadleigh is now held in said prison, as petitioner is informed and believes, solely for the collection of the fine imposed by said judgment." The return of the warden does not deny the allegation of the petition that the petitioner has earned the credits and deductions allowed him by law, and that, allowing him such credits, he has served his full term of imprisonment imposed as a punishment, but contends that the credits provided for by the statute cannot be allowed except upon some action of the governor authorizing it. So much of the judgment against the prisoner as provides for his imprisonment in the state's prison for the collection of the fine imposed is void. *Ex parte Arras*, 78 Cal. 304, 20 Pac. Rep. 683. Therefore we must treat the sentence as one of imprisonment for five years. So treating it, the statute provides, in express terms, that certain credits or deductions from the term of imprisonment imposed shall be allowed for good conduct. *Deer. Codes*, p. 490 Sup. § 20, (*Pen. Code Cal.* § 1590.) This statute does not require any action on the part of the governor, nor is any such action necessary. The statute, by its terms, entitled the petitioner to his discharge, the same as if his term of imprisonment had expired without such commutation as he is allowed by its provisions. The statute is not unconstitutional as an infringement of the power of the executive to pardon. It does not take away or interfere with such power in any way. The statute simply fixes the term of imprisonment in certain cases and upon certain conditions. This provision enters into and becomes a part of the judgment of the court below. When a defendant is sentenced to imprisonment for five years, this means five years, subject to the deductions allowed from such time by law. The respondent asks upon whose order a prisoner is to be discharged under this statute. The answer is given by the above construction of the statute. If the term for which he is imprisoned has expired, allowing him the credits provided for, he is entitled to be discharged by the warden, as in any other case where the term of imprisonment has expired, without an order from any other officer. This is subject, however, to the right of the board of prison directors to determine, before the expiration of his term, that he has, by subsequent misconduct, forfeited his right to such deductions. The petitioner is entitled to be discharged, and it is so ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.

THORNTON, J. I concur on the ground of

the decision in *Ex parte Arras*, supra. In *Arras'* case I dissented, and still think it wrongly decided, but I feel bound now to accept it as settled law in this state.

McFARLAND, J. I concur in the judgment and in the opinion of Mr. Justice WORKS. But, as it may be thought that some things were decided in *Ex parte Arras* which were not before the court in that case, I desire to express my doubt whether a defendant can be imprisoned, even in a county jail, beyond the maximum term of imprisonment prescribed by the statute as a punishment for the offense of which he has been convicted. A fine is, no doubt, quite a severe additional punishment to one who is able, and can be forced, to pay it; but, after a sentence to the full term of imprisonment provided by law for the offense, to then impose a fine of one thousand or five thousand dollars on an impecunious defendant, known to be utterly incapable of raising one thousand cents, for the mere purpose of prolonging his imprisonment beyond the term prescribed by law, seems to me to be a species of legal jugglery not contemplated by the Code. When the Code provides that the punishment of imprisonment for a certain offense shall be for a term, for instance, "not exceeding one year," does it mean that a court may indirectly imprison him for two, or five, or twenty years? The asserted power to do this is based on section 1205 of the Penal Code by applying to it the most extreme rule of literal construction. The section is as follows: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied," at a certain rate per day. Now, it must be remembered that the judgment, prescribed for many offenses is imprisonment, or fine, or both. There are therefore three different kinds of judgments,—one imposing imprisonment alone, another imposing a fine alone, and a third imposing both imprisonment and fine. And is it not a fair construction of the words used in section 1205, "a judgment that the defendant pay a fine," construing it as a penal statute, to hold that they constitute a distinguishing description or definition of a certain kind of judgment, viz., a judgment to "pay a fine,"—that is, a judgment which imposes a fine alone, and not one which, in addition to a definite term of imprisonment, also imposes a fine? Such a construction would bring the section in harmony with all the other sections of the Code on the subject, and with the evident purpose of the legislature. When the legislature says that imprisonment in punishment of a certain offense shall not exceed a certain term, it ought not to be held that a court can imprison one beyond that time, unless such holding be imperative. Under the construction herein intimated, a court could imprison a defendant for the maximum term prescribed by law, and could in addition, if it thought proper, impose a fine, to be collected, if possible, by execution; but it could not, under the guise of the fine, extend the

maximum term of the imprisonment almost indefinitely. Or if a proper case for leniency should arise, when it seemed probable that the defendant could pay a fine, and that it would be better for both him and the public that he should expiate his offense in that way, a fine alone could be imposed, and enforced by imprisonment,—at least, to the extent of the maximum term. And it seems to me that the most savage court should be satisfied with this power; at least, until the legislature chooses to enlarge it. I am aware that this court formerly, on one or two occasions, expressed views different from those above stated, and I am as loth as any one to depart from a settled rule; but I think that the question here discussed can hardly be considered as definitely settled. It seems to me that in recent years the practice of imprisonment for fines has resulted, in some instances, in great oppression, and in imposing on defendants convicted of only trivial offenses extreme and cruel terms of imprisonment, against both the letter and spirit of the law. I think, therefore, that on a proper occasion the question here presented should, at least, be opened and reconsidered.

I concur: PATERSON, J.

83 Cal. 39

NIDEVER v. AYERS. (No. 13,328.)

(Supreme Court of California. Jan. 30, 1890.)

BONA FIDE PURCHASERS—QUITCLAIM DEEDS.

1. A decree in probate for the final distribution of land, which is unrecorded at the date of a conveyance of the land by the holder of the legal title, is not constructive notice to the vendee of an outstanding equitable title.

2. Nor is the vendee chargeable with constructive notice of an outstanding equitable title by his deed, which recites that "the grantor has granted, bargained, and sold and confirmed, and by these presents does hereby grant, bargain, sell, convey, and confirm, all the right, title, and interest of the party of the first part in and to the premises described," though it be deemed to constitute a quitclaim deed.

Commissioners' decision. Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Joseph H. Skirm, for appellant. *McKeeby & Smith and Blackstock & Shepherd*, for respondent.

FOOTE, C. The complaint in this case, in one aspect, might be called a complaint in an action to quiet title. Upon that theory, the evidence showing that the legal title was in the defendant, no right of recovery would accrue to the plaintiff. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518. But possibly it might be construed as a complaint for a conveyance of the legal title, and, inasmuch as we have reached the conclusion that the judgment in favor of the defendant should be affirmed, we have examined the merits of the case. The complaint alleges that one George Nidever, the father of the plaintiff, was at the date of his death the owner of and seized of an equitable estate in certain lands;

that the legal title thereof was vested in John Nidever at the time of the bringing of this action, also deceased; and that the last-mentioned person held such lands as the trustee of his son George, above mentioned, the father of the plaintiff, George D. Nidever. The record shows that upon the death of George Nidever, who died intestate, his father, John Nidever, became the administrator of his estate, being duly appointed as such by the probate court of the proper county. While acting in that capacity, and, as alleged, "holding the legal title to and being in possession of said equitable estate," the administrator filed an inventory, to which, among other things, he declared the land in dispute equitably to belong to his son's estate. He also filed in that court a verified petition, asking that the estate of his decedent be distributed, in which the same declaration is made as to the title of the land involved here. An order of distribution was made, and under it the plaintiff, as the only child surviving his father, George Nidever, had set apart to him an undivided one-half of the land distributed as above specified in the inventory and petition, the other half being set apart to his mother, the widow of George Nidever, which last is not included in this action. Several years before this order or decree of distribution was recorded, John Nidever made and delivered a deed of the land to which he thus held the legal title to George S. Gilbert and W. S. Chaffee, and through that deed and mesne conveyances the defendant deraigned his title from John Nidever. The deed which the latter executed was duly recorded long before the decree above mentioned. Both parties to the action claim from the same source of title, under a patentee from the United States government. According to the admissions of the plaintiff, by his counsel, on the trial, the defendant never had any actual knowledge of any payment made by the decedent, George Nidever, upon these lands, or any actual notice of any trust relation existing between the father, John Nidever, and his son, George. The whole contention is that the probate court proceedings, and the recitals of the deed which John Nidever executed, were constructive notice to the defendant of the outstanding equitable title in George Nidever and his successors, which equitable interest arose from the payment of the purchase price of the land by George Nidever, and his causing the legal title to be vested in his father, John Nidever. Upon this state of facts the motion of the defendant for a nonsuit was granted, and from the judgment thereupon entered this appeal is prosecuted.

Was the decree of distribution, unrecorded at the date of the conveyance by John Nidever, the holder of record of the legal title, constructive notice to the defendant of the equitable title vested in George Nidever by his paying the purchase money for the land, and having the legal title thereto vested of record in his father, John Nidever? The ap-

pellate court of this state said, in a case where a similar question arose, as to one claiming, as the defendant does here, to be a *bona fide* purchaser without notice: "The intervenors claim that, by virtue of the homestead proceedings in the Alhoff estate, they became tenants in common with their mother in the ownership of the premises; that when Chalmers acquired the title from the United States government he acquired it for them, and thence held it in trust for them; and that the possession by their father, and the setting apart by the probate court, imparted to the plaintiff sufficient notice to put it upon inquiry, and that it is not an incumbrancer in good faith, without notice. We do not think the homestead proceedings in any manner affect the mortgage. Those proceedings operated only upon whatever right the intestate had at the time of his death." *Association v. Chalmers*, 65 Cal. 95, 3 Pac. Rep. 101. We perceive no reason why the rule thus laid down should not apply as well to a decree of final distribution of land as to a decree setting apart a homestead.

Should the recitals in the deed made by John Nidever, through which the defendant claims, be held sufficient to put him upon inquiry as to the existence of the outstanding equity? An examination of the deed upon record, if made, would have shown that John Nidever was invested with the legal title to the land. The language of the granting clause in the recital in the deed from John Nidever, through which defendant claims, relied on to defeat the defendant's claim as a *bona fide* purchaser without notice, is "that the grantor has granted, bargained, and sold and confirmed, and by these presents does hereby grant, bargain, sell, convey, and confirm, all the right, title, and interest of the party of the first part in and to the premises described." Conceding that this constituted the instrument a quitclaim deed, does it necessarily follow, from this circumstance alone, that the defendant must be held to have been put upon inquiry as to the secret equity? The appellate court of this state, in *Graff v. Middleton*, 43 Cal. 341, held that "in this state, from the earliest times, quitclaim deeds have been in every-day use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale. It is true they transfer only such interest as the seller then has, and do not purport to convey the property in fee-simple absolute, so as to pass an after-acquired title, but to the extent the seller has an interest they divest him of it, and vest it in the purchaser. We consider, therefore, that a quitclaim deed received in good faith and for a valuable consideration, which is first recorded, will prevail over a deed of older execution, which is subsequently recorded." In the present case there is nothing, unless the mere recitals of the deed can be so treated, to show any want of good faith, and it is not denied that a valuable consideration was paid for the land, and the deed recorded before the

recordation of the decree of the probate court. With reference to a like question the supreme court of Mississippi, speaking through Mr. Justice CAMPBELL, said: "We conclude that there is no authority for the proposition that a quitclaim deed in the chain of title deprives him who claims under it of the character of a *bona fide* purchaser. There are *dicta* and suggestions and inferences to that effect. But we deny and repudiate the proposition as unsound and insupportable on authority, principle, or policy. We fully approve and adopt the language of Rawle, *Cov.* (4th Ed.) 36: 'In the absence of local usage, it would seem that no presumption of notice can properly arise, either from the absence or presence of unlimited covenants.' Such a doctrine, as that a quitclaim conveyance in the chain of title affects the party who claims under it with notice of infirmities in the title, would be as impolitic as it is unsupported by reason or authority." *Chapman v. Sims*, 53 Miss. 168, 169. It follows, therefore, that the contention of the appellant that the defendant was a purchaser with notice of the equitable title of George Nidever and his successors is without force, and we advise that the judgment of nonsuit be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit is affirmed.

82 Cal. 621

DREYFUS v. HIRT. (No. 13,129.)

(*Supreme Court of California.* Jan. 27, 1890.)

LEASES—BONA FIDE PURCHASERS.

1. Defendant in ejectment held two leases from plaintiff's grantor, each of which embraced, with other land, a part of the land granted to plaintiff. Only the first lease was of record at the time plaintiff recorded his deed. The evidence clearly showed that defendant entered into and was exclusively occupying the whole tract at the time of plaintiff's purchase. It also appeared by the evidence of a surveyor that defendant's house was on the tract covered by the second lease. *Held*, that this, being consistent with the first lease, put plaintiff on inquiry, and he, not having pursued it, was charged with notice.

2. Civil Code Cal. § 1111, provides that grants of rents, reversions, or remainders are good without attornment of the tenants, "but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby." Defendant paid rent to his lessor on both leases in advance of the time it became due, and plaintiff received his conveyance before the rent so paid would have become due, but defendant had no notice of plaintiff's purchase until after the time specified in the leases for the payment of such rent. Moreover, plaintiff and his grantor had made no apportionment of the rent. *Held*, that defendant was not in default to plaintiff for the rent so paid to his lessor.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Ejectment by Isidore Dreyfus against Anton Hirt. Judgment for defendant, and plaintiff appeals. Exhibit 3 was an agreement between defendant and his brother, as lessees, and Hope, their lessor, and Cowles

and Redding, as purchasers of part of the demised premises, for the surrender of the leases referred to in the opinion, so that Hope might give a clear title to Cowles and Redding. Exhibit 4 is a surrender of the leases, but expressly excepts from the release the land claimed by plaintiff.

Jarrett T. Richards, for appellant. *B. F. Thomas*, for respondent.

GIBSON, C. Ejectment. Judgment for defendant. Plaintiff appeals on the judgment roll, which contains a bill of exceptions. Defendant admitted by his answer that the plaintiff was the owner of the premises in dispute, and that he (defendant) had possessed and occupied them, and averred that his possession and occupation thereof were pursuant to two leases, granted to him by the grantor of plaintiff. From the findings it appears that while one Hope was the owner in fee of 290 acres of the Rancho Las Positas in the county of Santa Barbara, he made two leases to the defendant. The first was executed on the 3d of October, 1885, and recorded on the 14th day of the same month, and demised certain land, including about one-half of the land in dispute, for the term of five years, from the 1st day of November, 1885, at the annual rental of \$375, \$250 of which was to be paid in advance. The second lease was executed on December 1, 1885, for the same term, commencing at the same time, and included all the land claimed by plaintiff, together with certain other land; and was not recorded until the 12th day of October, 1887, six months after plaintiff received his conveyance from Hope. On the 1st of November, 1885, or soon thereafter, the defendant entered upon the land described in both leases, and on that part of the land not included in the lease of October 3, 1885, placed a dwelling-house, barn, stable, and corn-crib thereon, and since said entry has exclusively occupied and cultivated the land described in plaintiff's complaint. The respondent, on March 5, 1887, paid to Hope the rent in advance for all the land demised to him, down to and inclusive of the 1st day of November, 1888, and the evidence shows that this rent was paid by respondent in good faith, at the solicitation of Hope. Shortly after, on April 19, 1887, Hope sold and conveyed to plaintiff the land sought to be recovered by him, and his only title thereto was derived from Hope. Plaintiff, at the time he received his conveyance, had notice of the lease, dated December 1, 1885. There are other findings to the effect that defendant did not oust plaintiff at any time, nor wrongfully withhold the possession of the land, nor damage the plaintiff by withholding the land, and that the value of the annual rents and profits of the land in dispute amounted to \$200.

Appellant contends that as the respondent's apparent possession of the premises was not inconsistent with the terms of the first lease, which was of record when Hope conveyed to him, that he was not bound to make any in-

quiry respecting such possession beyond what the record disclosed; and that as the lease of December 1, 1885, was not of record when he purchased in good faith from Hope, without actual notice of the lease, and placed his deed of record before the lease was recorded, that he could not be charged with notice of the lease, which, as against his subsequent conveyance, was void, under section 1214 of the Civil Code, which provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." In support of his contention, appellant claims that the evidence shows that the respondent only entered into and held the possession of the premises first demised to him, and which only embraced one-half of the land subsequently purchased by appellant; and that, therefore, the fourth finding, wherein the court found that the respondent entered into and held the exclusive possession of the premises embraced within both leases, and placed structures upon that portion of the premises included in the second lease, but not included in the first, is contrary to the evidence; and that the seventh finding, wherein the court found that the appellant at the time he purchased of Hope had notice of the second lease, is also contrary to the evidence.

As respondent relied upon his unrecorded lease, it was at the trial incumbent upon him, in order to avoid the effect of section 1214 of the Civil Code, *supra*, to show that at the time appellant purchased he (respondent) was in the open, notorious, and exclusive possession of the premises in controversy; as such possession would, if proven, establish the fact that appellant had actual notice of respondent's leasehold interest in the premises, unless the appellant pursued with proper diligence, and without obtaining knowledge of such interest, the inquiry such a possession would impose upon him. *Fair v. Stevenot*, 29 Cal. 486; *Smith v. Yule*, 31 Cal. 180; *Thompson v. Pioche*, 44 Cal. 508; *Palmtag v. Doutrick*, 59 Cal. 154. The evidence clearly shows that respondent entered into and exclusively occupied the whole tract, embracing the portion subsequently acquired by appellant, for a period of three years, covering the time appellant made his purchase. There does not seem to be any evidence to the contrary. As to the location of his buildings, the evidence is only a little less clear. The respondent says in one place that the house was upon the land described in the first lease, and again he says it was upon the slope of the hill on the land embraced within the second lease, which was not included in the first, and upon that portion, as we understand it, which appellant subsequently bought. He is corroborated regarding his last statement by witness Cooper, a surveyor, familiar with all the land, and who was called for appellant, and testified that the first lease

included only the valley land and one-half of the land in dispute, and that the second lease included both valley and hill land; that there were two houses upon the land embraced in the last lease, one of which was on the Dreyfus tract, the premises in dispute. Witness Hirt, a brother of defendant, testified that his brother's house was on "the land between the hill and valley," and that his brother lived there three years. Witness Williams testified: "I know where the defendant has been living for the last three years. I don't know the boundary of the land in controversy. Defendant's house is built on the slope of the hill; the hill sloped to the bottom,—just at the foot of the hill." There was therefore ample evidence to justify the findings assailed. The respondent, then, at the time of appellant's purchase, having had the exclusive, open, and notorious possession of the hill land embracing one-half of the Dreyfus place, with a house upon it, which made it a visible possession, and which was inconsistent with the first lease which was of record, was sufficient to put the appellant upon inquiry, and, not having pursued it, he was properly charged with notice. Civil Code, § 19. And the unrecorded lease was valid as to him by reason of such notice. *Id.* § 1217.

The appellant further contends that the respondent had, prior to the commencement of the action, forfeited his first lease by non-payment of rent; and proceeds, as to the second lease, upon the theory that as to him it was a nullity. "Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby." *Id.* § 1111. This is a protection to the tenant who pays rent to his landlord before notice of the grant of the reversion. As we have seen from the findings, the respondent paid rent on both leases in advance of the time it became due and prior to appellant's purchase, until and including the 1st day of November, 1888. On the first lease, according to its terms, the first annual rent, payable in advance, that became due after the purchase by appellant, was on November 1, 1887, for the ensuing year; and on the second lease, on the same date, for the year ending on that date. Now, as the appellant failed to give notice of his purchase to the respondent, the respondent, even if he was not, as claimed by appellant, justified in paying it in advance, as he did, he would have been justified in paying on the first lease on November 1, 1887, a year's rent in advance, which would carry it up to the time he did pay for; also upon the second lease, on the same date, for the year ending on that date. The first time appellant brought the fact of his interest in the land claimed to the notice of the respondent was when he served a written demand upon him for the possession of the portion purchased by him one year, less a few days, after his

purchase; during all of which time the respondent was in the exclusive and visible possession of the land.

There is a reference to the purchase of appellant, Dreyfus, in a release executed by respondent and his brother on the 17th of December, 1887, (Exhibit 4.) But Dreyfus was not a party thereto, and the date is subsequent to the time when the rent above referred to became due, and therefore is insufficient alone to show knowledge of Dreyfus' purchase, so as to charge respondent with the rents that accrued November 1, 1887. Besides, as each of the leases covered other land in addition to one-half of the land in dispute, it follows that the appellant only received a portion of the reversion affected by each lease, and consequently was not entitled to the whole rent reserved in each lease. He and his grantor having failed to make, so far as the record shows, any apportionment of the rent, his grantor, as the lessor of respondent, would, it seems, be entitled to collect the whole of it, even after notice of a grant of a portion of the reversion, and could sue for the whole of it, and leave it to the jury to determine the apportionment between himself as lessor and his grantee of a portion of the reversion. 1 *Tayl. Landl. & Ten.* § 385; *Worthington v. Cooke*, 56 Md. 51; *Walter v. Maunde*, 1 Jac. & W. 181. It is therefore evident that as all the rent which had accrued before the action was brought had been paid to Hope without notice of the sale of a portion of the reversion, and without any apportionment of the rent and notice thereof, the respondent was not in default.

Appellant further urges that the agreement between respondent and his brother, as lessees, and Hope, their lessor, and Cowles and Redding, as purchasers of a portion of the demised premises, for a surrender of the leases, (Exhibit 3,) and a release of a portion of the premises pursuant to said agreement, expressly, however, excepting the portion sold to Dreyfus, (Exhibit 4,) canceled all the leases, and that the exception in Exhibit 4 was of no effect, as it was not provided for in Exhibit 3. But we fail to see how the appellant could derive any benefit from the transactions. They were designed to give a clear title to Cowles and Redding to that portion of the demised premises which they had purchased, and the appellant was not a party thereto, nor interested therein. We therefore advise that the judgment be affirmed.

We concur: VAN CLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

82 Cal. 659

WATERMAN v. BOLTINGHOUSE. (No. 13,377.)

(*Supreme Court of California.* Jan. 28, 1890.)

REAL-ESTATE AGENTS—COMMISSIONS.

A real-estate broker who has a contract giving him the exclusive right to sell land within a

certain time cannot recover his commissions of his employer, who sells, himself, within the time, without the agency of the broker, unless he has produced a purchaser ready and willing to buy according to the terms of the contract.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Meux & Edwards, for appellant. *E. C. Winchell and Wharton & Short*, for respondent.

THORNTON, J. This is an action by plaintiff to recover commissions for an alleged sale of land. He never produced a purchaser ready and willing to buy on the terms of his employer, the defendant. He cannot, therefore, recover. *Dolan v. Scanlan*, 57 Cal. 261; *Moses v. Bierling*, 31 N. Y. 462; *Sibbald v. Iron Co.*, 83 N. Y. 378. Here the plaintiff had the exclusive right to sell for a term ending January 1, 1889; and the defendant, during this period, himself effected a sale. Though the plaintiff had the right to sell, to the exclusion of his employer, still he cannot recover his commissions unless he has produced a purchaser ready and willing to buy, as above stated. This is expressly held, and correctly held, in *Moses v. Bierling*, supra, which is a case similar to this. The plaintiff argues this case as if it was a suit to recover damages for defendant's breach of contract. The complaint does not set forth any such action, but one to recover the compensation agreed to be paid on a sale. There is no error. Judgment affirmed.

We concur: **McFARLAND, J.**; **SHARPSTEIN, J.**

(83 Cal. 10)

HESPERIA LAND & WATER CO. v. ROGERS.
(No. 13,150.)

(Supreme Court of California. Jan. 30, 1890.)

IRRIGATION—ADVERSE USER—EVIDENCE.

1. The adverse user of an irrigating ditch, through the lands of another, only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed does not break the continuity of the user.

2. In an action to quiet title to land in which defendant claims an easement, the assessment book is not admissible to show an assessment for taxes of plaintiff's land in which the easement is claimed, when defendant's easement has never been assessed for taxes.

Department 2. Appeal from superior court, San Bernardino county; **HENRY M. WILLIS**, Judge.

R. M. Widney and H. C. Rolfe, for appellant. *Rowell & Rowell*, for respondent.

THORNTON, J. Action to quiet title to a parcel of land situate in the county of San Bernardino. Defendant had judgment. Plaintiff moved for a new trial. His motion was denied, and he appeals from the judgment and order denying his motion. The controversy turned on the adverse user of defendant for more than five years of an irrigating ditch constructed by him over plain-

tiff's land. The adverse user is made out by defendant, unless the contention of plaintiff that it was not continuous is maintainable; and it is urged that the user by defendant was not continuous, for the reason that defendant only ran the water in the ditch every year during the cropping season, and when he needed it. The correct rule as to continuity of user to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him to constitute continuity of use to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary to make good such use that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it, from time to time, he makes use of it, this is a continuous use. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed. *Bodfish v. Bodfish*, 105 Mass. 319. Neither such intermission nor omission breaks the continuity.

It does not appear that the defendant's easement in the use of the ditch has ever been assessed for taxes, and the court did not err in excluding the assessment book showing an assessment of plaintiff's land for taxes over which the ditch ran. There is no error. Judgment and order affirmed.

We concur: **SHARPSTEIN, J.**; **McFARLAND, J.**

(83 Cal. 96)

GIDDINGS et al. v. 76 LAND & WATER CO.
et al. (No. 13,199.)

(Supreme Court of California. Feb. 1, 1890.)

FORCIBLE DETAINER—EVIDENCE—DAMAGES.

1. Code Civil Proc. Cal. § 1160, subd. 2, provides that every person shall be guilty of forcible detainer who unlawfully enters on real property during the absence of an occupant who, within five days preceding such unlawful entry, was in peaceable and undisturbed possession of the land. *Held*, that plaintiffs need not prove their actual, personal presence on the land for five days continuously preceding the unlawful entry.

2. It need not be shown (subdivision 2) that defendants held possession by force or threats.

3. Evidence that plaintiffs have been in the exclusive possession of the land in dispute for three years, no one interfering with them except one time, when defendants came and got some hay, and that defendants entered and took possession during the temporary absence of plaintiffs, without their consent, and against their will,

and have ever since retained possession, is sufficient to support a finding that plaintiffs were in the peaceable, actual, and undisturbed possession, and that defendants unlawfully entered.

4. Where the land is used in the same manner that owners of land of like character in the neighborhood commonly use theirs, the fact that it is not inclosed is immaterial.

5. Where the court finds that plaintiffs are in possession of all the lands, and this finding is not assailed, an objection that plaintiffs are not entitled to recover damages for the whole tract because they show themselves in possession of no definite part will not be sustained.

Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by E. Giddings and others against The 76 Land & Water Company and others to recover possession of land. Defendants appeal. Code Civil Proc. Cal. § 1160, provides that every person is guilty of a forcible detainer who by force, or by menaces and threats of violence, unlawfully holds possession of any real property, or who unlawfully enters on real property during the absence of an occupant who within five days preceding such unlawful entry was in peaceable and undisturbed possession of the lands.

Wigginton & Hawes and Jarboe, Harrison & Goodfellow, for appellants. *Thompson & Thompson and O. L. Abbott*, for respondents.

PATERSON, J. This is a proceeding under the provisions of section 1160, Code Civil Proc., relating to forcible detainer, to recover possession of a tract of land in the county of Tulare. The court gave judgment for plaintiff for the restitution of the land, \$900 damages, and costs of suit. Defendant appealed from the judgment, and from an order denying its motion for a new trial. The second and fifth findings of the court are assailed by appellant on the ground that they are not supported by the evidence. The second finding is as follows: "The plaintiffs herein, for and throughout the period of more than two years last past, before the time of the entry by the defendants hereinafter mentioned, were, and continuously had been, and at the time of said entry were, in the open, peaceable, actual, and undisturbed possession and occupancy of all the land described in the complaint." Sibley, one of the plaintiffs, testified: "I have been in possession of the land in controversy for the past three or four years, putting it in crops, harvesting, etc. * * * Giddings and I have had, as partners, the entire, exclusive possession of the land for the past three years, using all of it in the customary manner for raising wheat. * * * No one ever disturbed our possession till the defendants took it as complained of by us herein. We never consented to defendants' taking possession; but, on the contrary, they took possession against our will, and without our consent. * * * We hauled hay from this land all through October and into November. * * * About the 13th of last November the defendants entered upon these premises." Giddings, plaintiff, testified: "Myself and partner have

farmed this land since 1884. * * * My partner, Sibley, and I were in full, peaceable possession up to the time the defendants took it from us. * * * On November 13th they [defendants] hauled lumber upon the premises in controversy, and built a house. Anterior to that time no one had interfered with us." Farl, a witness for defendant, testified: "They refused to deliver the hay. This was on October 2d. We then took teams, and went there, and got the hay. This conversation took place near Mr. Giddings' house." Shipe, one of the defendants, testified: "I first went upon this land on November 13th. I hauled wood there. I had a conversation with Mr. Giddings; told him I had the land rented; he told me I might unload the wood, but if I moved in I would be moved out; that they did not mean to fight or break the peace, but were in possession of the land, and meant to keep it by all lawful means. I afterwards went and took possession in their presence." This testimony, which is consistent with all the evidence offered by the plaintiffs, is sufficient, we think, to support the second finding. Plaintiffs alleged, and the court found, and the finding is not attacked, that "on or about the 13th day of November, 1888, during the temporary absence of the plaintiffs from said land, the defendants, without the consent, and against the will, of plaintiffs, entered upon said real property, the land so described in the complaint, and took possession and occupancy thereof, and have ever since intruded thereon, retained and had, and they still retain and have, the possession and occupancy of all of said land."

The fact that the land was not inclosed is immaterial. The land was occupied and used by the plaintiffs in the same manner that owners of land of like character in that neighborhood commonly occupied and used their land.

Nor was it necessary for plaintiffs to prove their actual, personal presence on the land for five days continuously preceding the unlawful entry. *Goodrich v. Van Landingham*, 46 Cal. 601; *Leroux v. Murdock*, 51 Cal. 541; *Minturn v. Burr*, 16 Cal. 107; *Shelby v. Houston*, 38 Cal. 410; *Wilson v. Shackelford*, 41 Cal. 630.

The fifth finding is as follows: "That by reason of the said taking and withholding of said lands by the defendants the said plaintiffs have sustained damage in the sum of \$300." We think this finding is supported by the evidence. It is said by appellants that "plaintiffs showed no possession, or right to take the possession, of the premises in controversy; therefore, they showed no right to damages." This point we have answered in considering the second finding.

It is claimed also that "the plaintiffs showed themselves in possession of no definite part of said premises. If the plaintiffs were only ousted from a part of the premises, clearly they were not entitled to damages for the whole." But the court found in its third

finding that the plaintiffs had retained, and still retain, the possession and occupancy of all of said land, and this finding is not assailed. No objection was made to the evidence offered by the plaintiffs on the question of damages. This evidence showed that the amount of crop which could be raised if planted after the middle of January would be only about half the amount that could be raised if the lands were "put in" in November or December. If the unlawful act of the defendants resulted in depriving the plaintiffs of half of the crop that could otherwise have been obtained, they were properly held liable. No objection was made to the evidence. If defendants deemed it speculative, or not within the issues, objection ought to have been made, so that the plaintiffs might have had the benefit of the ruling of the court upon the question, and, if adverse, overcome the effect of the objection by adopting some other mode of proof or measure of damages, and, if necessary, by amending their complaint.

It was not necessary for plaintiffs to show that defendants held possession of the premises by force, or threats of force. Code Civil Proc. § 1160, subd. 2; *Leroux v. Murdock*, supra. The cases cited by appellants on this proposition are some of them based on statutes in force prior to the adoption of the Code, and others are cases of forcible entry. In such cases the force is a necessary element. *Hodgkins v. Jordan*, 29 Cal. 577; Code Civil Proc. § 1159.

We find no error in the rulings of the court in the exclusion or admission of evidence. Under our statute, evidence of title in actions of forcible detainer is inadmissible. "The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by the defendants, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise. A forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution though the fee-simple title and present right of possession are shown to be in the defendant." *McCauley v. Weller*, 12 Cal. 524. "Under the Code, all entries on the actual possession of another are unlawful; and the question of good or bad faith on the part of the defendants no longer affects the right of the recovery in this form of action." *Voll v. Hollis*, 60 Cal. 575. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.

82 Cal. 577

SHAIN v. FORBES *et al.* (No. 12,145.)

(*Supreme Court of California*. Jan. 27, 1890.)

ATTORNEY AND CLIENT—COMPENSATION—NON-SUIT—MISJOINDER OF PARTIES OR CAUSES—WITNESS—TRANSACTION WITH DECEDENT.

1. In an action for professional services rendered by an attorney, where defendants' answer admits that the attorney acted for one of them in

two actions, and for the other in a third action, it is error to grant a nonsuit on the ground that there was no evidence that the attorney was ever employed by defendants; the presumption being that an attorney is employed by the persons whom he represents.

2. Though the action is brought jointly against two defendants, one of whom has since died, and though under Code Civil Proc. Cal. § 1880, relating to testimony of transactions with a person since deceased, testimony by the attorney as to the value of his services is incompetent as against the executors of the deceased defendant, it should be admitted as against the other defendant. A several judgment may be entered against the surviving defendant, under Code Civil Proc. Cal. § 578, which provides that judgment may be given for or against one or more of several plaintiffs or defendants, and that the court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

3. A misjoinder of defendants or of causes of action, not specified by defendants as a ground of a motion for a nonsuit, will not justify an order granting the motion, as it is the settled law of the state that the grounds for a nonsuit must be precisely stated by the party moving therefor, and none other can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge. *Gordon & Young*, for appellant. *Henry E. Highton*, for respondents.

BELCHER, C. C. This is an appeal from a judgment of non-suit. The action was originally brought by the plaintiff, as assignee of one Vincent Neale, an attorney at law, to recover from the defendants Alexander Forbes and William McPherson the sum of \$2,021, alleged to be due for professional services performed, and money expended for them, at their special instance and request, by plaintiff's assignor. The defendants jointly answered the complaint. The answer averred in substance that the only professional services ever rendered by Neale to the defendants, or either of them, were in the matter of the collection of a promissory note for \$5,000, made by E. J. Weston and S. Boushey, and payable to the defendant Forbes and L. L. Robinson; that the note was secured by a mortgage upon real property, and on the day of its date was indorsed and delivered by the payees thereof to the firm of Forbes Bros., then composed of the defendant Forbes and one Charles Forbes; that the indorsers waived demand and notice of non-payment of the note; that after the maturity of the note, and on or about the 6th of October, 1880, Forbes Bros. retained and employed the said Vincent Neale, as attorney at law to collect the amount due for principal and interest on said note, and to foreclose the said mortgage, which provided for an attorney's fee in the event of foreclosure of 10 per cent. upon the amount that might be found to be due; that Neale was employed to collect the full amount due—*First*, through a sale of the mortgaged property; and, *second*, by a personal judgment for any deficiency against the makers and indorsers of the note; that Neale was so employed under a specific agree-

ment that the compensation for his services should consist of \$100, afterwards increased to \$135, and any sum that might be collected over and above the principal and interest of the note and the costs and expenses, other than counsel fees; that this agreement ever since has been, and now is, in full force and effect; that in pursuance of the said agreement Neale commenced two actions in the name of the defendant Alexander Forbes, as plaintiff therein, to collect the note and foreclose the mortgage, which, for reasons stated, were dismissed, and that Forbes Brothers paid him \$200, instead of \$135, as agreed; that, after these actions had been dismissed, Forbes Brothers, under the advice and direction of Neale, "sold, indorsed, assigned, and delivered the said promissory note to the defendant William McPherson, and thereafter the said Vincent Neale continued his services under the agreement aforesaid, but as the attorney for the defendant, Wm. McPherson, who ratified and confirmed the said agreement;" that McPherson, by Neale, as his attorney, commenced an action to collect the note and foreclose the mortgage against Weston and Boushey, the makers and mortgagors, and against Forbes and Robinson, the payees and indorsers, and that such proceedings were subsequently had in the action that judgment was rendered therein as prayed for against all of the defendants, except Robinson; that judgment was rendered in favor of Robinson, and from that judgment and an order denying a new trial the plaintiff, by Neale, as his attorney, duly appealed to the supreme court, where the appeal was still pending; and that the foregoing constituted all the professional services rendered by the plaintiff in this action and alleged in his complaint. The answer then further averred that before the commencement of this action the claim and demand set forth in the complaint had been and was fully paid and satisfied, and that there was a misjoinder of parties defendant in this, that each of the said defendants is improperly joined and united with his co-defendant. After the answer was filed Forbes died, leaving a will, which was duly admitted to probate. The executrix and executor of the will were then substituted as defendants in his place. The plaintiff presented to them his claim for allowance, but the same was rejected; and thereupon he filed a supplemental complaint, to which defendants filed a joint answer. The case was tried before the court sitting without a jury. To support his side of the case the plaintiff called as a witness Lewis Shearer, who testified that he was an attorney at law, and knew Vincent Neale and of the action entitled "William McPherson vs. E. J. Weston et al.;" that Neale was attorney for the plaintiff in that action, and witness was attorney for defendant Robinson; that the court gave judgment in favor of the plaintiff against all the defendants except Robinson, and fixed the fee of Neale at \$1,500; that Robinson had judgment for his costs, from which the

plaintiff appealed; that Neale acted as McPherson's attorney in the appeal proceedings. He prepared a statement on motion for a new trial, argued the motion, and, when it was denied, served notice of appeal, prepared transcript on appeal, prepared appellant's first brief, and argued the case before the supreme court. The witness estimated that Neale's services on the appeal were worth \$750. The plaintiff then called as a witness Vincent Neale, when the following occurred: "Counsel for Defendants. I object to his testifying—*First*, with respect to all of the defendants; *second*, specially as respects the defendants Mary Agnes Forbes and Charles Forbes, executrix and executor of the last will and testament of the deceased Alexander Forbes. The Court. The witness is incompetent to testify to any fact anterior to the death of Mr. Forbes. Counsel for Plaintiff. I offer to prove by Vincent Neale the true services in this case as against Mr. McPherson, and the question that I asked him was to go against Mr. McPherson, and he has never been paid for them. All that I ask to do is to put Mr. Neale on to prove the question as against Mr. McPherson, and I think he is competent. The Court. I don't see very well how the court can pass on the testimony. If the case were on trial before a jury, and the question should arise which has arisen here, it seems to me it would be very difficult, indeed, for the court to treat Mr. Neale as competent and incompetent at the same time. As to Mr. McPherson, he is a competent witness; as against the estate he is incompetent to prove the facts which you offer to prove by him. Now, you have averred the services rendered for two parties. It amounts to this, that his testimony, whatever it is, is in his own favor, and tends to make out a case which the jury could take into consideration as well against the estate as against McPherson. It would be quite impossible for the court to remove the matter by way of a charge to the jury. This testimony of Mr. Neale is against the estate of Alexander Forbes. If he were the only witness, then it would be very easy for the court to control the case by directing a verdict either of nonsuit or in behalf of Mr. Neale. But suppose there were other witnesses. I will sustain the objection. Counsel for Plaintiff. We except." The defendant McPherson was then called by plaintiff as a witness, and on cross-examination, against the objection and exception of plaintiff, was allowed to testify that he never employed Mr. Neale in the action of McPherson v. Weston. At the conclusion of the plaintiff's testimony counsel for defendants moved for a nonsuit—"First, on behalf of all the defendants; second, on behalf of the executor and executrix of the estate of Alexander Forbes; third, on behalf of the defendant McPherson." And as ground for the motion it was specified that there was "no evidence of any employment, either expressed or implied, to render the specific services which are alleged in the

complaint;" "that, so far as the defendants Mary Agnes Forbes and Charles Forbes, executrix and executor, are concerned, there is no testimony tending to establish any employment of Vincent Neale, and, so far as the defendant Wm. McPherson is concerned, the testimony shows specifically and positively that there was no such employment." The court granted the motion, and the plaintiff reserved an exception to the ruling.

1. It is settled law in this state that when a party moves for a nonsuit, the grounds of the motion must be precisely stated, and no other grounds than those stated can be considered by the court in granting or refusing the motion, or by the appellate court in reviewing the order. *Coffey v. Greenfield*, 62 Cal. 602; *Gardiner v. Schmaelzle*, 47 Cal. 588; *Raimond v. Eldridge*, 43 Cal. 506; *Hayne, New Trials & App.* § 116. In this case the only ground stated for the motion was that there was no evidence tending to show that Neale was ever employed by the defendants to render the services for which compensation was asked. But it is clearly admitted in the answer that Neale acted as the attorney for the plaintiff Forbes in the two actions which were commenced and dismissed, and also that he acted as attorney for the plaintiff McPherson in the third action, which was tried, and, as against Robinson, was appealed to the supreme court. This being so, he was presumptively employed by the parties whom he represented, and was entitled to receive a reasonable compensation for his services. The answer, however, attempts to meet this by stating that there was a special contract as to the compensation which he was to receive, and that this contract remained in full force, and was binding in the last as well as the first two cases, and that the agreed compensation had been fully paid. But, the services being admitted, a *prima facie* case was made against the defendants, and the burden was upon them to meet it. The misjoinder of parties defendant, or of causes of action, was not specified as a ground of the motion, and, if admitted, it could not be held to justify the ruling. As the motion was made, we think the court erred in granting it, and that the judgment should therefore be reversed.

2. Counsel have very fully argued the question as to the right of the plaintiff to call and examine Vincent Neale, his assignor, as a witness, and, as this question will again arise on a new trial, we think it should be considered. It is clear that Neale was not a competent witness as against the representatives of the estate of Forbes, (Code Civil Proc. § 1880,) and equally clear that he was competent as against McPherson. It is argued, however, for respondents that the action was joint, and no several judgment could be rendered against McPherson therein; that the testimony, if given, must operate against the estate as well as McPherson, and therefore that it was incompetent for any purpose. It is true that the rule contended for existed at

common law, but from the earliest time it has been changed by statute in this state. The Code provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves." *Id.* § 578. And this was but a reenactment of section 145 of the old practice act. Under this provision it has been held that where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. *Rowe v. Chandler*, 1 Cal. 168; *Lewis v. Clarkin*, 18 Cal. 399; *People v. Frisbie*, *Id.* 402. In opposition to the rule declared in these cases counsel for respondents cite *Stearns v. Aguirre*, 6 Cal. 176; *McCord v. Seale*, 56 Cal. 262; and *Weinreich v. Johnston*, 78 Cal. 254, 20 Pac. Rep. 556. But *Stearns v. Aguirre* was overruled in *Lewis v. Clarkin*, *supra*, and the other two cases cited are not in point. In *McCord v. Seale* the names of the plaintiffs appeared in the title of the complaint as individuals, and in the body of the complaint it was averred that they were partners. On the trial a partnership contract was proved, and it was objected that the plaintiffs had not filed or published the certificate required by section 2466 of the Civil Code. It was held that proof of a partnership contract could not sustain allegations of an individual contract. So, in *Weinreich v. Johnston*, the action was brought by the plaintiffs, as partners, upon a promissory note, which was proved and found to have been made to the plaintiff *Weinreich* alone, and it was held that upon the pleadings no judgment could be rendered on the note. In our opinion a several judgment might have been rendered against *McPherson*, and the testimony of *Neale*, as against him, was admissible. We advise that the judgment be reversed and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded for a new trial.

(88 Cal. 36)

BOOTH *et al.* v. PENDOLA *et al.* (No. 13,267.)

(Supreme Court of California. Jan. 31, 1890.)

MECHANICS' LIENS—ENFORCEMENT—WITNESS—TRANSACTIONS WITH DECEDENTS.

1. Under Code Civil Proc. Cal. § 1195, which permits several mechanics' liens to be united in one complaint, the different causes of action are stated sufficiently separate, where there are distinct statements of the facts concerning each lien, though they are not numbered or otherwise formally designated.

2. The failure of the mechanics' liens, filed against two houses on the same lot, to specify how much of the material and labor was furnished for each, merely gives precedence to other liens, under Code Civil Proc. Cal. § 1188, and cannot be com-

plained of by the owner, who is not thereby affected.

3. An action to enforce a mechanic's lien, being in the nature of a proceeding *in rem*, in which no personal judgment can be recovered against a decedent's estate, payable in course of administration, is not a "claim," within the meaning of Code Civil Proc. Cal. § 1880, which declares that a party cannot be a witness in an action against an executor or administrator "upon a claim or demand against the estate of a deceased person."

4. There is a sufficient finding of the value of materials and labor furnished by lien claimants where the court has found that they were employed by the contractor at a certain price, as under the Code the contractor is the agent of the owner.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Cope & Boyce, for appellants. *A. E. Putnam, W. P. Butcher*, and *B. F. Thomas*, for respondents.

McFARLAND, J. This is an action brought by plaintiffs, having several liens of mechanics and material-men, against property owned by Giovanni Pendola (now deceased) in his life-time. He died during the pendency of the action, and his executors were made defendants. Other persons were also made defendants, who set up other mechanics' liens on the property. The judgment went for plaintiffs, and for the defendants asserting liens. The defendants, executors of said Pendola, deceased, appeal from the judgment, and from an order denying a new trial.

The only safe course for one desiring to have a house built by contract, when the price exceeds \$1,000, is to have the contract written and recorded, as provided by section 1183 of the Code of Civil Procedure, and to follow the contract in his payments of money. This is, no doubt, a hardship to owners of land who desire to improve it, and limits, to them, the general control which men usually have over their own property. But it is quite evident that the legislature has industriously endeavored, by extreme means, not only to protect and favor mechanics and laborers who actually work on buildings, (which seems to have been the original notion of a "mechanic's lien,") but also certain merchants, who are brought in under the category of "material-men." And, as long as the provisions of the present lien law are held to be constitutional, (and they seem to have been so held by this court,) owners of buildings must protect themselves by the written contract provided by the Code, unless they can induce the legislature to change the law. In the case at bar the owner did not have any recorded contract; and that neglect has given rise to most of the questions in the case, as similar neglects have brought many similar cases to this court. We have examined all the points made and argued in this case, and we find no error which should work a reversal of the judgment. We shall briefly notice a few of those points.

Several different liens were united in the complaint,—which may be done under section 1195 of the Code of Civil Procedure,—

and appellant contends that the different causes of action were not separately stated. It is doubtful if this point can be raised on the record; but, at all events, we think that there is a sufficient separate statement. There was a distinct statement of the facts as to each lien, and there was no necessity that they should be numbered or otherwise formally designated.

There were two houses built on the same lot,—the Western Hotel and the Pendola cottage,—and appellant objects that in some of the liens it does not appear how much material and labor was furnished for one, and how much for the other. But that circumstance, under section 1188 of the Code of Civil Procedure, would only have the effect of giving precedence to other liens. It would be no concern of the owner of the lot. See *Dickenson v. Bolyer*, 55 Cal. 285.

The demurrer to defendant McCann's supplemental cross-complaint was properly overruled. It contained a sufficient averment of presentation of the claim to Pendola's executors, if such presentation was necessary.

Appellants contend that it was error to allow plaintiffs to testify, because, the defendant Giovanni Pendola having died before trial, they were incompetent as witnesses under subdivision 3 of section 1880 of the Code of Civil Procedure. It is to be observed that at one time a party was prohibited from testifying in any case where the adverse party was "the representative of a deceased person," as to facts which occurred before the death of the deceased. Civil Prac. Act, § 393; Hitt. Gen. Laws, 769. The law was changed to the present provision, which is that a party cannot be a witness in an action against an executor or administrator "upon a claim or demand against the estate of a deceased person." In *Fallon v. Butler*, 21 Cal. 24, it was held that a "claim" referred only to such demands against the decedent as might have been enforced against him in his life-time by a personal action, and did not include a mortgage lien, where no money judgment was sought against the estate. This ruling has been approved in *Estate of McCausland*, 52 Cal. 576; *Estate of Swain*, 67 Cal. 641, 8 Pac. Rep. 497; and *Stuttmeister v. Superior Court*, 72 Cal. 489, 14 Pac. Rep. 35,—although in those cases the application of the rule was not made to the precise question raised here. But in *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. Rep. 192, the competency of a party as a witness against an administrator, under section 1880, was directly involved, and it was there held that, in an action to enforce a resulting trust against the personal representative of the deceased trustee, the plaintiff was a competent witness. The principle there adopted was essentially the same as the one here invoked by respondent. An action to enforce a mechanic's lien is of the nature of a proceeding *in rem*. No personal judgment can be recovered in it against the estate, payable in due course of administration, and therefore, in our opinion, it is not a "claim," within the meaning

of subdivision 3 of section 1880. We think, therefore, that the court did not err in overruling the objections to the competency of the witnesses.

Appellant contends that there is no sufficient finding of the value of the materials and labor furnished by two of the lien claimants. But the court finds that they were employed by Hamilton, the contractor, at a certain price; and as, under the Code, Hamilton was the agent of the owner, we think that this was sufficient.

There are other assignments of error which we do not deem it necessary to notice in detail. We have noticed those which we deem the most important. It must be remembered that the mechanics' lien law of this state has been changed at nearly every session of the legislature since the first statute on the subject was passed, and that many former decisions of this court in relation to it rested upon provisions not now in existence. From a careful examination of the whole of the record in this case, we see no prejudicial error.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

82 Cal. 471

DOWNING v. LE DU. (No. 13,448.)

(*Supreme Court of California.* Jan. 7, 1890.)

MORTGAGES—FORECLOSURE—JURY TRIAL.

1. In an action to foreclose a mortgage, defendant is not entitled to a jury trial as a matter of course, though judgment is asked for any deficiency, and the execution of the note is denied.

2. As against the mortgagors, a foreclosure of a mortgage will be granted without proof that the mortgage was recorded.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

John I. Caldwell, and Geo. D. Buckley, for appellant. *Caldwell & Little*, for respondent.

WORKS, J. This was an action by the respondent against the appellant and her husband to recover on a promissory note executed by them jointly, and to foreclose a mortgage on certain real estate given by them to secure payment of the same. The husband allowed judgment to be taken against him by default. The wife answered, denying the execution of both the note and mortgage, and setting up a homestead in the property. There was judgment against her, and she appeals. The bill of exceptions shows that she demanded a jury trial, which was denied her, and she excepted. This is assigned as error. The respondent contends that she waived a jury trial, and it is so recited in the findings. But there is nothing in the record showing such waiver, and the recital in the findings that there was a waiver cannot prevail against the showing in the bill of exceptions that she demanded a jury, and it was denied. The respondent further contends that the case was a purely equitable one, and that, therefore, she was not entitled, as a

matter of right, to a trial by jury. But was this a purely equitable case?

The defendant denied the execution of the note, and denied that she was indebted to the plaintiff upon it for any sum. These were not equitable issues. Standing alone, they would have been triable in a court of law. Could the fact that the issues were joined with others of an equitable character deprive her of the right to a trial by jury upon those which were not equitable? The case of *Société Française v. Selheimer*, 57 Cal. 623, does not reach the point. That case was one to foreclose a mortgage, but the party appealing was not a party to the note or mortgage, but was a subsequent purchaser of the mortgaged property, and as to her the issues were purely equitable. It was said in that case: "Appellant demanded a submission of the issues raised by her answer to a jury, which was refused. Nothing is better settled in this state than that it is entirely within the discretion of the court to grant or refuse such a demand in an action in equity; and this proceeding, so far as it affects the appellant, is purely one in equity. She was made a defendant in order that her equity of redemption might be foreclosed, and for no other purpose." The other cases cited by the respondent are not in point, except that they support the well-settled rule that in purely equitable cases a party cannot demand a jury as a matter of right. But this precise question was before the court of appeals of New York in a late case, in which the defendants pleaded part payment of the amount due. It was held in that case that the party was not entitled to a jury, the court saying: "This is an action for the foreclosure of two mortgages on real estate, and was triable by the court. The defendant was not entitled, as matter of right, to a trial by jury. Although a sale of the mortgaged premises might result in a deficiency for which a money judgment could be docketed against the defendant liable for such deficiency, such a judgment was not the sole object of the action, but was an incident of the equitable relief sought. It might not even become necessary, as the mortgaged premises might bring a sufficient sum to pay the mortgaged debt, and the circumstance that in the contingency of the premises proving insufficient a judgment for the deficiency might result, did not entitle the defendant to a jury trial." *Carroll v. Deimel*, 95 N. Y. 254. We are of the same opinion, and hold that a jury trial was properly denied.

It is contended by the appellant that the findings of the court were not sustained by the evidence, but we think otherwise. One contention is that no lien was established, because there was no proof that the mortgage was recorded; but, the action being against the mortgagor, this was not necessary. The execution of the mortgage created the lien. The recording of a mortgage is not necessary, as between the parties to it. It is only necessary to give notice to third parties.

It is further contended that the mortgage was not properly acknowledged by the appellant. But the certificate of the officer shows the acknowledgment to have been in due form, and if it were conceded, as contended by the appellant, that the certificate was not conclusive, but only *prima facie* evidence of a proper acknowledgment, we think it is corroborated by the parol testimony; but, if it were not, it was sufficient to uphold the finding. It is claimed, also, that it was not shown that there was any consideration moving to the appellant for the note and mortgage. This was not necessary. The note imported a consideration, and no such proof was necessary. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

3 Cal. Unrep. 227

PEOPLE v. TOAL. (No. 20,610.)

(Supreme Court of California. Feb. 1, 1890.)

CONSTITUTIONAL LAW—POLICE COURT OF LOS ANGELES—ESTABLISHMENT.

1. Const. Cal. art. 6, § 1, provides that "the judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county." Section 13 provides that the legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1, and shall fix by law the powers, duties, and responsibilities of the judges thereof. *Held*, that an inferior court can be established only by the passage of an act of the legislature, and its approval by the governor, or its passage over his veto, in the same manner as any other law is enacted under Const. art. 4, §§ 15, 16.

2. Laws Cal. 1887, pp. 88-90, (Const. 16th Amend., amending art. 11, § 8,) provides that any city of more than 10,000, and not more than 100,000 inhabitants may frame a charter for its own government "consistent with and subject to the constitution and laws of the state," and, if ratified by a majority of the qualified voters of the city, it shall be submitted to the legislature for its approval or rejection as a whole, and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and the organic law thereof, and "shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter." *Held*, that this does not dispense with the requirements of Const. art. 6, § 13, and that the provisions of a charter establishing a police or inferior court in such city which depend alone for their validity on a joint resolution of approval of the charter by a majority of the members of the legislature, but in no way submitted to or passed on by the governor, are unconstitutional, and the acts of such court are void.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

Wm. T. Williams and Horace Bell, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was convicted of an assault with intent to commit murder. From the judgment of conviction, an order overruling his motion in arrest of judgment, and an order denying his motion for a new

trial, he appeals. The order overruling the motion in arrest of judgment is not itself appealable by the defendant, but may be reviewed on his appeal from the judgment. *People v. Majors*, 65 Cal. 100, 3 Pac. Rep. 401.

The main point relied on by the defendant seems to be that the police court of the city of Los Angeles, before the judge of which his preliminary examination was had, and by whose order he was committed for trial before the superior court of Los Angeles county, was not a legal court; that the judge thereof was not authorized by the constitution of the state to perform any function whatever as a committing or other magistrate. The defendant made a motion in due time that the information be set aside upon the ground that before the filing thereof he had not legally been committed by a magistrate, under section 995 of the Penal Code. If in fact he was not legally committed by a magistrate, the point made is well taken. *People v. Ah Fook*, 64 Cal. 382, 1 Pac. Rep. 347; *Kalloch v. Superior Court*, 56 Cal. 229.

In support of his contention, the defendant declares that the provisions of the charter of the city of Los Angeles, under and by virtue of which L. Stanton, the police judge, who sat as committing magistrate in his case, was elected and claims to exercise the functions of a magistrate, are in violation of article 6, § 1, of the state constitution; that the joint resolution under which that charter was adopted by the legislature as a whole, to be found in Acts 1889, p. 512, was without force and effect so far as it concerned the establishment of a police court in said city. That resolution, omitting the preamble and charter which precede it, reads as follows: "Resolved, by the senate of the state of California, the assembly thereof concurring, (a majority of all the members elected to each house voting for and concurring herein,) that said charter be, and the same is hereby, approved as a whole for and as the charter of said city of Los Angeles." Was this a proper legislative method of enacting a law which would establish a legal inferior court, such as article 6, § 1, of the state constitution, warrants? That section of the above-named article reads thus: "The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in an incorporated city or town, or city and county." It is conceded by the appellant that the supreme court of California, in *Brooks v. Fischer*, 21 Pac. Rep. 652, has held that the charter above referred to was legally adopted, and valid in most of its provisions, but that as to the particular provisions which bring into existence a police court, and invest it with the functions of a committing magistrate, that there has been no adjudication of their validity. Section 13 of article 6 of the state constitution is: "The legislature shall fix by law the

jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof." It seems clear from the language used in these constitutional provisions that it was the intention of those who framed that instrument, in establishing inferior courts, such as the one under consideration, to declare that it must be done by the passage of an act of the legislature, and its approval by the governor, or, upon his veto thereof, must be passed again by two-thirds of the members of each house voting therefor, and must become a law in the same manner as any other law is to be enacted under sections 15 and 16 art. 4 of the constitution; and this method of procedure must prevail in all cases, unless a different rule is established, pertaining to the bringing into existence of inferior courts, under provisions of charters, such as that of Los Angeles. This difference can only exist, if it be authorized at all, by the sixteenth amendment to the state constitution, amending the eighth section of article 11 of the constitution, to be found in Laws 1887, pp. 88-90. The portion of it applicable here is as follows: "Any city containing a population of more than ten thousand, and not more than one hundred thousand inhabitants, may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city, at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy thereof to the mayor or other chief executive of said city, and the other to the recorder of the county. Such proposed charter shall then be published in two daily papers of general circulation in such city for at least twenty days; and the first publication shall be made within twenty days after the completion of the charter; and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city, at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment; and if approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendments thereof, and all special laws inconsistent with such charter."

Does this amendment to the constitution of 1879, as to such courts as the one in hand, which the Los Angeles charter seeks to establish, supersede the provisions of the constitution, which were existent at the time of

its ratification, and which we have heretofore cited? If not, then the establishment of the police court, the judge of which acted as an examining magistrate in this case, was without due form of law, and the court thus attempted to be established does not exist, its acts are void, and the defendant was not legally committed by a magistrate. We do not think, in so important a matter as this, viz., the changing of the form by which inferior courts shall be established by law in cities of the class to which Los Angeles belongs, that the sixteenth amendment, supra, should be held to have so far-reaching an effect, and that in this way the important provisions of the constitution, which before its passage existed, should be held to be struck dead. Again, the amendment declares that if such a charter is "approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendments thereof, and all special laws inconsistent with such charter." Thus the idea kept constantly in view is that the charter must be consistent with and subject to the existing constitution, and all general laws, but that any preceding charter or amendment, or special laws inconsistent with the charter are to be superseded by the approval of the legislature alone. In other words, the force and effect of the sixteenth amendment, supra, as applied to charters of cities containing over 10 and under one hundred thousand inhabitants is this: That such charters may be framed in the manner prescribed by the amendment, and, if ratified by the majority of the qualified voters of the city to which it is to apply, shall be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, and if approved by a majority vote of the members elected to each house it shall become the charter of such city, and the organic law thereof, and shall supersede any existing charter, and any amendment thereof, and all special laws inconsistent with such charter, but that such charter must be consistent with and subject to all constitutional provisions then in force, and all general laws. Is it permissible to declare that the provisions of a charter establishing a police or inferior court in a city of over ten and under one hundred thousand inhabitants, which depend alone for their validity upon a joint resolution of approval of the charter by a majority of the members of the legislature, but not in any way approved by, submitted to, or passed on by the governor, are consistent with or subject to the constitutional provisions and general laws in existence at the time of the ratification of the sixteenth amendment, supra, which constitutional provisions prescribe a different method for the establishment of such a court, as the charter provisions bring into existence. And can a constitutional amendment which contains such limitations as those existing in the sixteenth amendment,

supra, be said to supersede the necessity of establishing an inferior court in the manner which the prior sections of the constitution point out as proper? We do not think that the sixteenth amendment is susceptible of the construction claimed for it; and we are of opinion that it plainly declares to the contrary, viz., that all existing constitutional provisions, and general laws in force at the time of its adoption are continued in full force and effect, and control any such charter. And this view is strengthened when we come to consider section 6, art. 11, in reference to corporations, which concludes in these words: "And all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws." If the whole charter had been duly passed by the legislature, and approved by the governor, or passed over his veto, and in all respects taken the ordinary form of legislative enactment under the constitution, (sections 15 and 16, art. 4,) we are not prepared to say, if no general law upon the same subject had remained in force, but that a police or other inferior court thus established would be within the terms of the constitutional provisions above adverted to.

There is another feature connected with the matter in hand, which, although not urged, is yet, under the circumstances, of such importance as to deserve at least passing mention. It is a well-known fact, as we think, not only, as it appears from the preamble of the resolution adopting the charter of Los Angeles, that it is a city of more than ten and under one hundred thousand inhabitants, but that it is a city of more than thirty and under one hundred thousand inhabitants. If this is so, then the portion of the charter objected to on the ground heretofore stated is also unconstitutional in another point of view, in this, that it is obnoxious to the so-called "Whitney Act," which is adverted to by the appellate court in the lately-decided bank case, *In re Ah You*, 22 Pac. Rep. 929, (No. 20,586.) It was there decided that the freeholders' charter of the city of Oakland, a city of the same class with Los Angeles, was subject to the provisions of the act above mentioned, the same being held a "general law," and to be found in the statutes of 1885, p. 213, and that the police court, established by that charter had no existence, and no jurisdiction to try misdemeanors, or any other offense known to the law. It follows, therefore, as it seems to us, that the police judge of Los Angeles had no jurisdiction or authority as an examining and committing magistrate, and that there was no authority of law for filing the information against the defendant; and therefore his motion to set aside the information should have been granted. We therefore advise that the judgment and order be reversed.

I concur: GIBSON, C.

PER CURIAM. For the reasons given in

the foregoing opinion the judgment and order are reversed.

PATERSON, J., (*concurring*.) It will be conceded, I presume, that the city of Los Angeles is a municipal corporation, having 30,000, and under 100,000 inhabitants. The judicial power of the city, therefore, is vested in a police court, "to be held therein by the city justices, or one of them, to be designated by the mayor." Whether such power is conferred by the act of March 18, 1885, known as the "Whitney Act," (St. 1885, p. 213,) or by the act in relation to municipal corporations of the second class (St. 1883, p. 200,) it is unnecessary to inquire, because under both acts it is made the duty of the mayor to designate a justice of the peace to hold said police court. The city is not in consequence of this decision left without a court for the punishment of misdemeanors, and examination into the commission of felonies within the city limits. Being a city having 30,000 and under 100,000 inhabitants, we have to presume, in the absence of anything in the record to the contrary, that the mayor has performed the duty required of him by the act of March 18, 1885, and designated a justice to hold the police court; and we have to presume, further, that such justice is in the actual discharge of his duty as *ex officio* judge of the police court.

It is said by respondent herein that Stanton's title to his office cannot be tried in this collateral proceeding; that he is at least a *de facto* officer, performing the duties of his office, and claiming to have been elected thereto in accordance with law. This point raises the most serious question in the case, and, if it were not for the statement in the record, that "the defendant had been examined and held to answer by L. STANTON, Esq., judge of the police court of Los Angeles city, the said police court having been authorized by the legislature of said state, to-wit, senate resolution No. 2, approving the charter of the said city of Los Angeles, adopted January 31, 1889, and the said L. STANTON having been elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election," I should consider the contention sound. This statement, however, shows that the defendant was held to answer in a judicial tribunal that has no lawful existence, namely, a police court organized under the charter of the city of Los Angeles, sanctioned by the legislature under senate resolution No. 2, and presided over by one who was elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election. While it is true that the acts of a *de facto* officer, acting in a *de jure* tribunal, cannot be questioned, we have here a case in which there is neither a court nor an officer authorized by law; and, as stated before, we must presume that the court authorized by the statute is in existence, and presided over by a justice duly appointed by the mayor. *In Re Ah*

You it was admitted that if the police court established by the freeholders' charter of the city of Oakland had no legal existence its judgment was void, and that the petitioner should be discharged. Perhaps, if such admission had not been made in that case, this court would have been bound to consider Laidlaw a *de facto* judge, and his acts valid and binding, there being nothing outside of said admission to show that he was acting solely under the authority of the charter, and by virtue of his election as a police judge. That case decided that the new charter of Oakland, is subject to and controlled by the act of 1885, so far as the police court is concerned, and that decision, under the facts admitted in this case, is conclusive upon the question as to the right of the defendant to his discharge.

Fox, J. I dissent. Conceding all that is said in the opinion of the commissioners as to the unconstitutionality of that portion of the charter of Los Angeles which provides for the establishment of a police court, and the jurisdiction thereof, I cannot admit that that city is left without a court for the punishment of misdemeanors, and for examination and inquiry into the commission of felonies within its borders. It is conceded in said opinion that the "Whitney Act," so called, is a general law applicable to the city of Los Angeles. Even if that be not true, the city is still not left without law, and without a police court with jurisdiction ample for inquiry into and commitment for offenses such as are charged against this defendant. In the absence of a constitutional provision in the charter, and of the "Whitney Act," there is still a general law for the establishment and government of municipal corporations, which establishes a police court in cities of this class, and defines their powers and jurisdiction, the same, so far as relates to this case, as the jurisdiction exercised in the examination and commitment of this defendant. See St. 1883, p. 200. The magistrate who presided at this examination, and made this commitment, even if not lawfully entitled to hold the place, was presiding in a *de jure* court, of competent jurisdiction, and was himself the *de facto* judge thereof. His acts and judgments as such are as valid and binding, as to third persons, as though he held the office by strict law. *Westbrook v. Rosborough*, 14 Cal. 180.

83 Cal. 66

MANN v. HIGGINS. (No. 13,400.)

(Supreme Court of California. Jan. 31, 1890.)

SPECIFIC PERFORMANCE—PLEADING—MISJOINDER—HARMLESS ERRORS.

1. A complaint which alleges that defendant agreed to pay plaintiff a sum of money, part of it to be paid by the conveyance of real estate, and asks for specific performance of the contract to convey and for judgment for the balance in money, is not a misjoinder of several causes of action, as the contract sued on is an entirety.

2. A complaint which alleges that plaintiff rendered defendant certain services by which de-

fendant was enabled to take such preliminary steps as would enable him to acquire title to certain lands, and that defendant promised to pay for such services, states facts sufficient to constitute a cause of action.

3. A memorandum of a contract to convey land, which describes the land as "1 acre in S., described as follows, to-wit, in the S. W. corner of section 5, township 16, range 22, all sold to W. M., for value received," which was signed by defendant, is sufficient to be enforced by specific performance.

4. It is not a reversible error for the court in instructing the jury to use the word "testimony" instead of "evidence," as it is entirely improbable that the jury was misled by the inadvertence.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by Washington Mann against Charles Higgins, to recover for services performed, and for specific performance of a contract to convey real estate. Under the contract for the services, the real estate was to be conveyed in part payment for the services, the balance to be paid in money. Defendant appeals.

Meux & Edwards, for appellant. *E. W. Risley* and *T. P. Ryan*, for respondent.

MCFARLAND, J. The complaint avers that for a certain consideration named defendant agreed to pay plaintiff to sum of \$6,400; and that \$2,200 of said amount was to be satisfied by the conveyance to plaintiff by defendant of certain described land, which defendant agreed to so convey, leaving \$4,200 due plaintiff after such conveyance. (There was also an averment of an agreement by defendant, made in the same contract, to purchase certain personal property from plaintiff for \$475; but, as that item was abandoned by plaintiff at the trial, it need not be further considered.) Certain special issues were submitted to a jury, who found them favorably to plaintiff. The court adopted them, and made other findings, and judgment was given to plaintiff for the \$4,200, and decreeing a conveyance from defendant to plaintiff of the said lands. Defendant appeals from the judgment and from an order denying a new trial.

Appellant demurred to the complaint on the grounds that several causes of action were improperly joined, and that the complaint was ambiguous, unintelligible, and uncertain. He contends that the court erred in not sustaining these grounds of demurrer, but the rulings of the court on these subjects are not specified as errors in the statement on motion for a new trial. Assuming that they can be considered here, although not contained in the assignment of errors, we think that the points were not well taken. As the alleged contract was an entirety, and defendant's promises were all founded upon the same consideration, we think that not only could plaintiff have judgment in the same action for the money and for the specific performance of the agreement to convey, but that it was his duty to unite them both in the same action if he wished to enforce both. Neither do we think that the com-

plaint was fatally defective on account of ambiguity, uncertainty, etc.

And we think, also, that the point that the complaint does not state facts sufficient to constitute a cause of action cannot be maintained. The facts alleged as constituting the consideration of defendant's promises are these: That "plaintiff and defendant entered into a certain agreement whereby it was agreed between them that plaintiff should use his knowledge and influence in behalf and render certain services to defendant, to enable defendant to take the preliminary steps to acquire from the United States for himself, or those whom he might name, the title to" certain named legal subdivisions of government land, containing 320 acres; and that he did use such knowledge and render such services, etc., by which defendant was enabled to and did take such preliminary steps as will enable him to acquire such lands. We think this was a sufficient statement of a cause of action.

Appellant contends that there was no sufficient "note or memorandum in writing" of defendant's agreement to convey to plaintiff the property described in the complaint. The written memorandum was as follows: "6,865. 4,675. Lots 5, 6, 7, and 8, in fractional block E of Cooper's addition to Selma; 1 acre in Selma, described as follows, to-wit: In the S. W. corner of section 5, township 16, range 22,—all sold to W. Mann, for value received. CHARLES HIGGINS." There was also another memorandum made at the same time, which, after mentioning certain horses and other personal property, ended with the words, "Due W. Mann, \$4,675. CHARLES HIGGINS," and immediately below defendant's name were the words, "one acre in Selma, 1,000; 4 lots, 1,200." We think that the memoranda were sufficient. The figures "6,875" were shown to be the \$6,400 which defendant was to pay plaintiff, with the additional \$474, at that time contemplated to be paid for the personal property; and the "4,675," found in both memoranda, the amount remaining after deducting the \$2,200 for the land at Selma. The facts here are materially different from those in Breckinridge v. Crocker, 21 Pac. Rep. 179. We have examined the assignments of error alleged to have been committed in rulings on the admissibility of evidence, and we think that none of them are tenable. They are mostly founded on the theory that there could be no explanation of the written memoranda.

The court, when instructing the jury on the subject of the preponderance of evidence, used the word "testimony," instead of "evidence;" and appellant contends that this was a reversible error. Of course, "evidence" is the more comprehensive word, and includes "testimony," which latter, strictly speaking, means only that evidence which comes from living witnesses who testify orally. But in common language, (and, sometimes, even, among lawyers) the two words are frequently used synonymously, and

it is entirely improbable that the jury was misled in the premises. The fact is that the real struggle of this case centered around the truth and weight of the evidence. But the evidence was certainly conflicting, and the responsibility of determining the questions of fact was with the jury and the trial court; and we see no good reason to disturb the view to which the judge of the court below took of the alleged newly-discovered evidence. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

86 Cal. 93

GOLDTREE *et al.* v. McALISTER. (No. 13,436.)

(Supreme Court of California. Jan. 31, 1890.)

WILLS—FOREIGN PROBATE—COLLATERAL ATTACK—MORTGAGE FORECLOSURE.

1. Code Civil Proc. Cal. §§ 1322-1324, provide that when a copy of a will, duly proved and allowed in a foreign country or state, and the probate thereof, duly authenticated, shall be produced, the same shall be filed, and the court must appoint a time for the hearing, and if, on the hearing, it appears that the will has been proved, allowed, and admitted to probate in any foreign country, it must be admitted to probate in this state. *Held*, that the question whether a will has been duly proved and allowed in a foreign country is a fact which the court must find from the evidence, and, where the court finds that a will has been properly probated in a foreign country, and admits it to probate in this state, its action cannot be attacked collaterally, but only by direct appeal.

2. Code Civil Proc. Cal. § 392, requires actions for the foreclosure of mortgages to be tried in the county in which the subject of the action, or some part thereof, is situated, and where real property is situated partly in one county, and partly in another, the plaintiff may select either county, and the one selected is the proper county for the trial of the action. *Held*, that where land is sold by the sheriff of the county of S. under foreclosure proceedings instituted in that county, and part of the land is shown to be in the county of K., but it does not appear where the remainder is situated, it will be presumed that the mortgaged premises consists of one body of land situate partly in the county of S. and partly in the county of K.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; J. B. CAMPBELL, Judge.

William Shipsey and Graves, Turner & Graves, for appellant. *W. H. Spencer and J. M. Wilcoxon*, for respondents.

VAN CLIEF, C. This is an appeal from a judgment for plaintiffs in an action of ejectment. The plaintiffs sued in the character of trustees of the estate of Jonathan Thompson, deceased, under his last will; and the first question to be considered arises from a contest upon the trial as to whether or not the plaintiffs were entitled to sue in that character. The defendant having denied the will, the plaintiffs, to prove it, offered in evidence a certified copy of the proceedings of the probate court of the county of San Luis Obispo in the matter of the estate of Jonathan Thompson, deceased, commenced by the petition of John Thompson and John A. Patchett, filed December 2, 1875, alleging, in

substance, that the testator died in the county of Monterey, Cal., leaving estate in the county of San Luis Obispo; that his will had been duly proved and allowed in the queen's probate court of England, at London, on the 28th day of October, 1875, which court had competent jurisdiction for that purpose; that the will was executed in conformity with the laws of this state; the character and value of the property in this state; who were the heirs and devisees residing in this state and in England; that petitioners and Thomas Grierson, of England, were named in the will as executors thereof; and that they consented to act as such; and praying that the authenticated copy of the will be admitted to probate, allowed, and recorded. With this petition was exhibited and filed what purported to be a copy of the will as probated in the English court, headed as follows: "Extracted from the principal registry of the probate division of her majesty's high court of justice. On her majesty's court of probate." Added and subscribed to this copy of the will was the following: "Affidavit filed that testator was a British subject, and that he made his will in England. Proved at London 28th October, 1875, by the oath of Thomas Grierson, one of the executors, to whom administration was granted. Power was reserved of making the like grant to John Andrew Patchett and John Thompson, otherwise John Brown Thompson, the other executors. I certify that this copy has been examined with the original will deposited in the registry, and that it is a true copy thereof. Examined, J. W. S. DAVID HENRY OWEN, (14 fos., W. J. O.,) Registrar. [The seal of her majesty's high court of justice, principal registry, probate division.]" It is admitted that due notice of the time and place appointed for hearing the petition and for probate of the will in the California court, as prayed for in said petition, was made and published according to law. On the day appointed, the probate court in which said petition was filed made the following order: "The petition of John Thompson and John A. Patchett, heretofore filed in the above-entitled matter, praying for admission to probate of a document purporting to be a duly-authenticated copy of the last will and testament of said deceased, and to be appointed executors of the said estate, and that letters testamentary thereon be granted to said petitioners, coming on regularly to be heard on this 27th day of December, 1875, on reading and filing of the publication and services of notices of the present hearing, as required by order of this court, and it appearing to the court that due notice has been given according to law, and that the aforesaid document is a duly-authenticated copy of the last will and testament of said deceased, together with a copy of the probate thereof, said will having been executed in the kingdom of Great Britain and Ireland, in conformity with the laws of this state, and thereafter, to-wit, on the 28th day of October, 1875, having been proved, al-

lowed, and admitted to probate in the queen's probate court, in the city of London, England, and it having heretofore, to-wit, upon the appointment of the special administrator of said estate, appeared that the said deceased died on the 5th day of September, 1875, being at the time a resident of the county of San Luis Obispo, having estate real and personal therein, and the said John Thompson and John A. Patchett being of lawful age, and competent to serve as executors, it is ordered that the paper heretofore filed, purporting to be a copy of the last will and testament of the said deceased, be admitted to probate as the last will and testament of said deceased; that the said John Thompson and John A. Patchett be, and they are hereby, appointed executors of said estate and that letters testamentary issue to the said petitioners upon their taking the oath as required by law. Dated December 27, 1875. Mc. D. R. VENABLE, Probate Judge." Letters testamentary were accordingly issued to John Thompson and J. A. Patchett, and they duly qualified. The will also appointed Thompson, Patchett, and Grierson trustees of the estate, and devised the property to them for the uses and purposes expressed in the will, so that upon the settlement of the estate in the probate court the residue of the property, including the testator's right and title to the demanded premises, was on March 10, 1877, distributed to them. On November 9, 1884, by order of the superior court duly made, Patchett was removed, and the plaintiff Goldtree was appointed in his place.

To the introduction in evidence of the record of the California probate proceedings the defendant objected on the ground that the probate court of San Luis Obispo county never acquired jurisdiction of the subject-matter of the probate of the will, because the copies of the will, and of the foreign probate thereof, were not certified nor authenticated as required by sections 1323, 1324, and 1906 of the Code of Civil Procedure. Sections 1322-1324 provide a mode of proving a defined class of wills in this state, viz., all wills which have been duly proved and allowed in any other of the United States, or in any foreign country or state. The mode of proof and the evidence required in this class of cases differ from the mode and evidence required in other cases, yet all are cases of probate of wills. Section 1324 provides that upon the proofs and conditions therein mentioned wills of this class "must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state." Conceding, for the sake of argument only, that the fact that the will had been "duly proved and allowed" in a foreign country or state, as expressed in section 1322, is a jurisdictional fact in addition to the jurisdictional facts of cases in which wills are first probated in this state, yet it belongs to that class of jurisdictional facts which the court must find from the evidence; and if the court found this fact upon insufficient evidence, or without competent

evidence, and thereupon proceeded to exercise jurisdiction, the action of the court in this respect was not void, but merely erroneous, and subject only to direct attack by appeal, and was not open to the collateral attack here made. *Irwin v. Scriber*, 18 Cal. 500; *Halleck v. Moss*, 22 Cal. 276; *Rogers v. King*, Id. 73; *Lucas v. Todd*, 28 Cal. 182; *State v. McGlynn*, 20 Cal. 233; *Luco v. Bank*, 70 Cal. 339, 11 Pac. Rep. 650; *Freem. Judgm.* §§ 118, 608. An error of the court in deciding that certain documentary evidence, not properly authenticated, proved a valid foreign probate of a will, is not different in character or principle from an error in deciding, as in the case of *Irwin v. Scriber*, supra, that certain evidence proved that the deceased had her last place of residence in Sacramento county. The error in the former case may have proceeded from a misconception of what constituted a valid foreign probate of a will, or from an error as to what was competent or sufficient evidence to prove it. In the latter case, the error may have arisen from a mistaken view of what constituted a residence, or from an error as to what was sufficient or competent evidence to prove it. Such errors may be corrected by appeal, but do not render the judgment void; and it makes no difference that the Code (sections 1323, 1324) provides that the fact of the foreign probate shall appear or be proved by duly authenticated record evidence, as these provisions only regulate the procedure by which the court shall ascertain that fact. It may be that the court considered the "copy of the will, and the probate thereof, duly authenticated" by the documents produced and filed with the petition as above stated; or, for aught that appears, it may be that the court permitted this documentary evidence to be supplemented by proof, in accordance with section 1907 of the Code of Civil Procedure. In either case the error, if it was error,—and this may be conceded for the present purpose,—was such only as to the competency or sufficiency of the evidence upon which the court found the fact which is claimed to be jurisdictional, viz., that the will had been "duly proved and allowed * * * in a foreign country or state," as required by section 1322, Id. I therefore think the trial court did not err in admitting in evidence the records of the probate court of the county of San Luis Obispo.

Counsel for appellant further contends that the court erred in sustaining a general demurrer to defendant's cross-complaint. The cross-complaint shows that the demanded premises, S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 19, township 28 south, range 19 east, are a part of what are known as the "University Lands" of California, sold by the state through the agency of the board of directors of the university. In March, 1871, Carolan Mathers applied to purchase the S. W. $\frac{1}{4}$ of section 19. His application was accepted, and he paid 20 per cent. of the purchase money, and interest on the remainder in advance, as required by law, amounting to \$64.50 and

\$8 fees, and received a certificate of purchase. In March, 1874, David C. Norcross, in the same manner, and upon the like conditions, applied for the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section 19, and received a certificate of purchase therefor. In September, 1871, Mathers conveyed his interest in the land, and assigned his certificate of purchase, to David C. Norcross; and in September, 1875, David C. Norcross conveyed and assigned one undivided half of both parcels of land, and of the certificates of purchase, to John C. Norcross. In October, 1875, David C. Norcross and John C. Norcross executed to the plaintiff John Thompson as administrator of Jonathan Thompson, deceased, a mortgage on 2,441 acres of land, including the demanded premises, to secure \$12,000 and interest. In January, 1877, at suit of the executors of Jonathan Thompson in the then district court San Luis Obispo county, against David C. and John C. Norcross, a decree of foreclosure of this mortgage was entered. November, 1877, in execution of said decree of foreclosure, the sheriff of San Luis Obispo county sold the mortgaged premises, including the demanded premises, to the plaintiffs as trustees of the estate of Jonathan Thompson, deceased, and issued to them a certificate of sale. This sale was made in front of the court-house in San Luis Obispo county. The demanded premises are wholly in Kern county; but it does not appear from the cross-complaint, nor from the record, in what county the remainder of the mortgaged premises, 2,441 acres, are situated. June 8, 1878, the sheriff executed to plaintiffs a deed for the whole of the mortgaged premises. On July 2, 1879, the plaintiffs presented the sheriff's deed to the proper officers of the university, representing that they were the assignees of Mathers and Norcross, to whom the certificates of purchase had been issued, paid the balance of the purchase money, and thereby procured state patents for the land. On October 8, 1885, over six years after the date of the patents, David C. and John C. Norcross conveyed to defendant, McAlister, all their right, title, and interest in and to the demanded premises, and said certificates of purchase. Upon this state of facts, the defendant claims that he is the equitable owner of the land; that plaintiffs hold the legal title in trust for him; and that upon payment by him of "all money they have necessarily and properly expended in procuring said patents with interest," (which he offers to pay,) they should be ordered to convey to him the legal title; and to this effect is the prayer of the cross-complaint.

The sole ground upon which defendant bases his right to this relief is that the sheriff of San Luis Obispo county had no authority to sell the demanded premises, situated, as they were, wholly in Kern county, and that the sale was therefore void. It is not denied, however, that the district court had jurisdiction to foreclose the mortgage, nor that the foreclosure procedure was entirely regular;

and, since it does not appear but that the mortgaged premises consisted of one body of land, situated partly in San Luis Obispo county and partly in Kern county, these facts must be presumed in support of the jurisdiction and regularity of proceedings of the district court. The constitution, art. 6, § 5, provides "that all actions for * * * the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." Section 392 of the Code of Civil Procedure requires "actions * * * for the foreclosure of * * * mortgages" to be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial. And further provides that "where the real property is situated partly in one county and partly in another the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action." The foreclosure of a mortgage embraces the sale of the property and the execution of the sheriff's deed, as well as the decree of the court ordering the sale. A mortgage cannot be said to be foreclosed, even in the sense of our Code, until the mortgagor's right of redemption is cut off. Anderson's Law Dictionary defines "foreclosure" as follows: "(1) Specifically, the extinguishment of a mortgagor's equity of redemption beyond possibility of recall. A mortgage is foreclosed in the sense that no one has the right to redeem it, or to call the mortgagee to account under it. In no sense can the term be applied to a mortgage until sale of the property has been effected." Referring to 2 Bl. Comm. 159. *Puffer v. Clark*, 7 Allen, 85; and *Duncan v. Cobb*, 32 Minn. 464, 21 N. W. Rep. 714.

In providing that an action for the foreclosure of a mortgage may be commenced and tried in any county in which any part of the mortgaged property is situated, it must have been the intention of the legislature that the mortgage should be foreclosed in such county; that is to say, that every judicial, ministerial, and executive official act necessary to effect a foreclosure might be performed in any county in which any part of the property was situated. A piece of mortgaged land may be partly situated in several different counties, as where three or four counties corner upon it, and also where it is traversed by a meandering stream which marks the boundary line between two counties. In such case it would be very inconvenient, and unnecessarily expensive, to require each part of the land to be separately sold and conveyed by the sheriff of the county in which it is situated. Besides, it would generally turn out that the sum of the value of all the parts thus sold would not equal the value of the undivided whole. These considerations strengthen the construction permitting the mortgage to be completely foreclosed in any one of the counties in which any part of the mortgaged property is situated. It must therefore be pre-

sumed, upon the facts stated in defendant's cross-complaint, that the sheriff of San Luis Obispo county was authorized to sell and convey the demanded premises. This being so, it follows that the cross-complaint does not state facts sufficient to entitle the defendant to any relief, and that the demurrer to it was properly sustained. I think the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(82 Cal. 654)

WHITE v. SOTO et al. (No. 12,341.)

(Supreme Court of California. Jan. 31, 1890.)

PLEADING CONTRACTS—MECHANICS' LIENS.

1. A complaint which alleges that there was a written contract between the parties, which was afterwards modified by an oral agreement, and then states the contract according to its legal effect as modified, sufficiently pleads the contract.

2. A written contract which has been modified, but not entirely superseded, by a subsequent parol agreement, is admissible in evidence in a suit on the contract as modified.

3. Where a written contract for building a house provides that the person for whom it is to be built may at any time during the progress of the work request any changes in the contract, and the same shall in no way avoid it, parol evidence is admissible, on the question as to whether a mechanic's lien was filed in time, to prove an oral agreement made during the progress of the work by which the building was enlarged, and the time for completing it extended.

4. An amended complaint, based on the same cause of action set up in the original complaint, relates back to the date of the filing of the original complaint.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

R. M. F. Soto, for appellants. Geil & Morehouse, for respondent.

GIBSON, C. This is an appeal by defendants from an order denying them a new trial in an action prosecuted by plaintiff to foreclose a mechanic's lien. It appears from the findings that on August 23, 1882, J. M. Soto, the husband of Maria P. de Soto, entered into a contract in writing with White, by which the latter agreed to erect a dwelling-house of a certain kind and dimensions upon land owned by Maria P. de Soto, and furnish all the material and labor therefor, and complete and finish it on or before November 21, 1882; for which J. M. Soto agreed to pay him the sum of \$2,850, in four several installments. After White had commenced the erection of the building under the contract, he and J. M. Soto made a modification of the said contract, by verbal agreement, by which White agreed to enlarge the building in certain respects, and furnish the necessary additional material and labor, and J. M. Soto to pay, in addition to the original contract price, whatever such additional material and labor should be reasonably worth, and that White should have such additional time as he might

require to complete the building. White, pursuant to the written contract, as modified by the subsequent oral agreement, completed the dwelling-house on January 31, 1883, and on the same day he delivered the entire possession of it to Soto and his wife, who both, on the same date, moved into it, and thereafter continued to occupy it as their place of residence. During the whole progress of building the defendant Mrs. Soto was in and about the building, and supervised plaintiff's work, and made directions as to certain changes therein, and never in any way objected to the erection of the building. The reasonable worth of the additional work upon and material furnished for the building was \$383, which, in addition to the original contract price, made all the work done and material furnished of the reasonable value of \$3,233. Of this sum, and before suit was brought, J. M. Soto paid \$2,880, leaving an unpaid remainder of \$353. White filed his claim of lien, and commenced suit thereon within the statutory time. During the trial it was admitted that after the action was commenced J. M. Soto paid to White the sum of \$253 of the amount sued for, and it was at the same time stipulated that the sum so paid should be deducted from whatever amount the court should find due, if any should be found due, and judgment for the remainder rendered and entered. Interest from the commencement of the suit was allowed on the \$100 found due, after all deductions; also an attorney's fee of \$100, and \$10 for expenses incurred in securing the lien. The objections upon which appellants seem to mainly rely are that the written contract, as subsequently modified by parol agreement, was not properly pleaded; and that the court erred in admitting the written contract, and parol evidence of its modification, in evidence.

1. It is alleged in the amended complaint that the written contract in question was made between the plaintiff and J. M. Soto; that subsequently, by their oral agreement, it was modified, and that as modified it is as follows, (then follows a statement of the contract according to its legal effect, followed by appropriate allegations to the effect that plaintiff upon his part had executed it, and that Maria P. de Soto, upon whose land the house was erected, had by her conduct accepted and ratified the contract, but had failed to execute it in full upon her part.) It has been decided in several cases that a contract may be declared upon *in haec verba* or in substance and according to its legal effect. *Stoddard v. Treadwell*, 26 Cal. 294; *Love v. Mining Co.*, 32 Cal. 639. Although the plaintiff did not set forth in his complaint the written contract, and then show, by appropriate allegations, wherein it had been modified by their subsequent executed verbal agreement, pointed out as the proper method in *O'Connor v. Dingley*, 26 Cal. 11, and

adopted in *Barilari v. Ferrea*, 59 Cal. 1, still, as the complaint shows clearly and with certainty what the contract as modified was, it was not subject to defendant's demurrer, on the ground of ambiguity, uncertainty, and unintelligibility.

2. As the original contract was not entirely superseded by the subsequent modification of it made by parol, it, together with such modification, constituted the basis of the suit; and it is therefore clear that the written contract was indispensable to enable the court to determine how far it had been performed, and to ascertain the stipulated time and mode of payment, in order to give it effect as far it might be applicable in connection with the parol modification of it. *O'Connor v. Dingley*, supra; *Dermott v. Jones*, 2 Wall. 9; *Ladue v. Seymour*, 24 Wend. 60. The written contract contained the following stipulation: "*Sixth.* Should the said Soto, at any time during the progress of the work on said building, request any alterations, deviations, additions, or omissions from this contract, or the said drawings or specifications, he shall be at liberty to do so, and the same shall in no way affect or make void this contract, but a rebate from or an addition to the amount of the contract price shall be made on account thereof, by a fair and reasonable valuation." Thus it appears the original contract provided for just such a subsequent deviation from it as was made. This deviation did not vary the terms of the written contract, but merely expanded them so as to embrace the enlargement of the building provided for in the written contract, and such additional time as might be required for the completion of the building as enlarged, and was properly provable by parol evidence. *O'Connor v. Dingley*, supra; 2 Whart. Ev. § 1026.

3. The further objection, made by appellants, that plaintiff failed to file his lien and to commence an action thereon in time, cannot be sustained because the record shows that the dwelling-house was completed on January 31, 1883, and that the claim of lien was filed March 30, 1883, within 60 days. This was within the statutory time, as the plaintiff was an original contractor. Code Civil Proc. § 1187. Suit was brought to enforce the lien on June 28, 1883, within 90 days after the claim of lien was filed, and was therefore in time. *Id.* § 1190. The amended complaint was filed on July 22, 1885, but, as it was based upon the same cause of action, it related back to the date upon which the original complaint was filed. *Jones v. Frost*, 28 Cal. 246; *Easton v. O'Reilly*, 63 Cal. 305. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 645)

WIESE v. SAN FRANCISCO MUSICAL SOC.
(No. 12,740.)

(Supreme Court of California. Jan. 30, 1890.)

RES ADJUDICATA.

1. A judgment, unappealed from, that a mutual benefit insurance association had no power to limit by by-law the amount of "sick benefits" to be paid to a member, is conclusive on the parties in an action for subsequently accrued installments.

2. The conclusiveness of the judgment is not affected by the fact that it was rendered in an action commenced in a justice's court, where it appears that the court had jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

W. H. L. Barnes, for appellant. O'Brien & Morrison, for respondent.

HAYNE, C. This was an action to recover certain "sick benefits." The general features of the case are like those in *Stohr v. Society*, 22 Pac. Rep. 1125, (filed January 22, 1890,) which is against the same defendant. After the passage of the by-law limiting the amount of benefits, and the payments in accordance therewith, the defendant refused to pay anything further; and within a few months thereafter the plaintiff commenced an action in the justice's court to recover the installments then claimed to be due. Judgment was given in his favor, and the society appealed to the superior court, where, after a trial on the merits, a similar judgment was rendered. The court below held this judgment to estop the defendant from maintaining the defense presented here, and we think that this ruling was correct. It affirmatively appears that the matters which are presented here were litigated and decided in the former action. There, as here, the main defense was that the by-law of 1883 limited the amount of benefits to be paid to the plaintiff. The court decided that the defendant had no power to impose such a limitation. The only difference between the two cases is that, by mere lapse of time and the continuance of the plaintiff's sickness, new installments have become due. It is quite true, as stated by Chief Justice DE GREY in the *Duchess of Kingston's Case*, that a judgment is not conclusive "of any matter to be inferred by argument from the judgment." But here the invalidity of the by-law was the ultimate point involved, and it was actually litigated, which circumstance distinguishes the case from *Cromwell v. County of Sac*, 94 U. S. 351, cited for the appellant. The preponderance of authority is in favor of the respondent's position that in such a case the judgment is conclusive in an action for subsequent installments. *Robinson v. Howard*, 5 Cal. 428; *Love v. Waltz*, 7 Cal. 250; *Outram v. Morewood*, 3 East, 346; *Aurora City v. West*, 7 Wall. 96; *Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. Rep. 495; *Smith v. Ontario*, 18 Blatchf. 454, 4 Fed. Rep. 386; *Laird v. De Soto*, 32 Fed. Rep. 652; *Oregonian*

Ry. Co. v. Oregon Ry., etc., Co., 27 Fed. Rep. 278; *Kennedy v. McCarthy*, 73 Ga. 346; *Cleveland v. Creviston*, 93 Ind. 31; *Furneaux v. Bank*, 39 Kan. 144, 17 Pac. Rep. 854; *Gardner v. Buckbee*, 3 Cow. 120; *Doty v. Brown*, 4 N. Y. 71; *Bouchaud v. Dias*, 3 Denio, 233.

The fact that the former case was commenced in the justice's court makes no difference. That court had jurisdiction; and, when a court which has jurisdiction renders a valid judgment, such judgment is as binding as any other. But, however this may be, the case was retried on its merits in the superior court, and the judgment relied upon was entered there, and is a judgment of that court. We therefore advise that the judgment and order appealed from be affirmed.

We concur: VAN CLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(83 Cal. 23)

BOREHAM et al. v. BYRNE et al. (No. 13,222.)

(Supreme Court of California. Jan. 30, 1890.)

HOMESTEAD—DECLARATION—TRIAL—COMMENTING ON INSTRUCTIONS—CUSTODY OF JURY.

1. St. Cal. April 28, 1860, p. 311, § 1, provides, *inter alia*, that a declaration of homestead shall state that declarants or either of them, are married, or, if not married, that he or she is the head of a family, and that at the time of making the declaration they, or either of them, are residing on the premises with their family, or the person under their care. *Held*, that a declaration is insufficient which states that the declarant was a married man, and had been in possession of the premises for a specified time, but fails to state the nature of the possession, or that either he or his wife, with the family, were residing on the premises at the time.

2. Evidence is inadmissible, in connection with such defective declaration, to prove that when it was made, and thereafter, declarant was in fact residing on the premises with his family, and that the purchaser from him took the premises with knowledge of all the equities, as actual residence, without a sufficient declaration, is ineffectual to constitute a homestead.

3. As the object of the act is to disable either spouse from voluntarily alienating the premises, but only when there has been a sufficient declaration, in the absence of such, a deed of the premises, executed by both husband and wife, is admissible in evidence as the deed of the husband alone; the wife's signature being superfluous.

4. Evidence that the wife's signature was a forgery is immaterial in such case.

5. It is discretionary with the trial court to permit counsel to read to the jury, and comment on, the instructions previously settled by the court.

6. It is not essential that a special oath should be administered to the person in charge of the jury; and a statement that he was an officer implies that he had taken his oath of office, which is a sufficient qualification for that purpose.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

M. T. Moses and Charles A. Sumner, for appellants. Byron Waters and Elmer E. Rowell, for respondents.

THORNTON, J. Ejectment. Trial by a jury. Verdict and judgment for defendants. Plaintiffs appeal from the judgment and order denying their motion for a new trial. On October 14, 1862, one Mee, who at that time held the title to the land in suit, conveyed it to George Boreham, husband of plaintiff, Louise Boreham. It was admitted that, from the day the foregoing deed bears date, up to the time George Boreham left San Bernardino, (about July 1, 1865), he and his family resided on the land sued for. Defendants claim title under a deed purporting to be executed by George Boreham and plaintiff Louise Boreham, his wife, to J. H. Stewart, dated May 31, 1865. "It was offered by defendants as the deed of George Boreham only." Whatever title Stewart took by this deed passed to, and vested in, the defendants.

On the trial, plaintiffs offered in evidence a certified copy of a paper executed by George Boreham on November 4, 1862, which was duly acknowledged and recorded on the day just above named. The following is a copy of it: "Know all men by these presents, that I, George Boreham, of the county of San Bernardino, state of California, do hereby make and declare my intention to use and claim the following-described premises as a homestead, to-wit, [here follows a description of said property], which said premises was conveyed to me, by Sydney Mee, by deed bearing date the fourteenth of October, A. D. 1862, together with all the appurtenances thereunto belonging; and I do further declare that I am a married man now, and have been since the date of said deed, in possession of said premises, and that said premises are worth less than \$5,000. In witness whereof, I have hereunto set my hand and seal this 4th day of November, A. D. 1862, at the city of San Bernardino. [Signed] GEORGE BOREHAM. [Seal.] Duly acknowledged and recorded November 4, 1862." Defendants objected to the introduction of the foregoing paper on the grounds that it was not a declaration of homestead; that it was immaterial, irrelevant, and incompetent, void on its face; that it did not state that the declarant was residing on the premises at the time it purported to have been made, nor that he was residing thereon with his family; and that it does not state the cash value of the property. The court sustained these objections, and excluded the declaration, to which plaintiffs reserved an exception. The plaintiffs again offered this paper in evidence, and offered to prove, in connection with it, that at the time the same was made and recorded the declarant was in fact residing upon the premises described therein with his family, claiming and using the same as a homestead, and that he so continued to reside there, with his family, up to about the 1st day of July, 1865, and also that the parties defendant acquired whatever right, title, or claim they had to said property under a deed from J. H. Stewart, and with knowledge of the nature and condition of said Stewart's title and equities

in the premises, and also that J. H. Stewart, the party dealing with George Boreham, understood and believed at the time that it was a valid homestead, and dealt with him as if it were such, and required that in the purported deed of said land from Boreham to Stewart the wife of Boreham should join, and procure some one to personate her, and sign her name to such deed; all of which was excluded under the same objections. To this ruling the plaintiffs also objected.

The paper thus excluded from evidence was offered as a declaration of homestead made by George Boreham under the act of April 28, 1860. St. 1860, p. 311, as amended by the act of May 12, 1862, p. 519. The act of 1860 was an amendment of the act of April 21, 1851, which latter was the first act passed in this state in relation to a homestead. St. 1851, p. 296. Under this act it was held that a homestead claim could not be created by the residence of the husband alone, in the absence of the wife and family. *Gambette v. Brock*, 41 Cal. 83, and cases there cited. A material modification of this act was made by the act of 1860. St. 1860, p. 311. This latter act authorized the creation of a homestead by either husband or wife, or other head of a family. Either could select or dedicate a homestead by a declaration in writing executed and recorded as provided in the act. In all cases, residence on the land was requisite to consummate the claim of homestead. *Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 316; *Gambette v. Brock*, 41 Cal. 83. This act was an enabling act, and intended so to be. The provisions of the act as to the declaration had to be complied with in order to make such a selection and dedication. The ability to protect the property claimed as a homestead from sale by forced or voluntary alienation did not arise unless the declaration contained the requisites provided for in the act of 1860. This act (first section) provides what the declaration shall contain. "Said declarations," the act provides, "shall state that they, or either of them, are married, or, if not married, that he or she is the head of a family; that they, or either of them, as the case may be, are at the time of making such declaration residing with their family, or with the person under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead." The paper offered in this case as a declaration of homestead is made by the husband. There is in it no statement that either he or his wife was at the time residing with their family on the premises. The statement that he was then a married man, and had been since the 14th of October, 1862, in possession of the premises, is not equivalent to the required statement of residence. The declarant might have been in possession by his tenant, or might have been in actual possession of the land while his family were residing elsewhere. The paper was manifestly insufficient as a decla-

ration of homestead, and the court did not err in excluding it.

Nor did it err in ruling out the other matters offered in connection with a further offer of the so-called "declaration of homestead." Nothing could make the premises a valid protected homestead without such a declaration as the statute required. Actual residence on the land would not so make it, in the absence of a sufficient declaration. A declaration sufficient in form without residence, and residence without a sufficient declaration, are alike ineffectual to constitute the homestead. The court did not err in any of the rulings above stated.

It is argued by counsel for plaintiffs that the declaration is required only to protect the land claimed as a homestead from forced sale. The act cannot be so construed, nor has it ever been so construed. It is manifest, from the perusal of the act, that it was to disable either spouse from making a voluntary alienation of the land, but only when a sufficient declaration was made. If there was no sufficient declaration, the power of the husband to alienate the land, of his own will, remained unimpaired.

The court did not err in allowing the defendants to offer the deed of George Boreham to Stewart as the deed of George alone. If it was signed by the wife of Boreham, it was not error. As we have seen, Boreham, (the husband,) there being no homestead, was competent to convey the land. The signature of his wife was a mere superfluity, and imported no efficacy whatever to the deed. Her signature conveyed no title. This contention comes with a bad grace from plaintiffs, who claimed on the trial, and offered to show, that Louise Boreham's signature to the deed was a forgery. Granted that such signature was a forgery, the deed had still the genuine signature of the husband, which was all that was required to pass the title to the land conveyed by it. It follows from the above that the court did not err in excluding testimony to show that the signature of Louise to the deed was forged. It would have been a waste of time to listen to such testimony, which would have been entirely irrelevant to any issue in the case.

There was no error in the refusal of the court to give the instruction No. 6 requested by the plaintiffs, nor did the court err in giving instructions 2, 3, 4, 5.

In the course of his argument, Byron Waters, Esq., of counsel for defendants, read to the jury, and commented on, the instructions previously settled by the court. To this conduct of counsel plaintiffs objected, and, on its permission by the court, excepted. This course was entirely within the discretion of the court, and, as there was no abuse of discretion in permitting it, this court finds no error in it.

After the charge to the jury had been given, it (the jury) was given in charge of an officer, and retired for deliberation. It appears in the statement that this officer was not sworn,

and that the plaintiffs excepted to this conduct of the court. The officer must have taken his oath of office. To this extent he was a sworn officer, and bound by his oath. The mere statement that the person who took charge of the jury was an officer implied that he had taken his oath of office; for without having taken such oath he would not have been an officer. It is consistent with what appears in the statement that the jury were put in charge of the sheriff. Though it is usual to put the jury, retiring to deliberate, in charge of an officer, to whom a special oath is administered in regard to the discharge of his duties while so in charge, we know of no law, and we have been referred to none, which requires it. The Code of Civil Procedure, in the chapter in regard to the trial by jury, contains no such requirement. Its provisions seem to have been framed under the idea that the official oath was sufficient. We so regard it, leaving it to the superior courts to administer a special oath or not, as they may think proper under the circumstances. The record is free from error. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

83 Cal. 30

JOHNSTON v. McDUFFEE *et al.* (No. 13,399.)

(Supreme Court of California. Jan. 30, 1890.)

MORTGAGES—FORECLOSURE—PARTIES—DEPOSITION OF PARTY.

1. Under a joint mortgage executed to secure two several notes, one of the joint mortgagees, who purchases the mortgaged land, acquires the legal title subject to the lien of the mortgage, and is a proper party defendant in an action of foreclosure by the other mortgagee's assignee.

2. Plaintiff's deposition is admissible in evidence where he is absent from the county, and one of his counsel testifies that he knows of no other witness in the county by whom certain facts can be proven.

3. Under Code Civil Proc. §§ 2021, 2034, relating to depositions, a plaintiff's deposition is admissible in evidence though he is present at the trial, and though other witnesses are present by whom he could have proved the same facts, as the exception in the statute excluding the deposition when the witness' presence can be procured relates to another kind of witness.

Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Charles R. Gray, for appellant. Harris & Gregg, for respondent.

THORNTON, J. Action to foreclose a mortgage executed by one Winters to Jameson and defendant McDuffee to secure two notes, one to Jameson and the other to McDuffee. The mortgage is joint, and the notes are several, as stated above. Jameson assigned his note and the mortgage to secure it to the plaintiff, Johnston. McDuffee, after the execution of the notes and mortgages, and before this action was brought, purchased of

the mortgagor, Winters, the mortgaged premises, a conveyance of which was executed to him by Winters. By his purchase of the equity of redemption of Winters, McDuffee became the holder of the legal title. He stood in Winter's place in regard to the land mortgaged. McDuffee was made defendant, and properly made a defendant, as the purchaser of the mortgaged property from Winters. As such purchaser, he came in by title subsequent, and subject to the lien of the mortgage. There was judgment of foreclosure against all the defendants. McDuffee only appeals.

It is argued that McDuffee is improperly such a defendant. We do not agree to this, for the reason above given. For the same reason, the complaint states a cause of action against him. The property is described in the complaint by reference to the mortgage, which is appended to the complaint as an exhibit, and made a part of it. *Emeric v. Tams*, 6 Cal. 156. The mortgage sufficiently describes the mortgaged premises. When the plaintiff offered the mortgage in evidence, no objection was made to it. It is not specified in any way that the findings are not sustained by the evidence.

The plaintiff offered in evidence his own deposition taken in the case. It does not appear to have been taken otherwise than in accordance with law. The defendant McDuffee objected to the offer of this deposition on the ground that it did not appear that plaintiff was absent from the county of San Bernardino, where the case was tried, and unable to be present at the trial, and on the further ground that it did not appear but that the facts sought to be proven by the deposition could be proved by other witnesses. The court overruled these objections, and the defendant excepted. It was proven to the court that the witness was absent from the county, and there was the testimony of one of plaintiff's counsel that he knew of no other witness in the county by whom the facts might be established, or could be proven. In fact, neither ground of objection is maintainable. The plaintiff had the right, under the statute, to read the deposition, though he had been present at the trial, and though other witnesses had been present by whom he could have proved the same facts. Such is the legal meaning of the statute. Code Civil Proc. § 2021. The only case in which the presence of the witness whose deposition has been taken is required is under the sixth subdivision of section 2021, *supra*, which does not concern us here, as it relates to a different sort of witness. The presence of a party whose deposition has been taken is never required, and the deposition may be read on the trial by either party, though he is in court when it is read. *Id.* §§ 2034, 2021. The judgment is supported by the findings. Though McDuffee's rights as mortgagee might have been protected by taking the proper steps to bring them before the court, the record before us is not in a shape that pre-

sents them. There is no error in the record. Judgment and order affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

83 Cal. 18

VAUGHN *et al.* v. CALIFORNIA CENT. RY. CO. (No. 13,183.)

(*Supreme Court of California.* Jan. 30, 1890.)

NEGLIGENCE OF MASTER.

In an action against a railroad company for the alleged negligent killing of one of defendant's employes, it appeared that deceased was sent out, with others, on a construction train, to find washouts and repair the track; that he knew the purpose for which the train started; and that he was killed by the wrecking and ditching of the train at one of the washouts. The complaint was drawn on the theory that defendant's servants in charge of the train were incompetent, and that defendant was negligent in selecting them. *Held*, that special findings by the jury that the company exercised ordinary care and prudence in selecting the servants, and that the accident was not proximately caused by the negligence of any of them, are in conflict with a general verdict in plaintiffs' favor, which cannot be allowed to stand.

Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

A. Brunson, Chas. R. Redick, and Brouseau & Hatch, for appellant. *Stephenson & Harris and Byron Waters*, for respondents.

McFARLAND, J. Pierce B. Vaughn, a young man about 27 years old, was killed by an accident on the railroad of the corporation defendant; and this action was brought by his father and mother (as heirs) to recover damages for his death, under section 377, Code Civil Proc. The verdict and judgment went for plaintiffs. Defendant appeals from the judgment, and from an order denying a new trial. The jury, in addition to a general verdict, returned answers to a large number of special issues submitted to them; and appellant contends (among numerous other points) that the general verdict is in conflict with the findings on the special issues, and therefore cannot stand. We think appellant right in this contention. Paragraph 4 of the complaint is as follows: "That on January 4, 1888, said Pierce B. Vaughn, while so engaged in such service of the defendant, was being carried upon a work-train of defendant upon such railway, in this county, when, owing to the negligent and defective manner in which the track and road-bed of such railway had been originally constructed and subsequently maintained by said defendant, and at a point about one mile west of North Cucamonga station, the said road-bed was and had been for many hours before, for a distance of thirty feet along the track, washed out, and by the negligence of the defendant the same was so allowed to remain, in an unsafe condition, till the accident complained of occurred." Paragraph 5 is as follows: "That, notwithstanding said unsafe condition of said track, the defendant, without exercising any care in the running of said

train, and without exercising any care to discover the unsafe condition of its track, and by its negligence in the running of said train at a reckless and fast rate of speed along and over said defective track, caused said train to be wrecked and ditched at such washout, thereby, without any fault on the part of said Vaughn, causing said Vaughn to be instantly killed."

An amendment to the complaint contains the following averments: "(8) That at the time of said wreck, and of the killing of said Vaughn, and continuously for more than ten days prior thereto, James McKenna was the section foreman of the defendant; and in that capacity had charge of the defendant's railroad track and road-bed where said washout and wreck occurred, and for several miles along the track on each side thereof, but that he was neither properly qualified nor competent, nor was sufficiently skillful, to perform his duties as such section foreman, and the defendant neglected to use ordinary care in selecting him as such section foreman. (9) That Edson Long was the conductor of said train at the time it was wrecked; but he was neither properly qualified or competent, nor of sufficient skill, to perform his duties as such conductor, and the defendant neglected to use ordinary care in selecting him as such conductor. (10) That at the times aforesaid A. Jones was the engineer of the said work-train, but he was neither properly qualified or competent, nor of sufficient skill, to perform his duties as such engineer, and the defendant neglected to use ordinary care in selecting him as such engineer."

It is apparent that the gist of the alleged cause of action lies in the averments contained in said paragraph 5 of the complaint, and in the matters averred in the amendment, and that the theory of the pleader was that appellant was liable in damages on account of the carelessness with which the train was run, the incompetency and misconduct of the employes, and the want of care of appellant in employing them; and the reason of this is quite apparent, when we look at the history of the accident. The train on which deceased was killed was not a passenger train; neither was it a work or construction train, traveling on ordinary business. The facts were that during a rainy and stormy time news came to the office of the defendant at San Bernardino of breaks and washouts along the line of the road, and this particular construction train was sent out for the express purpose of finding washouts, and repairing the road at points where such washouts should be found. The deceased was a co-employee of defendant with the other persons on the train, and he knew all the facts, and the purpose for which the train started. He therefore took the extra-hazardous risks. It would therefore have been difficult (we do not say impossible) to have rested a cause of action for damages for personal injury upon the mere fact alone that the managers of the train found what they were seeking, viz., a washout, and went into

it without any carelessness on the part of anybody. The fact that the road had not been constructed as thoroughly as it should have been at the place where the washout occurred, cuts but little figure, because it was evident from the start that the breaks would be most likely to be found at the weakest points. At all events, the complaint goes upon the theory that the injury was caused by the reckless speed with which the train was allowed to approach the washout, and the negligence and misconduct of the company's employees at the time of the accident, and, to avoid the rule that damages cannot be recovered for injuries caused by the negligence of a co-employee, the complaint avers the incompetency of the employees, and defendant's want of care in employing them. But the jury, by its findings on the special issues, expressly negatives all negligence on the part of any person at the time of the accident, and exonerates defendant from any want of care in selecting its employees. To the following questions the following answers were given by the jury: "Were the engine-man and conductor in charge of defendant's train exercising ordinary care in the running of the train at the time of the accident? *Answer*. Yes. Did the defendant exercise ordinary care and prudence in the selection of its employes having charge of its trains? *A*. Yes. Did defendant exercise ordinary care and prudence in the selection of its conductor, and persons having charge and supervision of its road-bed and track? *A*. Yes. Was the proximate cause of the accident the negligence of any such servant. If so, which one? *A*. No." With these issues thus found, there was nothing left of the complaint and the evidence to warrant the general verdict for plaintiff, which was for the very large sum, under the circumstances, of \$10,000.

It is to be observed, also, that part of these special findings seem to be in conflict with the averments and admissions of the pleadings. The complaint avers that the section foreman was not qualified or competent to discharge his duties, and the answer admits this, and affirmatively alleges that his negligence, etc., caused the accident; and yet the jury found against the negligence of any servant. The judgment and order are reversed, and the cause remanded for a new trial.

I concur: SHARPSTEIN, J.

THORNTON, J. I concur in the judgment. I think the pleader in the complaint counts on the negligent and defective manner in which the track was originally constructed, and subsequently maintained, as well as on other acts of negligence by the defendant. For negligence in constructing and maintaining its track, an employee can recover against a railway company. *Trask v. Railroad Co.*, 63 Cal. 96. But in this case the deceased, Vaughn, went out on a train sent for the purpose of repairing the track, which had been damaged by washouts caused by a severe

storm, which had a short time previously occurred. He knew the train was sent out for this purpose, and on an errand of danger. By going on this train, he accepted the risks incident to its passage over the track. Under these circumstances, I cannot see how the plaintiffs can recover.

82 Cal. 533

SMITH v. TAYLOR. (No. 13,421.)

(Supreme Court of California. Jan. 13, 1890.)

VENDOR AND VENDEE—THE CONTRACT—TITLE—SPECIFIC PERFORMANCE—PLEADING—EVIDENCE—FINDINGS.

1. Where a written contract for the sale of land contains a stipulation that the money paid thereunder shall be refunded if the abstract of title to be furnished by the vendor does not show good title in him, evidence of the groundlessness of the claims of persons whom the abstract shows to be asserting title adverse to the vendor is inadmissible in an action to recover the installments paid.

2. Evidence that, on the vendee's refusal to receive a "certificate" of title, it was agreed that the vendor should furnish an abstract instead, which was to be referred to a lawyer for examination, does not show a change of the terms of the written contract.

3. Where the written contract is that the vendee should take the land subject to a specified mortgage, evidence that, when the contract was executed, he knew of the existence of other incumbrances, and that there was a parol agreement as to how, when, and by whom they were to be paid off, is inadmissible, as Civil Code Cal. § 1625, provides that when the parties to a contract reduce it to writing the writing supersedes all other agreements between them on that subject.

4. Where a written contract for the sale of land has ceased and determined by its own terms, and the acts of the parties under it, a subsequent oral agreement that a sale should be concluded on the vendor's quieting title against all adverse claimants is void under the statute of frauds. Civil Code Cal. § 1624.

5. Even if regarded as a modification of the written contract, the oral agreement, being unexecuted, is void, under section 1693.

6. While ordinarily, when it is alleged that two parties entered into an agreement for the sale of land, it will be assumed, if nothing else appears, that the agreement is in writing, yet that assumption will not be made in favor of a cross-complaint for specific performance of a land contract containing stipulations that, by his answer in the same cause, defendant declares to have rested in parol.

7. Where a cross-complaint by a vendor for specific performance of a contract for the sale of land fails to show that he has tendered a deed conveying the title he has agreed to convey, or that he is in a condition to convey such a title, and also fails to allege how or when conveyance of title is to be made, or how deferred payments are to be secured, it is not prejudicial error to allow the withdrawal of a demurrer for want of facts, and for ambiguity and uncertainty, and the filing of a second demurrer on the same grounds, but adding further specifications of ambiguity and uncertainty.

8. Where a party makes no request for leave to amend a defective pleading, it is not error for the court, on making an order sustaining a demurrer thereto, to omit to say anything about leave to amend.

9. Where the ultimate facts found by the court are sufficient to sustain the judgment entered, it is not prejudicial error for the court, before entry of judgment, to file a second set of findings, practically a copy of the first, but containing additional probative facts not necessary to be found.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by W. M. Smith against J. M. Taylor to recover \$500, the first installment of the purchase price of land agreed to be conveyed to plaintiff by defendant. Defendant answered, and also filed a cross-complaint for specific performance. Judgment for plaintiff, from which, and an order denying a new trial, defendant appeals.

Lee & Scott, for appellant. Owens & Woodward, for respondent.

FOX, J. Judgment for plaintiff; motion for new trial denied; and defendant appeals from both judgment and order. The complaint is in three counts. The first is for the recovery of \$500, money paid on account of the purchase of an interest in certain lands under an agreement that if, upon examination of abstract, it was found that title was not good, the money was to be refunded, and alleging that upon such examination it was found that the title was not good; the second, upon the common count for money had and received; and the third, for the recovery of the same money upon an alleged parol agreement to repay the same, and rescind the contract mentioned in the first count. Upon the trial the claim under the third count was abandoned, and no findings are presented on the issues presented by said third count, and the answer thereto.

The answer admits of making of the contract set out in the complaint, and the receipt of the \$500 on account of the same, but contains numerous denials going to the legal effect and meaning of the contract, and then proceeds to deny that the title, as shown by the abstract furnished by defendant, was defective, and alleges that such title was good and valid, and follows with a statement of the facts shown by the abstract, upon which defendant says plaintiff bases the claim that said title was not good, and to claim therefrom that the objections made by plaintiff were groundless; also, sets out that as to certain incumbrances found to exist upon the property, other than the one provided for in the written contract, they were known to the plaintiff at the time of the contract, and that in regard to them certain oral agreements were made that are not set out in the written agreement. Defendant further alleges that after the making of the written agreement, and the delivery and examination of the abstract, a certain parol agreement was made between the parties, under which the defendant was to quiet his title against certain adverse claimants, or parties who seemed to be such, and that upon this being done the sale should be completed as contemplated in the original and written agreement, and that he (defendant) had duly performed the conditions of this subsequent parol agreement on his part. His answer to the second and third counts of the complaint consists of denials putting in issue the allegations of the complaint in that behalf. Defendant also filed a cross-complaint, setting out that on the 31st day of December, 1887,

which was the date of the written agreement set out in plaintiff's complaint, plaintiff and defendant made and entered into an agreement for the sale by defendant to plaintiff of a certain interest in certain lands which defendant alleges are the same as those mentioned in the agreement sued upon, although they are differently and more specifically described, the terms of which agreement he sets out in said cross-complaint. These terms are a combination of those given in the written agreement, and of the other matters which in his answer he alleges were understood, and rested in parol, at the time of making the written agreement. He then further sets out the furnishing of an abstract of title, the discovery of the alleged defects of title, and avers that within 15 days after furnishing the abstract plaintiff notified him of the defects discovered, but that he still elected to purchase the property, but required the defendant to quiet the title, and then follows with allegations as to the subsequent agreement to quiet title, performance on his part, etc., as already set out in his answer, and prays, practically, for specific performance of this agreement.

It is not pretended in this cross-complaint that any part of the agreement upon which it was based was in writing; but, on the contrary, it is expressly stated that the part of it which is claimed to have been made after the examination of the abstract was verbal. While, ordinarily, it may be true that when it is alleged that two parties entered into an agreement for the sale of lands, if nothing else appears, it will be assumed that the agreement was in writing, it can hardly be so in this case, where the defendant in his pleading refers to another agreement made between the same parties at the same time, which was confessedly in writing, and then proceeds to set out a different agreement, which he declares was made in reference to the same property, and containing stipulations, as a part thereof, which by his answer in the same cause he declares did rest in parol.

This cross-complaint was demurred to for want of facts, and also for ambiguity and uncertainty, and afterwards, and before the demurrer came on for hearing, the plaintiff, by leave of the court, filed a second demurrer, which was in effect, though not so entitled, an amended demurrer, made on the same grounds as the original one, but adding other specifications of ambiguity and uncertainty. In due time these demurrers were argued and sustained, when the defendant excepted to the ruling of the court permitting the said second demurrer to be filed, and also to the ruling of the court sustaining said demurrers. This part of the case is brought upon a separate bill of exceptions, and these rulings are relied upon as errors on this appeal. Without passing upon the question of whether a demurrer is a pleading which the party has a right to amend of course, or by leave of court, or not, it is sufficient to say that in this case,

if error was committed, it was not prejudicial; for, in our opinion, either demurrer was sufficient in form and substance, and an order sustaining either of those demurrers to the cross-complaint was not erroneous. The cross-complaint did not state facts sufficient to entitle the defendant to the affirmative relief sought, even assuming that the agreement for the sale of lands mentioned in it was in writing, and not, therefore, void under the statute of frauds. Under the facts stated, the defendant could not, even if so commanded by the court, specifically perform the terms of that agreement on his part. He was not, therefore, entitled to a decree for specific performance against the plaintiff. The cross-complaint failed to show that the defendant had tendered the deed conveying the title which he had agreed to convey, or that he was in a condition where he could convey such a title. It showed affirmatively that the abstract did not show good title, and did not show that he had made, or could make, it good. It was also indefinite, ambiguous, and uncertain, in that it did not allege as to how or when conveyance of title was to be made; also, as to how the deferred payments were to be evidenced or secured; also, as to the assumption of mortgages. It is a well-settled rule that if the contract is vague and uncertain the court will not decree a specific performance, but will leave the party to his remedy at law. See *Agard v. Valencia*, 39 Cal. 301, and the cases there cited; also, *Sturgis v. Galindo*, 59 Cal. 28; *Magee v. McManus*, 70 Cal. 553, 12 Pac. Rep. 451.

It was not error, in making the order sustaining said demurrer, to omit to say anything about leave to amend, as the defendant did not ask for such leave, or for any order on that subject.

On the issues framed by the complaint and answer, the case was tried before the court without a jury, and the court found, among other things, that on the 31st day of December, 1887, the defendant entered into a contract in writing with the plaintiff, which is in the following words and figures, to-wit: "RECEIPT AND CONTRACT ON SALE OF LAND.

"Los Angeles, Cal., Dec. 31, 1887. Received, this date, from William D. Smith, the sum of five hundred dollars, (\$500,) lawful money of the United States of America, being a deposit and part payment on account of a bargain and sale made to him this day of a certain lot, tract, or parcel of land, lying, situate, and being in the county of Los Angeles, state of California, bounded and described as follows: Being an undivided one-sixth interest in the 509.84 acres of the Rincon de los Bueyes ranch, situate in Los Angeles county, Cal., conveyed by José de Arnaiz, February 3, 1887, to Joseph Moffat and H. Clay Graham. Said tract of land, above described, having been sold to said William D. Smith this day for the sum of eighty-four hundred and ninety-seven dollars, (\$8,497,) the balance to be paid as follows: Twenty-

five [hundred?] (\$2,500) to be paid within ten days, \$1,461 on or before twelve months from date, and \$1,461 on or before twenty-four months from date, with interest at 8 per cent. per annum, interest payable semi-annually, and assume and pay one-sixth of a certain mortgage for \$15,450, now on said ranch. The title to said above lands to prove good, or no sale; five days being allowed to examine abstract or certificate, and pass upon title, after abstract or certificate is delivered. If the remaining payments be not made according to this agreement and contract, the above-mentioned deposit to be forfeited without recourse. If title prove defective, said deposit to be returned. J. M. TAYLOR, Agent. I hereby extend the time of this agreement five days longer from the date hereof. J. M. TAYLOR."

The further findings necessary to be noted here were in substance as follows: (2) That, at the time, plaintiff paid to defendant the sum of \$500, "Which is acknowledged by said contract as a deposit to secure the sale of one-sixth interest," etc. (3) That said payment was upon express condition that the title should prove good upon examination of abstract or certificate; otherwise there should be no sale, and the said \$500 should be repaid. (5) That the defendant delivered to plaintiff an abstract which, within 10 days was examined by plaintiff's attorney, and the title found to be not good, but defective. (6) That thereupon plaintiff returned the abstract with objections to the title, to the effect that the same was not good, but defective, and that plaintiff then informed defendant that he elected not to consummate the sale. (7) That afterwards, and on or about the 29th of May, 1888, the plaintiff made written demand upon the defendant for the repayment of said deposit of \$500; but (8) that defendant refused, and still refuses to repay the same, or any part thereof. (9) That no other contract or agreement relative to the sale of said lands was made between the parties. (10) That at the time of making said contract, and depositing said money, and of the examination of the abstract, and ever since, the defendant had not, and has not, a good and perfect title of record, but the same was and is defective; that the same was incumbered by mortgage liens of record, and was subject to litigation between parties other than the parties in this action. (11) That at the time of making the contract, and up to the examination of the abstract, plaintiff had no knowledge of said defects of title, or of any incumbrance except \$15,450. (12) That at the time of making the contract, and of the examination, there was a mortgage on the whole of the tract to secure an indebtedness of \$20,450, also a mortgage on the undivided two-thirds, embracing said undivided one-sixth of \$3,333.34. (13) That all the allegations and averments of the first and second causes of action of the plaintiff's complaint are true. And the court finds as conclusion of law that plaintiff is entitled to re-

cover the \$500 with interest, amounting to \$533.45, with his costs of suit, and judgment is entered accordingly. Two sets of findings were filed, one on the 13th and one on the 14th of May, 1888; and judgment is entered May 17, 1888.

One of the errors of law assigned and relied upon is that the court erred in filing the second set of findings. They are, confessedly, exactly like the first, except that in the second, in No. 11, the court states that the plaintiff knew of the existence of an incumbrance amounting to \$15,450, a statement omitted from the findings as first filed, and in No. 12 the mortgage liens are set forth, which was not done in the first. With the exception of the two corrections which we have noted, the paper indorsed "Findings," filed on the 14th, was practically a copy of the one so indorsed and filed on the 13th; and, if the filing of the second was error, it was not a prejudicial one, for all that there was new in it was finding of certain probative facts, not necessary to be found, the ultimate facts already found being sufficient. Both sets of findings were filed before judgment. Both are brought up to this court. Either is sufficient to support the judgment, and there is nothing in either that conflicts with the other in any matter material to the issues in the cause, or the judgment entered. While it is true that a court cannot change its findings after the entry of judgment without granting a new trial, and doing it upon new trial, it does not follow that it may not make such modification or correction of its findings before judgment as shall make them conform to the truth, and cover the issues in the cause. We have carefully examined all the testimony in the record, and are satisfied that the evidence supports the findings. It only remains to consider whether there was any such errors of law, not already disposed of, as will require a reversal of the judgment or order appealed from.

Appellant contended at the trial, and contends here, that he had the right to prove by evidence *aliunde* that the claims of persons who appeared by the abstract of title to be asserting title to land adverse to the title which he offered, and who had suits pending regarding the same, were groundless. Many of his exceptions are to rulings of the court in rejecting evidence offered for that purpose. We are not called upon at this time to determine what would have been his rights in this regard, if his contract had been simply one to make good title. But that was not the force or effect of his bond. The only fair interpretation of this contract is that he was to furnish an abstract of title,—a paper prepared by a skilled searcher of records, which should show an abstract of whatever appeared on the public records of the county affecting the title,—and that this abstract must show good title, or there was no sale; and in that event he was to return the money. He did furnish such abstract, and the plaintiff found, and the court, upon sufficient

proof,—in fact, upon the admissions of the defendant himself, as well as upon presentation of the abstract,—sustains the finding, that the abstract did not show good record title. Under that contract, the plaintiff was not bound to make any investigation outside the abstract, or to take the chances of any litigation which the abstract showed to be either pending or probable. The court therefore did not err in rejecting any of the evidence offered for this purpose.

Appellant claims that at the time of the making of the contract the plaintiff had knowledge of the existence of incumbrances upon the land other than the \$15,450, of which he was to pay the one-sixth, and that there was then a parol understanding or agreement between them as to how, when, and by whom the incumbrances in excess of said \$15,450 were to be paid off; and several of his exceptions and assignments of error are directed to the rulings of the court in rejecting certain evidence offered in support of that claim. It was not error to reject this evidence, for when the parties reduced their agreement to writing the writing superseded all other understandings or agreements between them on that subject. Civil Code, § 1625. Some evidence, however, on that subject did get in from both sides; and the court found that the plaintiff at the time had no such knowledge, and that there was no other agreement between the parties than the written one.

It was also claimed on the part of the appellant that long after this examination and rejection of the title the parties made an oral agreement whereby defendant undertook to quiet his title against all adverse claimants shown by the abstract, and that upon his doing so the sale was to be concluded, and many exceptions were saved to rulings of the court rejecting evidence offered in support of his claim; and these rulings are now assigned as error. These rulings were not erroneous. The agreement in writing had already ceased and determined by its own terms, and the action of the parties under it. According to its express provisions, there was "no sale." Defendant was already bound to repay the \$500, and it had already been demanded of him. This subsequent agreement, then, if there was one, must stand or fall by itself. If there was such an agreement, it was one for, or in relation to, the sale of an interest in lands, and was not in writing. It was therefore void under section 1624, Civil Code. But even if it was, as defendant contends, an alteration or modification of the former written agreement, it was void under section 1698, *Id.*, being an unexecuted oral agreement. So that in either event the defendant was not entitled to introduce evidence in support of it. But in this case, as in the other, the parties were finally permitted to tell what did occur, and to call other witnesses to the same point; and from the evidence so admitted it appears that some effort was made to make such an agreement, but

that the minds of the parties never met, and no such agreement was ever concluded, orally or otherwise, and the court so finds.

In the course of the trial it was shown that the defendant, in the first instance, presented to the agent of plaintiff a certificate of title, as distinguished from an abstract of title. This certificate exposed the fact of the existence of some adverse claims, and the agent of plaintiff declined to accept it, when it was agreed between the agent and defendant that defendant should furnish an abstract instead, when it should be referred to Judge Minor for examination, and plaintiff would accept Minor's opinion as to whether it showed good title or not. Defendant moved to strike out this evidence on the ground that it was incompetent to change the terms of the written contract. This motion was denied, and defendant excepted, and now assigns this ruling as error. There was no error in denying the motion on the ground upon which it was made. The evidence was perhaps irrelevant and immaterial, but it worked no injury to defendant, and certainly did not tend to show a change of the terms of the written contract.

The foregoing covers a review of all the 32 exceptions taken by defendant, and now assigned as errors of law. It follows from the conclusions reached that the judgment and order appealed from must be affirmed. So ordered.

PATERSON, J.: I concur.

WORKS, J.: I concur in the judgment.

Hearing in bank denied.

(82 Cal. xix)

GOOD v. TAYLOR. (No. 13,419.)

(*Supreme Court of California.* Jan. 13, 1890.)

FOX, J. This case is in all material respects like the Case of Smith, against the same defendant, ante, 217, No. 13,421, (decided this day.) It was tried at the same time, and submitted on the same evidence. On the authority of the decision in said case, No. 13,421, the judgment and order appealed from in this case are affirmed.

We concur: PATERSON, J.; WORKS, J.

(82 Cal. xix)

CARSCADDON v. TAYLOR. (No. 13,420.)

(*Supreme Court of California.* Jan. 13, 1890.)

FOX, J. This case is in all material points like the Case of Smith, against the same defendant, ante, 217, No. 13,421, (decided this day.) It was tried at the same time, and submitted on the same evidence. On the authority of the decision in said case, No. 13,421, the judgment and order appealed from in this case are affirmed.

We concur: PATERSON, J.; WORKS, J.

(83 Cal. 1)

GEER v. SIBLEY. (No. 13,221.)

(*Supreme Court of California.* Jan. 29, 1890.,

SWAMP LANDS—KNOWLEDGE OF PURCHASER.

Pol. Code Cal. § 3443, provides that a person desiring to purchase swamp and overflowed land shall state in his affidavit "that he knows the land applied for, and the exterior bounds thereof,

and knows of his own knowledge that there are no settlers thereon." In an action to try defendant's right to purchase such land, it appeared that, before making his affidavit, he went to the north-east corner of the section with a surveyor, by whom the corner post was pointed out to him; that the surveyor set up his instrument at this corner, and with it showed defendant the prolongations of the east and north boundaries, telling him that the south-east and the north-west corners were at the distance of a mile along the respective lines; that they went to the north-west corner of the north-east quarter section, and to the south-east section corner, where they found the stakes in the water, and from which points the surveyor showed him the projections of the north and south boundaries, and gave him corresponding information; that they traversed the east boundary; that all the land, except a few acres at the north-east section corner, was covered with the waters of a lake; that one had an unobstructed view for two or three miles in each direction. *Held*, that defendant's knowledge was sufficient, within the statute.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

Chas. E. Wilson and T. M. McNamara, for appellant. *Chas. G. Lamberson*, for respondent.

FOOTE, C. This was a contest in the superior court of Tulare county as to the respective rights of the plaintiff and defendant to purchase a section of swamp land of the state. Judgment passed for the plaintiff, from which the defendant appeals. The point made for the reversal of the judgment is that the findings of fact do not support it. The only ground relied upon in the complaint to defeat the defendant's right to purchase the land is that his affidavit filed with the surveyor general was false, in that it asserted that at the time of making it the defendant knew "the land applied for, and the exterior bounds thereof," when he did not so know. The court found, among other facts necessary to enable the defendant to recover, in finding 4, that, "at the time of making and filing said affidavit and application, defendant did not know of any valid claim to said land other than his own; he knew of his own knowledge that there were no settlers thereon, and he did not, and does not now, own swamp and overflowed land, which, together with that sought to be purchased by him as aforesaid, exceeded six hundred and forty acres." But found in the fifth finding "that, immediately prior to the making and filing of his affidavit and application, the defendant went to the section of land in controversy in company with John Gilerest, a practical surveyor, whom the defendant employed to survey and point out to him the said section. They found the north-east corner of the section, which was marked by the government stake standing at that point. The surveyor set up his instrument at this point, and, turning south, projected the east line of said section, and at his request the defendant looked through the instrument along said line, the surveyor at the same time informing him that he was looking along the east line of said section, which line extended one mile from that point. The surveyor

then turned his instrument west, projecting the north line of the section. The defendant looked through the instrument along this line, being at the same time informed by the surveyor that said north line extended one mile on that course. They then followed along said line to the quarter section corner of said section, in said line, at which point they found the government stake floating in the water, but confined by tules. The surveyor set his instrument at this point, sighting west on said north line, and the defendant looked through the instrument, being at the same time informed by the surveyor that the north-west corner of said section was located one-half mile west of said quarter section corner in said line. They then went back, and around to the south-east of section 1 in said township, and from there ran west to the south-east corner of the section, which they found marked by the government stake standing in the water. The surveyor set his instrument at this corner, looking west, and projecting the south line of the section. The defendant looked through the instrument along this line, being at the same time informed by the surveyor that he was looking along the south line of said section, and that the south-west corner thereof was located at a point in said line one mile west of said south-east corner, in the direction pointed by the instrument. At this time the section of land in controversy, except about ten or fifteen acres at the north-east corner thereof, was covered with the water of Tulare lake. The defendant could see the entire surface of the water covering said section, and for two or three miles in either direction. From the foregoing facts the court finds that the defendant did not, at the time of making and filing his affidavit and application, know the land he applied to purchase, and in controversy herein, nor the exterior bounds thereof." From this the court, as a conclusion of law, decided that the defendant was not entitled to purchase the land, and that the plaintiff was so entitled, and rendered judgment accordingly.

The appellate court held in *People v. Reed*, 22 Pac. Rep. 474: "But, conceding that the finding is one of fact, or, as counsel terms it, a 'conclusion of fact,' it is apparent that the court below did not intend to cut off the right of the appellants to test the sufficiency of the specific facts found to show such dedication, in the manner indicated. This finding is based upon the other facts found. It recites in terms that, 'by the acts, facts, and matters above found, said premises were by said parties dedicated,' etc. It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all the facts proved. But it does appear from the

finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved, but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed." The supreme court in *Price v. Beaver*, 73 Cal. 625, 15 Pac. Rep. 356, said: "It is claimed for the appellant that the finding 'that at said time she knew the land applied for, and the exterior bounds thereof, and knew of her own knowledge that there were no settlers thereon,' was not justified by the evidence; and this is the principal point made for a reversal of the judgment. We do not think the judgment should be reversed, for the reason urged. * * * It is true the Code requires any person desiring to purchase swamp and overflowed land to state in his affidavit 'that he knows the land applied for, and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon.' Pol. Code, § 3443. And it is also true that in cases of this kind each party is an actor, and must allege and prove that he has strictly complied with the law. But it is not required that the purchaser of swamp land shall know 'of his own knowledge' the land applied for, and the exterior bounds thereof. Ordinarily he does not, and, unless he is a skilled surveyor, must gain this information from others. Having gained it, however, he can and must then state, if such be the fact, that he knows of his own knowledge that there are no settlers on the land. The defendant was shown by her brother-in-law what he supposed to be the corners and boundary lines of the land in controversy. She relied and acted upon the information thus received, and there was no attempt to show that it was not correct. It is not pretended that she did not go upon the land which she desired to purchase, nor that she was incorrectly informed as to its bounds or limits, nor that there were any settlers on the land. The claim is only that J. W. Beaver did not at the time know the true lines and corners, and so, however correct her information may have been, her application must fail. If this be the correct view, then it must follow that if defendant had employed a surveyor to show her the land, and he had made mistakes as to the corners and lines, and had incorrectly located its bounds, her application could be successfully assailed by any subsequent applicant. We do not think that such a result was intended by the lawmakers, or should receive sanction from the courts."

In the present case the point seems to be that the defendant did not know the exterior boundaries of the land applied for, because neither his own information, nor that derived from the surveyor he had employed, was sufficient to enable him to have such knowledge in the sense intended by the statute. But the findings of special facts show that the land was covered with water, except in one corner of the section, and that on this dry

land the defendant did find and have located by his surveyor the government stake; and that he and the surveyor also found another quarter section stake on the north line of the section, and one upon the south-east corner of the section; and that from each of the stakes thus found the surveyor showed the defendant a prolongation of some one of the boundaries of the section, and the distance along them at which the other section corners were; and that they traversed at least one of the boundaries, and went to the south-east and north-east corner stakes, and to the quarter section stake on the north line; so that the defendant had pointed out and shown to him by a surveyor three of the boundary lines of the section, viz., the north, south, and east lines, and the west line could easily be determined, as it was the prolonged line between the north-west and south-west corners. Such knowledge, so obtained, under all the circumstances surrounding the matter, in the light of the construction given to the statute in the case just adverted to, and in the sense in which we believe it should be construed, must be held to satisfy the terms and spirit of the statute involved here. It must therefore be apparent that the ultimate fact in finding 5 is manifestly inconsistent with the specific facts previously set out in the same finding, and the judgment is therefore without proper support. We advise that it be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

83 Cal. 56

CULLEN *et al.* v. SPRIGG *et al.* (No. 13,131.)

(Supreme Court of California. Feb. 1, 1890.)

DEEDS—DESCRIPTION—CONDITIONS.

1. The city of San Diego, by its president and trustees, conveyed to defendants' grantor "that lot of land containing 60 acres, lying in block No. 1111, according to the official map of said city made by * * * A. D. 1856." The deed referred to a resolution of the trustees, under which the lands were sold, which provided that all surveys should be made by the purchaser. At the time of the conveyance there had been no survey or subdivision of the block. *Held*, that the deed should be construed to convey an undivided 60 acres of the block.

2. The resolution of the trustees provided that lands should be granted only on these terms: One-half of the purchase money should be paid at the time of securing certificate; the lands should be occupied and improved within six months from date of certificate; and, if within a year therefrom improvements of a certain amount were not made, then the purchaser should forfeit his deposit, and the lands should revert to the city. The deed to defendants' grantor recited a sale made to him that day on the conditions of the resolution, and an agreement on his part to make the improvements, but these recitals preceded the granting clause, which, together with the *habendum*, in consideration of the full receipt of the purchase money by the city, purported to vest in the grantee the full title of the city in fee-simple absolute, without condition. *Held*, that the grant was absolute, and not on condition.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; E. PARKER, Judge.

Levi Chase, for Lillian Cullen. *C. F. Holland*, for George Cullen. *J. E. Deakin*, for Walter L. Pease. *M. A. Luce*, for San Diego Building & Loan Association. *Parrish, Mossholder & Lewis*, for College Hill Land Association. *Hunsaker, Britt & Lamme*, for C. A. Lumsden. *Sprigg & Carter*, for J. C. Sprigg, Jr.

VAN CLIEF, C. This is an action for partition of pueblo lot No. 1111 of the lands known as the "Pueblo Lands of the City of San Diego." The appeal is from an interlocutory judgment determining the rights of the parties as to their respective interests in said lot, and from an order denying a new trial. The rights of the appellants rest upon their deraignment of title from the city of San Diego under a deed from the city executed October 25, 1869, to James W. Cullen, purporting to convey a tract in the southeastern portion of said lot, specifically described by metes and bounds, and forming a rectangular piece of land 40 chains in length and 20 chains in width. The rights of the respondents depend upon their deraignment of title from the city under two deeds from the trustees of the city, dated March 1, 1869, to William Evans, one for "that lot of land containing sixty acres, lying in block No. 1111, according to the official map of said city made by Charles H. Poole, A. D. 1856," and the other for "that lot of land containing forty acres, lying in block 1111," according to the same map. The deed for the 60 acres recites, in substance, that the president and trustees, in compliance with a vote of the qualified electors of the city at an election held May 25, 1868, in pursuance of the "Act to repeal the charter of the city of San Diego, and to create a board of trustees," approved January 30, 1852, by which they are directed, authorized, and empowered to sell pueblo or city lands, the property of said city, sold the land and premises in said deed described "for the sum of \$15, in gold coin of the United States of America, being at the price of 25 cents per acre, upon the conditions provided for and prescribed in a certain resolution or order of said board of trustees, made and entered on the 8th day of June, 1868, and said party of the second part has agreed to complete all improvements upon said land by said resolution or order requiring to be done, and has fully paid said sum of \$15 into the treasury of said city." But these recitals precede the granting clause, to which no condition is appended, and which is in the following words: "Now, therefore, the president and trustees of the said city of San Diego, parties of the first part, for and on behalf of said city, by virtue of the power and authority in them vested by the law, and for and in consideration of the said sum of \$15 gold coin of the United States, to them in hand paid by the said party of the second

part, at or before the ensembling of these presents, receipt whereof is hereby acknowledged, have given, granted, bargained, and sold, released and quitclaimed, and by these presents do grant, give, bargain, and sell, release and quitclaim, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest, and claim whatsoever of the said city of San Diego of, in, and to the following described piece or parcel of land situate in the said city, and within the limits of the pueblo lands of said city, and more particularly described as follows: Being that lot of land containing sixty acres, lying in block 1111, according to the official map of said city made by Charles H. Poole, A. D. 1856, and on file in the office of the secretary of said board, together with all and singular the tenements and appurtenances thereunto in any wise pertaining. To have and to hold all and singular the above-described premises unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as we, the said president and trustees, may or can by virtue of the power in us vested convey the same."

The deed for 40 acres contained, in substance, the same recitals and provisions, the consideration being \$1.25 per acre, amounting to \$50. The whole controversy relates to the admissibility and effect of these two deeds. Each was objected to by appellant upon the ground that it is void for uncertainty in the description of the lot attempted to be conveyed thereby. It is further insisted by the appellant that these deeds, being of no effect, do not sustain the findings of the trial court, as the findings are based upon an erroneous construction of the deeds, to the effect that they respectively conveyed an undivided 60 acres, and an undivided 40 acres, of block 1111; thereby making the grantee tenant in common with the grantor in the whole block, which contains 107.67 acres. By stipulation of the parties it is agreed that on March 1, 1869, the city of San Diego had title to the whole of pueblo lot 1111, and that the rights of the parties depended upon the validity and effect of the respective deeds from the city authorities to William Evans and James W. Cullen. It appears that on June 8, 1868, at a special meeting of the board of trustees of the city, it was resolved "that the only way pueblo lands will be granted is as follows: One-half of the purchase money to be paid at the time of securing certificate; to occupy and improve the lands within six months from date of certificate, said certificate to be called for within one month after approval of petition. The value of improvements to the amount of land granted, viz., on a fraction of an acre up to forty acres, \$250, and on eighty acres, \$400; and, if within one year from date of certificates the said improvements are not made, then the petitioner to forfeit the money deposited, and the land to revert to the city: provided, also, that whenever the stipulated amount of improvements shall have been made on the land granted, then the peti-

tioner may apply for a deed for the same on his paying the residue of the purchase money. All surveys whatever to be paid for by the petitioner."

It is contended by appellants' counsel that, under these resolutions which were referred to in the recitals of the deeds to Evans, these deeds were given upon conditions precedent; and that, there having been no occupancy or improvement of the lands within six months, it was treated by the city as having been forfeited by non-compliance with the conditions, as evidenced by the fact that it (the city) afterwards conveyed the property to James W. Cullen, under whom appellants claim title, and that this conveyance operated as a declaration of forfeiture. The record does not show whether or not any part of the land in controversy was ever improved either by Evans or by Cullen, or by any person claiming under either of them. The only testimony relating to the subject is that of the county surveyor, who testified that "the block has never been subdivided into lots, except that recently some specific pieces of it have been sold by persons claiming under the Evans deeds, and these have been surveyed and located in blocks and lots." No equitable considerations arising from improvements appear in favor of either of the parties, and the questions presented are pure questions of law as to their respective rights, as successors in interest to the city.

I think the trial court ruled correctly both as to the admissibility and the effect of the deeds to Evans. Those deeds did not purport to describe any specific part of block 1111 by metes or bounds, but, by reference to the Poole map, described the block as a whole. This description is as definite and specific as if the metes and bounds of the block as indicated upon that map had been inserted in the deed. It is the settled law of this state that a conveyance of a definite number of acres, or of any other definite quantity of land within, and as parcel of a larger tract of land well described, but without locating the land thus conveyed, is to be construed as conveying an undivided interest in the larger tract, provided the deed does not purport specifically to describe the smaller tract so conveyed, and fail to do so with reasonable certainty. *Schenk v. Evoy*, 24 Cal. 110; *Grogan v. Vache*, 45 Cal. 610; *Lawrence v. Ballou*, 37 Cal. 518; *Lick v. O'Donnell*, 3 Cal. 60; *Wallace v. Miller*, 52 Cal. 655. In *Pipkin v. Allen*, 29 Mo. 229, a grant of 750 arpens of land was described as the "balance and remainder of a tract" of 1,220 arpens of land, which originally belonged to the grantor, "500 arpens of which have been selected by the recorder of land titles as being ratified by the laws of congress," and previously sold to another grantee; but it appeared that the 500 arpens so previously sold had not been selected as described. The court held, in view of the maxim, *ut res magis valeat quam pereat*, that the portion of the description which referred to the 500 arpens as having been selected

should be disregarded, and the deed construed as if 500 arpens had been previously sold, without any other description, and as creating a tenancy in common of the two grantees in the whole tract in proportion to their respective interests. Section 1643 of the Civil Code provides that "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." The reference to the land granted as "being a lot," without any description of metes and bounds, does not alter the nature of the grant as essentially one of quantity undivided at the time of the grant, it being the manifest intent of the parties that the lot should be definitely fixed by a future location and survey, at the expense of the grantee.

The circumstance that the grant was by a municipal corporation does not affect its nature, or exempt it from the rule of interpretation which requires the grant to be made effective, if possible. It is only in cases of uncertainty, "not removed by the preceding rules of interpretation," that section 1654 of the Civil Code requires a contract between a public officer or body and a private party to be interpreted most strongly against the private party, as being the one who presumably caused the uncertainty. It is, indeed, a settled rule of construction that public grants to private persons are to be construed most strongly in favor of the grantor, (Civil Code, § 1069;) but this rule presupposes the existence of an effective grant, and relates only to the extent of its operation. In all cases it must be presumed that a grantor intended to make a valid grant of some property unless the contrary appears. In view of the cardinal principle of interpretation expressed by the maxim above quoted, I think the grant to Evans should not be held void for uncertainty. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates," (Id. § 1647;) and, in view of the known circumstances that these deeds were executed on the day of the sale, without any previous survey or subdivision of block 1111, and that the resolutions of the trustees provided for a survey at the expense of the grantee, the deed should be construed as if the description had been: "Being a lot of land" to be located and surveyed at the expense of the party of the second part, "containing sixty acres, in block No. 1111," etc. Had these words of the resolution been inserted in the deed, there could be no question that, until a partition should be made by some mode, the grantee would take an undivided interest in the block. *Lawrence v. Ballou*, 37 Cal. 518; *Jackson v. Livingston*, 7 Wend. 136.

The grant to Cullen, October 25, 1869, could not operate as a declaration of forfeiture of the lands granted to Evans, March 1, 1869, in any view of the case. The resolutions of the trustees, adopted June 8, 1868,

provided for a forfeiture only upon failure to make the required improvements within one year, and, if the resolution had been made an express condition of the grants to Evans, the conveyance by the city to Cullen in less than one year from the date of the sales to Evans could not operate as a declaration of forfeiture before Evans was in default. But under the terms of the deeds to Evans there could be no forfeiture of the lands. Contracts and laws declaring a forfeiture must be strictly construed, and a forfeiture can never take place by implication, but must be effected by express, unambiguous language. The terms of the resolution of June 8, 1868, only related to the forfeiture of contracts or certificates of purchase, and did not contemplate the execution of a deed until the required improvements should be completed. It is true that, in the deeds to Evans which were made on the day of the sale, there is a recital of a sale upon the conditions prescribed in the resolution, and also of an agreement by Evans to complete all improvements required by them; but the granting part and *habendum* of the deed, in consideration of the full receipt of the purchase money by the city, purports to vest in the grantee the full title of the city, in fee-simple absolute, without condition precedent or subsequent. To create a condition in a grant, apt and appropriate words must be appended to the grant, which *ex vi termini* import that the vesting or continuance of the estate is to depend upon the condition. *Craig v. Wells*, 11 N. Y. 320; *Jackson v. McClallen*, 8 Cow. 296. An estate upon condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation. Reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon conditions, nor containing a clause of re-entry or forfeiture. 2 Washb. Real Prop. 4, 8. A clause in a deed, stating that it is made "on the express stipulation that a dwelling-house of not less than a certain value shall be put upon the land within a certain time," has been held not to constitute a condition, (*Stone v. Houghton*, 139 Mass. 175;) and a recital in a deed that it is made for and in consideration of a prior agreement between the parties, accompanied by a provision following the granting clause that it is upon certain further express terms, conditions, and reservations, contained in such agreement, has been held not to create an estate upon condition subsequent, there being no provision for a re-entry for breach of such terms, appended to the grant, nor that the absolute title granted should cease upon such breach, (*City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. Rep. 90.) It is further to be considered that no forfeiture appears in this case, for the reason that the record does not show affirmatively whether Evans or his successors in interest have or have not made the improvements required by the resolution. The

grant being *in presenti*, if the recitals preceding it, as to the conditions of the contract of sale, and the agreement of Evans to perform those conditions, could be construed as conditions appended to the grant, they could only be regarded as conditions subsequent, (*Hihn v. Peck*, 30 Cal. 289,) and the burden would devolve upon the city or its successors to prove a failure to perform such conditions, in order to defeat the vested title. Moreover, the mere breach of conditions subsequent does not, *ipso facto*, effect a reverter of the title until the proper steps are taken to consummate the forfeiture. *Ruch v. Rock Island*, 97 U. S. 693; *Ferris v. Coover*, 10 Cal. 589-619. No such steps appearing to have been taken in this case after the time limited within which a forfeiture might accrue, if at all, the title of the grantee remains in him and his successors. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 159

JUE FOOK SAM v. LORD. (No. 13,462.)

(Supreme Court of California. Feb. 22, 1890.)

RECORD ON APPEAL.

An appellant who used no statement on his motion for a new trial, and who presented no bill of exceptions to the court for settlement at the time the decision was made, (Code Civil Proc. § 649,) nor served a copy of the proposed bill on the adverse party within 10 days after the decision was made, (section 650,) is not entitled to the use of any statement or bill of exceptions on his appeal from the judgment; section 950 providing that a bill of exceptions "settled as provided in section 649 or 650," or a statement or bill of exceptions "used on motion for a new trial," may be used on appeal from a final judgment.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Vincent Neale, for appellant. Cross & Simmonds, for respondent.

PATERSON, J. Judgment was entered in the court below in favor of the plaintiff, on February 20, 1889, for the sum of \$774.74 and costs; and the defendant appealed therefrom to this court on April 8, 1889. The complaint states facts sufficient to constitute a cause of action, the verdict of the jury covers all the issues, and the judgment follows the verdict. There is therefore no merit in the appeal from the judgment. The notice of intention to move for a new trial was not filed or served until March 9, 1889, more than 10 days after entry of the verdict and judgment; and the proposed statement on motion for a new trial was not served on the attorney of defendant until April 25, 1889. The judge of the court below declined to settle the

statement on the ground that neither the notice of intention nor proposed statement was served in time. Defendant thereupon appealed from the order refusing to settle the statement.

There is no doubt that the steps taken by defendant in his proceedings for a new trial were not within the time required by law, and that the statement, if settled, could not have been used in support of his motion. This his counsel concedes. It is claimed, however, that on his appeal from the judgment he was entitled to a statement, and, there being no time fixed by law within which such statement is to be served, and having the right, under the statute, to appeal from the judgment at any time within a year after its entry, his statement was prepared and served within a reasonable time, and should therefore have been settled by the judge as a statement on appeal. The Code provides that "any statement used on motion for a new trial, * * * or any bill of exceptions settled as provided in section 649 or 650, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial." Section 950, Code Civil Proc. Unless the statement was used on motion for a new trial, it cannot be used on appeal from the judgment. The letter and spirit of the Code provisions unite in showing that it was the aim of the legislature to require a party desiring to review a decision of the trial court on matters of fact, or its rulings at the trial, to take some steps to correct the error while the history of the trial is fresh in the memory of the judge and the parties. If the aggrieved party desires the court which tried the case to review its own decisions of law or of fact, and grant a new trial, "he must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, * * * file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds," etc., and thereafter he must prepare and serve his bill or statement within the time fixed. Section 659, Id. Any such bill or statement used on motion for a new trial may be used on appeal from a final judgment, although there has been no appeal from the order, if it appear, from the certificate of the judge or otherwise, that it was used on the hearing of the motion. If the proper steps have not been taken in time, and for that reason the judge has refused to settle the bill or statement, it is not one which has been used on motion for a new trial, and cannot, therefore, be used on appeal from the judgment. If the party aggrieved does not desire to ask the court below to review its own rulings, but prefers to appeal directly to this court from the judgment, he may do so, and may have the rulings of the trial court reviewed by complying with the provisions of sections 649 and 650, supra. Those sections provide: "A bill containing the exception to

any decision may be presented to the court or judge for settlement at the time the decision is made, and, after having been settled, shall be signed by the judge, and filed with the clerk." Section 649, Id. "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Section 650, Id.

It does not follow that, because the party aggrieved has been given a year within which to appeal from the judgment, that he may wait a year, or nearly a year, before serving the statement or bill upon which he relies to show error in the rulings of the court. The provisions of the Code which we have cited show that where the party aggrieved intends to rely upon the insufficiency of the evidence, or upon errors of the court not appearing upon the face of the judgment roll, he must present a bill containing the exception at the time the decision is made, (section 649, supra;) or must, within 10 days after the decision, serve his proposed bill, (section 650, supra;) and, in order that a fair and reliable record of the evidence and proceedings may be preserved, the legislature has provided that when the motion is to be made on the minutes of the court, in which case the statement need not be settled until after the motion is heard and determined, the notice of intention must specify the particulars in which the evidence is claimed to be insufficient, and the particular errors upon which the moving party relies, (section 659, subd. 4.) The old practice act provided for statements on appeal, and statements on motion for a new trial; and the latter could not be used in place of the former, in the absence of a stipulation. The Code originally did not provide for statements at all, but amendments were made in 1874, restoring statements on motion for new trial, and providing that they might be used on appeal from the judgment, if used on the motion. As appellant never used any statement on his motion for a new trial, and did not present any bill of exceptions under the provisions of sections 649 and 650, supra, he lost his right to a statement or bill of exceptions on appeal from the judgment; and the judge properly refused to settle the statement presented to him. This subject is very carefully and thoroughly considered by Mr. Hayne in his "New Trials and Appeals," c. 45.

We have discussed this matter of practice upon the assumption that an appeal lies from an order refusing to settle a statement. Counsel for respondent contend that there is no appeal from such an order. It is unnecessary, in view of what we have said, to decide whether the order is appealable. There is no

merit in either appeal. The judgment and order are therefore affirmed.

We concur: FOX, J.; WORKS, J.

81 Cal. 588

WARD v. CLAY. (No. 12,392.)

(Supreme Court of California. Feb. 10, 1890.)

TRIAL—FINDINGS.

Though a finding, in an action on a note for \$2,546.48 with interest, that there is a balance of \$790.75 due is merely a conclusion of law, and not a sufficient answer to the issue of non-payment, such issue is covered where the court specifically finds that plaintiff sold a \$2,000 note, which defendant had assigned to him as collateral security, "for the amount of the principal and interest then due," and credited the proceeds on the note in suit, and that no part of the latter has been paid, except the amount of the principal and interest due on the \$2,000 collateral note, January 25, 1886.

In bank. On rehearing. For former opinion, see ante, 50.

Action by John T. Ward against Sadie I. Clay on a promissory note for \$2,546.48, with interest. From a judgment for plaintiff for \$790.75 and costs, and an order denying a motion for a new trial, defendant appealed, and, on affirmance, now moves for a rehearing.

R. Percy Wright, for appellant. J. W. Ward, Jr., and J. A. Cooper, for respondent.

BEATTY, C. J. The appellant bases her petition for a rehearing altogether upon the contention that the ninth finding of the superior court, "that there is now due and owing from defendant, Sadie I. Clay, to plaintiff, on the promissory note sued on in this case, a balance of \$790.75," is merely a conclusion of law, and not a finding of fact covering the issue of non-payment. I think the contention is well founded, and that we ought not to approve the ninth finding as a sufficient answer to the issue of non-payment. But there are specific findings covering this issue. It is found that the defendant, as collateral security for the note in suit, assigned a note payable to her, dated December 7, 1883, for \$2,000, bearing interest at 6 per cent. It is further found that this note so held as collateral security was sold by the plaintiff, January 25, 1886, "for the amount of the principal and interest then due" thereon, and the proceeds credited on the note in suit. It is further found that no part of the note in suit has been paid "except the amount of the principal and interest due on the \$2,000 collateral note, dated January 25, 1886." The word "dated," in the last part of this finding, is an evident clerical mistake, and should be omitted. With or without it, the meaning of the finding is perfectly clear, viz., that no part of the note in suit has been paid except \$2,000, the principal of said collateral note, and the interest due thereon, January 25, 1886. It is true this leaves the amount paid to be computed, but that is certain which can be made certain; and allowing in favor of the defendant that all the interest that had ever accrued on the \$2,000 note was due and

unpaid when it was sold, and deducting this maximum sum from the amount of the note in suit at the date of judgment, there remains the full sum found to be due, and for which judgment was rendered. Rehearing denied.

82 Cal. 502

LAREW v. NEWMAN, County Auditor. (No. 12,251.)

(Supreme Court of California. Dec. 4, 1889.)

COUNTY OFFICERS — INCREASE OF COMPENSATION.

Under Const Cal. art. 11, § 9, providing that the compensation of a county officer shall not be increased during his term of office, one who is appointed to fill a vacancy in the office of county superintendent of schools, the salary of which was increased after the election of his predecessor, but before the happening of the vacancy, is not entitled to the increase; as Pol. Code Cal. § 1004, provides that any person appointed to fill a vacancy is subject to "all the liabilities, duties, and obligations of the officer whose vacancy he fills."

Department 2. Appeal from superior court, Mariposa county; J. M. CORCORAN, Judge. J. H. Campbell, for appellant. Newman & Jones, for respondent.

McFARLAND, J. This is a proceeding in *mandamus* to compel defendant, auditor of Mariposa county, to draw his warrant in favor of plaintiff for \$837.50. In the court below judgment went for defendant, and plaintiff appeals from the judgment, upon the judgment roll alone. The facts necessary to be here stated are these: W. D. Egenhoff, having in 1882 been elected superintendent of schools of said county, qualified and entered upon the duties of said office on the 8th day of January, 1883, and held the office until March 19, 1884, when he resigned. On said March 19th the plaintiff, by an order of the board of supervisors, was appointed "to serve the unexpired term of W. D. Egenhoff, resigned." Under such appointment plaintiff held the office until the first Monday in January, 1887. He was paid his salary at the rate of \$350 per annum; but he contends that he should have been paid at the rate of \$650 per annum, and brings this proceeding for the difference. When Egenhoff took the office, the salary fixed by statute was \$350 per annum. Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at \$650 per annum. This act enacted that its provisions for salaries "shall not affect the present incumbents;" and also that a vacancy in an office should be filled by appointment by the supervisors, "the appointee to hold office for the unexpired term." Section 9, art. 11, of the state constitution, provides that "the compensation of any county * * * officer shall not be increased after his election, or during his term of office." Section 1004 of the Political Code provides that "any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills."

We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed. The judgment is affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

83 Cal. 130

PEOPLE v. LUM YIT. (No. 20,579.)

(Supreme Court of California. Feb. 10, 1890.)

ROBBERY—NEW TRIAL.

1. An order granting a new trial, without disclosing any grounds for its basis, will not be disturbed, on appeal, if it can be sustained on any of the grounds specified in the motion, unless an abuse of legal discretion is manifest.

2. The only direct evidence of an alleged robbery was the testimony of the prosecuting witness, to the effect that he was called out in front of a store, and there engaged in conversation by one A., who was ostensibly seeking employment, when defendant and others approached and robbed him. A policeman who arrived a few minutes thereafter found prosecuting witness much excited, but, deeming pursuit of the alleged robbers useless, communicated with two detectives, who, a few hours later, arrested defendant and A. The place of the alleged robbery was lighted, and people passed to and fro, several being in the store at the time. Defendant's evidence tended strongly to show that on meeting prosecuting witness, and demanding payment for what he owed defendant's brother, an altercation ensued, terminating by defendant and his companions walking away. Prosecuting witness, while denying personal liability, admitted the indebtedness to defendant's brother. A. was subsequently released, and employed by prosecuting witness. *Held*, that an order granting a new trial on the ground that a conviction was not warranted by the evidence would not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

J. D. Page, Dist. Atty., for the People. Thomas D. Riordan, (Lyman I. Mowry, of counsel,) for respondent.

GIBSON, C. The respondent in this case was charged with, and convicted of, the crime of robbery. He moved for and obtained a new trial. From the order granting his motion the people appeal. The fourth and sixth of the several grounds upon which the motion was based were, respectively, that the verdict was contrary to the evidence, and that material evidence had been newly discovered, which the defendant, with reasonable diligence, could not have found and produced at the trial. In support of the motion upon the last ground, the respondent introduced the affidavits of six different persons. The court, in granting the motion, did not specify any particular ground in its order. The argument of the appellant is that, as the instructions given to the jury do not appear in the record, and as no exception was taken to the admission of evidence, nor to any ruling

of the court, the motion must necessarily have been granted upon the ground of newly-discovered evidence, and, as the several affidavits consisted merely of the opinions of the respective affiants as to the innocence of the respondent, they were consequently incompetent and insufficient to warrant a new trial.

We agree with the appellant as to the character and insufficiency of the affidavits; but we must presume, in the absence of anything in the record to negative it, that the court acted regularly and tested the affidavits by the proper rules of evidence, and, having found them insufficient, granted the motion upon some other ground, if any other ground to sustain it can be found in the record. So it is with regard to the charge to the jury. In view of the statement, in the bill of exceptions, that the court duly charged the jury upon the law of the case, we must presume that the charge was correct.

This brings us to the leading question, can the ruling be sustained upon any of the grounds of the motion? We are of the opinion that it can be, upon the ground that the verdict was contrary to the evidence. It seems to be well settled that, when it appears by the record that a motion for a new trial, based upon several grounds, was granted by an order which does not disclose any ground for its basis, the ruling will not be disturbed, if it can be sustained upon any of the specified grounds of the motion, unless an abuse of legal discretion is manifest. In *People v. Baker*, 39 Cal. 686, a case in which the record was in many respects similar to the one here, the appeal was from an order granting the defendant's motion for a new trial. Among several specified grounds of the motion was one that the verdict was contrary to the evidence. The bill of exceptions contained all, or some portion, of the evidence, but none of the minutes of the trial, or the rulings of the court during the trial. The order did not show upon what ground the motion had been granted. In this state of the record, the only ground upon which it appeared that the court could have made the order was that the verdict was contrary to the evidence; and, although the evidence apparently strongly preponderated in favor of the verdict, still, as it did not appear that the trial judge has abused his legal discretion in determining otherwise, the order was affirmed. See *People v. McAuslan*, 43 Cal. 55; *Weddle v. Stark*, 10 Cal. 302; *Oullahan v. Starbuck*, 21 Cal. 414; *Hayne*, New Trials & App. § 284, p. 842.

The only direct evidence of the robbery in the present case was the testimony of Chung Wey, the prosecuting witness. About 7 o'clock of the evening of January 19, 1889, he, being at the time engaged as a contractor in employing men for an Alaskan fish cannery, was called out of a store on Sacramento street by one Ah Fook, who was in search of employment. While conversing with Fook in or near a hallway opening into the street,

and but four or five steps away from the store which he had left, the defendant, with three other Chinese, came up and robbed him. The defendant drew a knife, and the three others held the prosecuting witness down, while defendant took from his pocket a handkerchief in which was tied \$240. A policeman, who was attracted by the blowing of a whistle, arrived at the place a few minutes after the robbery, and found the prosecuting witness much excited, and learned from him that he had been robbed by several Chinese, who had run down the street. Thinking it useless to pursue them then, the officer went over to Washington street, and left word for two officers detailed for detective work in the Chinese quarter. These last two officers, about 11 o'clock of the same night, came to see the first officer about the affair, and the three together interrogated Chung Wey; and later, the same night, one of the detective officers arrested the defendant and Ah Fook. The hallway, at the time of the robbery, was lighted. There were people passing to and fro upon the street, and a number of other Chinese were in the store referred to as being but four or five steps from the hallway. The testimony of two other witnesses tend to corroborate Chung Wey as to the amount of money he might have had upon his person at the time. Ah Fook, who was arrested, according to Chung Wey, because he was the man who had called the latter out of the store when he was robbed, was subsequently released, and employed by, and received advance money from, Chung Wey, to go to Alaska. On the other hand, the testimony given on behalf of the defendant tends strongly to show that at the time of the alleged robbery Chung Wey was indebted to the brother of the defendant for services rendered in some fish cannery; and that, Chung Wey having theretofore refused to pay the sum claimed, the defendant, with several other Chinese, at the time and place of the alleged robbery, met Chung Wey, when the defendant demanded the amount due unto his brother, which was refused. An altercation then ensued and was continued a few minutes, and then terminated by the defendant and his companions walking away. Chung Wey, on being recalled for the defendant, did not deny but what somebody owed the defendant's brother for services rendered, but claimed he was not responsible for the debt, because at the time he was simply a foreman, upon a salary, in the cannery where the services were rendered, and not a contractor. Altogether, the testimony given on behalf of defendant tends forcibly to support the theory that the motive of the prosecuting witness was to have an importunate creditor removed or silenced, rather than to punish a veritable robber. It is apparent that the only question that such a state of the evidence presents is one as to its weight, and we cannot say that the trial judge abused his discretion in determining that the jury had mistaken its weight. He

had the witnesses before him, and an equal opportunity with the jury to observe the manner of the witnesses, the character of their testimony, and to judge of their credibility, and discover their motives. He, too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial. *People v. Baker*, supra; *People v. Ashnauer*, 47 Cal. 98; *People v. Hotz*, 73 Cal. 241, 14 Pac. Rep. 856. The order should therefore be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

83 Cal. 138

PEOPLE v. MULLINGS. (No. 20,598.)

(Supreme Court of California. Feb. 12, 1890.)

WITNESS—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.

1. Under Code Civil Proc. Cal. § 1881, which provides that a husband or wife cannot be examined for or against each other as to "any communication made by the one to the other during marriage," a defendant in a criminal case, who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between himself and his wife, cannot, without his consent, be examined by the state as to any such communications.

2. Where the state asks defendant a long list of questions as to communications made by him to his wife, an objection to several of them that the communications were privileged and the questions incompetent is sufficient, without repeating the objection to every question.

3. Where the state asks defendant a long list of incompetent questions which assume defendant's guilt, with the evident intention of impressing the probability of his guilt on the minds of the jurors, it cannot be said that the questions were not prejudicial to defendant, though he answers them in the negative.

Department 2. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

W. J. Herrin and M. C. Barney, for appellant. Geo. N. Johnson, Atty. Gen., for the People.

McFARLAND, J. Defendant was charged with the murder of one John S. Moore. He was convicted and sentenced to the state-prison. He appeals from the judgment and from an order denying him a new trial. Defendant went upon the stand as a witness in his own behalf. After a denial that he had made one or two statements testified to by one or two of the witnesses for the prosecution, his testimony consisted simply of the following question and answer: "Question. Did you or did you not kill John Moore? Answer. No." Upon cross-examination the prosecution asked him a great variety of questions, against the objections of his attorney that they were not proper cross-examination of a defendant under section 1323 of the Penal Code; that is, that they were not as to "matters about which he was examined in chief." The cross-examination in this respect certainly went, at least, to the very verge of error,—a place where prosecuting

officers seem frequently to want to go on all doubtful questions. But, considering the general nature of defendant's statement, this court (at least a majority of it) is not prepared to say that error was committed on the sole ground that the questions asked were not proper cross-examination.

In the course of the cross-examination, however, the prosecution asked the defendant a long list of questions about conversations between him and his wife, to which his counsel objected on the additional ground that they were privileged communications, about which he could not be examined. The objection was overruled, and defendant excepted. This was error of a most material character. At the time of the conversations asked about, the person with whom they were had was defendant's wife, although afterward she was divorced from him. The provisions of our Codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: The privilege at common law did not extend to communications which were not in their nature confidential; and, although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our Code sweeps away that embarrassing distinction by extending the privilege to "any communication made by one to the other during the marriage." Code Civil Proc. § 1881. The general rule is stated in section 398 of Wharton's Criminal Evidence, as follows: "Aside from the question of interest, confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations." The main provision of our Codes upon the subject is as follows: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage." The rule is founded on public policy, and its purpose, as stated in the clause of the Code just quoted, is to "encourage confidence, and preserve it inviolate;" and no disclosure can be forced from either spouse without the consent of the one against whom it is sought to be used. In *Murphy v. Com.*, 23 Grat. 960, the rule was applied to a mere witness for the prosecution. In that case Alexander Murphy was on trial for an alleged assault with intent to kill on one John Murphy. John Murphy was a witness for the prosecution, and on cross-examination he was asked by counsel

for defendant if he had not stated to his wife that defendant acted only in his own defense. The prosecution objected to the question as privileged, and the objection was sustained, and the supreme court of appeals of Virginia held the ruling correct, because the question "required him to state a communication supposed to have been made by him to his wife, which, if made, was what the law considers a confidential communication, and which he was not bound to disclose." And, of course, the rule applies much more strongly to a defendant himself on trial upon a serious charge.

It has been repeatedly held that a party offering himself as a witness in his own behalf cannot be cross-examined as to any communication made to his attorney. In *Duttenhofer v. State*, 34 Ohio St. 91, the defendant was indicted for and convicted of forgery. He was a witness for himself; and, on cross-examination, the state succeeded in examining him, over his objection of privilege, about certain communications made by him to his attorney concerning the matter in controversy. But the supreme court of Ohio reversed the judgment for this error, and in its opinion said, among other things, as follows: "The privilege applies to the communication; and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or his legal adviser." And the court further says: "Nor do we see the propriety of not allowing the attorney to make the disclosures without the consent of his client, and yet compelling the client himself to make them." In *Bigler v. Reyher*, 43 Ind. 112, it was held (we quote for brevity from the syllabus) that "communications made in consultation by a client to his attorney are privileged and protected from inquiry, when the client is a witness, as well as when the attorney is a witness." In *Hemenway v. Smith*, 28 Vt. 701, one Orcutt, who was a defendant, was a witness on his own behalf, and was cross-examined, against his objection, about consultations with his attorney. For this error the judgment was reversed, the supreme court of Vermont saying that "the rule should be the same as it would have been if the counsel had been called to prove the consultation." In *Bobo v. Bryson*, 21 Ark. 387, it is held that "a witness is protected from testifying as to any communication he may have made to his attorney in confidence." In *State v. White*, 19 Kan. 445, the defendant, who was being tried for bigamy, was a witness for himself, and he was cross-examined by the prosecution, against his objection, about consultations with his attorney. For this error the judgment was reversed, and the court, after reciting that the statute prevents an attorney from testifying about communications made to him by his client, proceeds as follows: "This statute would be of no utility or benefit, if the client could be compelled, against his consent, to make such disclosures. It

would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client. In such an event, in all civil actions, the confidential statements of client and counsel would be exposed, and likewise the same would occur in all criminal actions where the defendant should testify. The authorities are otherwise." The reasoning and philosophy of these cases (and there are many others to the same effect) apply with increased force to the relation of husband and wife,—a relation more confidential than that of attorney and client; indeed, the most confidential relation known to human beings. And we have cited the above cases because they are closely analogous in principle to the one at bar; and because we have been unable to find any reported case where it has been attempted to compel a defendant in a criminal case to testify to communications between his wife and himself. Slightly changing the language above, quoted from *State v. White*, but applying its principle to this case, we can say that "this statute would be of no utility or benefit, if the husband could be compelled, against his consent, to make such disclosures. It would be absurd to protect communications between husband and wife, and to leave them unprotected on the examination of the husband." All along the line of the cases about communications between client and attorney it was steadily argued on the one side that the statute only prevented the attorney from testifying, and that when the client was on the witness stand he could be forced to disclose; and the constant answer of the other side, sustained by the courts, was "the privilege applies to the communication," and it cannot be forced from either party to the confidential relation. It is clear to us, therefore, that a defendant in a criminal case who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between his wife and himself, cannot, without his consent, be examined by the state as to any such communications.

The attorney general makes the point that the defendant's attorney did not sufficiently object, on the ground of privilege, to the questions asked defendant about communications with his wife; but the point is not tenable. We do not understand that, when an attorney has clearly and pointedly objected several times to a certain line or class of testimony, he is called upon to repeat his objection to every question. Such repetition would be unbecoming, and needlessly annoying to the court. The first question in the case at bar to which the question applied was this: "What did you say to your wife when you went home that night?" The objection of defendant's counsel was this: "We object to any conversation between him and his wife as not in cross-examination, and as improper; being a privileged communication." The court overruled the objection, and defendant excepted. Further on, to the question, "Did you not

tell your wife that you had killed a man?" the objection was, "We object on the ground that, even if so, it was a privileged communication." Objection overruled, and defendant excepted. Other objections were made to similar questions which did not expressly state the ground of "privilege," but which did state, among other things, that the question was "not in cross-examination, and incompetent." The word "incompetent," under the circumstances, was sufficiently broad to include the ground of objection under review. Such questions were "incompetent;" that is, apart from the consideration of relevancy and materiality, they were incompetent because prohibited by law. Again, toward the close of the cross-examination, when a question was asked about something which the wife was assumed to have said to the defendant, his attorney said: "All this testimony, pretended conversations between this man and his wife, I move to have stricken out, for the reason that they are not such communications as can be repeated in any form, because the wife would not be allowed to come in and testify to them, and because irrelevant and incompetent for any purpose whatever. They are not such conversations as can be rebutted in any way, but are, if anything, privileged communications, not allowed to be brought out in court. I shall ask for a ruling on the motion as soon as the testimony of the witness is finished." And at the close of the examination of defendant his attorney said as follows: "Now we move to strike out all the evidence with reference to conversations had between this defendant and his wife concerning the killing of John Moore, as not such evidence as can be brought out by the prosecution because privileged." The motion was overruled, the court announcing the broad proposition that "any declaration that he might have made to his wife he might be interrogated about on cross-examination." The defendant excepted. It appears, therefore, that defendant's objection to the evidence was clear, fair, and full; that it was thoroughly understood by the court; and that it was pointedly overruled.

Counsel for respondent contends that the questions asking defendant about conversations with his wife did not injure him, because his answers to them were mostly in the negative. But what answers were expected? After defendant testified that he did not kill John Moore, can any sane man think that the district attorney supposed for a moment that defendant would answer affirmatively a long list of questions framed upon the presumption that he did kill him? Why, then, did he ask them? And if the questions and answers did not help to strengthen the case against defendant, why did not the prosecution consent to have them stricken out? It is quite evident that the questions and not the answers were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging

facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense. The questions themselves were incompetent, and, after one or two of them had been asked showing the purpose of the prosecution, counsel should not have been allowed to ask others of like character. A similar point to the one under discussion—that is, that the defendant was not injured by the questions on account of the character of the answers—was made in *Gale v. People*, 26 Mich. 161; but in that case Judge COOLEY, delivering the opinion of the court, says: "A review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it, and there is no other evidence. Holding that these questions were erroneous, and that they might, and probably did, prejudice the prisoner, the conviction must be set aside, and a new trial ordered." Of course, occasionally one or two questions may be erroneously allowed, and the answers may be such that, under the circumstances of the case, it can be readily seen that no injury was done. For instance, counsel for respondent cites *People v. Brown*, 76 Cal. 574, 18 Pac. Rep. 678. In that case the court was dealing with one single question of doubtful propriety, and held that at all events the defendant could not have been injured by it, because, as the court said: "He would not have been in any more favorable position if the question had neither been asked nor answered." The distinction between that case and the one at bar is too apparent to need pointing out.

We see no other matters in the record necessary to be noticed in detail. The examination of defendant's divorced wife was properly stopped as soon as she was asked about communications between defendant and herself during the marriage. The instruction as to preponderance of evidence is mostly of a negative character, and can hardly be said to be erroneous; but it would be safer for prosecuting attorneys and courts to limit themselves on that subject to the language of the Code. Great exuberance in the way of instructions is a prolific source of difficulty. Of course, when a defendant asks for doubtful instructions, the court is compelled to pass on them; but district attorneys and courts should not themselves voluntarily load up records with a mass of instructions which are both doubtful and unnecessary. Judgment and order reversed, and cause remanded for new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

83 Cal. 240

MULLER v. SOUTHERN PAC. B. RY. CO.

(No. 13,453.)

(Supreme Court of California. Feb. 27, 1890.)

RAILROAD COMPANIES—EMINENT DOMAIN—COMPENSATION—EVIDENCE.

1. Under Code Civil Proc. Cal. § 1870, subd. 11, providing that evidence of common reputation existing prior to the controversy may be given on the trial in cases of boundary, hearsay evidence establishing the common reputation as to the beginning point of the survey of a street, to show the boundary of such street, is admissible.

2. In an action to recover damages for land taken by a railroad company under the right of eminent domain, evidence as to offers made for the purchase of the land is admissible to prove its value; the weight of such evidence, and the *bona fides* of the offers, being for the jury.

3. In an action against a railroad company for damages for a street taken by it to build its road, one-half of the fee of which is in plaintiff, and for damages to an abutting lot not taken, plaintiff is entitled to recover the value of his interest in the street taken, subject to the easement for a public street, and for damages to the lot not taken, the measure of which is the difference between its value when defendant entered to construct the road and its value when the road was completed.

4. The damage to the lot cannot be shown by proving what its value would have been if the road had been constructed along some other street.

5. In arriving at the value of the lot, evidence as to its adaptability, and the uses to which it may be put, is admissible.

Department 2. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

R. B. Canfield, for appellant. *B. F. Thomas*, for respondent.

THORNTON, J. Action to recover damages for a strip of land, situate in the city of Santa Barbara, taken by defendant on which to build its road, and for damages to the abutting lot not taken. Judgment passed for plaintiff, and defendant appeals. It became necessary to prove the boundaries of the land of plaintiff, in order to adjust the damages suffered. The official map of the city of Santa Barbara was produced. The lot is situate on Gutierrez street, in that city. There was a controversy in regard to the line of the street, and it became necessary to prove it. No beginning point was designated or shown on the map. To show where the beginning point was, (the map appeared to have been made by one Haley, in pursuance of a survey of

the city, showing streets, etc., made by him,) the plaintiffs called F. N. Guiterrez, and put to him this question: "Well, have you learned from reputation, hearsay, or otherwise as to where the initial point was in the making of this survey?" Defendants objected to the question on the ground that it called for hearsay and incompetent testimony. That common reputation or hearsay is admissible to establish a boundary line of general and public interest, we think, is settled at common law, and in this state by statute, Code Civil Proc. § 1870, subd. 11.¹ Such reputation which is hearsay must have existed before the controversy has arisen. We think that the objection to the competency of the question on the ground that it was hearsay was not well taken; and this is, in our opinion, all that the objection amounted to. The question, as a preliminary one, was permissible. Probably, the further examination might have brought out testimony which was inadmissible; but this does not make the question improper. There was no error in allowing the question. We add, on this point, that, if the boundary may be proved by hearsay, certainly the beginning point—the most material point—can be so proved. The greater includes the less.

The testimony of Muller as to offers made for the purchase of the lot of land above mentioned not taken was admissible to prove its value, and the question properly allowed upon the issue of damages. *Bona fide* offers for property afford some test as to its value, and are, we think, admissible. *Harrison v. Glover*, 72 N. Y. 451. What weight such testimony is entitled to is for the jury; so, also, the *bona fides* of the offer is a question of fact to be determined by the jury. A cross-examination as to all the circumstances of the offer will show to the jury what weight is to be given to the testimony.

We must consider this a case where the fee of one-half of the street is in the plaintiff; for the jury, by their verdict, have so affirmed. Hence the plaintiff is entitled to recover the value of the land taken, subject to the easement for a public street, and, in addition, damages to the part not taken,—here to the abutting lot,—by reason of the part taken for railroad purposes. The value of the land taken is that which it had when the defendant entered to construct its road. The value of the part not taken is to be determined by ascertaining the value of such part when the defendant entered to build its road, and by deducting from it, if a depreciation occurred, the value when the road was completed. If there had been no depreciation when the road was completed, there has been no damage, and none can be allowed. On this subject, see the following cases: *Imlay v. Railroad Co.*, 26 Conn. 249; *Kucheman v. Railway Co.*, 46 Iowa, 366; *Railroad Co. v. Esterle*, 13 Bush, 667; *In re Coney Island R. Co.*,

13 Hun, 345; 16 Hun, 261; *In re New York Cent. R. Co.*, 15 Hun, 63; *Henderson v. Railroad Co.*, 78 N. Y. 423; *Hegar v. Railway Co.*, 26 Wis. 624. We are inclined to think, in this case, that the difference between the value of the lot when the defendant entered to construct its road and the value when the road was completed will show what the plaintiff is entitled to recover. The value of the land taken on the street, when the street is subject to public easement, is so small as to be scarcely appreciable. There seems no probability of the termination of the easement, and until that is terminated the plaintiffs can only use the land for the purposes of a street. The depreciation of the abutting lot is caused only by the obstruction to the street by the embankment raised on it by defendant, and thus impairing plaintiffs' use of the street in connection with his lot. We do not intend, however, to say that plaintiffs cannot recover the proved value of the land taken.

The court below admitted evidence as to the value the lot would have had, had the railroad been built on some other street in Santa Barbara. This could only have been admitted as affecting the damage to the lot by the defendant. We cannot see on what view or principle this evidence was admitted. The damage to plaintiff must be estimated on the actual facts of the case; not on any speculative theory of what might have been the result if something had occurred which in fact did not occur. It is difficult to see what effect this evidence could have had on the subject of damage. If the court intended to allow the jury to add to the difference in values above pointed out as legitimately allowable the enhancement in value which would have occurred had the road been built on some other street in the city, it was a departure from the just rule. The damage allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered; and the defendant is only called on to make compensation for that loss. The court was requested by defendant to tell the jury that, "in estimating the damage to the portion of plaintiff's land not taken by the railroad, you must not consider what the value of the land would have been if the railroad had been constructed through the city, but along some other street than Guiterrez street." For the reasons above given the admission of the evidence was an error. The failure to give the requested direction above quoted was also an error, as it in effect allowed the jury to take into consideration the question of value as affected by the building of the road on a different street, the consideration of which tended to lead them (the jury) away from the true rule. We see nothing in this case which raises the question of setting off benefits to plaintiffs against damages suffered by them; and we say nothing in regard to the point, except to refer to the former decision of this court in *Railroad Co. v. Porter*, 74 Cal. 261, 15 Pac. Rep. 774, which meets our approval.

¹Said section provides that evidence may be given, on the trial, of "common reputation, existing prior to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary."

In arriving at the value of the land, all its capabilities, or the uses to which it is adapted, should be taken into consideration. These capabilities are estimated by a purchaser, and we cannot see why evidence in regard to them is not admissible. The same considerations are to be regarded as in a sale of land between private parties. *Town Co. v. Neale*, 78 Cal. 67, 20 Pac. Rep. 372; *Boom Co. v. Patterson*, 98 U. S. 409; and cases cited in 3 *Suth. Dam.* p. 441, note 4. If the abutting lot is rendered less valuable by the obstruction because the owner is using the lot for a particular business, and the obstruction renders the lot less valuable for that business, we do not see why that should not be considered on the question of damage. This is a use to which the lot may be put, and for which it is actually employed. Such damage is actually incurred, and should be allowed. *Driver v. Railroad Co.*, 32 *Wis.* 569. We find no error in the record, save the one pointed out; and for that error the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

So ordered.

I concur: SHARPSTEIN, J.

McFARLAND, J. I concur in the judgment on the ground upon which the reversal is based in the opinion of Mr. Justice THORNTON. With respect to the views therein expressed on other points I express no opinion.

3 Cal. Unrep. 211

UNITED LAND ASS'N *et al.* v. KNIGHT. (No. 12,748.)

(Supreme Court of California. Jan. 2, 1890.)

PUBLIC LANDS—PATENTS—AUTHORITY OF LAND-OFFICE.

1. Act. Cong. 1864, § 7 (13 U. S. St. at Large 334,) provides that "it shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made as near as practicable in one tract, and in a compact form, * * * and it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of this section before approving any plat and survey forwarded to him." Act Cong. 1851, § 13, (9 U. S. St. at Large 631,) provides that "the patent shall issue to the claimant on his presenting to the general land-office an authentic certificate of confirmation, and a plot or survey of said land duly certified and approved by the surveyor general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and furnish plots of the same." The decree confirming defendant's land claim described the land as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." The survey made under this decree included by metes and bounds land below the line of ordinary high tide. The patent following the survey described the

lands by metes and bounds, but recited the decree of confirmation. *Held*, in ejectment for the lands below high tide, that the north, east, and west boundary lines given in the decree and recited in the patent would prevail over those given in the survey and the granting clause of the patent, as there was no power by which land could be included in the survey and patent, the claim to which had not been confirmed by the decree. McFARLAND, J., dissenting.

2. In an action of ejectment, plaintiff can attack the patent from the United States, under which defendant claims, on the ground that the land-office had no power to issue a patent for the lands embraced therein.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Ejectment by the United Land Association and others against Knight. Judgment for plaintiffs, and defendant appeals.

E. F. Preston and *James A. Waymire*, for appellant. *Doyle, Golpin & Scripture*, for respondents.

PATERSON, J. This is an action of ejectment to recover a block of land lying below ordinary high tide in the city and county of San Francisco, and being a portion of that part of San Francisco known as "Mission Creek lands." The defendant claims under a patent of the United States to the city, issued June 20, 1884, in satisfaction of a pueblo grant of four square leagues, which was confirmed, by the decree of the United States circuit court, May 18, 1865. The tract confirmed by this decree is described as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid,"—subject, however, to certain deductions for lands previously reserved or dedicated to public use by the United States. Under the decree referred to, a survey was made, and on August 13, 1868, was approved by the United States surveyor general for the state of California, which fixed the southern boundary of the land by following the high-water mark; thus excluding the lands of Mission creek, of which the land in suit is a part. Subsequently, in 1884, the secretary of the interior caused another survey to be made, one line of which ran directly across the mouth of Mission creek; thus including the lands of Mission creek as a part of the grant to the city. The patent to the city recites the decree confirming the grant. Plaintiffs' claim of title is based upon a deed from the tide land commissioner to Ellis, dated November 24, 1875, and subsequent conveyances to them. They contend that the state, upon its admission into the union, by virtue of its sovereignty, became seized of the land; it being tide land. This right of the state, they claim,

is recognized by the decree confirming the grant to the city. It is claimed that the patent is bound to follow the decree in fixing the boundary at high-water mark, and that so much of the patent as attempts to convey lands below high-water mark is void because in excess of the authority of the officials issuing the patent.

Appellant contends that a party in an ejectment suit cannot question the validity of a United States patent for land upon the ground that it does not follow the decree confirming the grant; that the patent from the United States government to the city and county of San Francisco for the pueblo lands confirmed to it under the acts of congress of March 3, 1851, and of July 1, 1864, by the decree of the United States circuit court, which patent conforms in its description of the lands granted to the final survey, made, as provided in the latter act, in accordance with the instructions of the commissioner of the general land-office, is conclusive evidence, as against the state of California and its grantees, of the right of the city and county to all the lands embraced within the exterior limits of the survey, including tide lands lying below the line of ordinary high tide. It is said that the question is no longer an open one in this state. The case of the *People v. City and County of San Francisco*, 75 Cal. 388, 17 Pac. Rep. 522, is cited and relied on in support of this contention. It did not appear in *People v. City, etc.*, whether the decree of confirmation was made a part of the patent. In this case it is shown that the patent contains full recitals of the decree, and shows upon its face that the tract confirmed embraced "so much of the extreme upper portion of the peninsula above ordinary high-water mark, (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues," etc. It shows that three sides of the tract are bounded by natural monuments, namely, "on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." If it be conceded, however, that the decision referred to covers the questions involved as fully as is claimed by the appellant, we feel satisfied that the supreme court of the United States would not follow it in this case or any other, involving the same questions, which might go to that court on a writ of error. "It has always been the practice here to adopt that view of a legal question which has been taken by the supreme court of the United States, when the question is within the branch of the jurisdiction of that court which may be exercised by writ of error to this court." As the question is a federal question, it is one which will be decided ultimately by the supreme court of the United States. *Belcher v. Chambers*, 53 Cal. 635.

The question involved in this case is whether the officers of the land department

had power to patent land outside of the natural boundaries given in the decree of confirmation. If the land department had no jurisdiction to act, if any portion of the land described in the patent was not a part of the public domain, or if there was no legislation authorizing its conveyance by the land department, then, under the decisions of the United States supreme court in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228; and other cases therein cited, the patent is inoperative to pass the title; and objection can be taken to it on these grounds at any time, and in any form of action.

Upon her admission into the Union, the state of California became the owner, by virtue of her sovereignty, of all tide-water lands within her borders lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state, of course, could not take more than the United States received; and the claim of the state, by virtue of her admission and her sovereignty, was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the exterior boundaries of larger tracts. *Lux v. Haggin*, 69 Cal., 255, 10 Pac. Rep. 674. The United States government has exercised the power vested in it, and has through its courts and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving, as the boundaries thereof on the west, the north, and the east, the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include, between it and the high-water lines north of it, said four square leagues of land. This, it seems, the surveyor did not do; but, ignoring the natural boundaries fixed by the court in its decree for the west, north, and east, ran his line below the line of high tide, and across the mouth of Mission creek, and included within his description the lands described in the complaint,—lands of the state not included within the decree of confirmation. Following the survey, the patent describes the land by metes and bounds.

The government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by congress; and it would seem that when congress vest-

ed in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of the section before approving any survey and plat forwarded to him;" that the officers of the land department are, as to such lands, merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Section 13 of the act of 1851, (9 U. S. St. 631,) provides that "the patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of confirmation, and a plat or survey of said land, duly certified and approved by the surveyor-general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of said claims the said surveyor general shall have the same power and authority as are conferred on the register of the land-office by section 6 of the Act, to create the office of surveyor of the public lands of the state of Louisiana, approved March 3, 1831. Under this provision, we think it clear that the power of the surveyor general is restricted to the claim as finally confirmed. It has been decided in several cases, on appeal from decrees of confirmation, that the description must be followed; that "the decree is a finality, not only on the question of title, but as to the boundaries which it specifies." (U. S. v. Halleck, 1 Wall. 455; the Fossat Case, 2 Wall. 649; Higuera v. U. S., 5 Wall. 829; Van Reynegan v. Bolton, 95 U. S. 35.) In Higuera v. U. S. the court declared that "confirmation must precede the survey which is made subject to such an order; and, if the decree of confirmation is so indefinite and incongruous that it cannot be executed, then it is void, and of no effect, and the claim to the land stands upon the same footing, in legal contemplation, as a claim which was never presented to the commissioners for adjudication." In the Fossat Case the court held that it was not competent for the district court to depart from its own decree in the exercise of the power conferred by the act of June 14, 1860; that the court was bound to execute the decree by fixing the lines on the grant in conformity with the provisions of the decree, the decree being not only the foundation of the validity of the grant, but of the proceedings in the survey and location of the land confirmed. In that case, as in this, the decree provided for specific boundaries on three sides of the tract, and left one side to be surveyed. If the court, which then had the power to supervise and confirm or reject the survey, as the land department now does, could not alter or depart from the specific boundaries given in its own decree, how can the officers of the land department?

These cases, to be sure, were direct appeals to the supreme court of the United States; but they bear directly upon the question of the authority of the officers of the land department to patent lands outside of the boundaries of the decree of confirmation, and that is the question here. If the land granted is not within the power of the officer, the grant or patent is invalid. In *Polk v. Wendal*, 9 Cranch, 87, Chief Justice MARSHALL said: "There are cases in which a grant is absolutely void, as where the state had no title to the thing granted, or where the officer had no authority to issue the grant." In *New Orleans v. U. S.*, 10 Pet. 662, 731, the court said: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face, it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor no right passes to the grantee." So in this case, unless congress has given the land department power to dispose of land belonging to the state of California,—lands lying outside of the boundaries of the decree,—a patent to land shown to be outside of such decree is invalid. In *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, it appeared that land which had been previously granted to the state by the swamp land act was held by the defendant under a patent from the United States issued on a pre-emption claim. The court held the patent to be invalid as a conveyance, because the land was not, at the time it was patented to the defendant, within the granting power of the land-office. The state of California took the lands in controversy, in 1850, as effectually as if she had received them by grant from congress. If the land department had the power to determine that land outside of the decree of confirmation should be conveyed, it would necessarily have the power to pass on its own right to convey the land, but the decree of confirmation was the foundation of the power to make the patent. It precedes and limits the power of the officers of the land department. If the latter are not limited by the decree, then the court may confirm a tract in one place, and the officers locate it in another, and the patent which attempts to convey the latter tract controls the former. This cannot be, for the whole power of deciding what shall be granted in pursuance of the treaty is intrusted to the judicial department. Section 7 of the act of 1864, (13 U. S. St. p. 334,) shows that the power of the land department is limited by the provisions of the decree: "It shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim; but, when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location shall be made, as near as practicable, in one tract, and in a compact form, * * * and it shall be the duty of the commissioner of the general land-office to require a sub-

stantial compliance with the directions of this section before approving any survey and plat forwarded to him." Here is an emphatic declaration by congress that the decree is the limit of the power of the land department, and shows very clearly, we think, that congress has not given to the officers of the land department the exclusive and final power of determining whether any land is within or without the location of the decree, or of locating grants in places where the courts have not located them. If such power is not conferred upon the land department, any attempt to convey land outside of the permanent boundaries named in the decree is not an error of judgment simply, but is an act void for want of jurisdiction.

Under the laws of Mexico existing at the time of the treaty, lands below and within 190 *varas* of the seashore could not be held in private ownership, (Wheeler, Land Titles, 13;) and the land officers of the United States could not, in the absence of a judicial adjudication that such land belonged to a Mexican claimant, convey to him. "All that place is called 'sea-beach' which is covered by the waters of the sea when at its highest point during all the year." Hall Mex. Law 448. The king could not alienate such lands. *New Orleans v. U. S.* 10 Pet. 726; *Milne v. Girodeau*, 12 La. 324. The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads and gulfs, and the rivers, although they may not be navigable (Mission creek is navigable,) their beds, mouths, and the salt marshes. Hall, Mex. Law, 448-503; Civil Code Mex. art. 802.

A patent cannot be issued by the land department to a person not named in the decree, because the courts, and not the department, are given the power to determine the person to whom the lands were granted by Mexico. If the judgment of the court should decree that the grant is a forgery, and therefore void, and the land department should patent the land claimed, the action of the department would be shown to be void upon the production of the decree, because congress has given to the courts jurisdiction to determine the validity or invalidity of the claim. Of course, in cases where the court, by its decree, has established the validity of the grant, and a tract of a certain number of acres has been confirmed to be located within the exterior limits of a larger tract, it is left to the officers of the land department, in their discretion, to locate and survey the requisite number of acres within the larger tract; and their action in execution of the decree is not subject to attack in any collateral proceedings, because it is within their jurisdiction, and in pursuance of the decree. In such cases there cannot possibly be any conflict between their action and the directions of the decree. It is auxiliary to the decree, and as conclusive as the decree itself. Unless we bear in mind the distinction between cases of this kind—the confirmation of a certain number of acres to be located within the ex-

terior boundaries of a larger tract, and designated by the supreme court of the United States as "floats"—and cases in which the boundaries, or some of them, are definitely fixed by the decree, the decisions upon the subject will appear to be very conflicting. An examination of the authorities cited at the argument of this case and the argument of *People v. City and County of San Francisco*, with this distinction in view, will illustrate the principle stated, and explain what would otherwise seem to be a conflict of decisions on the subject. In *Moore v. Wilkinson*, 13 Cal. 478, relied on by parties claiming under the patent from the United States, the court regarded the grant "as conveying an interest to four leagues lying within a larger tract." Page 486.

It is true the patents, in some cases, seem to have gone beyond the boundaries of the *diseno*, and yet they were held not to be void; but it was so held in each case because the parties attacking the patent had no title to land lying outside of the exterior boundaries, and were not, therefore, in a position to attack the validity of the patent. In *Doolan v. Carr*, the court held (only WAITE, C. J., dissenting) that one who had not even connected himself with the paramount source of title might question the validity of the patent. 125 U. S. 618, 8 Sup. Ct. Rep. 1228. In *Ward v. Mulford*, 32 Cal. 369, the district court, as it had the right to do under the law then applicable to its decrees, had reviewed the survey, and confirmed it. Even if its action were irregular, it was not void. But at the time the grant before us in this case was confirmed the surveyor was not required to report his action to the court for confirmation, and no report was made.

In *Chiple v. Farris*, 45 Cal. 539, the patent covered only a portion of the tract described in the decree, but not the land in controversy. Plaintiff had no legal title, because no patent had been issued to him under the decree. The question as to the power of the land department to patent lands outside of the boundaries of the decree was not involved. Within the boundaries of the decree it may act. Without the boundaries it has no jurisdiction. Furthermore, in that case the descriptions were both by metes and bounds, and it is expressly admitted by respondent in that case, in his written points, that if the side lines of the tract in controversy were the seashore a different rule would apply. In *Teschemacher v. Thompson*, 18 Cal. 11, the court assumed that the grant was of "a specific quantity lying in an area of larger extent." Page 24. In *Cassidy v. Carr*, 48 Cal. 339, there was no conflict between the decree and the patent. The survey and patent, as the court said, simply carried out the decree, and were conclusive between the parties. Of course, where "the survey and patent but carry out the decree" the patent is conclusive between the parties. In none of the cases cited is the question of the power of the officer to issue a patent for land not embraced in the decree considered. It does not follow

logically that because the patent is conclusive in all cases where the land department had jurisdiction, it is conclusive as to all lands lying without the boundaries of the decree, as well as within them. The surveyor cannot incorporate into the decree lands not confirmed, nor can he shift on the surface of the earth the natural boundaries,—mountains, bays, or oceans. The presumption always is, doubtless, that the metes and bounds follow the decree; but to hold that the positions of the natural monuments are indisputably fixed by the courses and distances of the surveyor, and approval of the land-officers, would be placing a construction upon the acts of congress never intended by that body, and not warranted by the decisions of the national courts. The land department has power to do what the court cannot do, viz., locate, survey, and patent tracts of land designated by the court within larger areas; and when a rancho is confirmed by name to fix its boundaries, but when the court itself, in its decree, fixes one or more of the boundary lines, the department has no jurisdiction to go beyond it. The distinction between the different kinds of grants is clearly and fully stated in *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, and in *U. S. v. Curtner*, 38 Fed. Rep. 1. In *Doolan v. Carr*, supra, the court said: "There is no question as to the principle that, where the officers of the government have issued a patent, in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority,—then their act was void,—void for want of power in them to act on the subject-matter of the patent, not merely voidable. In which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." Under this and other decisions, including many decisions of this court, (*McLaughlin v. Powell*, 50 Cal. 64; *McLaughlin v. Heid*, 63 Cal. 208; *Railroad Co. v. McCusker*, 67 Cal. 67, 7 Pac. Rep. 122; *Mining Co. v. Oliver*, 75 Cal. 194, 16 Pac. Rep. 780, quoted approvingly in *Wright v. Roseberry*, supra,) the evidence of-

ferred and admitted was competent, relevant, and material, and fully established the findings of the court. The deeds to Ellis, and evidence of the location on the earth's surface of the line of high tide, were properly admitted.

Now, if it be true, as a matter of law, that the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, and that neither the commissioner of the land-office nor the secretary of the interior had any power to direct or approve such a survey, the only question is, which of the west, north, and east boundary lines, respectively shall prevail,—those given in the decree, and recited in the patent, or those given in the survey, and employed in the granting clause of the patent? In determining this question, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. It becomes simply a question of construction. Both descriptions are upon the face of the patent, and the case is one in which the plaintiffs claim that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes land not included within the natural boundaries, and which defendant claims to own, but which is in fact owned by plaintiffs; that their title should be quieted because the natural and permanent boundary lines should prevail over the description by metes and bounds. A determination of this question will in no way affect the location of the south line. By the decree, the surveyor was to fix that line; but, if the surveyor had run his line through the bay of San Francisco, and taken in lands of the state lying below the high-water mark on the eastern shore of the bay, or lands lying in the foothills of the county of Contra Costa, would it be contended that the patent, although reciting the decree confirming four leagues on the peninsula of San Francisco, with the bay of San Francisco as the eastern line thereof, is conclusive evidence, as against the state or its grantees, of the right of the city and county of San Francisco "to all the lands embraced within the exterior limits of the survey, including tide land lying below the line of ordinary high tide," and in fact conclusive against everybody as to all lands included in the survey, wherever located? If the plaintiff, in the case supposed, would not be prevented from showing that the metes and bounds included land belonging to him, not confirmed by the decree, and which the land-officers could not convey, why may he not show the same thing in this or any other kindred case? In *More v. Massini*, 37 Cal. 432, the court said: "The call for the seashore as the southern boundary must be regarded as the more definite and certain, and will prevail over a call for a mere station and over the courses and distances."

But, whether we consider it as a collateral attack, or a mere matter of construction, it

is clear, we think, that, under the decisions of the supreme court of the United States in *Doolan v. Carr*, supra, and other cases there cited, "want of power in an officer of the land-office to issue a land patent may be shown in an action at law by extrinsic evidence, although the patent has been issued with all the forms of law required for a patent of public land." There were no errors in the rulings of the court. The evidence shows beyond doubt that the land in controversy is outside of the natural boundaries of the decree. The judgment is therefore affirmed.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment, and will file an opinion hereafter.

I dissent: MCFARLAND, J.

82 Cal. 122

HANNAN v. McNICKLE. (No. 12,179.)

(Supreme Court of California. Dec. 19, 1889.)

VENDOR AND VENDEE—CONTRACT—IMPROVEMENTS
—ACTION FOR POSSESSION.

1. Where a contract for the sale of land for \$300, under which possession is given, fails to specify the time of payment further than to provide that the price shall be payable in monthly installments, a period of nearly three years is more than a reasonable time for payment.

2. A stipulation that interest is to be paid on overdue installments does not operate to extend the time for payment of the principal.

3. A tender of a deed on payment of the purchase price and interest, no mention being made of a payment of \$10 when the contract was executed, is sufficient, where defendant does not object to the amount, but denies that anything is due.

4. Where a vendee takes possession of land under a contract of purchase, and fails to make any payment, a judgment for rents and profits accruing after demand by the vendor for possession, and up to the time of trial, is proper.

5. Code Civil Proc. Cal. § 741, provides that "when damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant * * * holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages." Held, that defendant is not entitled to set off the value of his improvements where he enters under a contract which says nothing about his taking possession, and is ejected on account of default in his payments, and where the improvements are made by him before a demand for possession, as, before demand made, his possession is not adverse.

6. An offer to rescind the contract before bringing suit is not necessary where defendant is in default in his payments, as he cannot be allowed to hold both the land and money.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

J. C. Bates, for appellant. A. H. Loughborough, for respondent.

PER CURIAM. Ejectment. Judgment for plaintiff for possession of the premises, and \$70 rents and profits. Defendant appeals. It is conceded that the plaintiff was the owner on August 29, 1883. On that day he gave to the defendant a contract in the following words: "San Francisco, August 29, 1883, John Hannan, party of the first part, sold to James McNickle, party of the second part,

lots 10, 11, 12, 23, 24, 25, in block 160, Outside Land, in the Hannan tract, for the sum of nine hundred (\$900) dollars, United States gold coin, to be paid in monthly installments; deferred payments to bear 8 per cent. per annum until paid. Title guaranteed to be perfect, and clear of all incumbrance. JOHN HANNAN. JAMES McNICKLE." This agreement, it is to be observed, says nothing about possession. But it is in evidence that the defendant went into possession with the consent of the plaintiff, but whether this consent was verbal or in writing does not appear. The defendant "graded the lots, sunk a well, fenced in the lots, and built barns and other buildings for a milk business;" which improvements, he testifies, cost him \$1,000, but which he states in his answer were "of the cost and value of \$950." On the day the writing was executed the defendant says he "paid him \$10, the first payment;" but nothing further has been paid. On May 4, 1886, the plaintiff tendered to the defendant a sufficient deed of the property, and "offered to deliver said deed on payment of \$900 and interest;" but the defendant did not pay any part of said sum, and the deed was not delivered. The plaintiff then served upon the defendant a demand in writing for the possession of the property. Upon these facts, we think that the judgment was right.

1. The contract does not fix any time for the payment of the purchase price. Nothing can be gathered from the statement in the contract that the price was to be paid "in monthly installments," because there is nothing as to the amount of such installments. The most that can be said is that there must be at least two installments. Nor can the amount of the installments be inferred from the statement in the defendant's testimony that when the agreement was signed he "paid him \$10, the first payment." Aside from any other reason, the inference from such a statement is too shadowy to serve as the basis for the addition of a new term to the contract. The defendant does not say that any oral agreement was made on the subject. He does not even say that this first "payment" was the first "installment" under the contract. The contract did not require any installment to be paid in advance; and it may be that the \$10 was paid because the parties supposed that it would serve to "bind the bargain." The proposition that the payment of a sum like \$900 was to be strung out over a period of seven years and a half, in sums of \$10 each, is one that requires some definite evidence to support it. The time not having been fixed by the contract, if the purchase money did not become due at once, or at the end of two months, it became due in a reasonable time, (see *Williston v. Perkins*, 51 Cal. 554; *Vance v. Pena*, 41 Cal. 686; *Luckhart v. Ogden*, 30 Cal. 548;) and we think that a period of nearly three years was more than a reasonable time for the payment of a sum like \$900. But taking the defendant's own theory, viz., that the purchase money was to be paid in

monthly installments of \$10 each, it follows that at the end of each month an installment became due; and therefore, at the time that a demand was made for possession, there were at least 32 installments due and unpaid. In any view that can be taken, therefore, the defendant was in default with his payments. He did not perform what his contract required of him; and, this being so, the fact that he made valuable improvements does not avail him. Such improvements cannot enable him to refuse to perform his contract, and yet retain possession of the property. The performance of his contract is an essential feature of any equitable defense on his part. If any authority were needed for such a plain proposition, it is to be found in some of the cases cited by the appellant himself. *Hicks v. Lovell*, 64 Cal. 20; *Whittier v. Stege*, 61 Cal. 241. The fact that interest was to be paid on overdue installments does not operate to extend the time for payment of the principal. To say that the defendant was entitled to hold the possession until all the installments became due is the very reverse of the true rule, which is that he has no sufficient equity until he has paid all that are due. *Alston v. Wingfield*, 53 Ga. 22. There is no question as to whether time was of the essence of the contract; for the defendant does not offer to pay what is due under the contract, but denies that he is in default.

2. This case is determined in favor of plaintiff by *Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. Rep. 804, which is precisely in point, and shows that the plaintiff had a right to recover. See *Seabury v. Stewart*, 22 Ala. 207-217, where the point is ably discussed, and the authorities cited. The plaintiff was not called on to rescind the contract, or return any part of the purchase money. His right of recovery is consistent with the contract. He recovers because the defendant was in default in paying the purchase money, and defendant cannot have land and money both. *Railroad Co. v. Mudd*, 59 Cal. 585; *Seabury v. Stewart*, supra; *Hansbrough v. Peck*, 5 Wall. 506. Equitable principles cannot affect plaintiff's rights, since equity follows the law, and rules as the law rules.

3. It is argued for the appellant that the tender of the deed was ineffectual, because, as a condition of its delivery, the vendor demanded the payment of \$900 and interest, which did not allow for the \$10 which had been paid. This is upon the theory that the making of the deed and the payment of the price were conditions concurrent under the contract. But, if we are right in the foregoing position, the contract had nothing to do with the question of possession. All that can be claimed to have been necessary, under this view, was to have converted the possession into a tortious one by a unconditional demand that it be restored; and such a demand was made. But waiving this, and assuming that the tender of a deed was necessary, we think that what was done was sufficient. For the vendee made no objection on the score of amount. He did not offer to

pay anything, but denies by his answer that anything was then due. Under these circumstances the objection to the tender was waived.

4. The judgment for rents and profits was proper. They were evidently allowed for the period commencing with the demand for possession, and extending up to the time of the trial. The evidence shows that \$70 was not too much for this period, and the finding on the subject is not attacked by a specification.

The defendant, being in default under his contract, is not entitled to set off the value of his improvements. That is the rule, independent of statutory provision. *Tyler v. Fickett*, 75 Me. 211; *Guthrie v. Holt*, 9 Baxt. 527; *Buell v. Irwin*, 24 Mich. 145. The provision of section 741 of the Code of Civil Procedure that the improvements may be set-off if made by one holding "under color of title adversely to the claim of the plaintiff, in good faith," applies only where the holding is adverse, (*Bay v. Pope*, 18 Cal. 694;) and before the demand above mentioned the possession of the defendant was not adverse, (*Kerns v. Dean*, 77 Cal. 556, 19 Pac. Rep. 817; *Knox v. Hook*, 12 Mass. 329; *Greeno v. Munson*, 9 Vt. 37; *Browning v. Estes*, 3 Tex. 476; *Bishop v. Truett*, 85 Ala. 376, 5 South. Rep. 154.) Judgment and order appealed from affirmed.

82 Cal. 642

CONNOLLY v. HINGLEY. (No. 13,437.)

(Supreme Court of California. Jan. 27, 1890.)

VENDOR AND VENDEE—EJECTMENT—EQUITABLE DEFENSES.

1. One who is in default in his payments on a contract of purchase under which he claims possession, and who has made no offer to pay what is due, cannot rely on the contract as an equitable defense in ejectment by a subsequent grantee.

2. A verbal promise by the owner of the land, made without consideration, to extend the time of payment for two years beyond the time fixed in the written contract, is not an equitable defense to an action of ejectment brought seven years after the expiration of that period, during all of which time no payments have been made.

3. Where the plaintiff has been in possession for seven years, when defendant enters on the land, claiming under a prior contract of purchase, no demand by plaintiff is necessary to make defendant's possession tortious.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Tupper, H. H. Welsh, and E. D. Edwards, for appellant. Geo. A. Nourse, for respondent.

HAYNE, C. Ejectment. Judgment for plaintiff. Defendant appeals. Both parties claim through one Chapman. The defendant claims to be in possession under a contract of purchase from Chapman made in November, 1875. This contract provided that defendant should pay for the property the sum of \$1,000, as follows: \$100 cash on the execution of said instrument; \$750 in 60 monthly installments of \$12.50 each, payable on the 1st day of each month; and \$150 on the 1st day of November, 1880. Of this sum

he paid only \$437.50. His last money payment was in 1877, and there was allowed him for a deficiency in fencing a credit of \$25 in 1879. These facts are established by the findings, which are sustained by the evidence. The burden was clearly upon the defendant to sustain the allegations of his equitable defense; and, having failed to do so, the finding was properly against him. *Leviston v. Ryan*, 75 Cal. 294, 17 Pac. Rep. 239; *Speegle v. Leese*, 51 Cal. 415. In 1879 he removed with his family to the Sandwich Islands, where he remained until 1887, when he returned to California, and, after several months' sojourn in different places, re-entered upon the land. The plaintiff claims under a deed from Chapman made in 1880. He was in possession under this deed from about the time it was made until the defendant's entry, in 1887. This is expressly found. The finding is not unsupported by the evidence, and there is no sufficient specification attacking it. It is apparent that the defendant can have no greater right against the plaintiff than he has against Chapman. And, so far as the possession is concerned, he has no equity against Chapman, because he was in default under his contract without excuse. As was said in *Hannan v. McNickle*, ante, 271, (filed December 19, 1889,) which is similar in principle: "The performance of his contract is an essential feature of any equitable defense on his part."

Defendant relies, however, upon an extension of time. In 1879, being then in default, he asked Chapman for an extension, and the latter replied: "If you pay me in two years, all right; and, if you don't pay me in two years, that will settle it." There was no consideration for this verbal promise; and, assuming that it would be a waiver of delay, it was not a valid alteration of the written contract. Civil Code, §§ 1607, 1608.¹ Furthermore, the two years expired in 1881. Seven years elapsed before the commencement of the action; and the evidence does not show that defendant has paid, or offered to pay, anything further than was paid before he went to the islands. He does not even offer by his answer to pay what is due, but merely says that he "has been willing to perform, and has performed, and has offered to perform, each and all the covenants in said agreement on his part to be performed;" which was by no means the case. The conveyance to the plaintiff did not relieve the defendant from his obligation to comply with his contract. Whether such conveyance operated in equity as an assignment of the contract to plaintiff or not, it did not have the effect of giving the defendant the land without payment of what his contract required of him. He was bound to pay some one, and he has not paid any one, or offered to do so. This

prevents him from having any right to equitable relief.

No demand was necessary to make the defendant's possession tortious. At the time of the entry complained of he had not been in possession under the contract for several years. The court finds that when he went to the Sandwich Islands he "abandoned" possession of the lots. We are not prepared to say that this finding is not sustained by the evidence. All that defendant says about it is that he "did not leave the lots vacant," and that he "rented the property for a year, when I went away, to J. R. Palmer." But, if we assume that Palmer went into possession, it does not appear how long he remained so. Waiving this, however, and assuming in favor of defendant that he did not "abandon" the possession, it sufficiently appears, as above stated, that plaintiff was in possession from the time of the deed under which he claims until the entry of defendant, in 1887. Under these circumstances it seems clear that, whatever may be the rule as to demand upon a vendee in possession under a contract of sale, it has no application to this cause.

A number of exceptions were taken during the trial, but no argument is made in support of any of them, and consequently they must be held to be waived. We therefore advise that the judgment and order appealed from be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

83 Cal. 51

RHORER et al. v. BILA et al. (No. 13,422.)
(*Supreme Court of California*. Jan. 31, 1890.)
VENDOR AND VENDEE—ACTION FOR PRICE—DEFECTS IN TITLE.

1. Vendees in possession of land are not discharged from paying the purchase price by the fact that a former tender was refused by the vendors; and it is immaterial whether or not the price was due at the time the tender was made.

2. The existence of a mortgage on the land in a smaller amount than the purchase price remaining unpaid, to which mortgage the vendees did not object when the vendors tendered a deed, and which has been released before trial, is no defense to an action for the purchase price.

Department 1. Appeal from superior court, Los Angeles county; WALTER S. VAN DYKE, Judge.

Action by George Rhorer and others against Augustin Bila and others to compel the payment of the purchase price of certain land, and, in case of defendants' failure so to do, to cancel an agreement of purchase under which defendants hold possession. There was a decree in plaintiffs' favor and defendants appeal.

Lee & Scott, for appellants. *J. M. Murphey*, for respondents.

PATERSON, J. On the 18th day of February, 1887, the plaintiffs entered into an agreement with the defendant Bila, by the terms

¹Civil Code Cal. § 1607, provides: "The consideration of a contract must be lawful." Section 1608 provides: "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."

of which they agreed to sell, and he agreed to buy, the land in controversy, for the sum of \$3,375. One dollar of the purchase price was paid at the time of the execution of the agreement, and the balance (\$3,374) was to be paid "as soon as said second party shall receive the second payment on a certain contract made between Frank P. Firey, Charles French, and George Rhorer, parties of the first part, and Augustin Bila, party of the second part." On the 26th of May, 1887, the defendant Bila tendered to the plaintiffs the balance of the purchase price, and demanded a deed. Defendants allege in their counter-claim that the plaintiff Firey, at the time of the tender, "in bad faith refused and failed to accept said money, or any part thereof, or to execute or deliver said deed, or any deed of said land, either jointly with said plaintiff George Rhorer, or otherwise, and then and there in bad faith repudiated said contract, and denied that he was obligated in any manner thereby, * * * and that the said George Rhorer, at the time of said tender and demand, failed to execute or deliver said deed, or any deed of said land, to said Bila, either jointly with said Firey or otherwise, and continued so to fail to execute or deliver said deed until the month of June, 1888." This action was commenced September 13, 1888, to compel the defendants to pay plaintiffs the balance of the purchase price, and, in case they fail to do so, for a decree canceling the agreement under which the defendants claim, and awarding the possession of the premises to plaintiffs. It is alleged in the counter-claim of defendants that the defendant Bila took possession of the premises under said contract, and placed valuable and permanent improvements thereon, aggregating in value not less than \$300; that thereafter the defendant Bila entered into a contract with the defendants Mills and Arnold, whereby he agreed to sell all of the land and improvements to them for the sum of \$2,500, a portion of which price was paid; that on the 26th day of May, 1887, the defendants Mills and Arnold duly tendered to the plaintiffs the balance of the purchase money, and demanded that said plaintiffs execute and deliver to them a good and sufficient deed; that the plaintiffs refused in like manner as they had refused to accept the tender made by the defendant Bila; that plaintiffs knew the defendants Mills and Arnold had purchased from Bila, and, Bila being present, consented that plaintiffs might convey to them, (said Mills and Arnold;) that after making said tender, and on the same day, May 26, 1887, Bila conveyed to Mills and Arnold. It was admitted at the trial that the defendants had never paid the balance of the purchase price, or any part thereof; that on the 19th of April, 1888, the plaintiffs tendered to the defendants Mills and Arnold a deed purporting to convey in fee-simple the real estate described in the complaint, and demanded that they pay the balance of the purchase price; that the value of the rents, issues, and profits is equal to the value of the improvements made by the

defendant Bila; that on the 29th day of April, 1886, plaintiff Firey executed and delivered to the Pomona Valley Bank a mortgage upon a tract of land, including the land in controversy, for the sum of \$2,500, payable one year from said date, with interest at the rate of 1 per cent. a month, and that said mortgage was a valid lien upon the premises for the amount of the principal sum from its date until February 8, 1889, when it was released. At the trial the plaintiffs tendered a good and sufficient deed to the defendants, but the defendants refused to accept the same, and refused to pay the balance of the purchase price; giving as a reason that the plaintiffs had damaged them, as set out in their counter-claim. The defendants Mills and Arnold in their counter-claim aver that, by reason of the plaintiffs' failure to convey, they (said defendants) have been damaged in the sum of \$9,126. They allege that at the time of the tender to plaintiffs said real estate was of the value of at least \$12,500, but that on the 1st day of January, 1888, and subsequent thereto, said real estate was not, and is not now, worth more than the sum of \$3,374. They therefore pray for judgment against the plaintiffs for the sum of \$9,126. The plaintiffs have received but \$1 of the purchase price. The defendants not only refuse to pay the balance of the purchase price, but seek to recover from the plaintiffs the title to the land, and also the sum of \$9,126. Plaintiffs had judgment as prayed for.

By the terms of the agreement the balance of the purchase price (\$3,374) was to be paid "as soon as said second party shall receive the second payment on certain contract as made between Frank P. Firey, Chas. French, and George Rohrer, parties of the first part, and Augustin Bila, party of the second part;" and it is admitted that the second payment referred to had not been made at the time defendants tendered to plaintiffs the balance of the purchase price, (\$3,374,) and demanded a deed. Under the strict letter of the contract, therefore, the tender was made too soon to put the respondents in default. Appellants claim, however, that the words "as soon as said second party shall receive the second payment," should be construed to mean, "not later than the time of said second payment," which would authorize the defendants to pay the balance of the purchase price, and demand a deed at any time. But, whether this be true or not, we deem it immaterial for us to determine, in view of the fact that defendants took possession of the land under the contract, and continue to hold the same, and refuse to pay the balance of the purchase price. A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled; but to allow him to hold possession, and at the same time defend against an action for the purchase price, would enable him to hold the land dis-

charged of the obligation under which he acquired it. The rejection of an offer to perform by one party to a contract excuses the other party from performance as a condition precedent. The latter cannot be held to be in default; but such rejection does not release him from his obligation to perform, so long as he insists upon the enforcement of the agreement for his own benefit. He cannot claim under the contract, and at the same time repudiate it. The law requires him to surrender the possession of the property, or prove an eviction therefrom, before permitting the defense of a failure of consideration, or a suit to recover the purchase price or damages. *Cooper v. Pena*, 21 Cal. 412; *Haynes v. White*, 55 Cal. 39; *Whittier v. Stege*, 61 Cal. 241; *Hicks v. Lovell*, 64 Cal. 20; *Gates v. McLean*, 70 Cal. 42, 11 Pac. Rep. 489; *Hannan v. McNickle*, ante, 271, (filed Dec. 19, 1889); *Kirtz v. Peck*, 113 N. Y. 231, 21 N. E. Rep. 130; *Abbott v. Allen*, 2 Johns. Ch. 519; *Wickham v. Evered*, 4 Madd. 53; *Younge v. Duncombe*, *Younge*, 275; *Tindal v. Cobham*, 2 Mylne & K. 385; *Sugd. Vend.* §§ 406, 407. "If a person be let into possession of land under a contract for its purchase, and no steps be taken by either party to enforce the agreement, it will be presumed that each is satisfied, and neither can insist on lapse of time as a bar to a suit for specific performance." *Wat. Spec. Perf.* § 463; *Scarlett v. Hunter*, 3 Jones, Eq. 84. So long as the purchaser retains possession, he waives all previous objections, whether of defect of title or delay in completing it, and is bound to accept title according to the terms of the contract, if offered while he still retains possession. *Thompson v. Dulles*, 5 Rich. Eq. 370. See, also, *Hale v. Wilkinson*, 21 Grat. 75; *Bellamy v. Ragsdale*, 14 B. Mon. 293. The mortgage for the sum of \$2,500 had not been paid off when Rhorer and Firey tendered the deed to the appellants, but the deed was not objected to on that ground, and the mortgage was in fact released before the trial of the action. Furthermore, the amount due on the mortgage being less than the balance of the purchase price, the defendants could have retained a sufficient sum to satisfy the mortgage debt. *Gates v. McLean*, supra. Upon the facts admitted at the trial, we think the court did not err in refusing to allow the evidence offered by defendants. Judgment and order affirmed.

We concur: FOX, J.; WORKS, J.

82 Cal. 427

WHITE v. WHITE. (No. 12,642.)

(Supreme Court of California. Jan. 2, 1890.)

DIVORCE—PROOF OF MARRIAGE—WITNESS—DEPOSITIONS—HARMLESS ERROR.

1. Plaintiff, in an action for divorce on the ground of adultery, went to live with defendant as his housekeeper, and within a week illicit intercourse was commenced between them, children were born to them, and plaintiff testified that, after the birth of the first child, defendant declared that "before God and man she was his wife under the laws of California;" but defendant

denied this. There was no formal marriage, but defendant sometimes called plaintiff his wife, and sometimes "madam," and introduced her in society as his wife. For about five years from the time they first lived together they were not reputed to be husband and wife in the community, but they removed to another community, and afterwards, for 20 years or more, they were uniformly reputed to be husband and wife. They cohabited together, and treated each other as man and wife. Held, that the facts were sufficient to prove a marriage by consent of the parties. *WORKS, J.*, dissenting.

2. Where the only evidence of cruelty pleaded in recrimination was the firing of a pistol by plaintiff behind defendant many years before they quit living together, judgment will not be reversed for want of a finding on that issue.

3. Where the court refuses to allow portions of a deposition of plaintiff, taken before the trial, to be read to plaintiff for the purpose of contradicting her statements on the trial, and afterwards the whole deposition is put in evidence, an objection that defendant was not allowed to contradict plaintiff in such way cannot be sustained, as the contradictory statements were all placed before the court when the deposition was admitted.

4. The allowance of leading questions is no cause for reversal, unless the court manifestly abuses its discretion in allowing them.

5. Where the court tries a case, judgment will not be reversed for the admission of irrelevant evidence, unless it appears that the court relied on it.

In bank. Appeal from superior court, city and county of San Francisco; *M. A. EDMONDS*, Judge.

Jarboe, Harrison & Goodfellow and *George A. Nourse*, for appellant. *T. I. Bergin*, for respondent.

THORNTON, J. This is an action for a divorce *a vinculo* on the ground of adultery, brought by plaintiff, Jane White, against the defendant, Lorenzo E. White. Judgment was recovered by plaintiff. Defendant moved for a new trial. This motion was denied, and defendant brings this appeal from the judgment and order. The defendant denied that he was ever married to the plaintiff. He claims that their relations during the whole period of the cohabitation were those of man and mistress. On this issue the court found against him. The court found the following facts: The plaintiff, Jane White, arrived in this state in the month of May, 1850. She was then a young widow of 20 or 21 years of age, with an infant of tender age. In the month of July, 1850, the defendant, at the city of San Francisco, engaged the plaintiff to act as housekeeper for him on the rancho San Geronimo, situate in the county of Marin, at a compensation of \$100 per month. In pursuance of this engagement, plaintiff went to the place of defendant, the San Geronimo ranch, to act as housekeeper, and did there act as housekeeper for defendant. Shortly after the arrival of plaintiff at the house of defendant on the ranch, defendant had illicit intercourse with plaintiff; and thereafter, in the year 1851, a child was born, the fruit of such intercourse. About the year 1853 another child was born to the parties. Between the birth of the first child and the birth of the second, the plaintiff and defendant mutually agreed to marry, and did marry, each other, and did thereafter live and cohabit together as husband and wife, and continued to do so

from that time continuously up to a short time before this action was begun. The marriage of the parties was not performed by any clergyman or minister of the law, but was assented to and agreed upon and entered into by and between the parties themselves, and from that time to the commencement of this action the parties have ever treated and held each other out to the community, their friends and acquaintances, as husband and wife, and they have always been accepted, received, and treated as such by their friends and acquaintances and the community. Other children than those mentioned were born to the parties. At the time this suit was begun there were two children living, the fruits of the intercourse between the parties. One of these was a daughter, named Nellie, born in March, 1856, and the other a son, named William, born in January, 1859.

In regard to the issue of the marriage, it is clear that there was never any promise to marry made between the parties, either by present words, (*per verba de presenti*), or by words in the future, (*per verba de futuro*.) But it is urged on behalf of plaintiff that the evidence shows cohabitation and repute sufficient to establish a marriage. Such seems to have been the view of the case taken by the court below. That a marriage may be inferred from cohabitation seems to be the settled law of most countries. The law of Scotland is set forth, and the cases on this subject are collected and commented on, by a learned and distinguished writer, Patrick Fraser, LL.D., in his able work on the law of Scotland regarding the relation of husband and wife. See chapter 8 of Fraser's "Husband and Wife" of the work above referred to. The law is thus stated in the initial sentence of the chapter just referred to: "If a man and a woman cohabit together as husband and wife, and are held and reputed by their neighbors and friends as married persons, they are presumed to have entered into marriage." The learned author adds to the above, by way of explanation, that "cohabitation and repute do not make marriage. They are merely items of evidence from which it may be inferred that a marriage had been entered into." The facts in evidence must be such as to justify the inference that matrimonial consent had been interchanged between the parties, for the matrimonial contract is formed by consent, and consent alone. See 1 Fras. *Husb. & Wife*, 399. Lord CRANWORTH, in his judgment in the case of *Campbell v. Campbell*, (a Scotch appeal case,) L. R. 1 H. L. Sc. 200, 201, thus expresses himself on this subject: "Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbors, in other words, *habite et repute*, may afford strong, and in Scotland, attending to the laws of marriage there existing, unanswerable, evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that *habite et repute* in any

case make the marriage; * * * but I prefer to say that *habite et repute* afford, by the law of Scotland, as, indeed, of all countries, evidence of marriage always strong, and in Scotland, unless met by counter-evidence, generally conclusive." Lord WESTBURY observes, in the same case, as follows: "Exception may possibly be taken to some few words occurring in one of the judgments [referring to a judgment in the court below] which represents cohabitation with habit and repute as a mode of contracting marriage. Perhaps it may not be strictly correct to say that it is a mode of contracting marriage. It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged. If I were to express what I collect from the different opinions on the subject, I should rather be inclined to express the rule in the following language: That cohabitation as husband and wife is a manifestation of the parties having consented to contract that relation *inter se*. It is holding forth to the world, by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations, and this continued conduct, then habit and repute arise, and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged. Probably, therefore, in the correct expression of the law, it would be more proper to say that cohabitation, with habit and repute, is a mode of proving the fact of marriage; rather, a mode of contracting marriage." Id. 211. To the same effect is the opinion of Lord MONCREIFF in *Lapsley v. Grierson*, 8 Ct. Sess. Cas. (2d Series,) 61, and in *Lowrie v. Mercer*, 2 Ct. Sess. (2d Series,) 966. The same rule is recognized by the law of England. See *Goodman v. Goodman*, 28 Law J. Ch. 745; *Plunkett v. Sharpe*, 1 Lee, Ecc. 441; *Bond v. Bond*, 2 Lee, Ecc. 45; *Diddear v. Faucit*, 3 Phillim. Ecc. 580; *Hervy v. Hervy*, 2 W. Bl. 877. See *Starkie, Ev.* (4th Ed.) 45, where the doctrine is explained. The observations of *Starkie* are quoted in 1 Fras. *Husb. & Wife*, 397. See, also, remarks of Lord CRANWORTH in L. R. 1 H. L. Sc. 199, 200. Fraser states that the rule is acknowledged to a limited extent in Code Civil of France, in relation to the legitimacy of children. Fras. *Husb. & Wife*, 397, 398.

The proof of marriage by cohabitation and repute has been recognized in many cases in the United States; as in *Fenton v. Reed*, 4 Johns. 52; *Clayton v. Wardell*, 4 N. Y. 230; *Jones v. Hunter*, 2 La. Ann. 254; *Barnum v. Barnum*, 42 Md. 251; *Cargile v. Wood*, 63 Mo. 501; *Foster v. Hawley*, 8 Hun, 68; *Bickings's Appeal*, 2 Brewst. 202; *Purcell v. Pur-*

cell, 4 Hen. & M. 512; Brinkley v. Brinkley, 50 N. Y. 197, 198; Hynes v. McDermott, 10 Daly, 428, 82 N. Y. 46, 91 N. Y. 451; Badger v. Badger, 88 N. Y. 554; Van Tuyl v. Van Tuyl, 57 Barb. 237; Rose v. Clark, 8 Paige, 580-582. That a marriage in this state may be established *per verba in presenti*, or by a contract *per verba de futuro, cum subsequente copula*, was recognized in Estate of McCausland, 52 Cal. 577. The contract characterized as entered into *per verba de futuro* is only evidence of marriage as proving the requisite matrimonial consent. Such consent is essential to every marriage, (1 Fras. Husb. & Wife, 415;) and, prior to the adoption of the Civil Code in this state, consent alone constituted marriage. The law at that time was correctly expressed by the Latin words, "*consensus non concubitus facit nuptias*." As cohabitation and repute are only a mode of proving the required consent, and thus establishing marriage, there is no reason why the rules above stated regarding cohabitation and repute did not obtain in this state during the greater part of the period of the cohabitation of the parties to this action.

The evidence in this case plainly shows, and it is so found, that the intercourse between the parties was in its beginning illicit and meretricious, and it is contended (1) that it is presumed to continue illicit and meretricious until such presumption is overcome by distinct proof of marriage; and (2) that mere continued cohabitation and reputation of marriage create no presumption of a subsequent marriage in such case. With regard to this contention, we think it may be considered as sound and settled law that as regards the cohabitation of a man and woman, not shown to have been in its origin illicit, the presumption is that it is lawful. Per Lord ELDON in *Cunningham v. Cunningham*, 2 Dow, 482; per Lord REDESDALE in same case. The law always presumes, in the absence of proof to the contrary, that the conduct of men is lawful, and in accordance with the rules of morality. *Lapsley v. Grierson*, 1 H. L. Cas. 498. But when the intercourse was illicit from the beginning, in the absence of evidence from which a change to the matrimonial relation may be inferred, it is presumed to continue. The state of illicit intercourse is presumed to continue until the evidence shows that the intercourse of the parties has become matrimonial. The above, we think, is the meaning and extent of the decision in the case of *Cunningham v. Cunningham*, (known as the "Balbougie Case,") above cited. No greater change than that above indicated is required. There are some expressions in opinions in the cases of *Cunningham v. Cunningham* and *Lapsley v. Grierson* which seem to go further. But on a particular examination of the above cases it is manifest that the learned court that decided those cases did not intend to hold that in the case where the intercourse in its inception was illicit, that that circumstance prevented the establishment of the marriage *status* by the subsequent conduct of the par-

ties, showing a general, undivided, and uniform habit and repute that they had interchanged the requisite matrimonial consent. In each of these cases the whole facts as to the lives and conduct of the parties were examined to see if they did not prove a marriage by habit and repute, and it was held insufficient because the repute was not general and uniform, but singular and divided. The opinions in the cases above referred to were examined in *Campbell v. Campbell*, (known as the "Breadalbane Case,") L. R. 1 H. L. Sc. 182, and the language of the opinions in them explained; and the conclusion there reached was that, though the connection was in its beginning illicit, yet the subsequent conduct of the parties might be such as to give satisfactory proof, by habit and repute, that the married *status* had been assumed. Three eminent law lords discussed the question, and reached the conclusion above stated. In the Breadalbane Case the controversy arose as to the legitimacy of a son of James Campbell, who eloped with the wife of one Ludlow in 1780 or 1781. Ludlow died in 1784. Up to that time no marriage could take place. The court held that the evidence proved that after that time, and during the life of James Campbell, the habit and repute was all uniform and undivided, and established a marriage between Campbell and the former wife of Ludlow.

The change must be such as is above pointed out. This must be so when the connection in its origin is illicit, and there is no impediment to the marriage. There was none in this case, nor in the Balbougie Case. In the case before us, as in the Balbougie, there was merely illicit cohabitation. Surely, there must be a change from mere illicit cohabitation, or a marriage cannot be said to be proved, since illicit cohabitation cannot establish a marriage. There must be a change operated by a cohabitation which the law regards as illicit; and such change may be operated by cohabitation and reputation. In the case of *Lapsley v. Grierson*, and in the Breadalbane Case, where the connection began, one of the parties, the woman, had a husband living. In the Breadalbane Case, the marriage was not contended for during the life-time of Ludlow, the husband. He died in 1784, and the parties continued to cohabit from that time until the death of James Campbell, in 1806; and during this period, from the death of Ludlow to the death of Campbell, and undoubtedly from 1793 to 1806, the woman, Eliza Marie Blanchard, was received and treated as his wife by his family and friends and all their acquaintances. There was evidence in the Breadalbane Case tending to show that there had been a formal marriage celebrated in 1781 or 1782, and some evidence that Eliza Marie Blanchard was recognized by Campbell's family as his wife; and it was in regard to this it was argued that there was a change. It was said that Campbell was deceiving his family and friends by passing the woman off as being his wife, and leading his relatives and friends

to believe that she was his wife. It was said that this system of deception continued during the entire period of the cohabitation of Campbell with the woman; and on this it was argued that, as there was no change in this system of deception, there was no evidence which operated a change, and showed cohabitation and repute, and therefore no marriage was proven. It was in thus regarding the case, or in regarding the conduct of the parties as the same, whether before or after the death of Ludlow, that it is stated in the head-note that the court held that the change in the character of the connection from adulterous to matrimonial need not be indicated by any public act, or by any observable change in the outward demonstration. It cannot be seen how such a proposition can be true, unless the public acts and outward demonstrations were the same before as after the removal of the impediment to the marriage by the death of Ludlow. If the conduct of the parties, and their treatment and reception by their friends and relatives, had been such before the death of Ludlow as would, but for Ludlow's being alive, have shown a sufficient habit and repute to evidence marriage, the continuance without change of the same conduct, reception, and treatment after Ludlow had died might also prove a marriage between the parties. In this view, what is stated in the head-note is correct, and only in this view; for, if the conduct and treatment and reception of the parties before the death of Ludlow had not shown cohabitation and repute, then, necessarily, after Ludlow's death, there must have been a change in the conduct, treatment, and reception of the parties to have evidenced a cohabitation and repute which would establish a marriage. We do not think that the court laid down the proposition announced in the head-note above referred to; for the opinions of the judges do show that there were public acts and outward demonstrations of parties from which habit and repute could have been inferred. This is plain from the lord chancellor's opinion; for after saying that, taking the rule to be settled by the case of *Cunningham v. Cunningham* that an illicit connection at the beginning can only be changed in character by some undoubted and open act of the parties, he proceeds to consider whether the circumstances of the case before him were not sufficient to establish a marriage between James Campbell and Eliza Marie Blanchard, and concludes that they did. To the same effect is the argument of the other learned judges, Lords CRANWORTH and WESTBURY. That they do find in the evidence uncontradicted and open acts of the parties which show cohabitation and repute, and a marriage will be plainly seen on a perusal of the discussions of the evidence in the case by the learned law lords. It cannot be perceived how repute can be established in such a case, except by the open, undisguised, and undoubted acts of the parties which are visible to outsiders. As reputation is no more than hearsay derived from those who had means

of knowing the fact, (1 Starkie, Ev. 4th Ed. p. 40,) how can the means of knowledge be derived from anything other than the acts of the parties, and how can anything be known by others from the acts of the parties, unless they are open and visible?

There are many cases in which it is held that, when the connection between the parties is illicit, the presumption will be that the relation continues as it began. *Floyd v. Calvert*, 53 Miss. 40, 46; *Rundle v. Pegram*, 49 Miss. 756; *Badger v. Badger*, 88 N. Y. 546; *Barnum v. Barnum*, 42 Md. 297; *Foster v. Hawley*, 8 Hun, 68; per Lord CAMPBELL in *Queen v. Millis*, 10 Clark & F. 749; *Hunt's Appeal*, 86 Pa. St. 294; *Physick's Estate*, 2 Brewst. 179; *Williams v. Williams*, 46 Wis. 478, 1 N. W. Rep. 98; *Dysart Peerage Case*, L. R. 6 App. Cas. 539, per Lord WATSON. It is a disputed question whether the presumption here referred to is one of law or fact. The decisions leave it in doubt. In *Cargile v. Wood*, 63 Mo. 511-514, an instruction in which it was stated that the presumption was one of law was approved. In *State v. Worthingham*, 23 Minn. 536, it is held not to be a presumption of law, but one of fact. We find but one case (*Cargile v. Wood*, supra) where it is held distinctly a presumption of law. Bishop, in his work on *Marriage and Divorce*, says it is a presumption of fact. See 1 Bish. Mar. & Div. §§ 506, 507a, 509, 513. Certainly a condition of things once existing is presumed to continue. *Eames v. Eames*, 41 N. H. 177. The distinction between a presumption of law and one of fact, or an inference from facts, (Code Civil Proc. § 1958) is sometimes very thin; but, treating the question arising on the testimony here as one of fact, it is both logical and just to hold that a connection, illicit in its origin, will be presumed to continue to be so until some change is established by evidence. Whatever be the character of the presumption, "it cedes to a contrary probation." In fact, it is not necessary to decide here whether the presumption is one of law or of fact, for in either case it is rebuttable. We think it may be safely held that the law will presume intercourse from cohabitation, and, where the illicit cohabitation continues, that the law will presume illicit intercourse. It seems to be well settled that the repute which, with cohabitation, will be proof of marriage must be uniform and general, not divided and singular. *Cunningham v. Cunningham*, 2 Dow, 482; *Jones v. Hunter*, 2 La. Ann. 254; *Hamilton v. Hamilton*, 1 Bell, App. Cas. 736, 9 Clark & F. 327; *Com. v. Stump*, 53 Pa. St. 132; *Barnum v. Barnum*, 42 Md. 297. If repute lacks uniformity and is divided, then such repute cannot prove a marriage. Let us look to the evidence here on this matter of repute. It should be stated here that a change from illicit to licit or matrimonial relations may occur, and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. *Badger v. Badger*, 88 N. Y. 554; *Caujolle v. Ferrie*, 23 N. Y.

90. Such seems to have been the opinion of the judges who decided the Breadalbane Case. We proceed to the consideration of the evidence of this case.

The testimony shows that the connection between the plaintiff and defendant began in 1850. The parties were then living on the San Geronimo ranch, in Marin county. The defendant came from that place to San Francisco in July, 1850, where defendant met plaintiff, and, after an acquaintance of not more than a week, he engaged her to go and live with him on the ranch as housekeeper. She was a young widow, with one child, and had come to San Francisco from Australia. The defendant was about the same age. She went over to the ranch with him in the month mentioned above. The house occupied by the parties there had two rooms, one of which was used as a kitchen. The defendant slept in the kitchen, and the other room was given up to plaintiff. The illicit intercourse commenced within a week after plaintiff reached the ranch, and continued for a period which cannot be definitely designated. In 1882 the defendant quit living with plaintiff. In 1851 a child, the fruit of the intercourse of the parties, was born. Another was born in 1853. A third child was born at Corte Madera, in Marin county, and a fourth at Petaluma in January, 1859. The plaintiff testifies that she was his wife from the beginning; that after the birth of the first child defendant said to her that before God and man she was his wife, under the laws of California. Defendant denies that he ever said so. There was never any formal ceremonial marriage between them. In a deposition, which appears in the record, the following question was put to her by counsel for defendant: "Then, what I understand you to say is that the way that you became his wife was by sleeping with him and being called wife by him in the presence of others?" to which she answered: "Yes, sir." She subsequently added to this: "In society, what little we go, he has always called me his wife." She states that White introduced her to his acquaintances as his wife. Defendant admits that he did at times, after the birth of his daughter Nellie, in 1856, introduce her as his wife. That he did so when he found himself in a position that he had to say something. When she was with him, and he had to say something for the protection of his children, he had introduced her as his wife. That he sought no opportunity to do so, and had not gone into society with her. The plaintiff states that he introduced her to his father and mother as his wife. Defendant testified that he made them acquainted some way,—he could not tell how; that he treated plaintiff well; that they were living together, and he left his parents to infer the relation between them. Mrs. B. F. White, mother of defendant, testified on this point. She and her husband (father of defendant) came to this state from New York at defendant's expense. They lived in defendant's home for some months when he kept an hotel

at Albion, in Mendocino county, arriving there in 1866. A daughter came with them. The mother testifies that the defendant introduced plaintiff as "the madam," and that she supposed that she was his wife, and treated her as his wife. The daughter (defendant's sister) testifies substantially to the same effect. She does not remember who introduced her to the plaintiff, or how she was introduced. She supposed plaintiff was his wife; that they lived together as husband and wife; and she further states that the plaintiff was received and treated by her father and mother and her relatives as the wife of defendant. She further states that she did not remember that she ever heard defendant address plaintiff as his wife. He addressed her as "Jane" or "Madam." This evidence shows that he sometimes called her "wife." On the point whether the parties were reputed to be husband and wife during the period of their connection, the evidence in regard to the period extending from 1850 to 1855 or 1856 shows a divided repute; the evidence that plaintiff was the mistress of defendant, and not his wife, greatly preponderating. This appears from the testimony of Dickenson, Taylor, Curran, Clingan, and Moulthrop. The evidences of the witnesses above mentioned is all one way as to the repute during the period just mentioned. The only contrary evidence, which is of small consequence, comes from the witness Clingan, that the women around Corte Madera called her Mrs. White. There was no other repute than the above during the time they lived in Marin county, from which they removed to Mendocino county in the spring of 1858, at which time they went to Long Ridge, in that county. From this place they removed to Albion, in the same county, in September or October, 1861, where they remained until October, 1868, when, in the month just named, they came to San Francisco, and have resided there together until August, 1882, when the defendant quit living with plaintiff. After the parties removed to Long Ridge, in the spring of 1868, we hear nothing of any reputation that they were living together as man and mistress.

We rarely collate the evidence in regard to its sufficiency to justify the decision, but we propose to do so in this case, by giving the substance of the testimony of each witness bearing on the point. A. W. McPherson knew the parties as Mr. and Mrs. White from 1861. They addressed each other as Mr. and Mrs. White. They were introduced to him as Mr. and Mrs. White. H. H. Hundley has known the parties since 1866. They were commonly known as Mr. and Mrs. White. Has known the children during the same period by the names William White and Nellie White. Patrick Cleary has known the parties since 1862. Recollects one time they visited his family. May have visited his family other times. When they made this visit he lived in the city, and they lived at Albion. He visited them as Mr. and Mrs. White. They behaved towards each other as

any other man and wife behaved. Never heard anything to the contrary, except a rumor about two years ago. (This would be about the time of the separation of the parties, which was in August, 1882. The witness gave his evidence at the trial, which took place in December, 1884.) Thomas Pollard has known defendant about 20 years, and plaintiff 14 or 15 years. They are known as Mr. and Mrs. White. Have known the children about 14 years. They go by the name of White. He was asked to state to the court how the plaintiff and defendant have been commonly reputed,—as husband and wife, or otherwise; to which his reply was: "I never knew anything to the contrary till recently." This witness stated that he lived with his family in this city, right across from White; that White never took plaintiff to visit his (witness') family at his house; that he has "no direct knowledge of White's ever taking her into any company to visit the neighbors, or anything of the sort." George M. Smith stated that he had known White since 1861. Had known the plaintiff since 1862 or 1863. Knew them as Mr. and Mrs. White. They had two children. He knew them by the names Nellie and Willie White. Has heard defendant address plaintiff as "Madam." Could not swear that he had heard White call her "wife" or "Mrs. White" in speaking to or of her. The next witness was Mrs. Smith, the wife of the former witness. She met the plaintiff about 20 years ago (this testimony was given on the trial, in December, 1884,) and Mr. White about 22 or 23 years ago. She met them at Albion, in Mendocino county. She lived near them. Knew the children Nellie and Willie. Sometimes she had seen plaintiff and defendant half a dozen times a day,—sometimes more; sometimes less. So far as she knew, they were known at Albion as Mr. and Mrs. White. She had heard the defendant call the plaintiff "the madam," "my wife," and "Jane." She was not very sure of any particular instance when she heard defendant call plaintiff his wife. She was very positive she had heard White call plaintiff his wife, and more than once, and this in addressing her. The next witness is Mrs. Helen M. Kimball, who was the sister of defendant. Has known the plaintiff since 1866. Became acquainted with her at her brother's (White's) house, in Albion, when he was keeping the hotel there. She was introduced to her. Cannot tell how she was introduced to her. Was introduced by her brother. He usually addressed her as "Jane," and in speaking of her he called her "Madam;" and, in speaking to the children, "your mother." She does not remember that her brother introduced plaintiff to her as his wife. Does not remember that he told her she was his wife. Her understanding was that she supposed she (plaintiff) was his wife. They lived as husband and wife. She and her father and mother lived in the house with them 8 months. She testifies further that plaintiff was received and treated by her father and mother (father and mother of de-

fendant also) and their relatives as the wife of defendant. She does not remember hearing her brother speak of plaintiff as Mrs. White. She thought it a little peculiar that he addressed her as "Jane" or "Madam." She does not know that she spoke of it while living at the hotel. While they lived there they regarded her as White's wife. Mrs. W. L. Jenny testified that she had known the parties 19 or 20 years. She was introduced to plaintiff by a lady named Cunningham. Mr. White was not present. White never introduced plaintiff to her. He always called her "the madam." Knew the children. They went by the names of Nellie White and Willie White. She had not been to their house for 20 years. Before that, used to call there once in a while. Have taken dinner there a good many times. Mr. White was present. The witness was a married woman. She always thought the parties acted towards each other as husband and wife. She never heard him call her "wife." The children addressed Mr. White and the plaintiff as their father and mother. George W. Le Mont had known the parties some 10 or 12 or 14 years. Had frequently taken lunch at White's house. He always judged from their conversation that they were man and wife. He and his wife had visited their house together. They always appeared like a family living in harmony. Miss Annie Manning had known the parties about 4 years. She thinks they acted towards each other as husband and wife. They acted towards their children as a father and mother should. Jerome B. Ford became acquainted with defendant at Albion some time between 1855 and 1865. Was at the hotel in Albion frequently. Had never been introduced to Mrs. White, and never spoke to her. They were said to be then Mr. and Mrs. White,—L. E. White and wife. Had known the parties 4 years next March. Mr. White used to speak to plaintiff as any man would to his wife. Could not say what name he called her. B. H. Madison testified that he had known Mr. White 10 or 12 years. Had visited the house several times on business, and thinks he once made a social call with his wife and eldest daughter. Both White and plaintiff were present. He called her Mrs. White in the presence of defendant, and of his wife and family. James Brett had heard defendant speak of plaintiff as his wife. His (witness') wife addressed plaintiff in presence of defendant as his wife. James Kenny had known the parties for 25 or 26 years. Had known them at Cuffey's Cove. He believed they had lived on a ranch there for 5 or 6 years as Mr. and Mrs. White. He was on friendly and social terms with them during their residence at Cuffey's Cove. The reputation of their relation while they resided there was that of man and wife, so far as he ever heard. He first called at defendant's house. Then Mr. White introduced her; "but not sure defendant was accustomed to speak to me and to others in my presence of plaintiff as Mrs. White. If I remember right, defendant introduced me to plaintiff

as his wife;" but he has no distinct recollection of the introducing. While the parties lived at Cuffey's Cove, heard a rumor that they were not married. Eugene Brown had known defendant a little over 20 years, the plaintiff a little less, while they resided in Mendocino county. He knew the reputation in the community in which the parties lived of the relation they bore to each other since he first knew them, and up to the time he gave his testimony. The reputation was that they lived together as married people in Mendocino county, and had never heard anything to the contrary until this divorce case came up. He did not think he had confounded his impression of the facts with public reputation thereof. Heard her called his wife once or twice in Mendocino county. Had heard her called Mrs. White frequently, but does not distinctly remember of hearing her called Mrs. White at the Albion. He could not remember who of the people at the Albion he had heard say that plaintiff and defendant were husband and wife. Mark D. Gray testified that he saw plaintiff at the Albion once in 1877. Defendant introduced plaintiff as "the madam."

There is evidence here, at least since 1861, of cohabitation and repute which tends to show a marriage between the parties. Such cohabitation and repute "is a mode," as said by Lord WESTBURY in *Campbell v. Campbell*, supra, "of making manifest to the world that tacit consent which the law will infer to have been already interchanged." L. R. 1 H. L. Sc. 211. The repute, which was nearly all one way prior to 1858, afterwards underwent a change. We think the evidence tends to show that the parties had agreed to stand in the relation of husband and wife. The defendant treated the plaintiff as his wife. If he did not in so many words formally introduce the plaintiff to his father and mother and sister as his wife, his conduct convinced them that she was his wife; and, according to the testimony of the sister, (Mrs. Kimball,) she and the father and mother of defendant received plaintiff and treated her as defendant's wife. They did not go much into society, but in the contracted circle into which they went they were regarded and treated as husband and wife. This treatment was induced by the conduct of defendant and plaintiff. We do not think that the law requires the formal introduction by the husband of the woman as his wife to each member of the social circle into which they go, but that his conduct should justify her reception in such circle as his wife. The defendant's styling the plaintiff "the madam," might well induce persons to whom he so introduced her, or to whom he thus spoke of her, to believe that she was his wife. He admits that he did introduce her as his wife, and this is evidence that he sometimes spoke of her as his wife. He explains the introduction of her as his wife as a mode of shielding his children, but such mental reservation cannot be considered of much weight. The credit to be given to such reservation, and the weight

and value of the testimony, are matters for the consideration and determination of the court below. That tribunal weighed the testimony, and found a marriage; and there is not such a lack of testimony here as will authorize this court to say that the evidence was insufficient to justify the conclusion of the trial court.

But it is urged that, inasmuch as the divorce is sought here on the ground of adultery, that a marriage cannot be proved by cohabitation and repute; and, to sustain this, two cases are referred to, decided in this court: *Case v. Case*, 17 Cal. 600, and *People v. Anderson*, 26 Cal. 133. In the latter case, which was an indictment for murder, a witness was called for the people, whose competency was challenged by the defendant on the ground that she was his wife, and an attempt was made to show that such was the relation of the witness to the defendant by cohabitation and repute. The court, per SANDERSON, C. J., said that the general rule is that such evidence was admissible, (citing several authorities to sustain this proposition,) and then adds: "Actions of crim. con., divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced, or the crime to be punished, are exceptions to this rule." 26 Cal. 134. *Case v. Case* was an action for divorce on the ground of adultery. The only evidence of marriage between the parties to the action was that of cohabitation and reputation. It appeared that defendant had, after this cohabitation, married another person. The evidence of cohabitation and reputation was objected to, and this court held it inadmissible. The court, per COPE, J., said: "We think that, under the circumstances, an actual marriage should have been proved. The general rule that in actions of this nature the marriage may be inferred from the cohabitation of the parties, we do not understand to be applicable. We cannot indulge this inference without presuming that the defendant has been guilty of the crime of bigamy; and the fact that it involves such a presumption is sufficient to repel it. In the absence of criminative proof, it is never to be supposed, as a matter of legal presumption, that a person has violated the criminal law; and the presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes collaterally in question." The learned justice then proceeds to quote two extracts from Bishop on Marriage and Divorce, and refers to *Rex v. Twynning*, 2 Barn. & Ald. 386, and *Clayton v. Wardell*, 4 N. Y. 230. The cases cited sustain the decision of the court in *Case v. Case*. But it will be observed that in both cases there had been an actual marriage, by which, if there was a prior actual marriage, the party would have been guilty of a violation of the criminal law from having committed the offense of bigamy. *Case v. Case* and the two cases go no further than what is just above point-

ed out, and they proceed on the ground that where a presumption of marriage is met by the presumption of innocence, which the defendant, on his trial for bigamy, has a right to make, the weaker presumption gives way to the stronger, which is the presumption of innocence. This question is considered and passed on in a criminal action in *People v. Feilen*, 58 Cal. 218, and is thoroughly discussed in *Jones v. Jones*, 45 Md. 157, 158, 48 Md. 397, 398, et seq. In every case above referred to, the strife was between two marriages; the antecedent marriage being one attempted to be made out by the presumption or inference from cohabitation and repute, and the other an actual marriage. See *Taylor v. Taylor*, 1 Lee, Ecc. 571, 5 Eng. Ecc. R. 454; *King v. Inhabitants of Twyning*, 2 Barn. & Ald. 386; *Poultney v. Fairhaven*, Brayt. 185; *Senser v. Bower*, 1 Pen. & W. 450; *Myatt v. Myatt*, 44 Ill. 473; *State v. Hodgskins*, 19 Me. 158, 159, etc.

The presumption of innocence will only arise when there is evidence brought to show that a party has been guilty of a penal offense; and this, we think, is the meaning of the portions of the text of *Best on Presumptive Evidence*, (page 64,) and *Bishop on Marriage and Divorce*, (sections 324, 325,) referred to in *Case v. Case*. The language in the work on *Presumptive Evidence* denotes that a violation of the criminal law is referred to. The author says that the presumption of innocence is not confined to proceedings for punishing the supposed offense, but holds in all civil suits where it comes collaterally in question. What can it refer to but to the offense which is punishable? It is evident that *Bishop*, in the extract made in the opinion, (17 Cal. pp. 600, 601,) refers to adultery as an offense against the public law. He speaks of the benign influence of the presumption of innocence, "in order to prevent the suspicion that an offense has been committed." We cannot find this section (325) in the last edition of *Bishop on Marriage and Divorce*. In section 442 (volume 1) *Bishop* states the rule thus: "The marriage has been required to be proved by evidence other than of cohabitation and repute in actions for criminal conversation, and in indictments for polygamy, for adultery, for incest, and for loose and lascivious cohabitation," citing cases which sustain this as to adultery. It will be remarked that he confined this rule to indictments for adultery. This could only be so where adultery was an indictable offense. Now, we have no statute, and never have had one, in this state, making mere adultery a penal offense. It was not a penal offense at common law. 4 Bl. Comm. 65. The statute in this state makes the living in open and notorious cohabitation and adultery an offense. See *St. 1871-72*, p. 380; *People v. Gates*, 46 Cal. 52. Section 123 of the act concerning crimes and punishments only refers to adultery between persons living within the degrees of consanguinity within which marriages are declared by law to be incestuous and void.

We think that the weight of authority shows the rule to be that evidence of cohabitation and repute is admissible to show a marriage in all cases where there is no question of a public offense involved. The statement of the rule in *People v. Anderson*, supra, as regards actions for divorce, is a mere *dictum*, outside of the case, and is not sustained by the decided cases or by the law. There are cases which tend to show that such evidence is admissible in a civil action, when it proves the commission of a public offense. *Archer v. Haithcock*, 6 Jones, (N. C.) 421, 422, 423; *Sneed v. Ewing*, 5 J. J. Marsh. 464, 491. In *Jewell v. Jewell*, 1 How. 224, the evidence seems to have been admitted by the lower court without objection, and the point was not distinctly made in the supreme court. In the North Carolina case it is said that the only exceptions to the rule are an indictment for bigamy and an action for criminal conversation. The court expressed the opinion that what is competent evidence in one case ought to be so in another. In this case the evidence was admitted in an action of ejectment to defeat rights under a second marriage, though the second marriage was formally solemnized and proved by direct evidence. *GARDINER, J.*, in a dissenting opinion in *Clayton v. Wardell*, supra, expressed the opinion that such evidence should be held admissible in all cases. He said the distinction between civil actions and criminal or *quasi* criminal proceedings was established by Lord MANSFIELD, and has been adopted without question or investigation, apparently. We think such evidence was admissible here, and that nothing in *Case v. Case* is adverse to it. The point was not decided in *People v. Anderson*. It was not involved in the case, and we are convinced that the *dictum* there pronounced is not sustained by authority or law.

It appears that a deposition of the plaintiff had been taken herein previous to the trial and returned to the court below. During the cross-examination of the plaintiff, defendant's counsel, with a view of showing contradictory statements made by her, read to her from this deposition several questions and answers, and inquired of the witness "if that was correct;" "Is that what you said then?" "Is that true?" An objection was made to this mode of cross-examination. The court sustained the objection, and the defendant excepted. The court, no doubt, would have allowed the defendant to put in such portions of the deposition as he might have selected to discredit the witness. The defendant certainly has a right to show the contradictory statements. To do this, as the witness was a party to the action, it was not necessary to call her attention to the statements formerly made, inconsistent with her statements made on her then examination. Her statements appearing in the deposition were admissions, and might have been offered as such. The mode of cross-examination was objectionable. It consumed time in doing what was utterly useless in asking

the questions as above stated. The court has the power, and should have it, to control the mode of examination of a witness, provided it does not trench on the rights of a party. The defendant might have put in portions of the deposition to show the contradictory statements, and the court would have allowed the contradictory statements, and the court would have allowed the plaintiff to put in the remaining portions. The deposition was subsequently offered and admitted. The statements which the defendant desired to get before the court did thus get before it. In this state of the case, conceding that the court erred in its ruling, putting a stop to defendant's mode of cross-examination, the error was rendered harmless to the defendant by placing the deposition before the court as evidence; and, as no injury was done by defendant, there can be no reversal for such ruling.

It is objected that the plaintiff's counsel was permitted to ask of the plaintiff, on her re-examination, a question admitted by the court to be leading. The allowance of leading questions, it is a well-settled rule in this state, is in the discretion of the trial court, and there should be no reversal for such allowances, unless there is a manifest abuse of this discretion. As we find no such abuse here, there is no error.

The admission of the mortgage of plaintiff and defendant to W. B. Spears, over the objection of defendant that it was irrelevant, is not error. When the court tries the case, this court never reverses for the admission of irrelevant evidence, unless it appears that the court, in making its decision, relied on the irrelevant evidence. It does not appear herein that the court relied on such evidence. Conceding that the admission of the acknowledgment of the mortgage was erroneous, the court is of the opinion that the evidence is of so trifling a character that it could not have prejudiced plaintiff, and it declines to reverse for such ruling.

It is contended that there is no finding on the issue of extreme cruelty, which was pleaded by defendant in recrimination. The court is of opinion that the evidence on this issue was insufficient to have sustained or justified a finding by the court below of extreme cruelty by plaintiff to defendant. The only evidence worthy of consideration is that regarding the firing of a pistol behind defendant by plaintiff many years before the former quit living with the latter. From this circumstance, it is evident that defendant did not regard himself in peril or danger of any kind from plaintiff. If he had regarded himself in danger, he would not have continued to live with her for five or six years after the firing of the pistol occurred. As the evidence would not have justified a finding of extreme cruelty on the part of plaintiff, and as this court would have reversed for such a finding, as not justified by the evidence, if it had been made, it will not reverse for want of such finding, and send the cause back for a

finding on that issue. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

FOX, J. I concur in the judgment. I think that the first part of the second finding negatives every allegation of extreme cruelty made by the defendant, and that a separate finding upon that subject was unnecessary. The other errors of law, if they were errors, are of so insignificant a nature as that they could not possibly have changed the result. It is true that consent lies at the foundation of every marriage, and without consent there can be no marriage; but as was said in *Campbell v. Campbell*, cited by Mr. Justice THORNTON, there are cases in which a tacit consent will be inferred. Even under our Code it will be presumed "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civil Proc. § 1963, subd. 30. And after a quarter of a century of that kind of deportment towards each other, and towards the world, the parties ought to be estopped to deny such presumption. Then the conclusive presumption arising under subdivision 3, § 1962, Id., ought to prevail: "Whenever a party has by his own declaration or act * * * intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration or act * * * be permitted to falsify it."

WORKS, J. I dissent. To my mind the evidence shows conclusively that these parties were never married. Cohabitation and repute may be sufficient to raise a presumption of marriage, and, if undisputed, authorize a judgment to that effect; but here the testimony of both of the parties shows beyond any question, not only that the intercourse of these parties was illicit in the beginning, but that it continued to be so up to the time of their separation. The positive and direct evidence of both of the parties is that there never was any promise or agreement to marry, or to live together as husband and wife. Therefore the evidence of cohabitation and repute, which in this case is extremely weak and unsatisfactory, cannot and should not prevail. A mere presumption of a marriage, arising from cohabitation, cannot stand as against positive evidence to the contrary by both of the parties interested.

Rehearing denied.

(83 Cal. 136)

SWASEY v. ADAIR. (No. 13,178.)

(*Supreme Court of California*. Feb. 10, 1900.)

APPEAL—DISMISSAL—RECORD.

1. An appellant who has neglected to file a proper certificate under Code Civil Proc. Cal. § 953, which expressly requires, on appeal, that the clerk or attorneys must certify that an undertaking in due form has been properly filed, will be al-

lowed to amend the certificate pursuant to rule of court 13, which provides that, where appellant has been given five days' notice of any technical exception to the record in a civil cause, he may present and file at the hearing of the cause such additional record or other matter as will remove or answer the exception.

2. Where but one judgment has been rendered in the case, an appeal will not be dismissed because the notice of appeal contains a mistake of two days in the date of entry of judgment.

3. Neither will the appeal be dismissed because of a mistake in the undertaking, both as to the year and day of the entry of judgment, where the judgment is otherwise correctly described, so that the sureties are bound thereby.

4. The failure of the sureties on an undertaking on appeal to justify after exception has been taken to their sufficiency is not a ground for dismissing the appeal, but only affects the stay of execution of the judgment appealed from.

5. An objection that an appeal is without merit will not be considered on motion to dismiss.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by G. A. Swasey against O. Adair. Judgment for plaintiff, and defendant appeals. Rule 13 of the rules of the supreme court provides that "any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing at least five days before the hearing, or they will not be regarded; and, when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificates, or other matter, if such there be, to remove or answer the objection or exception so taken."

B. F. Thomas, for appellant. E. B. Hall, J. W. Taggart, and R. B. Canfield, for respondent.

BEATTY, C. J. The respondent in this case moves on several grounds to dismiss the appeal.

1. The transcript contains a copy of an undertaking on appeal with its indorsements, certified by the county clerk to be correct, from which it appears that an undertaking on appeal in due form was properly filed; but this court has held that such evidence of compliance with the statutory provisions as to taking and perfecting appeals (Code Civil Proc. § 940 et seq.) does not satisfy the express requirement of section 953 that the clerk or attorneys must certify that an undertaking in due form has been properly filed, (*Railroad Co. v. Anderson*, 77 Cal. 299, 19 Pac. Rep. 517.) In this case, however, the appellant has offered to do what in that case it refused or neglected to do, *i. e.*, to file an amended certificate pursuant to our rule No. 13. I think he should be allowed to file his amended certificate, and that such amended certificate should be held to cure the defect in the original.

2. The notice of appeal, properly entitled in the action, and dated and served on February 6, 1889, refers to the judgment as entered

October 24, 1888, and to the order denying a new trial, as entered January 25, 1889. The date of the order is correctly given; but the judgment was rendered on the 23d, and entered on the 26th of October. There was, however, but one judgment in the case, and it cannot be held that the slight mistake in the date of its entry had the effect of invalidating the notice of appeal.

3. The undertaking on appeal was dated and filed February 6, 1889, and was properly entitled in the action. It recites a judgment entered October 24, 1889, and an order denying a new trial, dated January 25, 1889. Here the year as well as the date of the judgment is incorrectly stated; but the mistake in the year is an obvious slip of the pen, and corrects itself, and the mistake as to the day is immaterial. Besides, the judgment is otherwise correctly described, so that the sureties on the undertaking would be bound by it, and therefore it is sufficient.

4. The sufficiency of the sureties was excepted to, and they failed to justify. This is no ground for dismissing the appeal. It only affects the stay of execution. *Wittram v. Crommelin*, 72 Cal. 89, 13 Pac. Rep. 160, and cases cited.

5. The printed record is badly disfigured by interlineations, but it is not worse than others that have been tolerated here. It is not so bad as to call for a dismissal of the appeal, or a reprint of the record.

6. It is claimed that the appeal is without merit. We cannot consider that question on a motion to dismiss. The appellant may file an amended certificate, and the motion to dismiss is overruled.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

83 Cal. 147

EMERSON v. WHITAKER *et al.* (No. 13,380.)
(*Supreme Court of California*. Feb. 12, 1890.)

CLAIM AND DELIVERY.

Claim and delivery will not lie for grain raised by defendants while in the actual possession of land to which they claimed title under an invalid conveyance from plaintiff. *Martin v. Thompson*, 62 Cal. 618, followed.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

S. C. Denson and C. H. Oatman, for appellants. J. C. Campbell and Louttit, Woods & Levinsky, (P. W. Bennett, of counsel,) for respondents.

SHARPSTEIN, J. This is an action of claim and delivery brought by the plaintiff, as the administratrix of the estate of H. G. Emerson, deceased, against the defendants, partners doing business under the firm name of Whitaker & Ray, for the recovery of the possession of 945 sacks of wheat. The court finds, among other things, that on the 27th day of December, 1886, the plaintiff, as such administratrix as aforesaid, executed and delivered to the defendants a deed purporting to convey to said

defendants the premises upon which the said wheat was grown, and that "shortly after obtaining such deed the said Whitaker & Ray, believing that such purchase was valid, and that they had thereby become the owners of said land, and with the full knowledge and consent of said administratrix, went into possession of said land, and, at their own expense, plowed, sowed, and planted the same in wheat, and harvested and sacked said wheat. The said crop amounted to 945 sacks of good grain, which are of the value of \$1,701.83, and ——— sacks of screenings, which were sold by them for \$17.10, which was the reasonable value thereof." The court further finds that on the 15th day of October, 1887, the said sale and conveyance of plaintiff to defendants was by the court, which made the orders for such sale, and the confirmation thereof, set aside, and declared null and void. The case is simply this: The defendants raised, harvested, threshed, and removed the wheat in controversy from the land in which they were in the actual possession, claiming title thereto under an invalid conveyance from the plaintiff, *i. e.*, under color of title. In *Martin v. Thompson*, 62 Cal. 618, this court said: "The action is brought to recover the possession (or the value thereof) of certain grain sown and harvested by the defendant upon lands to which he claimed title, and of which he had the actual, adverse, and exclusive possession. The action cannot be maintained." That we understand to have been the well-established doctrine before that case arose. Under that doctrine the defendants are entitled to a judgment in their favor upon the findings. Judgment reversed and cause remanded, with direction to the court below to enter judgment for the defendants upon the findings.

We concur: THORNTON, J.; MCFARLAND, J.

83 Cal. 135

EATON v. RICHERI. (No. 13,067.)

(Supreme Court of California. Feb. 22, 1890.)

ADMISSIONS IN PLEADINGS—PAYMENT—CONTRACT.

1. Where there is a discrepancy between the admissions of the pleadings and the findings, the former will govern.

2. Plaintiff served defendant under an agreement that payment should be made in provisions and supplies, "and for any balance that might be due plaintiff, plaintiff was to wait until the mining property aforesaid was sold, or until a sum sufficient to pay plaintiff said balance was realized from said mine." When plaintiff's services ceased, a balance was due him. Thereafter a contract of sale of the mine to a third person was made, the contract being signed by defendant, and a sum greater than the balance due plaintiff was paid on the contract. *Held*, that plaintiff was then entitled to sue for the balance due him.

3. It is immaterial whether defendant was the owner of the mine or not, as, if the contract is to be construed as meaning that he was the owner, he is estopped from denying his ownership, and, if it is to be construed that he was not the owner, the contract calls for the payment when the owner, whoever he was, sold the mine, etc.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. W. Street, for appellant. *F. D. & G. W. Nicol* and *F. P. Otis*, for respondent.

HAYNE, C. This was an action to recover for services rendered. The trial court gave judgment for the plaintiff, and the defendant appeals. It is admitted by the pleadings that the defendant agreed to pay plaintiff at the rate of three dollars a day, such payment to be made in provisions and supplies; "and, for any balance that might be due plaintiff, plaintiff was to wait until the mining property aforesaid was sold, or until a sum sufficient to pay plaintiff said balance was realized from said mine." If the contract stated in the findings is any different from the foregoing, it is to be disregarded, and the one admitted by the pleadings is to govern.

The plaintiff rendered services during a long period, and only a portion of the price was paid; leaving a balance of \$1,490.05. After the services had ceased, a contract of sale was made of the mine for \$15,000, which contract was signed by the defendant, and the sum of \$5,000 was paid on account. We think that the time of payment specified in the contract had arrived when the action was brought. The word "sold" does not necessarily, and in all connections, mean that a conveyance must be made, or that the title must pass. See, generally, *Blackwood v. Packing Co.*, 76 Cal. 218, 18 Pac. Rep. 248. And we think that it does not have such meaning in the contract above stated. In our opinion, the time of payment arrived when the contract to sell was made, and the \$5,000 paid on account of the purchase money.

It is argued, however, that the defendant was not the owner of the mine, and did not receive any of the purchase money paid. But there is no merit in this contention. If defendant's contract is to be construed as meaning that he was the owner, he will not be allowed to contradict such statement for the purpose of evading payment. If, however, the contract is not to be construed as meaning that he was the owner, then the fact that he was not the owner is immaterial. Parties may adopt any event as fixing the time for their obligations to mature, just as they may fix a date therefor. In this view, the contract simply means that the money was to be paid when the owner, whoever he was, sold the mine, etc. No other point is made. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

83 Cal. 173

GRAHAM v. LARIMER. (No. 13,100.)

(Supreme Court of California. Feb. 22, 1890.)

NEGOTIABLE INSTRUMENTS—ACTIONS—WITNESS.

1. In an action on a negotiable note which defendant alleged was given on the payee's promise

not to prosecute her brother for a crime, and to keep the crime secret, where counsel on both sides treat the court's findings that neither plaintiff nor his indorser had any notice of the "want of consideration" or "invalidity" of the note as equivalent to a finding that the consideration was illegal, a new trial will not be granted for the failure of the trial judge to find specially as to the consideration.

2. Where the court has found that plaintiff's indorser took the note without notice of the illegal consideration, to which finding defendant has not excepted, a finding that plaintiff himself had no knowledge of the illegal consideration becomes immaterial, and is not a ground for a new trial, though without evidence to support it, and properly excepted to.

3. Though Civil Code Cal. § 1615, provides that "the burden of showing want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it," yet, when the maker of a note has shown that the consideration therefor is illegal, a *prima facie* case of notice to the indorsee is made out, who must then prove that he took the note for value, and without notice of the illegality of the consideration.

4. Where plaintiff's indorser has testified that he took the note in good faith, and for value, it is error to refuse permission to cross-examine him as to whether he knew that the consideration for the note was illegal at the time he bought it, and whether at that time he did not know that the maker had warned all persons, in a newspaper notice, from purchasing it, on account of its illegality.

5. The fact that defendant has not objected to the examination in chief of one of plaintiff's witnesses out of the proper order does not deprive defendant of the right to cross-examine the witness.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

A. Burrows, for appellant. Caldwell & Little, for respondent.

VANCLIEF, C. Suit on a promissory note, dated June 2, 1888, made by defendant, payable on demand to James Ward or order. The note was twice assigned before June 4, 1888,—first by Ward to George Lord, and second by Lord to plaintiff, who demanded payment on June 4, 1888. Among other defenses, the defendant pleaded "that said promissory note was signed on a void, illegal, and invalid consideration, in support of which she shows that on June 2, 1888, said James Ward was about to prosecute one Robert Larimer, brother of defendant, on a charge of felony; that said Ward then and there promised and agreed with defendant that if she would sign said note he would refrain from such prosecution, and keep silent as to the alleged crime; that in consideration of his so doing, at his request, the said defendant signed the said promissory note." The answer further alleges that each of the assignees of the note had notice of the character and illegality of the consideration at the time of the assignment of the note to him. Judgment was rendered for the plaintiff for the full amount of principal and interest of the note, and for costs, from which, and from an order denying her motion for a new trial, the defendant appeals.

The third finding of the court is that at the time of the assignment to him "Lord had no notice or knowledge of any want of consideration for, or invalidity in or to, the inception or making of said note." The fourth

finding is "that said plaintiff had no notice or knowledge of any fact or facts or acts of any person tending to impeach, or in any way affect, the validity of said note at the date of his said purchase." But there is no finding of what was the consideration for the note, nor of whether or not the consideration was such as it was alleged to be in the answer of the defendant, although there was evidence bearing directly upon this issue. On her own behalf, the defendant testified "that she gave the note to Ward for the sole consideration of his promising to keep quiet about a burglary that Ward claimed had been committed in his cabin by a brother of the defendant. Ward had agreed that, if such note was given to him, that he would keep silent about the crime." P. H. Paynter, on behalf of defendant, testified "that he drew the note for Ward, and that at the time Ward told him it was to be given to prevent the prosecution of defendant's brother for burglary." The only evidence against this is the testimony of Ward, who said "that he took the note in payment and for the money her brother took from him, and never agreed not to prosecute her brother."

1. The appellant contends that the judgment should be reversed for want of a finding as to what was the consideration, and whether or not it was as was alleged in the answer. On the other hand, counsel for respondent contends that the third and fourth findings, as to want of notice to the assignees of the note, Lord and plaintiff, supersede the necessity of any finding as to what the consideration was; that is, as I understand counsel, that, admitting that the only consideration for the note was the promise of Ward not to prosecute defendant's brother for burglary, and to keep secret the fact of the crime, yet, if the assignees of the note took it for value, and without notice of what was the original consideration, the plaintiff was entitled to recover, and that the defendant is not injured by the want of a finding which would have been no defense to the action. Admitting that the court found that Lord and plaintiff paid value for the note, and had no notice that the consideration was the promise of Ward not to prosecute defendant's brother for burglary, or to keep the crime secret, I think the position of respondent's counsel would be correct, under sections 3122 and 3123 of the Civil Code; but it seems extremely doubtful, to say the least, whether or not the third and fourth findings mean that Lord or plaintiff had no notice of the facts that the consideration was a promise of Ward not to prosecute, etc., or a promise to keep the crime secret. The finding that Lord had no notice "of any want of consideration," or "invalidity" of the note, and the finding that plaintiff had no notice of "any fact tending to impeach or affect the validity of the note," if not pure conclusions of law, are not necessarily equivalent to findings that the consideration of the note was a promise of Ward not to prosecute defendant's brother for the

crime of burglary, and to keep the crime secret, since a "want of consideration," and "invalidity" of the note, may be inferences properly or improperly drawn from other and different facts; and the finding that plaintiff had no notice of any fact "tending to impeach or affect the validity of the note" may have proceeded from a mistaken view of the law as to what facts would or would not tend to impeach or affect the validity of the note. Again, the third and fourth findings expressly refer and apply only to "want of consideration" and "invalidity" of the note, although the material issue is taken upon allegations of fact constituting an illegal consideration; and the distinction between mere "want of consideration" and an illegal consideration is obvious, and, as will hereafter appear, becomes important in this case. But, as counsel on both sides tacitly assume that the third and fourth findings are equivalent to findings that plaintiff and Lord had no notice that the consideration consisted of a promise not to prosecute defendant's brother for the crime of burglary, and to keep the crime secret, the point under consideration may be disposed of on that assumption, from which it follows that a finding on the issue as to the illegality of the consideration becomes immaterial, and therefore that the defendant was not injured by the failure of the court to find upon that issue. But then the effect of this assumption, viz., that a finding as to the illegality of the note is immaterial, and therefore that its illegality may be conceded, must be allowed, for all purposes of this appeal, since it would be illogical, as well as unjust, after conceding the illegality of the note for the purpose of excusing the want of a finding as to its illegality, to deny the illegality for the purpose of exempting plaintiff and his assignor from the burden of proof which would be cast upon them by the concession of illegality for the former purpose. This will be exemplified under the next point.

2. The next point made by appellant is that the evidence does not justify the finding that plaintiff had no notice of the nature or illegality of the consideration. The only evidence applicable to this issue was that on the part of defendant, tending to prove the illegality of the consideration, as to which there was no finding, but, for the purpose of dispensing with the necessity of a finding as to the nature of the consideration, it has been necessarily conceded that the consideration was, or may have been, illegal; and, as above shown, that concession must be held good for all purposes of this appeal, and therefore must not be denied for the purpose of sustaining the finding under consideration. Section 1615 of the Civil Code provides that "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Conceding that this section applies to cases of illegal consideration, which is not quite clear, since the same Code distinguishes between a mere want of consideration and an illegal con-

sideration (sections 1607, 1608, and 1667,) yet, when the defendant has proved, or the plaintiff has conceded, that the consideration for a promissory note, upon which the former is sued by an indorsee thereof, is illegal, a *prima facie* case of notice to the indorsee of the illegality of the consideration is thereby made, which discharges the burden of proof on the part of the defendant, and casts it upon the plaintiff to prove that he took the note for value, and without notice of the illegality of the consideration. Story, Prom. Notes, § 196; 1 Pars. Notes & B. 188, 189; Fuller v. Hutchings, 10 Cal. 526; Sperry v. Spaulding, 45 Cal. 548. Mr. Parsons, on pages above cited, says: "But if the defendant can show that the note was originally obtained by fraud or duress, or has been fraudulently obtained from an intermediate holder, or has been lost or stolen, or has been in any way the subject of fraud or felony, this will throw the burden of proof upon the plaintiff. In such cases the presumption is that he who has been guilty will part with the note for the purpose of enabling some third party to recover upon it for his benefit; and such presumption operates against the holder, and it devolves upon him to show that he gave value for it. So where the note was given for a distinctly illegal consideration." In Bailey v. Bidwell, 13 Mees. & W. 73, Baron PARKE said: "It certainly has been, since the later cases, the universal understanding that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a *bona fide* indorsee for value." In Fitch v. Jones, 5 El. & Bl. 245, 32 Eng. Law & Eq. 134, Lord CAMPBELL, after expressing the rule as above stated, added: "It is not properly that the burthen of proof as to there being consideration is shifted, but that the defendant, on whom the burthen of proof that there was no consideration lies, has, by proving fraud or illegality in the former holder, raised a *prima facie* presumption that the plaintiff is agent for that holder, and has therefore, unless that presumption be rebutted, proved that there was no consideration. But no such presumption arises where there was in the former holder a mere want of consideration, without illegality or fraud." Therefore, as it has been assumed and conceded in this case that the consideration was illegal, the effect of which was to cast the burden upon Lord and plaintiff of proving that one of them, at least, took the note without notice of the illegality of the consideration; and as there is no evidence that plaintiff so took the note, it follows that the finding by the court that the plaintiff had no such notice is not justified by the evidence. But, as the court also found that Lord had no notice, which finding is not excepted to, the finding that plaintiff had no notice is immaterial, and the defendant is not

injured thereby. If Lord took the note for value, and without notice of the illegality and want of consideration, the plaintiff, as Lord's assignee, could recover upon it even though he had notice. Story, *Prom. Notes*, §§ 178, 191; *Edw. Bills*, § 441; *Poorman v. Mills*, 39 Cal. 351.

3. Upon the trial, plaintiff placed upon the stand George Lord, who testified "that he purchased the note mentioned in the complaint from Ward for a valuable consideration, and afterwards assigned it to the plaintiff; that he paid Ward \$336 for the note." On cross-examination he was asked the following question: "At the time you bought this note did you have any notice that it was executed for an illegal consideration?" To this question plaintiff's counsel objected on the ground that it was not proper cross-examination. The court sustained this objection, and defendant's counsel excepted. Defendant's counsel next asked the witness "if, at the time of the purchase, he did not know that the defendant had warned all persons, in a newspaper notice, from purchasing it, on the ground of illegal consideration?" The plaintiff also objected to this question as not being proper cross-examination. The court sustained this objection, and defendant's counsel excepted. The appellant's counsel contends that the court erred in sustaining these objections, and I think this point should be sustained. The tendency of Lord's testimony in chief was to prove that he took the assignment of the note in good faith, by showing that he paid full value for it. Therefore, any question, the answer to which might tend to prove that he did not take the assignment in good faith, was proper cross-examination. The answers to the questions asked on cross-examination might have proved that he took the assignment with notice that there was no legal or valid consideration for the note, and that he knew "that the defendant had warned all persons, in a newspaper notice, from purchasing it on the ground of illegal consideration." The facts that Lord's testimony in chief was intended to meet and avoid the anticipated defense, and, properly, should have followed the evidence of that defense, make no difference as to defendant's right of cross-examination. The plaintiff chose to introduce his evidence in that order; and defendant did not object to it, but simply claimed the right to cross-examine the witness. The plaintiff had the benefit of the testimony in chief, and had no right to deprive the defendant of the privilege of proper cross-examination. Nor did the plaintiff object to the questions on any other ground than that they were not within the limits of proper cross-examination. There was no objection on the ground that plaintiff had examined the witness in chief out of the proper order. In view of the fact that appellant's second point, above considered, would have been well taken but for the finding that Lord had no notice, the matter to which his cross-examination was directed

was material, and very important. Had the cross-examination been permitted, it might have disclosed that, before the assignment to him, Lord had notice of the illegality of the consideration; and this would have cast the burden upon the plaintiff of proving that he had no notice. For the error in sustaining the objection to the cross-examination of Lord, I think the judgment and order should be reversed, and a new trial granted.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

83 Cal. 181

CLARK v. BROWN *et al.* (No. 13,335.)

(*Supreme Court of California*. Feb. 24, 1890.)

MINING PARTNERSHIP—ACCOUNTING—LOCAL ACTIONS.

Though, in the absence of an express allegation in a complaint for dissolution of a mining copartnership, and for an accounting, it be deemed to appear by implication that the firm has an interest in the mine therein described, the presumption, in the absence of evidence to the contrary, is that the interests of the partners therein are equal, and require no adjudication, within Code Civil Proc. Cal. § 392, subd. 1, which provides that an action for the recovery or determination of an interest in land, or for an injury thereto, must be tried in the county where it or some part thereof is situated, subject to the power of the court to change the place of trial under the Code.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; JOHN W. ARMSTRONG, Judge.

Action by W. A. Clark against H. B. Brown and others, for the dissolution of a mining copartnership and for an accounting. Code Civil Proc. Cal. § 392, subd. 1, provides that an action "for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property," must be tried in the county where it, or part thereof, is situated, subject to the power of the court to change the place of trial, as provided in the Code. From an order denying their motion to change the place of trial defendants Brown and Flaherty appeal.

F. W. Street, for appellants. James H. Budd, for respondent.

VANCLIEF, C. This action was commenced in the superior court of the county of Stanislaus, in which two of the defendants resided. It is alleged in the complaint, substantially, that in 1880 the plaintiff and the defendants Brown and Flaherty entered into a mining copartnership, for the purpose of working mining claims situated in Tuolumne county, called the "Green Claims," and extensions thereof. That they actually engaged in working said claims, and extracting mineral therefrom, from said date until October 25, 1887, when Flaherty sold to the defendants Clark and Crittenden "his interest in the above mine, and claim and business, since which date said

defendants Clark and Crittenden have, with defendant Brown and this plaintiff, been actually working said mine and claim, and extracting minerals therefrom. That in the working of said mine and claim, * * * as above, plaintiff has advanced and used to and for the defendants, and each and all of them, large sums of money, amounting to many thousands of dollars. That between the 1st day of January, 1881, and the 25th day of October, 1887, plaintiff advanced in the working of the mine and claim aforesaid, and in extracting minerals therefrom, many thousands of dollars, and since said date has advanced for such purpose, and in working said mine, several thousands of dollars, all for the use of said copartnership. That there has never been any settlement of any of the partnership accounts of plaintiff and defendants, or any of them, nor of the accounts between plaintiff and each or all or any of the defendants herein. That the defendants Flaherty and Brown have refused, and still refuse to carry on the aforesaid business, or to settle their, or either of their, accounts with the copartnership, or with this plaintiff on account thereof, or to have or make any accounting whatever for the moneys that they, or either of them, have received on account of the said copartnership. That the copartnership aforesaid can be carried on only at a pecuniary loss. That plaintiff is desirous of dissolving the same, and having a liquidation of its affairs. That no term was ever prescribed or fixed between the parties hereto, or any of them, during which the said copartnership should continue. That defendants Clark and Crittenden are residents of Stanislaus county, state of California." The prayer is that the partnership be dissolved, and an account taken of all the partnership dealings and transactions from the commencement thereof, and of the moneys received and paid by the plaintiff and the defendants, respectively, in relation thereto; that the affairs of the firm be wound up, and the copartnership debts and liabilities be paid; and that plaintiff be paid his advances, and that the surplus, if any, be paid to the plaintiff and defendants according to their respective interests, and for such other and further relief as the nature of the case may require. To this complaint the defendants Brown and Flaherty interposed a general demurrer, on the ground that it does not state facts sufficient to constitute a cause of action; and, at the same time, regularly demanded that the place of trial be changed to the county of Tuolumne, for the reason that the real property in the complaint described appears to be situated in Tuolumne county, and that it further appears by the complaint that the "action is brought to determine the interest of the parties to said action in and to said real property." The appeal is by Brown and Flaherty, from the order denying their motion to change the place of trial; and the only question presented for decision is, does it appear from the complaint that the action is

"for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest," in the true sense of subdivision 1 of section 392 of the Code of Civil Procedure?

Counsel for appellants contend that the action is for the determination of the rights and interests of the respective parties in and to the mining claims described in the complaint, and therefore that the court erred in refusing to change the place of trial to the county in which the mining claims are situated. The plainly apparent object of the action is to obtain a dissolution of a mining copartnership, and an accounting between the partners. It does not expressly appear that the copartnership concern had any estate or interest in the mine described; but conceding that this appears by implication, which is the most that can be claimed, yet, in the absence of evidence to the contrary, the legal presumption is that the interests of the partners were equal, and that there was no necessity nor occasion in this action "for the determination, in any form, of the right or interest" of any party to this action, in or to the mine. The mine alleged to have been worked by the concern is described as "the Flaherty Quartz mine, known as the Green vein or claims, and the extensions thereof;" and for aught that appears the vein or claims, and the extensions thereof, may have been owned in severalty by the individual partners, and the partnership may have been limited to the working of those claims without any interest or estate in them, and the partnership may have been so limited, even if the partners had been tenants in common of all the claims and extensions. It is enough, however, for the disposition of this appeal in favor of the respondent, that it does not appear that the action is "for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest;" and that it does appear that all the relief prayed for may be granted without the determination, even incidentally, of any right or interest in real property. I think the order should be affirmed.

We concur: BELCHER, C. C., FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

83 Cal. 167

KITTS v. AUSTIN. (No. 13,284.)

(Supreme Court of California. Feb. 22, 1890.)

QUIETING TITLE—CLAIM TO PUBLIC LANDS.

1. 23 U. S. St. at Large 1883-85, p. 321, provides that one taking possession of government land without connecting himself with the title is a mere trespasser. St. Cal. 1873-74, p. 544, § 2, provides that every qualified claimant under the homestead laws of the United States, residing on public land of the United States within this state, who shall have made his original homestead entry in accordance with said laws, shall, from the date of such entry, be deemed to have title to, and be in possession of, all the land described in such

entry, as against trespassers, and all persons having no superior right or title to the same, as long as he shall continue to reside thereon, and to comply in good faith with said homestead laws. *Held*, in an action to quiet title to land, by one in no wise connected with the government title thereto, against one who had filed her homestead entry on certain land embracing the land on which she resides, and also the land in dispute, that, as against plaintiff, defendant had title to the premises.

2. Where plaintiff relies solely on naked possession for a recovery, he cannot, on rebuttal, show that a third person resides on the land under a title superior to defendant's.

3. Where defendant's answer sets up her adverse claim of title, the court having found that title superior to plaintiff's may properly include in its decree an award of the possession to defendant, under Code Civil Proc. Cal. § 380, providing that in an action by a person out of possession to determine an adverse claim of an interest therein, if the judgment be for plaintiff, he may have a writ for possession as against the defendants in the action.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Chas. W. Kitts, for appellant. *Thos. S. Ford*, for respondent.

GIBSON, C. This was an action to quiet title. The defendant set up her adverse claim, and judgment passed in her favor, from which, and an order denying a new trial, plaintiff appeals. From the findings, which are fully sustained by the evidence, it appears that the land in controversy is a portion of the public domain, and is comprised of 10 acres within a larger tract, to which the defendant acquired the right of possession by a deed from Wilson and wife in 1867, who were at the time and prior thereto had been, in the exclusive possession of the whole tract. Under this deed the defendant immediately entered upon the exclusive possession of the land, built a house, and made other improvements upon a portion not included within the 10-acre tract. The latter was used, in connection with her dwelling, as a pasture for her cattle. In 1869, one of the predecessors of plaintiff entered upon the land, and inclosed the 10-acre tract with a fence, which was sufficient to exclude stock for three years thereafter, during which time defendant was prevented from using the land; but thereafter, that is to say, from and including the year 1872 until the year 1886, the defendant used the land the same as before, except that such use was in connection with, but hostile to, that of the plaintiff and his predecessors. April 17, 1886, the defendant, who was duly qualified to do so, made and filed her original homestead entry upon certain public land, embracing the land upon which she resides, and the 10 acres in dispute, and received the certificate of entry therefor, which she owns, and the same has never been suspended, canceled, or revoked. Neither the plaintiff, nor any of his predecessors, ever connected himself with the government title to the tract in dispute; but the plaintiff, in 1886, after defendant had made her homestead entry, erected, and has since maintained, a substantial inclosure around the said tract.

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At the trial considerable evidence was introduced by both parties tending to prove that they and their respective predecessors had, as against each other, acquired the right to the possession of the land in dispute by adverse use. This evidence shows that neither the predecessors of plaintiff, nor himself, ever had the exclusive possession of the land against the defendant, except perhaps during three years from 1869 to 1871, both inclusive; and even during those years, it seems, a school was maintained in a school-house, previously built upon the land by the permission of the defendant's husband, since deceased, who was at the time one of the trustees of the school-district that maintained the school. But the case seems to have turned in defendant's favor upon the right she acquired as a homesteader. This was right. The plaintiff, not having shown any connection with the government title to the land in controversy, was a mere naked trespasser; and his inclosure of it was made and maintained in violation of the provisions of the act of congress of February 25, 1885, (23 U. S. St. at Large, 1883-85, p. 321,) while the defendant, as a qualified homesteader, possessed of a certificate of entry which remained in full force, was deemed, as against trespassers and others not having a superior right or title to the land, to have title to, and be in possession of, all the land described in her certificate of entry, (St. Cal., 1873-74, p. 544; *Whittaker v. Pendola*, 78 Cal. 296, 20 Pac. Rep. 680.) That case was parallel with the one here. There the plaintiff sought to recover all but two or three acres embraced within his homestead entry, which was evidenced by a receiver's duplicate receipt. The plaintiff, on the trial, introduced this receipt in evidence, together with testimony, from which it appeared that before the commencement of the action, he had, in addition to making the payment mentioned in the receipt, built a house, and established his residence, upon the two or three acres within his homestead claim, that were not sued for; that for two years prior to the issuance of the receipt the defendant had maintained an inclosure around, and cultivated a large portion of, the homestead, and had a house and barn thereon. On the case thus made, defendant moved for a nonsuit on the ground that no title to the land had been shown by plaintiff. The court denied the motion; and the defendant thereupon, without offering any evidence on his part, submitted the case, and judgment was rendered for plaintiff. In passing upon the appeal, this court said: "The defendant, not having shown any capacity in himself to acquire the government title to the demanded premises, nor any effort or intention to do so, stands in the position of a mere naked trespasser upon the public domain, with an inclosure erected and maintained contrary to the express provisions of the act of congress of February 25, 1885, (23 St. at Large, 1883-85, p. 321;) and the main question in the case is whether by

such unauthorized inclosure he can prevent a homestead entry of the land by a citizen of the United States who goes peaceably upon a portion of the tract, and in other respects complies with the law. This is the precise question, or the converse of it, involved and decided in the case of *Haven v. Haws*, 63 Cal. 514; and on the authority of that case we hold that this plaintiff had the right to make his homestead entry of the whole tract, notwithstanding the possession by defendant of the greater portion of it." And, with regard to the certificate of entry as evidence of the right of the plaintiff as a homesteader, it further said: "The evidence, therefore, brought the plaintiff squarely within the provisions of the second section of the act of the legislature of this state passed March 23, 1874, (St. 1873-74, p. 544,) which reads as follows: 'Sec. 2. Every qualified homestead claimant under the homestead laws of the United States, residing on public land of the United States within this state, who shall have made his original homestead entry in accordance with said laws, shall, from the date of such entry, be deemed to have title to, and to be in possession of, all the land described in such entry, as against trespassers, and all persons having no superior right or title to the same, as long as he shall continue to reside thereon, and to comply in good faith with said homestead laws.' Under this law, the plaintiff must be deemed to have the title, as against the defendant, to the demanded premises."

The offer of plaintiff to prove in rebuttal that one Luey, as a qualified pre-emptor, had entered the land as such, had received his certificate therefor, which bore date one month prior to that of defendant, and that he was residing upon the land, was properly rejected. It was not evidence in rebuttal. He relied solely upon naked possession, and could only recover, if at all, upon the strength of his own title, and not upon the weakness of the defendant's; and the attempt to show that the land was in the possession of a third person, to say nothing of its inconsistency with his own claim, could not aid him. It could not avail him in any way, unless he could show some connection on his part with whatever right or title Luey may have had. *Niagara C. G. M. Co. v. Bunker Hill C. M. Co.*, 59 Cal. 612; *Wilson v. Madison*, 55 Cal. 5; *Funk v. Sterrett*, 59 Cal. 613. All of these cases were to quiet title to land. In the first, the defendant offered to prove prior possession of the mining claim in a stranger. This was rejected because the defendant disclaimed any intention of connecting itself with such prior possession. The ruling was sustained. In the next case it was held that the defendant could not rely upon an outstanding title in the United States; he not having shown any privity with it, or any title whatever. In the last case it was decided that the plaintiff, a mere possessor of a mining claim, who had not brought himself in privity with the title of the United States by

a location of the claim, could not prevail over one who had.

It is objected that the court, in this form of action, erred in awarding the possession to the defendant. But there is warrant for the relief granted in section 380 of the Code of Civil Procedure, which is as follows: "Sec. 380. In an action, brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants; and, if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendant in the action against whom the judgment has passed." See, also, *Polack v. Gurnee*, 66 Cal. 266, 5 Pac. Rep. 229, 610. The defendant here, in her answer, set up her adverse claim of title to the property. She thereby became an actor, with the burden of proof upon her to establish her claim. And the court, having found that her adverse claim was superior to that of the plaintiff's, from which the right of possession flowed, properly included in its decree an award of the possession. We have discovered no prejudicial error in the record, and therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 215

BURGESS v. FAIRBANKS et al. (No. 13,262.)
(Supreme Court of California. Feb. 26, 1890.)

VENDOR'S LIEN—PLEADING—WAIVER OF LIEN.

1. A complaint alleging that plaintiff sold land to defendant W. for a certain sum, of which a part was paid, leaving a specified balance due and unpaid; that at the time of the sale, for reasons known to W., and at his request, a conveyance of the land was made with the name of defendant F. inserted therein, and that the latter knew all the facts of the transaction,—is sufficient to warrant the enforcement of the vendor's lien for such balance as against F.

2. It is not necessary that, in such case, the vendor, before suing in equity to enforce his lien, shall have first exhausted his remedy at law.

3. An instrument in the words, "Due G. W. B., and payable when the suit now in court between him and C. B. R. is settled, \$750," is not a promissory note, and the vendor, by taking it as security for the balance of the purchase money for the land, does not waive his lien.

Department 2. Appeal from superior court, Trinity county; T. E. JONES, Judge.

Barclay Henley, for appellants. *John W. Turner*, for respondent.

McFARLAND, J. This is an action to enforce a vendor's lien for balance of unpaid purchase money. Judgment was for plaintiff, and defendants appeal from the judgment on the judgment roll alone.

The complaint is sufficient. It avers clearly enough that plaintiff sold the land to the defendant George E. White for \$4,150; that,

of said purchase money, said White paid plaintiff \$2,400, and also, according to the terms of the sale, paid to one McMurray \$1,025 due on a mortgage on the land, and that the balance, \$750, with interest, is due and unpaid; that at the time of the sale, for reasons known to the said White, and at his request, a conveyance of the land was made by plaintiff, with the name of the defendant H. T. Fairbanks inserted therein; and that the latter knew all the facts of the transaction. These averments warrant the enforcement of the lien as against Fairbanks.

There is nothing in the point that the remedies at law must first be exhausted before a bill in equity to enforce a vendor's lien can be resorted to. *Sparks v. Hess*, 15 Cal. 186.

The point that plaintiff waived his lien by taking as security the promissory note of a third person is not tenable. The written instrument relied on to sustain this point is as follows: "\$725 Kikawaka, Nov. 15, 1886. Due to George W. Burgess, and payable when the suit now in court between him and C. B. Rice is settled, seven hundred and twenty-five dollars. [Signed] Wm. T. WHITE, Agent for George E. White." This instrument is not a promissory note; and it is unnecessary to determine whether, *prima facie*, it is the personal obligation of the principal or the agent. It at least bears a strong suggestion of agency; and it would have been competent to show by parol evidence how it was received, and who was intended to be bound by it. *Bean v. Mining Co.*, 66 Cal. 451; 6 Pac. Rep. 86; *Sayre v. Nichols*, 7 Cal. 535. And, as it is averred in the complaint, and found by the court, that the instrument was made by George E. White, the finding will be presumed to be supported by the evidence. We see no material insufficiency in the findings. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

83 Cal. 217

RILEY v. SIMPSON *et al.* (No. 13,233.)

(Supreme Court of California. Feb. 26, 1890.)

NEGLIGENCE—DANGEROUS PREMISES—EVIDENCE.

In an action for injuries sustained by the falling on plaintiff, while on a public street, of an awning and part of the wall of defendant's premises, the evidence showed that the wall was not of sufficient strength to support the awning, though it had done so for several months, and that it was carelessness to put it up; that the premises were occupied and the awning erected by lessees of defendants, with permission of the latter, who furnished some of the material therefor. *Held*, that defendants were liable.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNER-TON, Judge.

W. L. Dudley and W. M. Gibson, for appellants. *J. C. Campbell and James H. Budd*, for respondent.

SHARPSTEIN, J. This action is brought

to recover damages caused by the falling of an awning and a portion of a brick wall upon the plaintiff while passing along upon a sidewalk under said awning. Defendants were the owners and lessors of the building to which said awning was attached. The case was tried by a jury, which rendered a verdict in favor of the plaintiff for \$5,000. Defendants moved for a new trial on several grounds, one of them being "insufficiency of the evidence to justify the verdict." The motion for a new trial was overruled, and from the order overruling it and the judgment this appeal is taken. There was sufficient evidence to justify a finding that the wall to which the awning was attached was not of sufficient strength to support that burden, although it did support it several months. But the evidence is abundantly sufficient to justify a finding that it was carelessness to hang such an awning to a wall in the condition that this wall is proven to have been. And somebody was guilty of carelessness in placing it there. The building, or some part of it, was occupied by tenants of appellants, and it was doubtless at the instance of those tenants that the awning was put up, and it was put up by contractors employed by said tenants. But appellants not only knew of and consented to the erection of the awning, but contributed the lumber for its construction; the tenants providing the iron used in the construction of it, and paying the contractors for the work on it. In *Kalis v. Shattuck*, 69 Cal. 593, 11 Pac. Rep. 346, this court said: "It is well settled that a landlord is not liable for such consequences, unless (1) the nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it, (*Jessen v. Sweigert*, 66 Cal. 182, 4 Pac. Rep. 1188; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; *Hussey v. Ryan*, 2 Atl. Rep. 729; *Wood, Nuis.* §§ 295, 676; *Wood, Landl. & Ten.* 918;) or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury." In this case appellants not only authorized or permitted the act, which caused the nuisance occasioning the injury, but contributed to it by furnishing material to be used in creating it. Under the rule above stated, appellants are certainly liable for the consequences of an act to which they contributed. We perceive no merit in any of the exceptions taken to the rulings of the court during the trial. The damages awarded the plaintiff are not, in our opinion, excessive, and the instruction of the court upon the subject of damages was not erroneous. Judgment and order affirmed.

We concur: THORNTON, J., MCFARLAND, J.

(83 Cal. xix)

CATTIS v. SIMPSON et al. (No. 13,234.)

(Supreme Court of California. Feb. 26, 1890.)

SHARPSTEIN, J. The only difference between this case and that of *Riley v. Simpson*, (No. 13,253,) ante, 293, recently decided by this court, is that the plaintiffs are not the same, and the judgment is for a larger sum in this case than in that. In all other respects the cases are similar, and, for the reasons given in *Riley v. Simpson et al.* for the affirmance of the judgment and order in that case, the judgment and order in this case are affirmed.

We concur: **THORNTON, J., McFARLAND, J.**

(83 Cal. 239)

McMULLIN v. LEITCH et al., Supervisors. (No. 13,271.)

(Supreme Court of California. Feb. 27, 1890.)

TOLL-ROADS—DEDICATIONS.

A toll-road, at the time of its construction, becomes a public highway by dedication, subject to the right of the company to collect tolls for the period prescribed by statute; and after the expiration of that period neither the company nor its stockholders have any interest in the road for which they are entitled to compensation.

Department 2. Appeal from superior court, San Joaquin county; **J. G. SWINNER-TON, Judge.**

Petition of *Eliza McMullin*, a stockholder in the *Stockton & French Camp Turnpike Company*, to have reviewed the proceedings of *A. Leitch* and others, supervisors of San Joaquin county, to have the order and proceedings of said commissioners, declaring the road of said company a free public highway declared null and void. From a decree in favor of petitioner, respondents appeal.

Avery C. White, Dist. Atty., for appellants.
J. C. Campbell, Edward I. Jones, and W. L. Dudley, for respondent.

PER CURIAM. The court is of the opinion that when the toll-road in question was constructed in 1867, by a corporation formed under the act of 1853, it became a public highway by dedication, subject to the right to collect tolls for a limited period. This period has expired, but the dedication to the public remains. Neither the plaintiff nor the corporation, nor the corporation which constructed any road, on the termination of the franchise to collect tolls, had any interest for which either of them can demand compensation. The questions arising in this case are settled by the decisions of this court in *People v. Davidson*, and *People v. O'Keefe*, in 79 Cal. 166 and 171, 21 Pac. Rep. 538, 539. See, also, *Wood v. Turnpike Co.*, 24 Cal. 474. The judgment and order are reversed, and the cause remanded, with directions to the court below to enter judgment for the defendants.

(83 Cal. 201)

FOGEL v. SCHMALZ et al. (No. 13,617.)

(Supreme Court of California. Feb. 26, 1890.)

APPEAL-BOND.

An appeal will not be dismissed, because the undertaking was not filed in time, where the certificate of the clerk shows that an undertaking was filed on the day the appeal was taken, but, the appellee's attorney having filed ex-

ceptions, a year thereafter, to the sufficiency of the sureties, another undertaking was given and approved within 20 days thereafter.

In bank. Appeal from superior court, city and county of San Francisco; **T. H. REARDEN, Judge.**

Henry H. Davis, for appellant. *H. H. Lowenthal*, for respondent.

PATERSON, J. Respondent has submitted a motion to dismiss the appeal herein on several grounds. The transcript does not, in some respects, conform strictly to the rules of this court; but the defects are matters of form, and not so irregular in character as to call for a dismissal of the appeal. The interlineations and erasures were made before the transcript was filed or certified to by the clerk, and do not in any respect render the record difficult to read or understand. Another ground of the motion is that the undertaking on appeal was not filed within time. The certificate of the clerk, however, filed herein with the appellant's affidavit in opposition to the motion, shows that an undertaking on appeal was filed in the court below on the day the appeal was taken, viz., on September 1, 1888; but, plaintiff's attorney having filed exceptions to the sufficiency of the sureties on the 6th day of September, 1888, another undertaking—the one set forth in the transcript—was given and approved within 20 days thereafter. Motion denied.

We concur: **McFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.**

(83 Cal. 155)

CLEGHORN v. ZUMWALT. (No. 13,394.)

(Supreme Court of California. Feb. 22, 1890.)

REFORMATION OF DEED—MISTAKE.

1. When the contract of sale by plaintiff to defendant of all her interest in certain lands was made, both parties supposed that plaintiff's interest was an undivided one-fifth, but before the execution of the deed defendant learned that plaintiff's interest was an undivided three-fifths. Plaintiff, however, had no knowledge of this until after the conveyance was made. Held that, the mistake being mutual at the time of the agreement, the deed would be reformed.

2. If it be held that the right to reformation must relate solely to the condition and understanding of the parties at the time of the execution of the deed, the same relief would be granted under Civil Code Cal. § 3399, providing that "when, through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention."

Department 1. Appeal from superior court, Colusa county; **E. A. BRIDGFORD, Judge.**

John C. Deuel and Oliver P. Evans, for appellant. *Richard Bayne*, for respondent.

FOX, J. Action to reform a deed. Judgment for defendant, and plaintiff appeals. The case comes up on the judgment roll. It appears from the findings that in October, 1885, *Mary Cleghorn*, then a minor, was the owner of an undivided one-tenth interest in

the N. W. $\frac{1}{4}$ of section 11, township 18 N., range 6 W., M. D. M., which she had inherited from her father; that upon the death of her father a one-half interest in said land passed to her mother, who had also died in October, 1885; that in the course of settlement of the estate of the mother, and on the 8th day of May, 1886, the said one-half interest so held by the mother was, by an order of the probate court, duly given and made, set apart to, and declared to be the property of, said Mary, but she was then advised by her counsel that this order only gave her the use of the property during her minority, and that upon her becoming of age her brothers and sisters would take each a one-fifth interest therein, the same as they had done in her father's estate, leaving one-fifth to her, thus vesting in her at her majority two undivided tenths, or one undivided fifth, of the whole title to the tract. The court finds that this, the one-fifth interest, is what she and the defendant both supposed she owned when, in November, 1887, she being then of lawful age, defendant agreed with her to purchase her interest in the tract, and pay her \$500 therefor, which price the court finds was the value of an undivided one-fifth of the tract. The court further finds that subsequently, and before the deed was executed, upon examination of an abstract of title, defendant was informed by his attorney, and at the time of the execution and delivery of the deed and payment of the money knew, that the interest of plaintiff in the tract was three-fifths instead of one-fifth, but did not disclose the fact to plaintiff. The deed was in a form that conveyed all her interest, whatever it might be. The relief sought is to so reform the deed that it shall convey an undivided one-fifth, as both parties expected it would, and intended it should, at the time the bargain was made for it, and the price was fixed, and as one of them believed it did when it was made. The granting of this relief is resisted, not on the ground that it would be inequitable, or would not make the deed conform to the purchase as actually made, but on the technical ground that at the time of the actual execution and delivery of the deed there was not a mutual mistake of fact as to what it conveyed.

While, from its full finding of facts, the court below seems to have been fully impressed with the equity of plaintiff's case, it seems to have thought the point made by the defense to have been well taken; for it finds, as conclusion of law, that, "under the complaint as it now stands, said plaintiff is not entitled to the relief prayed for," and judgment is entered for defendant. In this we think the court erred. There is no doubt whatever that, at the time the minds of the parties met, and the bargain was actually made, the mistake was mutual. Both then understood and believed that what the one was selling and the other was buying was the undivided one-fifth, and the price was fixed on that basis. The execution and delivery of

the deed afterwards was but the carrying into effect of the agreement already made. The mistake relates to the time of the agreement, not merely to the time of the carrying of the agreement into effect.

But, even if it be held that the cause of action must relate solely to the condition and understanding of the parties at the time of the execution and delivery of the deed, the case is one which comes within the provisions of section 3399, Civil Code, and entitles the plaintiff to the relief demanded. That section reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Here no question of the rights of third persons is involved, and the court expressly finds that at the time of the execution and delivery of the deed the defendant knew that the plaintiff believed she was the owner of only an undivided one-fifth, and she was not informed by the defendant, or any one else, to the contrary, until after the execution of said deed. The allegations of the complaint are ample to cover either "mutual mistake" or "mistake of one party which the other at the time knew and suspected," or to entitle the plaintiff to the relief provided for in the section quoted. Judgment reversed, and case remanded, with instructions to the court below to enter judgment on the findings in favor of plaintiff, as prayed in her complaint.

We concur: PATERSON, J.; WORKS, J.

(83 Cal. 333)

FOX *et al.* v. STOCKTON COMBINED HARVESTER & A. WORKS. (No. 13,274.)

(Supreme Court of California. Feb. 28, 1890.)

BREACH OF WARRANTY—EVIDENCE—HARMLESS ERROR.

1. In an action for breach of contract of a sale of machines, evidence that other machines, made on the same pattern, and of like materials, did good work, is inadmissible.

2. Where papers are offered in evidence and admitted, they are in the case for all purposes for which they were admissible; and it is no error for the court to refuse to admit them when offered a second time, though the ground of such refusal may not be tenable.

Department 2. Appeal from superior court, Stanislaus county; WILLIAM O. MINER, Judge.

W. L. Dudley, J. H. Budd, and Hatton & Fulkerth, for appellant. W. E. Turner and J. C. Campbell, (Edward L. Jones, of counsel), for respondents.

THORNTON, J. Action to recover damages for breach of contract of sale by defendant of two harvesting-machines. Verdict

and judgment for plaintiffs. Appeal by defendant from the judgment and order denying its motion for a new trial.

Several points have been discussed by counsel which have to be determined. We are of opinion that the court did not err in its ruling in excluding the papers, copies of which are annexed to defendant's answer, when offered the second time. They had been already offered and admitted. We cannot see that, because they were read in evidence as a part of the cross-examination of other witnesses, therefore they were not in the case for all purposes for which they were admissible. The papers having been already put in evidence, the court did not err in refusing to allow them to be put in the second time. Nor does it make any difference that they were excluded, when offered a second time, for a reason not legally tenable. They were, as said above, already in for all purposes. Though the ground of their exclusion on the second offer may have been untenable, that was not equivalent, when they were already in, to a ruling that they were not evidence at all. We see no error in the ruling of the court which would justify a reversal.

There is no error in refusing defendant's request designated by the letter "A." The evidence tended to show a much broader and more particular warranty than that designated in the request; and the granting it would have tended to confuse and mislead the jury, by diverting their attention from the other evidence in the case.

The refusal of the court to allow evidence that other machines, made on the same pattern, and of like materials, did good work, is not error. It involved an inquiry into the working of other machines on an outside issue. The other machines may have worked well, and still those in question may have failed to do so. The conditions may not have been the same in both cases. The machines may have been better constructed than those involved in this case.

We think the instructions 1, 3, and 5 were properly given. They were applicable to the evidence. Instruction 5 was in accordance with the testimony as to representations referred to in it, which were properly submitted to the jury to determine whether or not they were intended by defendants as warranties.

We perceive no such variance between the averments in the complaint and the evidence as to render any of the instructions erroneous. The averments in the complaint are sufficient to embrace such warranties. There was no error in the instruction given as to the return of the machines in the spring of 1885. The averments of the complaint were sufficient to include it. Instruction B, requested by defendant, was properly refused, for the reason that it had already been given at the request of defendant in instruction 3. The court did not err in allowing the question, respectively, put to Fox and Tilton. The evidence is sufficient to justify the ver-

dict. The record discloses no error, and the judgment and order are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

Hearing in bank denied.

(3 Cal. Unrep. 238)

SUKEFORTH v. LORD. (No. 13,363.)

(Supreme Court of California. Feb. 22, 1890.)

FRAUD—PLEADING AND PROOF—EXCEPTIONS.

1. In an action for the conversion of merchandise levied on under an execution on a judgment against S., the answer alleged "that the defendant is informed and believes, and, upon such information and belief, so avers the fact to be, that, * * * while said S. was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he, said S. and the plaintiff, who is his brother, conspired together for the purpose, and with the intent, to hinder, delay, and defraud the creditors of said S. out of their just debts and demands against him, said S.; and with such purpose and intent said S. made a pretended false and fraudulent sale of the property mentioned in plaintiff's complaint * * * to the plaintiff; and with such purpose and intent the said plaintiff received said pretended false and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise." *Held*, that defendant could not prove fraud, under the answer, as it merely alleged a conclusion.

2. After the case was given to the jury, counsel for defendant said that he desired certain exceptions entered, to which the judge replied, "Have any exceptions entered that you desire," and in answer to counsel's question, "Shall I have the clerk enter them?" the judge replied, "If you choose, do so." Counsel, however, never had any exception entered, either by the court or clerk, and never prepared or had settled any bill of exceptions. *Held*, that this did not entitle defendant to a review of the rulings. WORKS, J., dissenting.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Geo. A. Rankin, for appellant. Cross & Denson and P. F. Simonds, for respondent.

Fox, J. This is an action against the sheriff of Nevada county for the recovery of the sum of \$4,000 damages, for the unlawful conversion of a stock of merchandise. The sheriff justifies under an attachment, and subsequent judgment, in the superior court of the city and county of San Francisco, in a suit wherein George D. Cooper was plaintiff and L. M. Sukeforth was defendant. No exception is taken to the regularity or legality of the proceedings or writ in that case. The goods were levied upon as the property of L. M. Sukeforth, the judgment debtor, but found in and taken from the possession of E. G. Sukeforth, the plaintiff in this action. The action was tried before a jury, verdict and judgment in favor of plaintiff in the sum of \$3,000, motion for new trial made and denied, and defendant appeals. The value of the property alleged to have been unlawfully converted is admitted by the pleadings to have been \$4,000, and the verdict and judgment was for \$3,000. This disposes of one point made on the motion for new trial, and insisted upon on the appeal,—that the verdict was excessive.

Another point made on the motion, and insisted upon here, is that the evidence was insufficient to justify the verdict. It is not disputed that L. M. Sukeforth and E. G. Sukeforth, the plaintiff in this case, are brothers; that for nine years prior to August 15, 1888, L. M. Sukeforth was a retail merchant doing business at Nevada City; that in August, 1888, he had on hand a stock of goods, principally furniture and carpets, the accumulation of that nine years, which would inventory at a cost price, with freight added, at about \$6,000, with a lot of book-accounts of uncertain value, and a small amount of other personal property not exempt from execution, and was in debt to wholesale merchants between \$5,000 and \$6,000, beside the indebtedness due to his brother, L. M. Sukeforth, and to some others. It is also shown in the evidence, without material conflict, that by reason of the age of the goods, the patterns being out of date, and many of them shop-worn and remnants, and of the state of the market, the stock was not worth at Nevada City over 50 cents on the dollar of its cost price. It is also shown, and contradicted, that on the 15th day of August, in that year, L. M. Sukeforth made to E. G. Sukeforth, the plaintiff, a bill of sale of this entire stock, and of all his book-accounts and personal property not exempt from execution, and put the vendee in possession, himself leaving the premises and going to Sacramento; that E. G. Sukeforth remained in the exclusive possession, and was actively engaged in trying to sell off the property and close out the business, until some time afterwards, when the stock was seized on attachment against L. M. Sukeforth, as above mentioned. The actual consideration of this sale to plaintiff was shown to have been in part an indebtedness actually due to the plaintiff, and upon which plaintiff was then threatening to attach if settlement could not be made; in part certain indebtedness due to other persons, which the plaintiff then assumed, and afterwards actually paid, either in cash or by giving his own notes therefor, and in part cash paid at the time by plaintiff to the vendor, and amounting in the aggregate to \$2,845. From the relationship of the parties; from what he insists was inadequacy of consideration; from the fact that L. M. Sukeforth was insolvent; and from the fact that this sale was made without taking an account of stock and accounts, or making a formal inventory of the goods and property conveyed,—appellant argues that this sale to respondent was fraudulent, and made with intent to hinder, delay, and defraud the creditors of L. M. Sukeforth. Upon this proposition he makes a very plausible argument, and selects many disconnected passages from the testimony which would tend to support it; but at the same time it appears that the evidence upon that subject is conflicting, and it therefore follows that, under the rule of this court announced in nearly 300 cases, the verdict of the jury ought not to be disturbed.

For this reason, as well as for the one announced in response to the next point, we are not disposed to discuss this evidence to the extent that we might otherwise feel called upon to do.

Another point made is that the court erred in its rulings as to the admissibility of certain evidence. We have examined the exceptions upon this point which are urged in the appellant's brief, and fail to perceive any prejudicial error; but, even if there were error, the appellant is not in position to avail himself thereof in this case, or of the point of insufficiency of evidence on the question of fraud in the transfer by L. M. Sukeforth to the respondent. It is conceded, even by the appellant, that an insolvent debtor, in the absence of any adjudication of insolvency, has the right to pay one or more creditors in preference to others, and to dispose of his property for that purpose, if it is fairly done, the transfer is *bona fide*, and not made under a secret trust, or to secure a personal advantage to himself, nor with intent to hinder, delay, and defraud his creditors generally. All the questions upon which these rulings claimed to have been erroneous were made, were propounded to prove fraud, and want of *bona fides* in the transaction between L. M. Sukeforth and the respondent; and this, also, is the point upon which it is claimed that the evidence was insufficient to justify the verdict.

The appellant was not in position to avail himself of the question of fraud in this transfer. There was neither in law nor in fact any issue upon the subject under the pleadings. It follows that if there was error in this regard it was not material error. The complaint alleged title and possession in the plaintiff at the time of the seizure by defendant, and the proof sustained it. To overcome this, it was incumbent upon the defendant to prove fraud and want of *bona fides* in the transaction by which the plaintiff became the owner and in possession. He was not entitled to prove it, unless he had laid the proper foundation therefor in his pleading. The only attempt at laying the foundation for such proof in his pleading was as follows: "That the defendant is informed and believes, and upon such information and belief so avers the fact to be, that on or about the 15th day of August, 1888, while said L. M. Sukeforth was so as aforesaid engaged in business, and while he was so as aforesaid indebted, he, said L. M. Sukeforth, and the plaintiff, who is his brother, conspired together for the purpose and with the intent to hinder, delay, and defraud the creditors of said L. M. Sukeforth out of their just debts and demands against him, said L. M. Sukeforth; and with such purpose and intent said L. M. Sukeforth made a pretended, false, and fraudulent sale of the property mentioned in plaintiff's complaint, and of all other property save such as is by law exempt from execution, owned by said L. M. Sukeforth, to the plaintiff, and with such purpose and in-

tent the said plaintiff received said pretended false and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise." By this pleading the defendant alleges a conclusion only. He concludes what constitutes a fraud, instead of stating the facts, and allowing the court to conclude whether they constitute fraud or not. This form of pleading has been held, in a long line of decisions by this court, to be insufficient. All the epithets, and much of the exact language, used in this answer, will be found in the complaint in *Pehrson v. Hewitt*, where a judgment by confession was sought to be set aside on the ground of fraud. It was fully considered by the court in *bank*, (79 Cal. 598, 21 Pac. Rep. 950,) and held that it did not state facts sufficient to constitute a cause of action; that the facts showing the fraud must be made to appear by averment. The question was again considered in *Albertoli v. Branham*, 80 Cal. 633, 22 Pac. Rep. 404, a case almost exactly like the present one, except that the pleading was less objectionable than this; but it was held to be insufficient,—that, in pleading fraud, it is not sufficient to allege it in general terms, but the facts constituting the fraud must be stated. That case is decisive of this, so far as the sufficiency of this pleading is concerned. Because of its insufficiency, the defendant is not entitled to be heard to impeach the *bona fides* of the sale to plaintiff.

Appellant also assigns as error certain rulings of the court in giving and refusing instructions to the jury. He is not entitled to be heard upon these assignments, for the reason that he saved no exception to such rulings. After the case was given in charge to the jury, counsel did step up to the judge, and say to him that he desired certain exceptions entered; to which the judge replied: "Have any exception entered that you desire." Counsel then said: "Shall I have the clerk enter them?" to which the judge replied: "If you choose, do so." But he never did have any exceptions entered, either by the court or the clerk, and never prepared or had settled any bill of exceptions. This is in no sense a compliance with the statute, and does not entitle the party to a review of the rulings. Judgment and order affirmed.

I concur: PATERSON, J.

WORKS, J. I concur in the judgment, but do not agree to what is said in the opinion of Mr. Justice Fox as to the manner of entering an exception to the giving of instructions. I think the record sufficiently shows that the exceptions were properly taken, and in time. It was enough that the judge was notified that the appellant excepted, and the record shows that this was done. It was not necessary that the exception should have been entered at the time by either the judge or the clerk.

INGRAM v. SMITH et al. (No. 13,347.)

(Supreme Court of California. Feb. 27, 1890.)

ACTIONS BY ASSIGNEE FOR BENEFIT OF CREDITORS —FICTITIOUS CREDITORS.

Under Civil Code Cal. § 3439, providing that every transfer of property, or charge thereon made, and every obligation incurred, with intent to delay or defraud creditors, is void as against creditors, and against any person on whom the estate of the debtor devolves in trust for the benefit of others than the debtor; and section 3412, providing that "a written instrument, in respect to which there is reasonable apprehension that, if left outstanding, it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up and canceled," an assignee for the benefit of creditors may sue the payee of a note fraudulently made by his assignor, to enjoin him from negotiating the note, and to require him to deliver it up for cancellation to such an extent as will enable the creditors to obtain the full amount of their claims.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; B. F. MYRES, Judge.

L. T. Hatfield and John M. Fulweiler, for appellant. D. W. Spear, E. L. Craig, and Wallace & Prewett, for respondents.

GIBSON, C. Plaintiff appeals from a judgment for defendants, rendered upon their general demurrer to his amended complaint. It appears from the complaint, which contains much evidential matter that should have been omitted, that on November 8, 1888, Smiley, being then insolvent, made an assignment for the benefit of his creditors to the plaintiff, who accepted the trust, and qualified as such assignee. Smiley, on the 3d day of October of the same year, was, and for a long time prior thereto had been, engaged in the business of dealing in merchandise, and was indebted to divers parties in different amounts, aggregating more than \$5,000; which he was, on the last-mentioned date, unable to pay in accordance with the terms of his several obligations, although possessed of personal property reasonably worth \$6,000. On or about that date, Smiley, for the purpose of hindering, delaying, and defrauding his creditors, and of securing to himself and his co-defendant, Smith, the benefit of his property, fraudulently entered into an agreement with him, the terms of which are to plaintiff unknown, but the moving consideration was that Smiley was to pretend to convey and assign to Smith all his property for the alleged consideration of \$2,300, asserted to be due to Smith from Smiley, when in fact he was not in any way indebted to Smith. Pursuant to this transfer Smith claimed to be in possession of all the property from the 3d until the 22d of October, 1888, during all of which time, however, Smiley continued to exercise acts of ownership over it, making sales of merchandise, taking pay therefor, and communicating with his creditors as though he had not parted with his property. Smith, who is

and was, at all times mentioned in the complaint, without property, and wholly dependent upon his earnings for a livelihood, knew of the insolvency of Smiley; and all his acts performed in concert with Smiley were for the purpose of cheating the creditors of the latter, for their joint benefit. About October 20, 1888, a firm of wholesale dealers in Sacramento, who were creditors of Smiley, first learned of the transfer to Smith; Smiley having never, prior to that time, disclosed to his creditors that Smith was one of them. On the 22d of the same month, after an interview with a member of the said firm, Smiley procured Smith to make him a deed, which expressed no consideration, purporting to reconvey the real property embracing the store previously conveyed to him by Smiley. The latter, upon receiving the deed, placed it on record, and thereupon made, and caused to be recorded, a declaration of homestead upon the same property. Thereafter, and in furtherance of their corrupt agreement, Smiley made and delivered to Smith, without receiving any consideration therefor, his promissory note for \$1,000, the true time and date of which are unknown to plaintiff. At the same time he delivered to Smith two solvent interest-bearing notes, payable to himself, for the sum of \$720 and \$750, respectively. On November 18th, in furtherance of their fraudulent design, Smith represented to the maker of the \$750 note that he was the *bona fide* owner of it, and procured from him, in payment of it, a deed to a one-twentieth interest in a mining claim, of the value of \$500. The other note is worth \$700. Smiley fraudulently included in his schedule of indebtedness the name of Smith as one of his creditors on account of the note for \$1,000.

The plaintiff, after qualifying as assignee, took possession of the stock of merchandise and other personal property; all of which personally, with the exception of the stock of merchandise, was estimated by Smiley at a much greater value than it was reasonably worth, some of the notes and accounts being at the time barred by the statute of limitations. The two notes delivered by Smiley to Smith with the \$1,000 note have not been offered to plaintiff. The actual value of Smiley's assets will not exceed \$5,000. His total indebtedness, as scheduled, including the \$1,000 on the note to Smith, is \$6,121.75; and is all justly due, except the amount of said note. Creditors' claims to the amount of \$419.83 have been exhibited to the assignee, and the expenses of executing the trust imposed by the assignment will be at least \$800. These last two amounts added to the scheduled indebtedness, less the \$1,000 on the note to Smith, bring the total liabilities up to \$6,341.58. And unless the note for \$1,000, held by Smith, is canceled, the creditors of Smiley will not receive more than 80 per cent. of their demands against him. The prayer is, among other things, for a temporary injunction to restrain Smith from negotiating the note; and that he be required to

deliver it for cancellation *in toto*, or to such an extent as will enable the creditors to obtain the full amount of their claims.

The assignment in this case was made pursuant to division 4, pt. 2, tit. 3, Civil Code; the first provision of which is as follows: "Sec. 3449. An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specific classes or persons." By section 3439, under the title relating to transfers with intent to defraud creditors, referred to in the section quoted, it is provided that "every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor." The promissory note to Smith, which upon its face purports to have been made for a valuable consideration, having been given by Smiley to and received by Smith for the purpose of defrauding the creditors of the former, clearly constitutes such an obligation as is contemplated by section 3439, and is therefore void against all of Smiley's creditors, and also the plaintiff, upon whom the estate of Smiley devolved for the benefit of his creditors. "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged and ordered to be delivered up or canceled." Id. § 3412; 3 Pom. Eq. Jur. § 1377. From the fact that the note is scheduled as one of the insolvent's items of indebtedness, it is *prima facie* a charge against his estate in the hands of the plaintiff. As the estate is insufficient to pay the *bona fide* creditors in full, it is manifest that although the plaintiff, as assignee, knowing the note to be fraudulent and without consideration, might successfully resist the payment of it, yet Smith, before it matures, may, unless restrained, transfer it for value to an innocent purchaser, who could enforce it, and thereby cause serious injury to such creditors by reducing the already insufficient assets of the estate. The date and time of maturity of the note are both unknown to plaintiff, but, in view of the other facts stated, his apprehension that it may not have matured, and may be so used as to result in injury to the beneficiaries of the trust imposed upon him, is well founded. For these reasons we think the court erred in sustaining the demurrer, and we therefore advise that the judgment be reversed, and the trial court directed to

overrule the demurrer, and grant the defendants leave to answer.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the trial court is directed to overrule the demurrer, and grant the defendants leave to answer.

(83 Cal. 290)

WASHINGTON v. BLACK *et al.* (No. 13,479.)
(*Supreme Court of California.* Feb. 28, 1890.)

EXECUTORS—ACCOUNTING—ASSETS—DEVASTATION.

1. The rents and profits of a testator's land accruing after his death are assets of his estate, under Code Civil Proc. Cal. § 1452, providing that the executor is entitled to receive the rents and profits of the real estate until the estate is settled, or until delivered by order of the court to the heirs or devisees.

2. The fact that the executrix did not include the rents and profits so received in her report, or settling her account before the probate court, does not estop her to say that she received them as assets of the estate, nor can she, after such settlement, be sued therefor by the devisee; since Code Civil Proc. Cal. § 1637, provides that the settlement of an executor's account, and allowance thereof by the court, or on appeal, shall be conclusive, as against all persons in any way interested in the estate.

Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

E. E. Bush and C. W. Thomas, for appellants. A. P. Catlin, for respondent.

THORNTON, J. James Moore died in 1884, leaving a will, which was afterwards duly admitted to probate in Yolo county. He died possessed of a large estate. By his will he bequeathed, among other things, a handsome estate to his wife, the defendant Mary A. Black, who since his death has married her co-defendant, James R. Black. He also bequeathed to her all of his personal property, in trust to pay his debts, funeral expenses, and costs of administration, and the remainder of this personal property to her. He devised to his daughter, Martha Washington, in fee, the S. $\frac{1}{2}$ of section 11, township 9 N., range 1 W., M. D. meridian, saving and excepting about 10 acres, etc. The defendant Mary A. was appointed, qualified, and acted as executrix, and administered the estate under the will. The personal property demised to her in trust was more than sufficient to pay the testator's debts, funeral expenses, and the expenses of administration. While the defendant Mary was executrix, she received in the year 1885, as rents, issues, and profits of the land devised as above-mentioned to the plaintiff, the following sums: \$2,652.82, on the 14th day of August, 1885, from the sale of wheat received by her as rent of said land; also, about the same time, the further sum of \$91.81 from the sale of other wheat received by her as such rent; also the further sum of \$100, received for pasturage of said land; also the further sum of \$676.50, received by her as proceeds of the sale of certain summer

fallow on said land,—all received prior to the 15th day of November, 1885, and making a total thus received of \$3,521.12. The defendant Mary rendered a final account of her administration to the proper superior court, which was settled and approved. The court further finds that on or about the ——— day of April, 1888, the defendant was discharged as executrix. The court further finds that the land devised to plaintiff was by the proper court ordered to be delivered to her, upon her giving security as provided by article 1 of chapter 2 of title 2 of part 3 of the Code of Civil Procedure. It is further found that the superior court of Yolo county did not at any time make an order for the sale by the executrix of the personal property above mentioned, as received for rents and profits of the land devised to plaintiff, or of any part of it; nor did the executrix ever sell said personal property, or any part thereof, under any order or direction of said superior court; nor did the said court at any time make any order confirming any sale of said personal property, or any part thereof; nor did said superior court at any time make an order or decree that said rents, issues, and profits, or any part thereof, were assets of said estate; nor did the said superior court at any time make any order or decree in the matter of said estate distributing to said defendant the said rents, issues, and profits, or any part thereof. The plaintiff, before this suit was begun, demanded of defendant Mary the payment of the rents and profits above mentioned, which she refused to pay. On the facts above detailed, the plaintiff, by the judgment of the court, recovered, of defendant Mary, \$3,112.12, with interest from the 13th of November, 1885.

It will be observed that it is found as a fact that the rents and profits in controversy here were received by the executrix while she was executrix. Whether she received them as executrix is not found. It appears from certain probative facts which are found that she did not treat them as assets of the estate. She never included them in any account rendered by her to the court, and she did render her accounts, which were by the court settled and allowed. Nor were they ever referred to in any report made by defendant to the court. But these probative facts do not necessarily show that the defendant did not receive these sums as executrix. And as she had lawful authority to receive them in her official capacity, and no authority to receive them in any other capacity, we must hold, until otherwise appearing, that she received them as executrix, in the only way she was authorized by law to receive them. There is not the least evidence that the defendant assumed to receive them as bailiff or steward or agent of the plaintiff, or that the latter ever empowered or authorized her to receive them as her agent. Conceding there is some evidence tending to show this, it is not so found.

The land out of which these rents and profits issued was ordered to be distributed to plaintiff prior to the receipt of some of

them by the defendant, but it was not delivered into her possession until the 16th of November, 1885. To this date the executrix was clearly entitled to receive these rents by virtue of the provisions of section 1452 of the Code of Civil Procedure. By this section she is entitled to receive the rents and profits of the real estate until the estate is settled, or until delivered by order of the court to the heirs or devisees. It is true that the devisee of this land, the plaintiff, takes title from the death of the testator, and has a right to the rents and profits arising from it from the same date; but this right is subject to the right of the executrix to the possession of the land, and to receive the rents and profits arising therefrom until the happening of the events above designated. Conceding that the plaintiff might have maintained an action to recover the rents, etc., on a promise to pay such to her by the executrix, we find no evidence of such promise here, and no such promise is found. As the facts appear, we see no ground for holding that the plaintiff could maintain an action on this case prior to the regular distribution by the probate court. It is argued that the executrix is estopped to say that they are rents of the estate of Moore by her conduct in withholding them from her account and report to the probate court; in never treating them as such. But we cannot see that this plaintiff was misled in any way by this conduct, and therefore it cannot be held that there is any such thing as an estoppel. How the failure on the part of the executrix to do her duty in relation to those rents and profits, in making return of them to the probate court, and accounting for them, can work an estoppel, we cannot see. We are bound to hold that the plaintiff was cognizant of her rights, and that she could have compelled an account of them to her by the executrix in due course of procedure in the probate court. She was notified regularly of the settlement of the accounts of the executrix, and made no attempt to charge the executrix with this money on the settlement. She might have examined the executrix before that court, and obtained a disclosure of the receipt of those rents.

In a case like the one before us, the matters in controversy are under the sole jurisdiction of the probate court. The remedy must be sought there. This, we think, is conclusively determined by this court in *Reynolds v. Brumagim*, 54 Cal. 254. It was there attempted to charge Brumagim for a neglect to sue as administrator within the period prescribed by the statute of limitations, for land in the possession of adverse claimants, whereby the land was lost to the estate. It was ruled that the action could not be maintained; that under our system the probate court had jurisdiction to settle the accounts of an administrator, and to ascertain and determine his liability to the estate, and the decree of that court settling the accounts and fixing the amount of liability was conclusive. See Code Civil Proc. §§

1637, 1908. Section 1637 declares that "the settlement of the account, and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate," with a saving which does not apply here, as it does not appear that the plaintiff was under any disability. The learned counsel for plaintiff lays some stress on the fact that the executrix in this case was guilty of a *devastavit* by her neglect to account, for which she is personally bound. This may be conceded, yet it does not change the result. The question is, by what mode of procedure is such personal obligation to be enforced? and that, as pointed out above, is to be enforced by a resort to the court which settled the account.

It is said by counsel for plaintiff that the rents and profits of the land were not assets of the estate. This contention cannot be maintained. The whole estate, real and personal, under our system, is assets, and may be, if required, applied to the payment of the debts of the estate. It was so held in *Re Woodworth*, 31 Cal. 605, 613, 617, 618. *SANDERSON, J.*, in his concurring remarks, expressly includes accruing rents of the real estate among the assets. In a general sense, every part of the estate is assets which comes under the law to an executor and administrator. 1 Story, Eq. Jur. § 531. The ruling in *Re Woodworth*, supra, that "the rents and profits of real estate accruing subsequent to the death of the testator are not personal property in the hands of the executor, to be first applied to the payment of debts in exoneration of the general personalty," does not hold that such rents are not assets for the payment of debts. On the contrary, the language used implied that they are such assets. The case was one calling for the marshaling of the assets of Woodworth's estate. What necessity was there to say anything about the accruing rents, in the marshaling of the assets, unless they were assets? But it is clearly held that such rents are assets. 31 Cal. 605, supra. It cannot be said that that which under the law comes to the hands of an executor or administrator is not assets. Such estate is all assets. Whether it is needed to pay debts or not is not the question. It cannot be said that that which is required to pay debts is assets, and that which is not required is not. The amount of assets is not determined by the amount of the indebtedness of the estate, but by the amount of the estate. We cannot perceive how the judgment and order in this case can be sustained. They are therefore reversed, and the cause remanded. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

83 Cal. 319

BUNNEL v. STOCKTON *et al.* (No. 12,469.)

(Supreme Court of California. Feb. 28, 1890.)

APPEAL—REVERSAL—FINDINGS—NEW TRIAL.

1. In an action to foreclose a mortgage against the estate of defendants' testator, wherein defend-

ants allege that testator declared a homestead in the property, which had never been abandoned, the fact that there is no direct finding on these issues will not cause a reversal, where the court finds that testator's divorced wife, one of the defendants, has no interest in the mortgaged premises, by homestead declaration or otherwise; that the other defendants have an interest under the will, subject to the mortgage; and that no probate homestead was ever designated out of the mortgaged premises. BEATTY, C. J., dissenting.

2. Under Code Civil Proc. Cal. §§ 659, 1054, requiring a statement of the case to be filed within 10 days after service of notice of intention to move for a new trial, and authorizing the court to extend the time for not more than 30 days without the consent of the adverse party, the fact that the latter consents to one extension beyond the 30 days does not authorize the judge to grant still another extension without his consent, and a statement filed during such extension is too late.

In bank. On rehearing. For former report, see 21 Pac. Rep. 961.

Spencer & Raker, for appellants. *Goodwin & Dodge*, for respondent.

WORKS, J. Appeal from a degree foreclosing a mortgage on real estate, and from an order denying the defendants a new trial. The case was decided against the appellants on a former hearing on the ground that the homestead relied upon by the defendants was void for the reason that the declaration thereof did not contain an estimate of the cash value of the property, as required by section 1263 of the Civil Code. *Knock v. Bunnell*, 21 Pac. Rep. 961. It was discovered subsequently that at the time this homestead was declared the statute did not require a statement of the value of the property, and a rehearing was granted; and the case has again been heard.

The motion for a new trial was properly denied, for the reason that no statement of the case was filed in time. The Code requires that the statement be served within 10 days after the service of notice of intention to move for a new trial. Code Civil Proc. § 659, subd. 3. The moving party must prepare and serve his statement within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered either at the hearing of the motion, or on appeal to this court. *Quivey v. Gambert*, 32 Cal. 304, 309; *Chase v. Evoy*, 58 Cal. 348; *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. Rep. 388. The time allowed by section 659 may be extended by the court or judge, but not longer than 30 days, without the consent of the adverse party. Code Civil Proc. § 1054. In this case the judge of the court below extended the time for the full 30 days, and then, upon a stipulation of the adverse party, extended it an additional 20 days, and then again, without the consent of the adverse party, gave the appellant another 20 days; and the statement was not filed until the last day of the last extension of time. This was too late. The judge of the court below exhausted his power when he extended the time 30 days, and the last extension of time by him was unauthorized. The fact that the respondent had consented to one extension of time beyond the

30 days did not give the judge any additional authority.

The action was against an estate, and the heirs of the deceased, to foreclose a mortgage; and the defendants, in their answer, averred that the deceased in his life-time declared a homestead on the property; that the same had never been abandoned; and that the mortgage had not been filed as a claim against the estate in which an administrator had been appointed, and notice to creditors duly given. It is contended by the appellants that the findings of the court do not find upon these issues, except that the mortgage was not filed as a claim against the estate. The court does not find, in direct terms, whether the homestead ever existed, or whether, having been declared, it had been abandoned; but it does find that Annie E. Stockton, one of the appellants, and the divorced wife of the deceased, had no interest in or title to said mortgaged premises, by homestead declaration or otherwise, and that the other defendants, minor heirs of the deceased, had an interest in the property as the devisees under his will, but that their interest was subsequent and subject to the mortgage, and that no probate homestead was at any time designated out of the mortgaged property, or any portion thereof. These findings are not as full and specific as they should have been, but we think they are such that the judgment should not be reversed in the absence of the evidence, which, we have shown, is not properly in the record. Judgment and order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.

BEATTY, C. J. I dissent. The findings do not respond to all the material issues.

3 Cal. Unrep. 243

EMHOFF *et al.* v. McMANN. (No. 12,752.)
(Supreme Court of California. March 7, 1890.)

FRIVOLOUS APPEAL.

Where, on failure of an appellant to appear when his cause is called, and the judgment appealed from is affirmed, with damages for frivolous appeal, on motion of respondents, there being no brief on file, and it thereafter appears that failure to file a brief was due to appellant's ignorance that his cause was on the calendar, and an examination of the record shows that the appeal was not frivolous, that part of the judgment imposing damages for frivolous appeal will be set aside.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

On application for rehearing. No opinion was rendered on previous affirmance of the judgment.

Vincent Neale, for appellant. *F. J. Caslehun*, for respondents.

PER CURIAM. This cause was regularly on the January calendar, 1890. When it was reached in due course and called for hearing, the appellant failed to appear, and no brief being on file, on motion of counsel for re-

spondents, and his suggestion that the appeal was frivolous, the judgment and order appealed from were affirmed, with damages. In making this order, the court acted upon the assumption that the appellant had voluntarily abandoned his appeal, and, as parties do not ordinarily abandon their appeals when there is even a plausible ground to support them, we were forced to conclude that this appeal had not been taken in good faith. It now appears that the failure of appellant to file a brief was due to his ignorance of the fact that his cause was on the calendar, and an examination of the record convinces us that the appeal was not frivolous. So much of the judgment, therefore, as imposes damages for a frivolous appeal is erroneous, and is hereby set aside. We do not think, however, that counsel has offered an excuse for his failure to note the time his cause was set for hearing sufficient to justify us in ordering a rehearing in bank. Rehearing denied, but the judgment is modified to one of affirmance simply, without damages.

83 Cal. 134

DESMOND v. FAUSS *et al.* (No. 13,553.)

(Supreme Court of California. Feb. 10, 1890.)

MOTION TO DISMISS APPEAL—ORDERS.

Under Code Civil Proc. Cal. § 1003, which defines an order to be any direction of a court or judge in writing, not included in a judgment, a writing signed by four justices of the supreme court, extending the time for filing transcript, is an order, though it is not filed; and a failure to file it is not ground for dismissing the appeal, especially where it was an inadvertence, and respondents had notice thereof by service of a copy on their counsel.

In bank. On motion to dismiss appeal.

F. J. Castelhum, for the motion.

THORNTON, J. Motion to dismiss appeal for failure to file transcript in time. By stipulation, the time to file the transcript had been extended to and including the 10th of October, 1889. By a writing signed by four justices of this court on the 8th of October, 1889, the time to file the transcript was further extended 20 days from the 10th of October, 1889. This paper was not filed, but a copy of it was served on the attorney of defendants on the said 10th of October. The order was filed after notice of motion to dismiss was served, and before hearing of the motion. It is now objected that the writing was of no force,—was not an order until filed,—and therefore the time was not extended. We are inclined to think that the paper signed by the four justices was an order of court before filing. It was a writing signed by the justices, and purported to be an order. See Code Civil Proc. § 1003.¹ We are satisfied that the failure to file the writing was an inadvertence, and that the appeal should not be dismissed. The respondents

knew that the writing existed, by the service of a copy on their counsel. We do not think the ends of justice would be promoted by dismissing this appeal. (Grant v. De Lamori, 71 Cal. 329, 12 Pac. Rep. 228,) and the motion must be denied. So ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.

83 Cal. 393

PEOPLE v. CENTRAL PAC. R. CO. (No. 12,-257.)

(Supreme Court of California. March 8, 1890.)

COLLECTION OF TAXES—PLEADING—CONSTITUTIONAL LAW.

1. Pol. Code Cal. §§ 4480, 4481, provide that "the provisions of the four Codes shall be treated as if passed at the same moment of time," and that, "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." Code Civil Proc. § 421, which is part of a title, the subject of which is "Pleadings in Civil Actions," being the only title in the four Codes devoted specially to the subject, provides that "the forms of pleading in civil actions, and the rules by which the sufficiency is to be determined, are those prescribed in this Code." *Held*, that a complaint in an action for the collection of taxes must conform to the requirements of the Code of Civil Procedure, and contain a statement of facts constituting a cause of action, as required by section 421, though the Political Code, in a title devoted to "Revenue," authorizes a special form of complaint in such cases.

2. Where such complaint avers an assessment of "the franchise, road-way, road-bed, rails, and rolling stock of the defendant," but does not allege that defendant is the owner of such property situate within the jurisdiction of the assessing board or of the court, it is defective.

3. A complaint, in such action, averring that the board apportioned the assessment among different counties, without showing its authority so to do, or that any portion of the property assessed, or of any property of defendant was situate in any one of such counties, and without describing any of the property, is defective.

4. An averment of indebtedness for taxes, without an averment that any taxes were ever levied on defendant or its property, or, if levied, when, where, and by whom the levy was made, or whether the taxes were based on the assessment mentioned above, or that there are any taxes against defendant, delinquent or unpaid, is insufficient.

5. Where such complaint states in one count an indebtedness to the state for state taxes, and to many different counties for county taxes, and demands payment of all, there is a misjoinder of causes of action.

6. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation.

7. Pol. Code Cal. § 3670, providing a special form of complaint in actions to collect taxes on railroads situate in more than one county, conflicts with Const. Cal. art. 4, § 25, subd. 3, which forbids the legislature to pass special laws "regulating the practice of courts of justice," as such provision is a "special law," though found in the Political Code, which is general.

8. Pol. Code Cal. §§ 3665-3670, providing a mode for the collection of taxes on railroads situated in two or more counties, differing from that found in the general law, are in conflict with Const. Cal. art. 4, § 25, subd. 10, forbidding the legislature to pass any special laws "for the assessment or collection of taxes."

9. Such law cannot be justified by Const. Cal. art 13, § 13, which provides that "the legislature shall pass all laws necessary to carry out the pro-

¹ Code Civil Proc. Cal. § 1003, provides that every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an "order."

visions of this article," on the ground that section 10 of that article provides a different method for assessing property of railroads operated in more than one county, from that provided for other property, as this does not refer to levy and collection of taxes, but to "assessment" only, and the general laws for the collection of taxes are sufficient to carry into effect the provisions of article 13.

BEATTY, C. J., and THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

George A. Johnson, Atty. Gen., and D. M. Delmas, for the People. Creed Haymond, John Garber, and H. S. Brown, for respondent.

FOX, J. This is an action, brought in the name of the people of the state, to recover from the defendant a certain sum of money alleged to be due the state for taxes, and also various other sums of money alleged to be due to divers of the counties of the state, for taxes for the year 1886. The defendant demurred to the complaint, which demurrer was, upon argument, sustained by the court below, and judgment entered for the defendant, from which the plaintiff appeals. So far as we are advised, this is the first case in which the precise questions here involved, under the present constitution, has been presented for adjudication. To a complete understanding of it, we give the pleadings at some length. The complaint, after giving the title of the court and cause, is as follows: "Plaintiff avers that on the 14th day of August, in the year 1886, the state board of equalization assessed the franchise, road-way, road-bed, and rolling stock of the defendant at the sum of \$20,000,000. That the board apportioned the said assessment as follows: To the county of Alameda, the sum of \$2,607,230, [and here follows similar language as to 16 other counties, differing only in amount.] That the defendant is indebted to plaintiff, for state and county taxes for the year 1886, in the following sums: For state taxes, in the sum of \$112,000; for county taxes of the county of Alameda, in the sum of \$16,225.34, [and here follows a statement in similar form as to the other 16 counties before named, differing only as to amount,] with 5 per cent. added to each of said several sums for non-payment of taxes. Plaintiff demands judgment for said several sums, with 5 per cent. added thereto, together with costs and counsel fees as allowed by law, and prays that an attachment may issue in form as prescribed by section 540 of the Code of Civil Procedure." To this complaint the defendant demurred on the following grounds: "*First.* That the court has no jurisdiction of the subject-matter of the action, nor the person of the defendant herein. *Second.* That the plaintiff has not the legal capacity to sue herein, for the following reasons: That sections 3668-3670 of the Political Code, under the provisions of which said action was instituted, are unconstitutional and void, in this: that said sections are in contravention

of subdivisions 3 and 10 of section 25 of article 4 of the constitution of the state of California. They also are in contravention of section 21 of article 1 of the constitution of the state of California, and of section 1 of article 12 of the constitution of the state of California. That said sections of the Political Code are in contravention of section 1 of the fourteenth amendment of the constitution of the United States. That, so far as the assessment of railroad property is concerned, sections 4 and 10 of article 13 of the state constitution, upon which the said action is founded, are in contravention of section 1 of the fourteenth amendment of the constitution of the United States. *Third.* That several causes of action have been improperly united. *Fourth.* That several causes of action have been improperly united, which are not separately stated in the complaint; that is to say: (1) a cause of action for state taxes; (2) a cause of action for county taxes of the county of Alameda. [Followed by a separate subdivision, in similar form, for each of the other 16 counties.] *Fifth.* That the complaint does not state facts sufficient to constitute a cause of action. *Sixth.* That the complaint is ambiguous, unintelligible, and uncertain, in this: that it does not appear how or when defendant became indebted for taxes; that it does not appear how or when 5 per cent. was added. Wherefore, defendant prays judgment against plaintiff, and that it may have its costs in this behalf expended."

1. It will be unnecessary to consider these grounds of demurrer separately, at any considerable length. The questions of jurisdiction, of misjoinder of causes of action, of insufficiency of facts, and of ambiguity, all turn upon the constitutionality of the provisions of the Political Code under which the plaintiff is attempting to proceed, and under which alone, if anywhere, this form of complaint can be justified. But, tested by the provisions of the Code of Civil Procedure, every point made against the complaint is well taken. Outside the Political Code of this state, it is doubtful if either authority or precedent can be found which would have induced any lawyer to file in a court of justice a complaint like this. It does not contain "a statement of the facts constituting the cause of action," as required by section 426, Code Civil Proc., or as required by any other rule of pleading known to the profession. And yet, by section 421 of the same Code,—the general statute of this state devoted specially to the subject of pleadings and procedure in civil actions,—it is expressly provided that "the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code." And by the provisions of the Political Code, from which Code it is conceded that this form of complaint is taken, it is expressly declared that "the provisions of the four Codes shall be treated as if passed at the same moment of time, and were parts of the

same act," and that, "if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title." Pol. Code, §§ 4480, 4481. The sections of the Code of Civil Procedure referred to are part of title 6, pt. 2. The "subject-matter" of that title is "Pleadings in Civil Actions," and it is the only title in the four Codes devoted specially to that subject. It is therefore, the title which section 4481 of the Political Code declares "must prevail as to all matters and questions arising out of that subject-matter." How, then, can we test the sufficiency of pleadings by the provisions of section 3670 of the Political Code? That section is the only warrant for this complaint, and is found in title 9, pt. 3,—a title devoted entirely to the subject of "Revenue." Responsive to this, the appellant says that the same legislature passed both Codes; that its power to legislate is supreme, except when and where limited by the constitution; and that its power is ample to prescribe one form of complaint for one class of cases, and another form for another class. That is true; but the same legislature had the power to say, and did say, that "the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act," to-wit, the Code of Civil Procedure, which is a separate act from other Codes, though deemed to have been passed at the same moment of time, and, in the exercise of the same power, at the same moment of time, in another act, which defines the rights and duties of all persons subject to the jurisdiction of the state, and a part thereof devoted to a "definition of the sources of the law," and a title of such part defining "the effect of the Codes," it expressly tells the courts by what rule they shall be governed in case the provisions of the four Codes, or of either Code, are found to be conflicting.

Guided by that rule, when we examine this complaint we find it defective in all these particulars: (1) The defendant is sued by a name indicating that it is not a natural person, but a company of some kind, but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being capable of being sued; nor, if incorporated, is there any averment to show where, or under what law, so that the court may determine where jurisdiction of its person lies. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. *Loup v. Railroad Co.*, 63 Cal. 99. (2) There is an averment of the fact of assessment of "the franchise, road-way, road-bed, rails, and rolling stock of the defendant;" but there is no averment that the defendant is the owner of such or any property situate in this state or elsewhere,—nothing to show that the property so assessed was or is within the jurisdiction of the board making the assessment,

or of this court, nor indeed, that there was any such property *in esse*. (3) There is an averment that the board apportioned the said assessment to 17 different counties in the state, but there is nothing to show its authority to make any such apportionment; that any portion of the property, or of any property of defendant, was situate in any one of said counties. The apportionment is of the total sum at which the assessment is made, without a word of description of the property so assessed, or of the part thereof so apportioned to any one of said counties. (4) There is an averment of indebtedness for state taxes, but no averment that any taxes were ever levied or imposed upon the defendant or its property; or, if a levy was made, when, where or by whom it was made, or whether the taxes were based or levied upon the assessment so made, or the property so assessed as aforesaid, or that there are any state taxes against the defendant, delinquent or unpaid. (5) There is an averment of indebtedness for county taxes in each of the 17 counties named, but as to each the same defect exists as above noted in reference to state taxes. (6) If there is any cause of action stated in this complaint at all, there are 18 separate and distinct causes of action, all in one count, and not separately stated. They affect—and if the money is collected it will belong to—18 different persons, to-wit, the state, and 17 separate counties. The only provision in the title of the Code on the subject of pleadings which authorizes the uniting of several causes of action in the same complaint requires that they shall all belong to one class, affect all the parties to the action, and must be separately stated. Code Civil Proc. § 427. (7) The complaint is also ambiguous, for the reason stated in the sixth ground of demurrer. Tax proceedings are *in invitum*, and, to be valid, must be *stricti juris*. *Cooley Tax'n*, 259, 260; *Moss v. Shear*, 25 Cal. 46; *People v. Mahoney*, 55 Cal. 288; *Lake County v. Mining Co.*, 66 Cal. 20, 4 Pac. Rep. 876. If not valid, they constitute no cause of action. It therefore becomes necessary that a complaint in an action for the collection of a tax should show upon its face facts sufficient to make out a *prima facie* case of valid tax and that it is delinquent. It is true that the title on "Revenue" provides that "no assessment, or act relating to assessment or collection of taxes, is illegal on account of informality, nor because the same was not completed within the time required by law." Pol. Code, § 3385. But the waiving of informality does not waive the necessity for action. That an assessment shall not be invalid because of some informality does not excuse the total want of assessment. There can be no assessment unless there is some property assessed; and, to be assessed, there must be some attempt at description of the property. At least, its general character must be shown, and its *situs* must be shown to be within the

state or the county where assessed. It will be observed, also, that the section quoted refers to informality in the matters of assessment and collection only. The statute nowhere waives informality in the matter of levy of the tax. There is no tax until one is levied, and a complaint shows no indebtedness for taxes unless it shows the levy of a tax. In this complaint there is no intimation that a tax, either state or county, was ever levied. Counsel for appellant has cited several decisions of this court in support of the power of the legislature to prescribe by special act a special form of complaint in actions for the collection of taxes. Unfortunately for his argument, those decisions were all based upon special acts, passed at a time when the legislature had power to pass special laws upon almost any subject, and even before the adoption of the Codes; forgetting that here he is attempting to proceed under the Codes themselves, and that in them the legislature has itself provided for just such a contingency as arises here, and directed us as to which shall prevail in case of conflict between the different parts of the same general law.

2. But the respondent, by its demurrer, attacks this complaint, and all the proceedings upon which it is based, upon other and higher ground than that which we have thus far considered. The law upon which these proceedings are based is attacked as being in conflict with the constitution of the state. The provisions of the constitution on the subject of revenue are all found in article 13, and comprise the whole law of the constitution on the subject of the assessment of property for purposes of taxation, and of the levy and collection of taxes. Those provisions which bear most directly upon the questions here involved are found in sections 10 and 13, which read as follows: "Sec. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, road-way, road-bed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value; and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts." "Sec. 13. The legislature shall pass all laws necessary to carry out the provisions of this article." The last section quoted is the one to which we have to look for authority to levy the tax. The first section of the article commences by providing that "all property in the state * * * shall be taxed in proportion to its value, to be ascertained as provided by law," and several subsequent sections speak of the "levy" and the "taxes so levied," and one says that "income taxes may be assessed to and collected from," etc.; but nowhere in

the article is there any provision made as to when, or by whom, or in what manner, any property tax shall be levied. Provision for that must be made by the legislature under section 13,—the last section of the article. The same is true with reference to the provision for the collection of property taxes. Both these subjects are relegated entirely to the legislature. We are therefore compelled to turn to the article of the constitution on the subject of the "Legislative Department," to ascertain whether or not there are any limitations upon the mode and manner in which the legislature may exercise the powers and perform the duties imposed upon it by this section 13, or as to the extent which it may go in the exercise of those powers. These provisions are found in article 4 of the constitution. Turning to section 25 of that article, we find this provision: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * *Third*, regulating the practice of courts of justice; * * * *tenth*, for the assessment or collection of taxes; * * * *thirteenth*, extending the time for the collection of taxes; * * * *twentieth*, exempting property from taxation; * * * *twenty-fourth*, authorizing the creation, extension, or impairing of liens." An examination of the whole section shows conclusively that the intention of the framers of the constitution, and of the people in adopting it, was to prohibit the legislature from passing local or special laws which should in any wise affect questions of taxation, or the liens of taxes, or the practice in courts of justice. All these must be provided for by general and uniform law. The legislature has provided a general and uniform law "regulating the practice of courts of justice." That law requires that the complaint in a civil action shall be such as we have already indicated, and that its sufficiency shall be determined as therein prescribed. Yet, in the teeth of this constitutional inhibition, and in spite of the fact that the provisions of the constitution are "mandatory and prohibitory unless by express words they are declared to be otherwise," (article 1, § 22,) the legislature has provided—*First*, a general scheme for the assessment, levy, and collection of taxes; and, *second*, a special scheme for the assessment, levy, and collection of taxes on railroads situate in more than one county, and in that special scheme has provided for the form of complaint adopted in this action. The special scheme referred to is found in sections 3665 to 3670 of the Political Code, the form of complaint being authorized by the latter section. The whole scheme, so far as it relates to the collection of taxes, is claimed to be in conflict with the constitution, and in due course will be considered, but for the moment we are dealing only with that part of it which provides for this complaint.

It is claimed by appellant that this is not in conflict with the third subdivision of said section 25 of article 4, for that it relates to

pleading and not to practice. But this is taking too narrow a view of the language of the constitution. It is evident that the words of this inhibitory clause of the constitution are used in their general sense, and in that sense the words "practice of courts of justice" include all "pleadings," although the word "pleadings" never includes all "practice." It is impossible to contemplate the subject of "practice of the courts of justice," and eliminate from the mind all thought of "pleading." Burrill defines "practice," first, as "the course of procedure in courts," and says that "in a general sense practice includes pleading." Rapalje's & Lawrence's Law Dictionary gives the following definition of the word "practice;" "The law of practice or procedure is that which regulates the formal steps in an action or other judicial proceeding. It therefore deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions."

But it is further claimed by appellant that, even if "practice" includes "pleadings," the provision is not in conflict with this inhibition of the constitution, for the reason that it is found in the Political Code, which is a general law. It does not follow that, because an isolated provision is found in a general statute, the provision is itself a general law. Such a provision may be purely "special," and come within the inhibition of the constitution, even when found in the Code itself. It was so held, with reference to a section of the Political Code, in *Earle v. Board*, 55 Cal. 489. In *Miller v. Kister*, 68 Cal. 142, 8 Pac. Rep. 813, it was held that a provision found in the general law, entitled "An act to establish a uniform system of county and township governments," temporarily suspending the operation of some of the provisions of the act as to four of the counties of the state, was "special" legislation, and void under the clause of the constitution here under consideration. So it appears that a clause or provision special in its character—applying to particular individuals, particular places, or particular cases—is none the less special because inserted in the most general of public acts. A special act cannot be converted into a general act by a declaration of the legislature that it shall be so considered." *San Francisco v. Water-Works*, 48 Cal. 493. Nor can it be so converted by being embodied or entombed in an act which in its general scope and purpose is a general law. If it can be so converted into a general law, then, as was said by the court in *Investment Co. v. School-Dist.*, 21 Fed. Rep. 151, "every prohibition * * * contained in the constitution may be violated with impunity. * * * An act cannot be both public and private; but it can be either and be special." In *Manning v. Klippel*, 9 Or. 367, it was held that an act providing for the compensation of the sheriffs and clerks of 14 out of 20 counties of the state was a "local law" for the assessment and collection of taxes for county purposes,

and therefore within this constitutional prohibition, and void.

3. But the objection goes not alone to the form of complaint, but to the entire legislative scheme for the collection of taxes upon railroads operated in more than one county. It is to the effect that the entire scheme is special, and in conflict with the different subdivisions of section 25, art. 4, of the constitution, which we have quoted, and that being so in conflict, no action can be maintained thereunder for the collection of taxes, whatever may be the form of the complaint. If this scheme is special, then the cases which we have already cited will apply to it in all its parts, and to them many others might be added from the courts of last resort in very many of the different states in the Union; but this court has already expressed itself so plainly upon the subject in the cases cited that it is unnecessary to go elsewhere for authority. Practically admitting that the scheme is "special," the appellant justifies it under section 13 of article 13 of the constitution above quoted, claiming that the legislature is not only authorized, but required, to pass all laws necessary to carry that article into effect. That is true, but it is not authorized, required, or empowered to pass laws that are not necessary to carry it into effect, nor to destroy the uniform operation of laws which are required by the constitution itself to have a uniform operation. It will be borne in mind that the constitution provides for a difference in the mode of assessment only,—not in the mode of levy, or of collection of the tax on the property when assessed. Under the constitution, it became necessary, or if not necessary, at least proper, for the legislature to pass laws providing the details for the assessment and apportionment of the assessment of this class of property by the state board of equalization. It is the only property in the state of which that board is authorized by the constitution to make assessment; and, as the board is only authorized to make such assessment when the property is situate in two or more counties, apportionment thereof to the several counties became necessary. To provide for the details of that apportionment, and of notice to the several counties interested, it became necessary and proper that the legislature should act; and, in so far as its action relates to the assessment, and the apportionment thereof, it is not attacked as being in conflict with the constitution. But this legislation also provides a mode of collection differing from that found in the general law on the subject,—not necessary for the purpose of carrying into effect any of the provisions of article 13 of the constitution, and special, because not applicable to all property, or even to railroad property generally, but only to such railroad property as is situate or operated in two or more counties. For this reason, it is in direct conflict with, and is specially forbidden by, subdivision 10 of section 25 of article 4 of the constitution. It is therefore

vo'd, and furnishes no cause of action upon which suit can be maintained under it. The provisions of the Code for the collection of taxes generally, and those for the collection of taxes upon the portion of this class of property, especially which lies in two or more counties, are too long to justify quotation in full in this opinion; but a reference to a few of the points of difference between them will serve to illustrate the special character of the legislation against which this objection is pointed.

Before calling attention to those differences, however, it is proper to note a few general provisions of the revenue law which are alike applicable to all persons and all property, and which serve to show a total absence of necessity for any difference in the mode of collection. "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all the property of the delinquent. The judgment is not satisfied, nor the lien removed, until the taxes are paid, or the property sold for the payment thereof." Pol. Code § 3716. "Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock M. of the first Monday in March in each year." Id. § 3717. "Every tax due upon real property is a lien against the property assessed, and every tax upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements, which several liens attach as of the first Monday of March in each year." Id. § 3718. These provisions apply to, and these liens attach to, the property of railroad companies owning and operating roads situated in two or more counties, the same as to all other property in the state. It will thus be seen that for the taxes upon this class of property the state, and every county in it, has the same security that is provided for taxes upon all other property in the state,—a lien upon all the property of the owner,—not even excepting that which is by law exempt from execution, and by other provisions of the statute it is made a first lien. So that in no event can the state be defeated in the collection of its taxes if its own proceedings in the assessment, levy, and collection have been lawful.

Under the general law, the taxes upon all property, except that here under consideration are collected by the tax collector of the county in which the property is situated. The state assumes the burden, the expense, and the risk of transporting its portion of the taxes so collected from the respective county-seats to the state treasury. Under this special law, all the taxes upon this class of property must be paid at the office of the state treasury, after first getting a certificate of the comptroller as to the amount thereof. This includes not only the state but the county taxes for the several counties; thus imposing upon the tax-payer the burden, the

expense, and the risk of transporting to the capitol of the state moneys which, in the aggregate, may be estimated by tons, as all taxes in this state must be paid in coin. Under both laws, if the tax becomes delinquent, 5 per cent. is added. Under the general law, on or before the first Monday in February the tax collector publishes in his county a delinquent list, which notifies the tax-payer of the amount of his delinquency, and of the time when the lien will be enforced by the sale of his property. Until that time, he has the right to pay the tax, with the 5 per cent. for delinquency, and 50 cents for the cost of publication of each separate description of real property assessed to him, and upon each assessment of personal property. If he does not pay it, the least amount of his property which any bidder will take and pay the tax and percentage and costs will be sold; and he will thereafter have at least one year in which to redeem the same. Under this special law, no notice of delinquency is ever published, but, if the taxes remain unpaid until after the first Monday in February, the comptroller must then commence an action for the recovery of the taxes due the state, and the various counties and cities and counties of the state, together with the said 5 per cent. penalty for delinquency, and the costs of suit; and it is specially provided that, whether the tax be then paid before or after judgment, the defendant shall also pay such counsel fees as the court may allow. It is further provided that in such action the unverified complaint, in the form used in this case, shall be sufficient, and that upon the filing of such complaint the clerk must issue the writ of attachment prayed for. It will thus be seen that under this law the tax-payer is not only burdened with heavy costs and expenses not provided for by the general law, but, in addition to that, and notwithstanding the fact that the state has, as in all other cases, a first lien upon everything which he owns, any particular portion of his property which the representatives of the state may see fit to direct is liable to be summarily seized upon attachment, and, if it be personal property, taken out of his possession, held pending the suit, and finally sold under judgment for what it will bring. If there then be a deficiency, the original first lien still remains upon all the balance of his property. The inequalities, and the possibilities of injustice, under such a provision, are certainly very great. Take the case at bar. The total amount sued for in this case, exclusive of costs and counsel fees, is \$330,800.44. For this the state has a first lien upon the property, and most of it fixed property, assessed by itself at \$20,000,000. Notwithstanding that vast security, she asks for—and, having asked, must have it—an attachment, under which her officers may direct the sheriff to seize and take possession of all the rolling stock of the company, stopping its entire traffic, and holding it for months,—possibly years,—until the litigation is con-

cluded. Such a provision is not only in conflict with subdivision 10, *supra*, but also with subdivision 3, *supra*; for the general law regulating the practice of courts of justice authorizes the writ of attachment only when the plaintiff, by affidavit, shows that the debt for the recovery of which the action is brought is not secured by any mortgage, lien, or pledge of real or personal property. We make no point of the want of undertaking for the writ, for the reason that the state is not, under the general law on that subject, required to give an undertaking in any action brought by it. Under the general law, the sale for taxes upon realty is of the realty, or some part thereof. Such a sale will also be for the taxes upon personal property, if assessed to the same person. Under such a sale, there is a year at least in which to redeem. Under this special law, if the proceeding goes to judgment and sale, the sale may be entirely of personal property, from which there is no redemption. If of realty, there is but six months in which to redeem.

These are but a few of the points of difference between the general and special provisions of this law, but they are sufficient to show a marked and broad discrimination against the owners of railroad property situate or operated in two or more counties of the state. It is a discrimination which is not made against, and does not apply to, railroad property, and the owners of railroad property generally, but only when the property is situate in two or more counties. It is a matter of common knowledge that there are numerous railroads in this state, each situate wholly within one county. To such this special mode of collection of taxes has no application. While it is true that a law which applies to all of a class in a state is held to be a general law (to which rule, however, this court has held that there are some exceptions, as in *Ex parte Westerfield*, 55 Cal. 550,) it is equally true that one which applies to only a part of a class is special, and, under a constitutional inhibition like ours, is void. The case of *Investment Co. v. School-Dist.*, 19 Fed. Rep. 359, is directly in point. The state of Oregon had a constitutional provision providing that the legislature should not pass "special or local" laws for the assessment and collection of taxes for state, county, township, or road purposes. An act was passed providing for the taxation of mortgages upon real property situate in no more than one county, in which it was provided that mortgages upon land situate in more than one county should be void. An attempt was made to enforce the collection of taxes upon mortgages upon land situate in no more than one county, by sale of the notes and mortgages, as provided might be done, under the act. The sale was enjoined, and the act declared void, because it provided for the taxation of mortgages upon lands situate in not more than one county, and not upon all mortgages. Judge DEADY, in discussing the question, said: "An act providing for the assessment of mortgages

generally is, so far, a general act. It comprehends the *genus*. But an act providing for the assessment of all mortgages for sums exceeding \$500, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood-lands, plow-lands, or river-lands, is special; and, in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the *genus* mortgages, but only the species,—one county mortgages." So, here, these provisions of law now under consideration do not comprehend the *genus* railroads, but only the species,—two county railroads.

The general law for the collection of taxes in this state provides for the bringing of suit in certain cases; but this is not one of them, and is not brought in accordance with that general law. This is a fact which still further serves to mark the provisions under which this proceeding is had as special, and in violation of the prohibitions of the constitution. Section 3899 of the Political Code, a part of that general law, reads as follows: "The comptroller may, at any time after the delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list, amounting to \$300, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the comptroller a certified copy of the entries upon the delinquent list relative to such tax; and the tax collector—or the comptroller, in case the tax collector refuses or neglects, for fifteen days after being directed to bring suit for collection by the comptroller—may proceed, by civil action, in the proper court, and in the name of the people of the state of California, to collect such tax and costs." This is the provision under which tax-payers other than those owning railroads situate or operated in two or more counties may be sued for the collection of taxes. The proceedings and form of complaint are then similar to those in this case, and are open to the same objection, when tested by the Codes, or by subdivision 3, § 25, art. 4, of the constitution, as already noted, but the action cannot be brought or maintained until the property has been offered for sale by the tax collector once, at least; and even then it must be commenced in the county where the property is situate, and the money, when paid,—whether before or after judgment,—must be paid to the county treasurer, and not to the state treasurer. *Id.* § 3900.

The appellant argues that all these special provisions now under consideration operate as, and constitute, an immunity in favor of the respondent, and that it cannot, therefore, complain of them. If appellant is correct in

this, then these provisions are in direct conflict with section 21, art. 1, of the constitution, and void. That section reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." But appellant is mistaken as to the party to whom these special privileges and immunities are granted. It is not to the few whose railroads are situate in two or more counties, but to those whose railroads are situate each entirely in one county, and to all other taxpayers except those of the class to which this defendant belongs. As to this defendant, and the few others situate like it, these provisions impose burdens not imposed upon other railroad corporations. All railroad corporations in this state are organized under one general law, and the constitutional provision with reference to that law is: "Corporations may be formed under general laws, but shall not be created by special act." Article 12, § 1. This court has held, in the most emphatic terms, that any attempt to confer a benefit or impose a duty upon one or more corporations formed under a general law, not conferred or imposed upon all corporations formed under the same law, is in conflict with this provision of the constitution, and void. "Private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all. * * * The rights and duties of all corporations formed under the general law * * * are fixed and determined by its terms, and can only be changed or modified by amendment of the general law; and every such amendment must be made applicable to all corporations created under the general law." *San Francisco v. Water-Works*, 48 Cal. 493. The same doctrine has since been laid down and adhered to in *Road Co. v. Cole*, 51 Cal. 381; *Water-Works v. Bryant*, 52 Cal. 132; and *Railroad Co. v. Baldwin*, 57 Cal. 160. That these provisions for the collection of taxes upon the property of railroad companies operating in two or more counties do impose burdens not imposed upon other railroad companies organized under the same general law, seems to us too plain for argument. From what we have already said, it follows that the judgment appealed from in this case must be affirmed. It therefore becomes unnecessary to consider the only other point made upon the demurrer. Our decision of that point either way would not change the result. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: THORNTON, J.

BEATTY, C. J. I dissent. The prevailing

opinion goes entirely upon the ground that the provisions of the Political Code relating to the assessment and collection of taxes levied upon railroads operated in two or more counties are in conflict with section 25 of article 4 of the state constitution,—a section which prohibits local and special legislation on certain enumerated subjects. In my opinion, the legislation referred to is neither local nor special. It is not local, because it operates throughout the state; and it is not special, because it applies to all railroads of a class created and defined by the constitution itself. I content myself with this brief indication of the grounds of my dissent because want of time precludes a more elaborate statement. The question as to the alleged conflict of our revenue law with the fourteenth amendment to the constitution of the United States not having been considered in the opinion of the court the occasion does not call for any expression of my individual views.

PEOPLE v. CALIFORNIA PAC. R. CO. (No. 12,258.)
(*Supreme Court of California*. March 8, 1890.)

Fox, J. This case is exactly like that of *People v. Railroad Co.* ante, 303, (No. 12,257,) decided this day, except as to amount involved, and identity of counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

PEOPLE v. NORTHERN PAC. RY. CO. (No. 12,259.)
(*Supreme Court of California*. March 8, 1890.)

Fox, J. This case is like that of *People v. Railroad Co.*, ante, 303, (No. 12,257,) this day decided, except as to amount involved, and counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

PEOPLE v. SAN PABLO & T. R. CO. (No. 12,260.)
(*Supreme Court of California*. March 8, 1890.)

Fox, J. This case differs from that of *People v. Railroad Co.*, ante, 303, (No. 12,257,) this day decided, only as to the amount involved, and the counties interested; and on the authority of that case the judgment is affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

PEOPLE v. SOUTHERN PAC. R. CO. (No. 12,261.)
(*Supreme Court of California*. March 8, 1890.)

Fox, J. This case is in all respects like that of *People v. Railroad Co.*, (No. 12,257,) ante, 303, this

day decided, except as to amount involved, and counties interested; and on the authority of that case the judgment is affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: BEATTY, C. J.

I dissent: THORNTON, J.

(83 Cal. 198)

WIEDEKIND v. TUOLUMNE COUNTY WATER CO. (No. 13,493.)

(Supreme Court of California. Feb. 25, 1890.)

EVIDENCE—RELEVANCY—TRIAL.

1. In an action for damages caused by the breaking of defendant's reservoir, defendant's witness, after testifying that he had "been in the water business 35 years," and had "had experience with earth dams," was asked by defendant, "What is your experience and observation in regard to the breaking of such earth dams through the earth at one end or the other?" also, "How many different reservoirs of earth have you had charge of and had under construction and management during the last 35 years?" *Held*, that objections to the questions were properly sustained, as defendant's dam was a wooden dam, which the evidence tended to show broke away by reason of decayed timbers.

2. The fact that the court compelled defendant's counsel to go on with the case at an evening session, against his objection that he was too ill to proceed, is not sufficient ground for granting a new trial, where it appears that defendant was not thereby prevented from having a fair trial, but that the trial proceeded as it would if defendant's counsel had not been ill.

Department 2. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

Edwin A. Rodgers, for appellant. Frank W. Street, for respondent.

SHARPSTEIN, J. This action is brought by plaintiff for alleged damages caused him by the breaking of defendant's reservoir, by reason of which a large volume of water flowed over and into the mining claim of plaintiff, situated below said reservoir, filling said claim with earth, rock, and timber, and carrying away mining implements and a bridge constructed by plaintiff, and depriving plaintiff of the use of said claim during a period of four months. Plaintiff avers that said dam was poorly constructed, and at the time of the break was in a rotten and decayed condition, and was badly and carelessly attended by defendant, and by reason of such carelessness and negligence it broke away, and caused the injuries of which plaintiff complains. All the material allegations of the complaint are denied by the answer of the defendant. The cause was tried by a jury, which returned a verdict in favor of plaintiff; and a judgment was entered in his favor for the damages awarded him by the verdict. Defendant moved for a new trial, which was denied, and from that order and the judgment he appeals to this court. Appellant's main contention is that the evidence is insufficient to justify the verdict. He admits that a break occurred by which the water of the reservoir escaped, but contends that it was not in the dam proper, but in the native earth at or near

the east end of the dam, which, if proven, he claims would negative the averment of its having occurred through carelessness or negligence in the construction or maintenance of the dam. But there is evidence tending to prove that the break occurred as alleged in the complaint, and that is sufficient to justify the verdict, although there is evidence tending to prove that the break occurred where the defendant alleges it to have occurred. It is a clear case of conflict of evidence, and we cannot disturb the order denying defendant's motion for a new trial on the ground of "insufficiency of the evidence to justify the verdict."

There are two exceptions to rulings of the court in sustaining plaintiff's objections to questions asked of defendant's witness Smith. After testifying that he had "been in the water business thirty-five years," and had "had experience with earth dams," he was asked by counsel for defendant, "What is your experience and observation in regard to the breaking of such earth dams through the earth at one end or the other?" Defendant's counsel objected to it as irrelevant. The court, in sustaining the objection, remarked that it did not see "how an earth dam might break would assist the jury in determining how the break in this case had occurred," this not being an earth dam. The ruling was correct.

Defendant's counsel then asked the following question: "Mr. Smith, how many different reservoirs of earth have you had charge of, and had under construction and management, during the last thirty-five years?" Plaintiff's counsel objected, and the objection was properly sustained. Defendant's dam was a wooden dam, and there is testimony tending to prove that it broke away by reason of the weakness of some of the timbers, which had become decayed by age and exposure. Any amount of familiarity with earth dams would not qualify a witness to testify as an expert in regard to wooden dams.

The last ground upon which defendant's counsel insists is "irregularity in the proceeding of the court, and abuse of discretion by the court, by which defendant was prevented from having a fair trial." The specification is as follows: "That on the 12th day of February, A. D. 1889, this case was on trial from 10 o'clock A. M. to 5 o'clock P. M., at which time the court took a recess until 7 o'clock P. M., to which defendant's counsel objected, stating that he was too unwell to attend an evening session. At about twenty minutes to 9 o'clock P. M. defendant's counsel again stated he was physically and mentally unable to proceed further. The court directed defendant's counsel to go on and call his next witness, and defendant here assigns that this order and direction were such an irregularity and abuse of discretion as to prevent defendant from having a fair trial." While it would have been eminently proper, under the circumstances, for the court below to have granted counsel's request, it does not

appear to us that the defendant was thereby prevented from having a fair trial. The trial appears to have proceeded, in all respects, as it would if defendant's counsel had not been ill. The application was one which addressed itself to the discretion of the court, and the denial of it is not a sufficient ground for granting a new trial, unless the party was prevented by it from having a fair trial, of which we find no evidence in the record. Judgment and order are affirmed.

We concur: THORNTON, J.; MCFARLAND, J.

(83 Cal. 225)

McGUIRE v. DREW *et al.* (No. 13,402.)

(Supreme Court of California. Feb. 27, 1890.)

NEW TRIAL—ABSENCE OF DEFENDANT—JURY TRIAL—ORDERS.

1. The case was tried in defendant's absence. He knew, on the day before the trial, that it was set for that day; also that plaintiff would grant no further continuance. It did not appear that the result would have been different if he had been present. *Held*, that these facts did not show accident or surprise entitling defendant to have the judgment vacated, and to have a new trial.

2. The fact that defendant was a candidate for office, and on the day of trial was looking after the returns, did not excuse his negligence in failing to appear or secure representation at the trial.

3. Defendant telegraphed the judge, demanding a jury trial. *Held*, that it was immaterial that a jury was not ordered, as the court was authorized, by Code Civil Proc. Cal. § 631, to dispense with a jury, on failure of defendant to appear in person or by counsel.

4. The court proceeded with the trial of the case at the same time with another case against the same defendant, allowing the testimony, so far as applicable, to be used in both cases, though the witnesses were separately sworn, in each case. Defendant claimed that counsel who went to the court to demand a jury in this case, were thus prevented from doing so. *Held*, that the course pursued by the court was within its discretion, and, that as no demand for a jury and a continuance was made, it could not be said that defendant was injured thereby.

5. A ruling on the admission of evidence is not an order, within Code Civil Proc. Cal. § 1003, which declares "every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an 'order,'" and must therefore be excepted to at the time it is made in order to be available on a motion for a new trial or on appeal, within section 646.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Thomas J. Clunie, (Andrew J. Clunie, of counsel,) for appellant. R. T. Devlin, for respondent.

GIBSON, C. This appeal is by T. J. Clunie alone, from a judgment rendered against himself and co-defendants, as partners, in an action prosecuted by plaintiff upon an account for material furnished to and work done for defendants; also from an order denying him a new trial, and an order refusing to vacate the judgment. At the time this case was called and set for trial another action was pending, which had been brought by Towle Bros. & Co. against the same defendants as partners, except C. A. Drew, to recover up-

on an account for building material furnished to them, and it was set for trial for the same day, namely, November 14, 1888. Notice that the case had been set for trial on the date mentioned was given to the defendant Clunie. On the day of the trial the plaintiffs and defendants in both cases, with their counsel, were present, except the defendant Clunie, who neither appeared in person nor by counsel. The court, it seems, proceeded with the trial of both cases at the same time, although no order of consolidation appears to have been made; but in the case here separate findings were made, and a separate judgment thereon rendered, in favor of the plaintiff, and against the defendants N. L. Drew and T. J. Clunie, as partners under the name of Sacramento Warehouse Company; the court first having granted a nonsuit as to C. A. Drew, the other defendant. Subsequently defendant Clunie made a motion for a new trial, which was denied. He then moved to set aside the judgment, with a like result. The first motion was based upon the grounds of the irregularity of the proceedings on the trial; accident or surprise which ordinary prudence could not have guarded against; insufficiency of the evidence to justify the decision; and that the same was against law; and the second motion was upon the ground of mistake, inadvertence, surprise, and excusable neglect. Excusable neglect is not one of the grounds of a motion for a new trial, under section 657, Code Civil Proc.; but, by section 473 of the same Code, it is one of the grounds, in addition to the ground of surprise, upon which a judgment may be vacated. Hence we suppose appellant made the motion to vacate the judgment in order to avail himself of the ground of excusable neglect, and as this last motion embraces the ground of accident or surprise, and is more fully presented upon the affidavits that were used upon the hearing, we shall consider it first; and the disposition of it will include the other motion, upon the ground last mentioned. The facts relied upon to establish accident, surprise, or excusable neglect may be briefly stated, as follows: At a general election in this state on November 6, 1888, appellant was a candidate for congress in the fifth congressional district, embracing a portion of the city and county of San Francisco. The contest was very close between himself and his competitor; and in consequence his presence in the city on that day, and almost continuously until the 23d of November, was necessary, in order that he might see that the returns were properly canvassed and declared. Having previously succeeded in obtaining from counsel for plaintiff a postponement of the trial until after the day of the election, on account of his political engagements, and relying upon his former success, he requested another postponement by letter, which the counsel for plaintiff on the 13th of November telegraphed he could not accede to. Thereupon the appellant notified the judge before whom the case would

come that he (appellant) could not be present on the 14th, and, in the same telegram demanded a jury trial, believing that the judge, upon the receipt of the telegram, would order a jury, and postpone the trial to some other day for that purpose. The appellant was the only witness who could prove the facts constituting his defense. Appellant's brother, at 9:15 o'clock in the forenoon of the 14th of November, by telephone requested the law firm of Johnson & Johnson, of Sacramento, to move for a jury in and a continuance of this and the case of Towle Bros. & Co. v. Clunie et al. In compliance with this request, which was not received by them until after 10 o'clock in the forenoon, they, or one of them, went to the court-room, and found both cases upon trial, and, apparently for this reason, made no demand or motion. E. J. Dwyer, an attorney at law at Sacramento, also on the same day, shortly after 10 o'clock in the forenoon, went on behalf of appellant to the court-room for the same purpose, and, finding both cases on trial, took no action. On the trial there was no evidence introduced on behalf of the appellant.

1. The terms "accident" and "surprise," though not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, (see *Bouv. L. Dict.*; *And. L. Dict.*,) which ordinary prudence could not have guarded against, (*Code Civil Proc.* § 657, subd. 3.) Whether the appellant was chargeable with notice of the setting of the case for trial on the 14th of November, under rule 13 of the trial court, set forth in the affidavit of counsel for respondent, or not, it seems that he had actual notice before the day of trial that the case was set for that date; and also knew on the day before the 14th that no further postponement of the trial would be agreed to by counsel for respondent. It was therefore his duty to have either appeared in person or by an attorney at the opening of the court on the day of the trial. *Haight v. Green*, 19 Cal. 113; *Mulholland v. Heyneman*, Id. 605; *Ekel v. Swift*, 47 Cal. 619. He must have known that the probable consequence of his failure to appear in person or by attorney at the trial would be a trial of the case in his absence. See *Code Civil Proc.* § 594. There is nothing in the affidavits used on behalf of the appellant to show any fault or omission of duty on the part of respondent or his counsel. It may be that the previous good nature of the latter misled the appellant, but, as he had no right to suppose that it would continue indefinitely, he cannot complain because it was terminated by the telegram of the 13th of November. We are therefore unable to see how the appellant can claim to have suffered an accident, or been surprised, when he knew or might have expected the result which followed his omission to appear

or secure representation at the trial. He also fails to show another necessary quality to entitle him to relief upon the ground of surprise, namely, injury. *Patterson v. Ely*, 19 Cal. 28; *Cook v. De la Guerra*, 24 Cal. 238; *Brooks v. Douglass*, 32 Cal. 208. There is nothing presented to show that a different result would be reached.

2. The omission on his part to appear or secure representation at the trial amounted to negligence, and, unless it was excusable, he is not entitled to any relief upon that ground. Now, it may be that the condition of the election returns were such that it was to the interest of the appellant to remain in San Francisco from the day of the election until the 23d of November, 1888, in order to ascertain the true result of the election; but we have been referred to no law, and know of none, that required him to personally watch and guard the canvassing of the election returns. On the contrary, we must presume that the canvassing board would have properly performed its duty without his presence; from which it follows that appellant's presence at the canvassing of the election returns was a matter of choice, and not of necessity; and he, having chosen to consider his interest in the election of more concern than his interest in this action, cannot now avail himself of his neglect of the latter as something that ought to be excused. *Haight v. Green*, supra; *Mulholland v. Heyneman*, supra.

3. Regarding the demand for a jury trial made by a telegram to the judge, sent by the appellant the day before the day of trial, it is sufficient to say that, even if the judge had ordered a jury upon the receipt of the telegram, yet, by reason of the failure of the appellant to appear in person or by counsel at the trial, the court was authorized to dispense with a jury. *Code Civil Proc.* § 631.

4. Another irregularity urged is that the court tried this case with that of Towle Bros. & Co. v. Clunie et al., without the consent of appellant. It appears from the statement, on motion for a new trial, "that said court, on said 14th day of November, 1888, tried this cause, and the cause of Towle Bros. v. Clunie et al., then pending in said court, at the same time, and permitted the testimony of the witnesses taken in the said case of Towle v. Drew et al. to be used and considered as testimony in this cause, so far as applicable, without said witnesses being separately examined in this case, but they were separately sworn in each case; that said action of the court was taken by consent of the parties present, but without the consent or agreement of this defendant, Thomas J. Clunie." From this it appears that the cases were, in effect, tried separately; and the course pursued, we think, was within the discretion of the court, and the appellant does not appear to have been injured by it. The only injury he claims that resulted from it is that the counsel who went to the court-room for him on the day of the trial, and found

both cases on trial, and then went away without doing anything, were prevented from demanding a jury trial in the second case, and obtaining a continuance for that purpose. There is nothing in the record to show, and we are therefore unable to say, that, if such counsel had made a proper application to the court for a jury in and for a continuance of the trial of the second case, it would not have been granted.

5. It is further urged that the court erred in permitting N. L. Drew to testify to the partnership between himself and appellant, it appearing in evidence that the agreement relating to such partnership had been reduced to writing, and was then within the jurisdiction of the court; and that, as the act of receiving such evidence was an order made in the absence of the appellant, it is deemed excepted to under section 647, Code Civil Proc. We do not understand that a ruling made during the progress of a trial, either admitting or excluding evidence, is an "order," within the meaning of the above section. By section 1003, Id., an "order" is defined as follows: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an 'order.' An application for an order is a motion." And by BENNETT, J., in *Loring v. Illsley*, 1 Cal. 24, as "a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some points of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment." This, we think, is a correct definition, and shows the proper scope of the term "order," as used in the above section, relied upon by the appellant, and excludes a mere ruling upon the reception or rejection of evidence made during the course of a trial, which, under section 646 Code Civil Proc., must be excepted to at the time it is made, in order to be made available upon a motion for a new trial or on appeal. The evidence complained of, although, perhaps, not the best that might have been had by the court, not having been excepted to upon the trial, cannot now be taken advantage of; and the absence of the appellant makes no difference. *Clark v. Gridley*, 35 Cal. 398. Besides, if the appellant desired to show that the best evidence referred to by him was different from that received by the court, he should have set it forth in his affidavit used in support of his several motions. We are of the opinion, however, that it is the duty of the trial court, when only one side is represented at the trial, to insist upon the best evidence attainable.

6. Appellant further contends that the evidence does not justify the findings and decision. Findings of fact were not necessary, so far as the appellant was concerned, because the Code of Civil Procedure, (section 634,) provides that they may be waived by the

several parties to an issue of fact, by failing to appear at the trial. But we have reviewed the evidence, and find that it fully justifies the findings and decision. As this disposes of all the points relied upon, we therefore advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

Hearing in bank denied.

(83 Cal. xix)

TOWLE *et al.* v. CLUNIE *et al.* (No. 13,403.)

(*Supreme Court of California.* Feb. 27, 1890.)

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Thos. J. Clunie, (Andrew J. Clunie, of counsel,) for appellant. Chauncey H. Dunn, for respondent.

GIBSON, C. This was an action brought by plaintiffs, as partners, against the defendants, as partners under the firm name of "Sacramento Warehouse Company," to recover the sum of \$324.07, for goods, wares, merchandise, lumber, and building material sold and delivered by plaintiff to defendants at their request. At the trial all the parties to the cause were present or represented, except defendant Clunie, who neither appeared in person nor by attorney. Judgment passed for plaintiffs, against the defendants, as partners, for the amount demanded. Defendant Clunie afterwards made a motion for a new trial and a motion to vacate the judgment, both of which were denied. This appeal is from the judgment, and also from orders denying said motions; and is the case mentioned and referred to in *McGuire v. Drew*, ante, 312, (No. 13,402,) this day affirmed, and involves the same questions therein considered. For the reasons given in that case, we advise that the judgment and orders appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(83 Cal. 344)

SMITH *et al.* v. BISCAILUZ *et al.* (No. 12,327.)

(*Supreme Court of California.* Feb. 27, 1890.)

SALE OF INFANT'S LAND—PLEADING.

Code Civil Proc. Cal. § 1781, applicable to sales of estates of infants by guardians, provides that the petition shall set forth the "condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale." Held, that a petition which shows that the land to be sold consists of three-sixteenths, undivided, of about 300 acres subdivided into lots containing from 17½ to 22 acres, and that "said real estate is now unproductive, and may remain so for years, and a constant expense, without income," but which is silent as to the existence of any personal estate of the ward, is sufficient to give the probate court jurisdiction to make the order of sale, without reference to section 1537, providing that a failure to set forth in the petition the facts showing the sale to be necessary will not invalidate the proceeding, if the defect be supplied at the hearing, and the "general facts showing such necessity be stated in the decree."

In bank. On rehearing. For former report, see 21 Pac. Rep. 15.

Code Civil Proc. Cal. § 1537, provides that, in a petition for the sale of real estate to pay the allowances of a family or debts outstanding against a decedent, or the debts, expenses, or charges of administration, or legacies, "a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree."

F. H. Howard, Bicknell & White, R. Dunnigan, and Smith & Patton, for appellants. *Chapman & Hendricks and W. J. Foley*, for respondents.

BEATTY, C. J. A former decision of this case is reported in 21 Pac. Rep. 15. After that decision was filed, a rehearing was granted on the second point discussed in the opinion, viz., the alleged insufficiency of the guardian's petition for the sale of Victoria Jordan's interest in the real property in controversy. For the purpose of that decision, we conceded, without deciding, that the petition was radically defective, but held that the order of sale was rendered valid by the clause added to section 1537 of the Code of Civil Procedure by the amendment of 1874. Upon the rehearing, counsel for the respective parties have elaborately reargued both the question as to the sufficiency of the petition and the effect of said amendment. Appellants contend that the petition in this case cannot be distinguished, on principle, from the petition which was held sufficient in *Fitch v. Miller*, 20 Cal. 352. Respondents, conceding the binding authority of that decision, point out what they contend are substantial differences between the two petitions. No doubt there are differences, but whether they are substantial and vital or not is a question not free from difficulty. What the statute then required,—as it does now,—in order to give the court jurisdiction to proceed, was a verified petition by the guardian setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition was founded, tending to show the necessity or expediency of a sale. *Fitch v. Miller*, 20 Cal. 382; Code Civil Proc. § 1781. Respondents contend that a first essential of every such petition is that it shall show by express averment that it contains a description of the whole estate of the ward, real and personal,—not only that which the guardian desires to sell, but all his other estate,—and that it shall set forth the condition of the whole estate, *i. e.*, the situation of the different parcels, and whether they are improved or unimproved, vacant or occupied, productive or unproductive. But this is a stricter construction than was given to the statute in *Fitch v. Miller*. The petition in that case did not purport to contain a description of all the estate of the wards, but only of the estate devised by their father. *Non constat* that they had no other estate. But, as court and counsel seemed to have as-

sumed in discussing the petition that it purported to set forth the entire estate of the wards, the case cannot be considered authority for the proposition that a petition deficient in this particular would satisfy the requirements of the statute. It does, however, decide that in the case of guardian's sales, unlike sales by executors or administrators, it is not necessary to state in the petition the values of the separate items of the ward's estate or their condition, except so far as may be necessary to enable the court to determine upon the necessity or expediency of a sale. Page 383. In other words, it holds that the sole office of the petition is to state facts—including the condition of the estate—from which the necessity or expediency of a sale may be inferred, and that the only reason for stating the condition of any part of the estate is that its condition may affect the question of such necessity or expediency. In consonance with this view, it was held that the petition there in question was sufficient to give the court jurisdiction to order the sale, although confessedly it contained no statement of the condition of the estate of the wards, (other than that which was to be sold,) except that it yielded a small income, and could not be sold without sacrifice. And even as to the property to be sold, the allegations of the petition, though somewhat more detailed and specific than those of the petition in question here, merely tended to show that the land was unproductive and expensive. These allegations, it was held, (pages 385, 386,) presented a case for the judgment of the court upon the question of expediency of a sale of the land, and investment of its proceeds. Turning to the petition in this case, we find that, fairly construed, it purports to contain a description of all the real estate of the ward, but it is completely silent as to the existence of personal estate.

Before considering to what extent this omission affects the sufficiency of the petition, we will notice the further contention of respondents, that it is also radically defective in failing to show the condition of the real property sought to be sold. As above stated, the petition in *Fitch v. Miller* was more detailed and specific as to the condition of the property to be sold than is the petition here, but the difference between the two is not essential. Here it is shown that the land to be sold consists of three-sixteenths, undivided, of about 300 acres of land subdivided into lots containing from $17\frac{1}{2}$ to 22 acres, respectively, and that "said real estate is now unproductive, and may remain so for years, and a constant expense, without income." Substantially, this is all that was alleged in the petition sustained in *Fitch v. Miller*. The allegations there, though more specific, only tended to show that the land to be sold was unproductive and expensive; and, as affecting the question of jurisdiction, it seems to us that no just distinction can be made between general and specific allegations of fact, which, in substance, amount to the same thing. Our

conclusion, on the authority of *Fitch v. Miller*, is that if this petition was insufficient in any particular to give the court jurisdiction to order the sale, it was solely because it failed to describe and show the condition of the ward's personal estate. Counsel for respondents contends that this omission constituted a radical and incurable defect in the petition, and they cite many decisions concerning sales of decedents' estates in support of their argument. But there is this distinction to be observed between sales by guardians and sales by executors or administrators. Ordinarily, no sale of a decedent's estate is authorized, except when it is necessary—*First*, to pay family allowance; *second*, debts of the decedent; *third*, expenses of administration; or, *fourth*, legacies.

Mines and mining interests, belonging to estates of decedents, are, however, an exception to this rule. They may be sold when it is expedient to do so in the interest of the estate, although the proceeds are not needed to pay debts, expenses, etc. Code Civil Proc. §§ 1529–1533. But none of the cases cited by respondents arose under these provisions. On the contrary, they all depended on sections 1536, 1537, and could be sustained only upon the ground that they were shown to be necessary. For this purpose, and in order to enable the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold, the condition and value of all parts of the estate must be set forth, in addition to the other matters enumerated in section 1537. Estate of Boland, 55 Cal. 315, and cases cited. But, in case of mining property which is sought to be sold for the interest of the estate, it is not required that the petition should set forth the condition of any property except that which is to be sold. Code Civil Proc. § 1530. The manifest reason of this is that the expediency of such sales is in no wise dependent upon the condition of other portions of the estate. This brief consideration of the difference of the provisions concerning the sale of mining claims and other real estate of decedents affords a valuable clew to the proper construction of the provisions concerning sales by guardians. Sales by guardians are authorized in two cases—*First*, when necessary to maintain or educate the ward; *second*, when expedient for the purpose of a more profitable investment of the proceeds. Id. § 1777 et seq. To obtain an order for such sale, the guardian must present a verified petition to the court by which he was appointed, "setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale." Id. § 1781. This section applies indifferently to necessary and to expedient sales, and should receive a sensible and reasonable construction, according as the sale is asked on the one ground or upon the other. If the sale is asked upon the ground that it is necessary, there is the same reason for re-

quiring a statement of the condition of the ward's whole estate as exists in the ordinary case of a sale by an executor or administrator, *i. e.*, to enable the court to decide what particular part it is best to sell. But if the sale is asked upon the ground that it is for the interest of the ward that some portion of his land should be sold, and the proceeds invested, it is manifest that the condition of the property to be sold is the only matter to be inquired into, and that the policy or expediency of selling it is in no wise affected by the condition of other portions of his estate. The beginning and the end of the inquiry in such case is whether the price of the land to be sold can be invested to better advantage in something else, and a petition which fairly presents this question ought to be sufficient to give the court jurisdiction to make the order, as it is by express enactment in the case of mining claims belonging to estates of decedents. We think it is doing no violence to the letter, and that it is in perfect accord with the spirit, of section 1781 of the Code of Civil Procedure to hold that its requirements are fully satisfied by stating the condition of the estate to be sold, when, as in this case, the sale is asked upon the sole ground that for the benefit of the ward his real estate, or some part of it, should be sold, and the proceeds otherwise invested. We conclude that the petition in this case was sufficient to give the probate court jurisdiction to make the order of sale, and that the sale made in pursuance thereof was valid and effectual, without reference to the amendment of section 1537 of the Code of Civil Procedure. This conclusion leads to the same result reached in our former opinion, and it is accordingly again ordered that the judgment and order appealed from be, and they are, reversed as to all parties except Miller and Guy, and as to them said judgment and order are affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; FOX, J.

83 Cal. 219

HIGGINS v. RAGSDALE. (No. 13,261.)

(Supreme Court of California. Feb. 27, 1890.)

BOUNDARIES—NONSUIT—WAIVER.

1. Where the only issue in ejectment was as to the dividing line between plaintiff and defendant, a surveyor testified for plaintiff that he went on the land, and sought for the missing quarter section corner, but could not find it, but that the north and south section corners could be easily found without field-notes, and that he established the lost corner by dividing the distance between the two section corners equally; that the line was over a mile long, while the survey called for only a mile; that he discovered a line of blazed trees from the south stake, which were originally line trees, and following this line he set a stake near which, and about the right distance and direction, was the remains of a pine stump, which he considered the bearing tree; and that he found line trees all along the line run by him, and that the line, as claimed by defendant, inclosed the land in dispute, which belonged to plaintiff. Held, that a motion to nonsuit plaintiff, on the ground of insufficiency of the testimony, was properly denied.

2. Where defendant, after a denial of his motion to nonsuit plaintiff on the ground that plaintiff had not shown that the corner between plaintiff and defendant was lost, and that the field-notes used by plaintiff's surveyor were not copies of any official survey or record, introduces a properly certified copy of the original field-notes, which are found to correspond with those used by plaintiff's surveyor, he thereby removes or waives the alleged ground of nonsuit.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Wallace & Prewett, for appellant. Chas. W. Kitts, for respondent.

VANCLIEF, C. Action of ejectment for a narrow strip of land containing about 2.2-3 acres. The parties are owners of adjoining lands. The division line between them is one of the lines surveyed by the United States government, dividing a section into quarters. Their disagreement as to the true location of this division line was the only issue tried. The judgment was for plaintiff, from which, and from an order denying his motion for a new trial, defendant appeals. The only point made by the appellant is that the court erred in denying defendant's motion for a nonsuit. A part of the testimony for the plaintiff was that of C. E. Uren, as follows: "I am a surveyor and civil engineer. I know the lines in controversy. I went upon the ground this spring at the request of plaintiff, to make a survey to establish the corner. I sought for the missing corner, and could not find it. The north and south section corners are in place, and are easily discoverable without the aid of field-notes. Not being able to find the corner, I established it as a lost corner by dividing the distance between the two section corners equally. The line is over a mile long, while the survey calls for a mile long only. I examined carefully all the marks that would aid me. I discovered a line of blazed trees from the south stake, which were originally line trees. I followed along the same, and at half a mile set a stake near which, and about right distance and direction, was the remains of a yellow pine stump, badly burned, but which I believe was the bearing tree. The only pine tree which is now standing has two blazes on the west side, which are old, and made quartering, just like line blazes. This tree could not be a witness tree. I examined it very carefully. It has a large burned place on the side defendant claims the stake to be, and facing stake. There is no mark outside the burned place. Surveyors do not make bearing marks on dead trees or burned wood. About 250 feet south of the pine is an oak 18 feet east of my line, with old blaze on the west side. If the line ran where defendant claims, it would be on the east side of this oak tree. I found line trees all along my line. I also found line trees on the north half of the line. Section lines are always originally run from the south towards the north. I ran the line through from section post to section post, and placed a stake exactly midway; the dis-

tance from said post to the north and south stakes being exactly 40.875 chains in each instance. The fence of defendant is 57 $\frac{3}{4}$ feet north of the stake so placed, and incloses 2.66 acres of plaintiff's land. I was absolutely unable to find or establish the original one-quarter section stake, and there is nothing on the ground by which it or a bearing tree can be established. I examined very carefully." At the close of the evidence for plaintiff the defendant moved for a nonsuit, "upon the ground that plaintiff had not shown that the corner was lost, and had not shown that the field-notes which he used to determine the fact that the corner was lost were copies of any official survey or record." After the motion was denied, the "defendant introduced in evidence a certified copy of the original field notes of survey. * * * These were compared with field-notes used by Surveyor Uren and Meredith, and all found to correspond." There can be no question that the testimony of Uren tended to prove plaintiff's case, and therefore that the motion for nonsuit was properly denied. If the testimony of Uren was deficient by reason of his having been guided by an uncertified copy of the field-notes, the deficiency was supplied by defendant, who introduced a properly certified copy of the original field-notes, which corresponded with those used by Uren, and thereby removed or waived that alleged ground of nonsuit. *Smith v. Compton*, 6 Cal. 26; *Perkins v. Thornburgh*, 10 Cal. 191; *Association v. Willard*, 48 Cal. 614. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 222

CARTER *et al.* v. GREEN MOUNTAIN GOLD MIN. CO. *et al.* (No. 13,031.)

(Supreme Court of California. Feb. 27, 1890.)

LABORERS' LIENS—SERVICE ON ATTACHMENT CREDITOR.

Code Civil Proc. Cal. § 1206, provides that, "in cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding \$100." *Held* that, as the only purpose of the notice is to divert from the execution or attaching creditor money which he would otherwise be entitled to receive as the result of the levy, the service of the notice on plaintiff's attorney was sufficient.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Goodwin & Goodwin, for appellants. *W. W. Kellogg*, for respondents.

BELCHER, C. C. The facts out of which the controversy in this case arises are as follows: The defendant was a corporation engaged in quartz mining at Crescent Mills, in Plumas county. On the 30th of September, 1887, the plaintiffs commenced an action against the defendant to recover a debt due for goods, wares, and merchandise sold and delivered, and at the same time took out a writ of attachment, which on the next day was levied by the sheriff on all of defendant's personal property. Such proceedings were afterwards had in the action that on the 24th of October, 1887, judgment for more than \$3,300 was entered therein in favor of the plaintiffs, no part of which had been paid. The personal property so attached was, on the 17th of December, 1887, sold by the sheriff under execution for the sum of \$991.48, over and above all his costs, and this sum was thereafter duly paid into court on his petition, showing that conflicting claims were made upon him for the money. The appellants, 51 in number, were miners, and during the 60 days next preceding the levy of the attachment were employed by the defendant as laborers in and about said mine. Their claims for the labor so performed amounted in the aggregate to \$3,488.18, no one of them, however, being for more than \$100. Before the sale—that is, on the 21st of October—each one of the appellants made out and duly verified his claim, as required by law, and the same was certified to be correct by the superintendent of defendant. Three days later copies of these claims, with notice attached that the claimant demanded that the amount thereof be paid to him out of the proceeds of the sale of any property of the defendant as a preferred claim, under sections 1206 and 1207 of the Code of Civil Procedure, were delivered to the sheriff, and to the attorney of the plaintiffs in the action; and on the same day like copies of a portion of the claims and notice were served on the defendant, by delivery thereof to its superintendent and managing agent. All of the claims, as originally subscribed and sworn to, with the notice and proof of service attached, were then filed by the clerk with the papers in the said action. None of the claims were disputed by either the plaintiffs or defendant, and, after the money realized from the sale was paid into court by the sheriff, the appellants filed their petition, asking that it be paid to them *pro rata*, in satisfaction of their respective claims. The plaintiffs contested the right of appellants to receive the money, or any portion of it; and after a hearing before the court it was ordered that the petition be denied, and that the whole of the money be applied towards the satisfaction of the plaintiffs' judgment. From this order the appeal is prosecuted. The only question is, did service of the notices of the appellants' claims upon the attorney of plaintiffs meet

the requirements of section 1206 of the Code of Civil Procedure? That section reads as follows: "In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding \$100," etc. We think the service sufficient. The purpose of the notice provided for is to divert from the execution or attaching creditor money which he would otherwise be entitled to claim and receive as the result of his levy. The laborer is not required to commence an action to establish his claim unless it is disputed. He, however, has an interest in the action already commenced, as against both plaintiff and defendant, and his proceeding is in the nature of an intervention. It is true he is not made a formal party to the action, but, in effect, he is a party to it, and obtains benefit from it. The attorney for the plaintiffs in an action is their agent for all its purposes, and on him all papers made by defendants and counter-claimants are to be served. He may direct the sheriff as to what property he shall seize, and may receive and receipt for any money realized from a sale thereof. The learned judge of the court below seems to have thought that the notice was the initiation of a new and independent proceeding, and that, to be effective, it must be served, like a summons, upon the parties, and not their attorney. In this we think he erred, and we therefore advise that the order appealed from be reversed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

(83 Cal. 270)

MOORE v. HOPKINS. (No. 12,334.)

(Supreme Court of California. March 1, 1890.)

BREACH OF MARRIAGE PROMISE—EVIDENCE—INSTRUCTIONS.

1. It is a good answer to a plea in abatement, of the pendency of a former action between the same parties, and for the same cause, that such action has been dismissed since the trial of the second action was commenced, but before its conclusion.
2. The certificate of acknowledgment or proof of a receipt and release from liability for breach of promise of marriage, taken before a notary public, is, under Code Civil Proc. Cal. § 1948, only *prima facie* evidence of the execution of the writing; and plaintiff, in an action for such breach, may by her own testimony controvert the facts therein contained, under Code Civil Proc. Cal. § 1961, pro-

viding that "a presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect."

3. In an action for breach of marriage promise, where there is no evidence to show that defendant entered into the alleged contract of marriage with improper motives, it is reversible error to instruct the jury that "a man who enters into a contract of marriage with a woman with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman for which she is entitled to exemplary damages."

Commissioners' decision. Department 1. Appeal from superior court, San Manteo county; E. F. HEAD, Judge.

Wilson & Wilson, for appellant. *Moses G. Cobb, D. M. Delmas, Geo. C. Ross*, and *Henry E. Wills*, for respondent.

FOOTE, C. This action was instituted to recover damages from the defendant based upon an alleged breach of a promise of marriage made by him to the plaintiff. The jury returned a verdict for the plaintiff. From the judgment rendered thereon, and an order denying a new trial, the defendant has appealed.

Among other matters, by way of defense the defendant pleaded in abatement that another action was pending at the time this suit was brought, between the same parties, and for the same cause of action. It is contended that the judgment of dismissal of a former action between the same parties, and for the same cause, was not admissible in evidence on the trial of the present cause, because, as is claimed, it is no answer to a plea in abatement of a pending action that a judgment of dismissal of the former action is entered after the trial of the second action has commenced, but before its conclusion. This contention, we think, is not well founded. A dismissal of a prior action may be made, and judgment entered, at any time before the trial of the second action is completed. *Dyer v. Scalmanini*, 69 Cal. 639, 11 Pac. Rep. 327; *Hixon v. Schooley*, 26 N. J. Law, 461, 462; *Averill v. Patterson*, 10 N. Y. 501.

The appellant further urges that the certificate of acknowledgement of a notary public to a release and receipt, such as here involved, is conclusive as to the facts stated in the certificate, and they cannot be contradicted by the parol evidence of the plaintiff. The statute under which instruments of the kind under consideration are allowed to be acknowledged provides, among other things: "And the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing." Section 1948, Code Civil Proc. "*Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." Section 1833, Code Civil Proc. "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted." Section 1837, Code Civil Proc. "A presumption, unless declared by law to be conclusive, may be controverted by other evidence, direct or indirect." Section 1961, Code Civil Proc. It therefore appears that

the facts recited in the certificate attached to the release and receipt given by the plaintiff to the defendant or his agent, admitted in evidence, are only *prima facie* presumed to be true, and can be contradicted by any evidence, direct or indirect. Wherefore, the instruction asked for by the defendant, viz.: "In this case, the plaintiff has offered no evidence, other than her own, which denies either the genuineness or the due execution of the receipt and release in evidence in this case; and I therefore instruct you that her evidence alone is not sufficient to overcome the certificate of acknowledgment of the notary public annexed to said release, and direct you to render a verdict in favor of the defendant,"—was properly refused by the court. We do not conceive that what we have here said is at all in conflict with the decision in *Banning v. Banning*, 80 Cal. 272, 22 Pac. Rep. 210, which was in reference to the force and effect of a notary's certificate to a conveyance of a married woman under section 1187 of the Civil Code, which provides that a conveyance by a married woman has no validity unless acknowledged in the manner prescribed by the statute; and the acknowledgment of such a conveyance has been held to be a part of the execution of the instrument itself. *Joseph v. Dougherty*, 60 Cal. 360.

As to the other main contention of the defendant, for a reversal of the judgment and order, viz., that the verdict of the jury was for excessive damages, and that a certain instruction granted by the court was misleading and caused such verdict to be rendered, it may be said with propriety that, whether the amount of the verdict was excessive or not, (about which we express no opinion,) it is clear that the jury may have been misled by the following instruction: "A man who enters into a contract of marriage with a woman with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman for which she is entitled to exemplary damages." There was no evidence whatever in the record to show that the defendant, if he entered into a contract of marriage with the plaintiff, intended to make any effort to undermine her chastity, or to do any other improper act of that sort. Nor is there any evidence (which the plaintiff's counsel argues to exist) that he entered into the contract with any levity, or in a heartless way, having the intention to break it off after amusing and enjoying himself in her society as her betrothed. There is certainly no evidence proceeding from the defendant that he had any but true and honest motives in the matter, for he says that all his conduct towards her was through "cordial friendship." If, then, his testimony does not show him to be guilty of any improper motive, prompted by levity, deceit, or faithlessness, he certainly cannot be said to have had any such motive; for the plaintiff, in the most unmistakable manner, stamps him as one not capable of such conduct, when she

says: "He was a gentleman. There is no mistake about it. He treated me as a gentleman should treat a lady."

Since the record discloses no sort of improper motive on the part of the defendant in entering into the alleged contract of marriage with the plaintiff, it was prejudicial to him for the court to intimate to the jury, as it did, that there was evidence tending to show such improper motive to have been entertained by him. The existence of evidence tending at least to show such motive on the part of the defendant is assumed in the instruction; and, as no such evidence was before the jury, and no such charge in the pleadings, we must presume that the jury was influenced by the importation of a fact into the case, through the language of the court, which did not appear in the evidence. For this reason we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

Hearing in bank denied.

(83 Cal. 384)

QUAN WO CHUNG *et al.* v. LAUMEISTER,
Sheriff. (No. 13,651.)

(Supreme Court of California. March 5, 1890.)

EJECTMENT—RESTITUTION—MANDAMUS.

In an action for the possession of land, wherein plaintiff had judgment, defendants were wrongfully dispossessed by the sheriff after proceedings had been stayed. Their motion to be restored to possession was granted by the supreme court, "with directions to the superior court to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendants." *Held* that, on the sheriff's failure to execute an order made in conformity to the mandate of the supreme court, a writ of mandate would issue against him, though a third person who had since gained possession of the land, asserting title adverse to both plaintiff and defendants, had procured a temporary injunction in proceedings to enjoin the sheriff from executing the order.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

James F. Smith and A. N. Drowne, for petitioners. Dorn & Dorn, for respondent.

BEATTY, C. J. This is a proceeding by *mandamus* upon the following case: In an action to recover possession of certain real property situate in San Francisco, in which one Lee Chuck was plaintiff, and the above-named petitioners were defendants, the superior court rendered a judgment in favor of the plaintiff, whereupon a writ of restitution was issued, under which petitioners were ejected from the demanded premises, and said Lee Chuck placed in possession. The petitioners afterwards moved the superior court to restore them to possession, on the ground that the writ of restitution had been wrongfully executed by the sheriff after stay of

proceedings by Lee Chuck, and denied by the superior court; but on appeal to this court the order was reversed, "with directions to the superior court to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendants." 81 Cal. 222, 22 Pac. Rep. 594, (1889.) The *remittitur* upon this judgment was filed in the superior court, December 21, 1889, and an order was thereafter made in conformity to the mandate of this court. But when the sheriff, the respondent here, was about to execute the order, he was met by the claim of a Chinese firm calling itself the Kwong Lun Hing Company, that they were rightfully in possession of the property under title adverse to both parties in the suit, and not in collusion with Lee Chuck. In consequence of this claim, and threats of an action for damages, the sheriff refused, or at least failed, to execute the order to restore the petitioners to possession, and this proceeding was thereupon commenced to compel him to do so. An alternative writ of mandate was issued, to which the sheriff makes return, showing the facts above stated among other things, and also the fact that a suit has been commenced in the superior court of San Francisco by or on behalf of said Kwong Lun Hing Company, to enjoin him from executing said order; in which case a temporary injunction has been issued and served upon him, the question of making it permanent being held under advisement by the judge of the superior court. Besides these proceedings, various other steps have been taken by said Kwong Lun Hing Company, all designed to frustrate the execution of the order of this court to restore the petitioners to the possession of the premises from which they were, by the agency of the superior court, wrongfully ejected. It is not necessary, however, to recapitulate these various devices, and we shall content ourselves with noticing the position upon which the Kwong Lun Hing Company bases its claim of right to keep possession of the disputed premises. They say they were not parties to the action of Lee Chuck v. Quan Wo Chung Co., and therefore are not bound by the judgment, or any orders made therein; that they are peaceably in possession of the premises, under title derived from an independent source, and cannot be ejected, except in consequence of a proceeding to which they are made parties, and in which they may have their day in court to litigate their rights. In support of this proposition, they cite us to numerous cases, in which it has been held that the plaintiff, in an action of ejectment or other suit to recover possession of real property, cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding the premises under an independent title or claim of title, and not in collusion with the defendant. But these cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the court. He does not stand in the position of the actor in a suit who seeks

the aid of a court to regain a possession lost by his own negligence or misfortune. On the contrary, he is out of possession only because the court has wrongfully put him out, and whoever is in is there only because the court has wrongfully made room for him to get in. All that the one has gained and all that the other has lost is due to the agency of the court, and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position, after being put out by the court, than he would have been in if the court had never acted, and the court cannot, without putting him out, undo its own wrong. If he has a superior right to the possession, he can, after going out, assert it with the same effect as if he had never been in, and he loses nothing but the advantage of holding the premises pending the litigation, an advantage to which he was never entitled. It must be understood, therefore, that our order remanding the case of Lee Chuck v. Quan Wo Chung Co. meant precisely what it said,—neither more nor less,—viz., that the defendants in that action, petitioners here, were to be restored to the possession of the property in controversy, and that any other party who might have got in pending the litigation, whether by collusion with Lee Chuck or otherwise, must be put out. As to the injunction issued by the superior court restraining the respondent from executing the order entered in pursuance of our judgment in the appeal case, we assume that it was issued in consequence of an erroneous construction of that judgment, and that it will be vacated upon the rendition of our decision herein; but, however that may be, the order of this court must control, and any conflicting order from the superior court must be disregarded. It is ordered that the peremptory writ issue, as prayed for by the petitioners, forthwith.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

33 Cal. 419

PEOPLE v. BEAVER. (No. 20,596.)

(Supreme Court of California. March 8, 1890.)

RECORD ON APPEAL—REMARKS OF COUNSEL.

1. Instructions not authenticated by the trial judge, nor shown by the bill of exceptions to have been either given or refused by him, form no part of the judgment roll, and will not be considered by the supreme court. *People v. Rogers*, 22 Pac. Rep. 592, followed.

2. Objections to statements of counsel for the people, in his argument to the jury in a criminal trial, cannot be considered by the supreme court where there has been no request for the action of the trial court with reference to such statements. *People v. Ah Fook*, 1 Pac. Rep. 347, followed.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Oregon Sanders and Chas. G. Lambertson, v. 23p.no.5—21

for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was charged with murder, and convicted of manslaughter. From the judgment rendered in the premises, and an order denying a new trial this appeal is taken.

Objection is made to certain portions of the charge of the court, alleged to have been given of its own motion, at folios 13, 14, 17, and 29 of the transcript. There is nothing in the record to show that such a charge was either given or refused by the court. It is not shown by any bill of exceptions that any such action was taken by the court. The alleged charge is not authenticated in any manner by the judge, is no part of the judgment roll, and is not to be considered by the appellate court. *People v. Rogers*, 81 Cal. 209, 210, 22 Pac. Rep. 592, and cases cited.

As to the question raised that the defendant did not have a fair trial by reason of the argument made by the district attorney and his associates, it may be said that, even if such comments as they made, brought out, as they were, by the argument of defendant's counsel, were improper, (which we do not decide,) the defendant cannot be heard here to assign error, for the reason that "the exceptions or objections to statements of counsel for the people in argument, and in the presence of the jury, cannot be considered. No action of the court with reference to allowing or forbidding such statements was demanded or requested." *People v. Ah Fook*, 64 Cal. 383, 1 Pac. Rep. 347. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 49

PEZUELA v. SUPERIOR COURT. (No. 13,409.)

(Supreme Court of California. Feb. 1, 1890.)

PROHIBITION—DISMISSAL.

An alternative writ of prohibition was issued to the superior court on the petition of an executor, who alleged that, notwithstanding his appeal from an order settling his account, the court, on the application of the heirs, was proceeding to a final distribution. Held that, on the withdrawal of their application by the heirs, and their stipulation not to renew it until the determination of the appeal, the alternative writ would be dismissed, though the heirs expressly reserve the right to apply for a partial distribution.

In bank. Prohibition to superior court, city and county of San Francisco; J. V. COFFEY, Judge.

T. I. Bergin, for petitioner.

PATERSON, J. On August 19, 1889, plaintiff filed a petition herein, alleging that, notwithstanding the fact that he had appealed from an order of the superior court settling his account as executor,—in which he was

required to account for \$9,847.29 more, he alleged, than he should be charged with,—said court claimed that the appeal did not suspend the operation of the order settling said account, and, on application of the heirs, was proceeding to a final distribution of the estate. Upon this petition an alternative writ of prohibition was issued out of this court, commanding the superior court to refrain from further hearing the said petition for final distribution, and to show cause on September 20, 1889, why it should not be prohibited “from further proceedings upon the aforesaid petition for final distribution of said estate until the appeal of the petitioner from the order of said superior court, settling the final accounts of the petitioner and executor, to this court, shall have been finally disposed of.” Thereafter respondent filed an answer herein, and argument was had upon the question as to the effect of the appeal referred to. Pending decision upon that issue, the heirs mentioned in the petition, and who filed the application for a final distribution, have filed a petition herein asking that the alternative writ of prohibition be dismissed, on the ground that since the argument on the return to the writ they had, by leave of the superior court, withdrawn their application for final distribution. In said petition they stipulate to make no application for final distribution of the estate until the determination of the appeal from the order settling the final account, expressly reserving, however, their right to apply for partial distribution if advised so to do. In support of the request, they have filed herein a certified copy of an order of the court below, allowing them to withdraw their application for distribution. We see no good reason for refusing to grant the application. The writ, if made peremptory, would prohibit the court only from proceeding to a final distribution until the determination of the appeal from the order settling the account of the executor. As that proceeding has been entirely abandoned in the court below, and the parties interested have stipulated not to renew their application, the issuance of a peremptory writ could serve no useful purpose. The question whether the heirs are entitled to proceed, under section 1658, Code Civil Proc., for a partial distribution pending the appeal from the order settling the account, is not before us in this proceeding. It is ordered that the writ heretofore issued herein be discharged, and that the moving parties pay the costs incurred.

We concur: BEATTY, C. J.; McFARLAND, J.; FOX, J.; SHARPSTEIN, J.

(83 Cal. 274)

CARTER v. MCQUADE. (No. 13,434.)*(Supreme Court of California. Feb. 28, 1890.)***HUSBAND AND WIFE—DIVISION OF PROPERTY.**

Civil Code Cal. § 158, provides that a husband or wife may enter into any engagement or transaction with the other, respecting property, which they might if unmarried; and sections 165 and 166 provide that the wife may file an inventory of her separate property in the county recorder's office, and that the filing shall be notice and *prima facie* evidence of her title. *Held*, that a division of community property between a husband and wife on their separation, followed by the record of an inventory of the wife's separate property, including her share of the divided property, gives the wife priority therein over a creditor of the husband who had both actual and constructive notice of the division before bringing suit, though there had been no immediate delivery of the divided property to the wife, followed by an actual and continued change of possession.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

I. M. Kalloch, for appellant. *F. D. & G. W. Nicol*, for respondent.

BELCHER, C. C. This is an action to recover the possession or value of certain personal property. The plaintiff had judgment, and from that judgment, and an order denying a new trial, the defendant appeals. The material facts of the case, as shown by the record, are as follows: In December, 1887, the plaintiff, Anna L. Carter, and Jacob E. Carter, were husband and wife, and were residing on a tract of land in Tuolumne county. On the 22d day of that month they entered into a written agreement, by which he agreed to give her "a bill of sale and peaceful possession" of certain described personal property, and in consideration thereof she agreed to relinquish all claims against any property,

real or personal, belonging to him, or which he might thereafter acquire, and also to relinquish all claims against him for the future support of herself and their children. It was then stipulated in the agreement "that the children now belonging to the family shall, at their own pleasure, visit either party to this instrument, and be welcome, and that either party to this instrument shall have the privilege to visit the children at any time or place they may be located, and no insinuations be offered by either party to the other to mar the pleasure of such visit." In pursuance of this agreement, Carter executed and delivered to his wife a bill of sale of the property agreed upon, reciting therein that it was made for and in consideration of \$512.10, "to me paid in hand by Mrs. Anna L. Carter;" and further reciting, after the *habendum* clause: "And I do, for myself and legal representatives, agree with said party of the second part, and her legal representatives, to warrant and defend the sale of the aforementioned property unto the said party of the second part, and her legal representatives, against all and every person whatever." Before making the agreement and bill of sale, the parties had all of their personal property appraised and divided into supposed equal parts, and it was one of these parts that he transferred to her. Shortly after the papers were signed Carter went away to Merced county, where he afterwards made his home. He also took away his part of the property. Mrs. Carter remained at her old home, in Tuolumne county, and kept there her five children and her part of the property. Carter occasionally went back to his old home. Several times he stopped over night, and one night he slept with his wife. On March 6th he made to her a new bill of sale for 30 head of hogs, more or less. In April following the above transactions plaintiff made out, signed, and acknowledged, in proper form, a full and complete inventory of her separate personal property, including that transferred to her as above, and caused the same to be recorded in the office of the recorder of the county in which she resided. In May, 1888, one Horsley commenced an action against Carter in a justice's court in Merced county, and, having obtained judgment, he filed an abstract thereof in the office of the county clerk, and had the same docketed in the judgment docket of the superior court. He then took out an execution, and placed the same in the hands of the defendant, who was the sheriff of Tuolumne county, with directions that he levy it on the property described in the complaint. The defendant levied the execution as directed, and advertised the property for sale. At the time of the levy plaintiff notified defendant that the property was hers, and before the sale she served on him a written notice that the property was her separate property, and a demand that he release and surrender the same to her. Defendant refused to comply with this demand, and thereupon this action was commenced. By

his answer the defendant denied that the plaintiff was the owner or entitled to the possession of the property described in the complaint or any part thereof, and he alleged that it was all the community property of Carter and his wife.

1. There is no pretense that the transfer to plaintiff was made with any intent to hinder, delay, or defraud any creditor or creditors of the transferrer, nor could such a pretense be sustained. Carter was a witness for defendant, and, after stating that he was the husband of plaintiff, said: "On December 22d I entered with her into an agreement of separation and division of property. The property described in the agreement has never been removed from the ranch to my knowledge. * * * My intention in leaving these things was to enable my wife to support herself and family, and for that purpose I made a bill of sale." Horsley was also a witness for defendant, and testified: "I talked with Mr. Carter about the suit. He told me his wife had violated the agreement in regard to this division of property, and that he couldn't get anything towards paying his debts. He told me he thought this property was subject to his debts, and I had better look out for my claim. I then commenced suit. On the same day I commenced suit I obtained judgment. Mr. Carter was there, and admitted service. He knew that I got judgment. As soon as I got judgment I issued execution. Mr. Carter told me that his wife had violated the agreement, and the property in her possession was subject to his debts. * * * He told me about the division between himself and wife, and I knew it when I gave instructions to the sheriff to levy on this property. Since that time Carter has continued to trade right along with me."

It is, however, claimed for appellant that there was no immediate delivery, followed by an actual and continued change of possession, of the property transferred, and that the transfer was therefore fraudulent and void, as against a creditor of the husband. In this state either husband or wife may enter into any engagement or transaction with the other, respecting property, which they might if unmarried. Civil Code, § 158. A husband may convey real or personal property to his wife, and, whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes, and is thereafter to be treated, as her separate property. *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. Rep. 715; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. Rep. 869. And, when a wife has separate personal property, the statute provides that she may file an inventory thereof in the office of the recorder of the county in which she resides, and the filing of the inventory is declared to be notice and *prima facie* evidence of her title. Civil Code, §§ 165, 166. It does not appear when the debt to Horsley was contracted. So far as we can see, it may have been after the

transfer to plaintiff. Nor does it appear that he could not just as well have collected his debt out of property belonging to the debtor. But, however this may be, it is clear that before commencing his suit he had actual and constructive notice of the plaintiff's title and possession, and we think that title and possession sufficient for all the purposes of this action. See *Morgan v. Ball*, 81 Cal. 93, 22 Pac. Rep. 331.

2. The new trial was also asked on the ground of newly-discovered evidence. We have carefully read the affidavits submitted, and find nothing in them which would have justified the trial court in granting the motion. Looking at the whole case, we see no prejudicial error, and we therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 303

In re DISBARMENT OF LUCE *et al.* (No. 20,534.)

(Supreme Court of California. March 1, 1890.)

DISBARMENT OF ATTORNEYS—CONSPIRACY TO DEFRAUD—EVIDENCE.

1. In disbarment proceedings against a firm of lawyers of many years' service at the bar, and of good reputation, it appeared that one of the partners had loaned an insolvent \$1,000, and had taken as security jewelry worth \$650 or \$700, but which the insolvent had represented to be worth more than twice as much. On learning of the overvaluation, some months afterwards, this partner insisted on a settlement of his claim, and it was agreed at the office of the firm that he should keep the jewelry as payment of \$500 on the debt, and that the insolvent should deliver in addition other jewelry out of his stock, at 50 cents on the dollar, at the insolvent's valuation, in payment of the balance, amounting to \$327. *Held* that, as both the insolvent and the partner testified that this was a *bona fide* transaction, the supreme court would not assume that a contemplated assignment by the insolvent was known to the partner, and that he entered into the arrangement for the purpose of aiding the insolvent in defrauding his creditors.

2. Immediately after the arrangement had been made, the insolvent asked for another member of the firm. On his arrival, the insolvent informed the two partners that he was unable to pay his debts; that he wished to make an assignment, but not to his principal creditor; and that he desired to retain the partners to draw the necessary papers, and act for him in any proceeding that the principal creditor might institute. After some talk, the partners agreed to accept \$2,500 worth of jewelry out of the insolvent's stock, at his valuation, as a retainer, and as payment of the \$327 still due one of the partners. *Held* that, it appearing that the actual value of the jewelry was only \$766, the court could not say that the retainer was so large as to render the parties liable to a charge of fraudulent conspiracy, or that for accepting it the partners were liable to be disbarred.

3. Evidence that the assignee had asked the partners whether he could go on with the business, keeping an account of sales; that they told him that they would not object, but that he must consult other counsel; and that the partners were general counsel in an action against themselves, the insolvent and the assignee,—does not support a charge that the partners acted as counsel, not only for the insolvent, but also for the assignee.

4. Evidence that at the time of their retainer the insolvent told the partners that a clerk in his store had not drawn her wages for two years—that he had just paid her off by giving her \$1,800 worth of goods; and that the partners told him that he had a right to do so if the debt was *bona fide*,—does not support a charge that the goods were delivered to the clerk on the advice of the partners, with the intent to defraud creditors.

5. The fact that the insolvent used the back of one of the business cards of the partners in drawing an order directing a bank to deliver pledged goods to one of his friends, is not proof that the order was given on the advice of the partners for the purpose of defrauding creditors out of the difference between the value of the goods and the amount for which they were pledged.

6. When the partners accepted the retainer, they had in their hands for collection a claim of \$80 against the insolvent. This fact was known to only one of the partners, who testified that it had escaped his memory on accepting the retainer; that it did not occur to him until after receiving the confidences of the insolvent; and that he had subsequently advised the person who sent the claim of what he had done, intending to make the claim good in case of dissatisfaction. *Held* that, as there must be a union of act and intent, the acceptance of the retainer while having this claim against the insolvent was not such unprofessional conduct as justified disbarment.

7. A few days after taking possession of the insolvent's store the assignee took an account of stock, and afterwards brought the book containing the account to the partners, to enable them to make out the inventory required by law. They then discovered that the assignee had used the same book that had been used by the insolvent some six months before for the purpose of taking an inventory, a copy of which had been sent to his creditors. They called the assignee's attention to the fact, and in his presence, and with his consent, one of them cut out the old inventory, intending to use it as protection to the insolvent if the correctness of the copy should ever be assailed. The book—a kind generally used for writing memoranda in pencil—contained nothing except these two inventories. *Held* that, as the book was not a book of record, and as the leaves were not destroyed, but promptly produced when called for, this transaction was not a violation by the partners of their oaths, or their duties as attorneys.

8. Where there is nothing to connect the senior member of the firm with any of the alleged frauds of the insolvent, or with the transactions of his partners, except that they used the firm name in the conduct of the business, the charges of unprofessional conduct, as against him, will be dismissed.

In bank. Disbarment proceedings.

Rothchild & Ach, for petitioner. *Bicknell & Denis* and *Chapman & Hendrick*, for respondents.

Fox, J. This is an application made and filed by August Heilbronner for the disbarment of the above-named defendants, composing the law firm of Luce, McDonald & Torrance, attorneys at San Diego. The record is very voluminous, consisting of some 800 pages of testimony and about 300 pages of printed argument. A careful examination of the entire matter reveals the fact that the proceeding is one of many instituted, under both the civil and the criminal law, in the course of a bitter contest between Heilbronner, a creditor, and K. C. Naylor, of San Diego, an insolvent debtor. Very much of the evidence introduced, and of the argument made, has no relation to this case, except as by it, it is attempted to show that Naylor was guilty of divers frauds or at-

tempted frauds to avoid a just settlement with his creditors, and that these defendants, his attorneys, were cognizant of, and active participants in, those attempted frauds. Naylor is not on trial in this proceeding, and there would be a manifest impropriety in our discussing the question of his guilt or innocence at this time. The very nature of the case requires that we should refer to some of his transactions, but it will be understood that in doing so it is merely for the purpose of illustrating the fact and the legal effect, as to them, of the connection of these defendants with those transactions.

And here we may as well dispose in the outset of one of the defendants. The alleged wrongs complained of, so far as it is claimed that there were any wrongs on the part of these defendants, commenced early in January, 1889. The firm of Luce, McDonald & Torrance was formed December 1, 1888. The defendant Luce was the senior partner and the head of that firm, but he had never been the counsel of Naylor; and there is nothing in all the evidence offered in this case to connect him in any manner with the frauds, if any, attempted by Naylor; nor is there anything to connect him with the transactions of his partners which are claimed to have been fraudulent, except that they used the firm name in the conduct of the legal business growing out of the Naylor assignment. It is not shown that he even had knowledge of the character or extent of that business, or upon what terms, or for what consideration, it was being conducted. Under these circumstances, we dismiss at once, and without further discussion, these charges, so far as they relate to the defendant M. A. Luce.

As preliminary to a consideration of the points separately which are made against the defendants McDonald and Torrance, it may be proper to say that it appears that they are both lawyers of many years' service at the bar. McDonald had been a resident of San Diego about two years, and Torrance a little over one year, when the firm of Luce, McDonald & Torrance was formed. Both have borne a good reputation as attorneys, and as men of integrity and honor, since their residence in San Diego. Both came to this state from Kansas and are proven to have borne an enviable reputation as lawyers and men in that state for many years before they came to California; Mr. Torrance resigning the position of district judge, which he had filled with distinction for nearly two terms, in order to come here, and having once been nominated for judge of the supreme court, but subsequently declared ineligible because of the fact that he held the position of district judge at the time. These facts are stated preliminarily, because these defendants, in this proceeding, which is *quasi* criminal in its nature, are entitled to the benefit, not only of the presumption, but of such proof as is made, of good character and reputation, in the consideration of the weight to be given to their own testimony, as well

as to such other evidence as may tend to either create or leave a doubt as to the fact or intent of their acts.

A few other facts of general application may be stated: K. C. Naylor was engaged in the jewelry business at San Diego, and, as early as June, 1888, became heavily embarrassed, and pressed for money to meet his obligations. In that month, he took an account of stock, and made an inventory, making the original entries thereof in a book such as is sometimes called a "tickler,"—a sort of memoranda book usually used for writing memoranda in pencil,—which had never been used before, and was never afterwards used by him. From the entries made in this book, an inventory of the stock, showing stock and fixtures on hand to the amount of \$25,675.38, was made up and sent to the creditors in San Francisco, with a view to securing forbearance. This was done in June, 1888. In January, 1889, Naylor was indebted about \$15,000, and of this something over \$12,000 was in the form of a promissory note held by the complainant Heilbronner, and represented all the then known eastern and San Francisco claims against him. On the 9th of January, 1889, Heilbronner appeared in San Diego, and threatened immediately to attach, unless Naylor would either pay him at once \$8,000, or give him approved security for his entire debt, or make to him (Heilbronner) an assignment of all his property for the benefit of his creditors. Naylor could not pay the money, but he made a statement in writing to Heilbronner to the effect that his assets were equal to \$20,000, and that he did not owe to exceed \$500, exclusive of the amount due to him, (Heilbronner,) and, upon some promise, either to find security, or make the assignment requested, (the testimony being conflicting as to just what the promise was, but that being immaterial,) induced Heilbronner to give him a few days' further time; and the latter then left the city. The further facts necessary to be stated in this connection will be stated as we consider the separate points or charges made against these defendants.

1. On the 10th day of May, 1888, Torrance had loaned to Naylor \$1,000 in money, and received from Naylor, as collateral security for the repayment of the same, goods from the store which Naylor represented as being worth \$1,414.28, at the cost price to him. About the middle of November, the money being past due, and only a small payment having been made thereon, and that out of the proceeds of the sale of some of the goods so deposited, which had been returned to Naylor, at his request, for that purpose. Torrance took the goods to an expert, and had them examined and appraised. The amount then remaining in his hands, at the price at which they had been deposited, was \$1,373.85. The expert placed their wholesale value at \$650 to \$700, but at the same time said that the selling value of the goods in San Diego would be considerably less than

the wholesale value he had placed upon them. Shortly after ascertaining the real value of the goods, Torrance informed Naylor that he had had the goods valued by an expert, who had placed a value on them of less than 50 cents on the dollar of Naylor's valuation, and insisted on Naylor paying the note, telling him that if he did not have the money he must pay in goods, or in some way raise the money. Naylor replied that he had a man in view from whom he expected to get the money; and thereafter Torrance saw Naylor many times and pressed him for the money. On the 10th of January, 1889, Torrance saw Naylor, and insisted that the matter must be settled at once. If he did not have the money, he must satisfy the claim with jewelry. Naylor then paid him \$100, and asked for further time, which Torrance refused to give. Naylor then said that he would see him the next day, and close the matter up by paying him in goods. On the morning of the 11th, Naylor called at the office of Torrance to settle the matter, when Torrance told him, as he had done before, that the goods he had were worth less than 50 cents on the dollar of the price Naylor had placed on them; that he had no use for them himself, and he would not be willing to take them for more than \$500. There was then due on the note \$827. It was then agreed between them that Torrance should keep the goods he had in hand as payment on the note to the extent of \$500, and that Naylor should deliver, in addition thereto, goods, at 50 cents on the dollar of Naylor's valuation, sufficient to pay the balance of the note, \$327. There is a little uncertainty as to whether this occurred on the 10th or 11th of January, but we conceive that point to be immaterial. Complainant contends that this arrangement was made in contemplation of assignment by Naylor, and for the purpose of defrauding his creditors, and that Torrance knew of the contemplated assignment, and entered into the arrangement for the purpose of aiding and assisting in the contemplated fraud; that the transaction was not *bona fide*, but for the fraudulent purpose aforesaid, and with a secret understanding that at the proper time Naylor would be allowed to pay off the debt, and have return of the goods. And he insists that we must assume, from the nature of the transaction, that both Naylor and Torrance swore falsely when they testified that at the time of this transaction Torrance and his firm were wholly ignorant of what had transpired between Heilbronner and Naylor on the 9th, and of the fact that Naylor contemplated any proceedings in the nature of assignment or insolvency. Whatever may have been in the mind of Naylor, we see no reason for disbelieving his testimony, or that of Torrance, on the question of knowledge on the part of Torrance of contemplation of assignment at the time of this transaction. Nor is there anything in the evidence to support the proposition that he acted with any intent to facilitate the commission of a fraud

on the part of Naylor as against his creditors, or in the expectation of ever returning the goods, or ever receiving his money otherwise than by their sale. There is nothing in the evidence to show that the goods were worth more than the price at which he took them. On the contrary, subsequent events show that he allowed for them all that, if not more than, they are really worth; and, even if Naylor did intend at the time to make an assignment, as he subsequently attempted to do, he had a right to pay off this or any other creditor, if he desired so to do. Civil Code, §§ 3432, 3451. And the creditor accepting payment, either in money or chattels, even with a knowledge of such intent, if he did it *bona fide*, receiving only his just due, and if paid in chattels at their fair value, and without intent to return them to the debtor, was not guilty of fraud in the transaction. This we find from the evidence to be the fact, in reference to this transaction, so far as the defendant Torrance was concerned; and his conduct in this transaction furnishes no ground for disbarment, as claimed by the complainant. The evidence is too voluminous to be here given in detail. In some instances it is conflicting, and in many counsel draw inferences in direct conflict with the sworn testimony, assuming that it is false, even though not contradicted. Time and space will not justify us in any lengthy discussion of such conflicts as arise, or of the inferences drawn by counsel on either side. It is a case where we are to find the facts; and in the further discussion of the case we shall content ourselves with a statement of the facts as we find the truth to be from the evidence, and the inferences which we think we are entitled to draw therefrom.

2. Immediately after the settlement noted in point 1, Naylor asked for Mr. McDonald, whom he had occasionally consulted in legal matters before the formation of the partnership. Mr. McDonald was called from another room to the one occupied by Torrance, and there and then Naylor related to the two—McDonald and Torrance—what had transpired between himself and Heilbronner on the 9th, and Heilbronner's threat to attach if his demands were not complied with. He followed up the statement by declaring that he was unable to raise the money or furnish the security demanded, and stated that he was willing to make an assignment, but would not make one to Heilbronner, as he did not believe that he would treat the other creditors fairly, and said that he owed some \$2,500 or \$3,000 beside what was due to Heilbronner; that he anticipated trouble with Heilbronner, if he assigned to anybody else, and he desired to retain them to prepare the necessary papers, and act for him in such future proceedings as Heilbronner might institute in the premises. We do not pretend to give the exact language of the statement, but the substance and legal effect of it. McDonald advised him, instead of making an assignment, to file a petition in insolvency;

but this he refused to do. They then told him that they could not afford to take hold of the matter for any fee that he would be willing to pay, and that he had better get other counsel; but he insisted upon their acting for him, and wanted them to name their fee. They said they would not accept the retainer for less than \$1,000, which he thought was too much; also, said that he had no money to pay them, and would have to pay them in goods. To this they demurred, and told him that they would not accept goods from his stock at more than 50 cents on the dollar of what he claimed to be his cost price. With this he went away, saying that he would think the matter over, and see them again. At a later hour, either the same day or the next morning, he returned, and said that he would turn over to them goods from his store to the amount of \$2,500 at his cost price in full for their services in his behalf, and of the balance of \$327 still due Torrance. This proposition was accepted, and subsequently, and before the assignment, carried out. It is claimed that this was done with a secret understanding, as in the other case, that the goods should ultimately be returned to Naylor, and the money paid instead, but there is no evidence to support such a contention; and, as before, subsequent events show that the goods were not worth over 50 cents on the dollar of the price fixed on them by Naylor, and were not in fact worth the amount of money for which they were received. This retainer being accepted, McDonald dictated to a stenographer a form of assignment to be made by Naylor to one J. T. Fisher, the nominee of Naylor for that position. After this assignment had been written out, it was ascertained that Fisher was absent from the city, and it was uncertain when he would return. Thereupon other names were discussed between Naylor and his counsel, and one or two other persons consulted about accepting the position of assignee before they found one to accept. At last J. D. Hanbury, whose name was suggested by Torrance, was seen and consented to act; and his name was substituted for that of Fisher in the paper, and it was duly executed. The expert who had examined the other goods also examined those delivered under this arrangement, and testified that the wholesale value of the goods on the day they were delivered was \$1,533.92, if new, but that, in their shop-worn condition, they could not have been sold in San Diego at that time for more than 50 per cent. of the value, say \$766.96. It is claimed that the charging and acceptance of so large a fee, and taking therefor out of the stock of an insolvent debtor so large a quantity of goods, is such evidence of fraud, and of aiding and assisting a fraudulent debtor in cheating, or in an attempt to cheat and defraud, his creditors, as not only justifies, but demands, the disbarment of the attorneys who did it. As to the nominal amount of the fee, we confess it would seem to be large for the mere work of preparing the assignment papers, but this

was not the only service which they took the risk of having to perform under that retainer; and future developments justify the opinion which they then entertained, that it was not the only service they would be compelled to perform. While, at Naylor's price, the quantity of goods taken was large, at its salable value, it was small, compared to the amount for which it was accepted. It was not in excess of the balance due Torrance for money loaned, and of a reasonable fee for the service which might reasonably be anticipated in any case of assignment of such a business and such assets. Since attorneys' fees are peculiarly a matter of agreement between the parties, it can hardly be said that the amount actually realized here was such as to render the parties liable to the charge of fraudulent conspiracy, or the attorneys who accepted it liable to disbarment for having accepted it. There is nothing in the evidence to justify the inference that the goods were to be returned at some future time, and the money accepted in lieu thereof, although it is apparent that this is the only way in which the money value for which they were received can ever be realized by the attorneys. In fact, they offered to return them for \$600, which was declined.

3. It is charged that the defendants acted as counsel, not only for Naylor, but also for Hanbury, the assignee. The evidence does not sustain this charge. Before the assignment, Torrance saw Hanbury, and asked him if he would accept the position of assignee, and explained to him the nature of the duties and responsibilities which he would have to assume; and after his appointment he asked the defendants if he could keep the store open, and go on with the business, keeping account of the sales, and the work done. They told him that they would not object to such a course, but at the same time told him that he must procure, and advise with, other counsel; and he did so. Afterwards, when a civil action was brought against Naylor, Hanbury, these defendants, and others who had received goods, to set aside the assignment, and recover the goods that had been transferred, these attorneys were general counsel in the case, in support of the *bona fides* of their client; but it does not appear that they acted as counsel for the assignee in the conduct of his business as such.

4. At the time of their retainer, Naylor told the defendants that Mrs. Dow, a clerk in his store, had been at work there for two years at \$75 per month; that she was his affianced wife, and had been anxious to make the business a success, and had not drawn any part of her salary, and that he had just paid her off, by giving her goods to the amount of \$1,800 from the store, and asked them if he had the right so to do. They told him, if it was a *bona fide* debt, he had the right so to do. It is claimed that these goods were not delivered to Mrs. Dow until after the advice of attorneys; that they knew it was not a *bona fide* debt, and the advice was given

by the counsel with the intent to cheat and defraud the creditors of Naylor. The evidence does not support this claim. Defendants and Naylor all testify that when consulted about the matter the information given to defendants was that the goods had already been delivered to Mrs. Dow, and we think the preponderance of the evidence as to the fact of delivery to her is in favor of the truth of that statement. Defendants knew that she was a clerk in the store, and they had no knowledge as to the *bona fides* of her claim, except the statement made to them at the time of the consultation.

5. It is claimed that other goods besides the amount above mentioned, of the value of some \$2,000 or \$2,500, were given to and secreted by Mrs. Dow, and never afterwards found, and that these were given to her, under the advice of the defendants, for the purpose of secreting them, and ultimately securing to Naylor the benefit of them. Whatever may be the fact as to the delivery of these goods, or the intent with which they were delivered, the evidence fails to show that these defendants had any knowledge of the transaction whatever, or any connection with it, as advisers or otherwise.

6. It is claimed that, at the time of their retainer, Naylor was indebted to a local bank, and as security therefor had pledged to the bank goods to an amount largely exceeding the indebtedness; that pending the preparation of the assignment an order was given to a friend of Naylor directing the bank to deliver to said friend the goods so pledged upon his paying the amount for which they were held; that this was done, under the advice of the defendants, for the purpose of securing to Naylor the benefit of the difference between the value of the goods and the amount of the indebtedness for which the same were pledged, in fraud of the rights of creditors. The only ground upon which to base this claim is that the order is written upon the back of one of the business cards of the defendants, and therefore, presumptively, in their office. All the defendants deny any knowledge of the transaction whatever, and there is no evidence to show that they had any such knowledge, or were consulted on the subject.

7. At the time of accepting this retainer the defendants had in their hands for collection a claim of \$80.96 against Naylor, in favor of Ingraham & Co., of San Francisco, which had been handed to Mr. McDonald by an attorney of San Francisco, in connection with some other business, and upon which McDonald had before that time made demand upon Naylor. It appears from uncontradicted evidence that no other member of the firm had any knowledge of the fact of this claim being in its hands at that time, and that at the moment of accepting the business of Naylor the fact had escaped the memory of McDonald. It did, however, occur to him, before the assignment was complete, and he tried to make Naylor pay the claim, but without success. He felt that it was putting him

in an embarrassing position, but he had already received the confidences of Naylor and his retainer, and could not then refuse to proceed. He had received no retainer on account of the claim, nor any instructions except to use his best judgment. He had known for months that a suit against Naylor was likely to precipitate insolvency, and concluded that, after all, the next best thing to collection was an assignment for the benefit of creditors, out of which he then supposed 75 or 80 per cent. would be realized. He subsequently advised the San Francisco attorney by letter of what had been done, and of the connection his firm with the assignment proceedings, not claiming for his firm any benefit of his oversight, but putting it in the strongest light against themselves, intending, as he testifies, if the attorney was not satisfied, to make that claim good themselves. He further said that the attorney had never expressed any dissatisfaction with the course pursued, and still continued to send his business to the firm. The acceptance of this retainer while they had that claim in hand is charged as one of the acts of unprofessional conduct for which the defendants should be disbarred. The charge is not made or prosecuted by any person interested in the collection of the claim, nor is any such person called as a witness in support thereof. The facts, as above stated, are shown by the sworn testimony, and uncontradicted. To support the charge there must be shown a union or joint operation of act and intent, and we do not think that the evidence upon this charge is sufficient to support a finding of guilty.

8. In communicating to his counsel the condition of his affairs at or after the time of their retainer, Naylor told them of the inventory which had been made in June, 1888, and sent to his creditors in San Francisco. They asked him if he knew that it was correct, when he said that he supposed so, but was not sure, as it had been written out by one Adams, who took it to San Francisco, and he had never compared it with the original memorandum. They then asked him for the original memorandum, but he said he did not know where it was, as it was entered in some old book which had been used for no other purpose, and he did not then know where it was. A few days after the assignee went into possession, he had the clerk take an account of stock, and, when finished, took it to the office of the defendants, at their request, to allow them to use it in making up the inventory which the assignor, Naylor, was required by law to make and file in the office of the county clerk. Upon examining it, they found that the pencil entries of this account of stock were made in the same "tickler" which Naylor had used for a like purpose in the June before. There were no other entries in the book; and these two memoranda were in different parts of the book, having no relation with each other. Indeed, the assignee did not know what the other entries were about. After using the new en-

tries in this book for the preparation of the inventory to be verified and filed by the assignor, the assignee came for the book, to deliver it to his own counsel. His attention was then called to the other entries, and it was explained to him what they were; and Torrance told him that they desired to keep that part of the book for the protection of their client, if any question was ever raised as to the accuracy of the inventory which had been sent to San Francisco in June. Hanbury, the assignee, said that he had no use for it, (which was true,) and that they might do what they pleased with it, but he wanted his own account of stock to hand to his counsel. Thereupon, in his presence and with his consent, Torrance cut out the leaves covering the memorandum of the account of stock taken in June, 1888, and laid them away, returning the balance of the book to Hanbury. This transaction is presented as the most serious of the offenses committed by these defendants,—one amounting to a public offense, for which they were liable to public prosecution, and for which they ought to be disbarred. We do not so consider it. The book had no value as an asset in the hands of the assignee. It was not one of the books of account of the business and property which passed by the assignment, and was not a book which passed or belonged to the assignee. As the assignee found it, it contained no entry or record of value or interest to him or to the creditors. In fact, it was unintelligible to them, and useful only to Naylor. To him it might or might not become useful, not only as a means of verifying the accuracy of an inventory which had not been written out by himself, but which had been transmitted to his creditors, but also as a means of tracing goods which had in the mean time been disposed of by Adams, the man who made up the June inventory from this memorandum, and with whom no accounting had yet been had. It was not an "invoice book," or a book of record, public or private. It was a mere private memorandum, was not taken to be destroyed, and was not destroyed; but the severed leaves were preserved, and, when called for, were promptly produced, offered in evidence, and filed as an exhibit in this cause. There has been no attempt made to use them for any fraudulent purpose, and the evidence fails to show that they were taken or removed for any such purpose, or with any such intent. There is some evidence tending to show that the fact of their removal was attempted to be used as a means of extorting a large sum of money from these defendants, in default of the payment of which this proceeding would be prosecuted; but the only connection of these defendants with that attempt was a refusal to yield to the demand. For this refusal they are not punishable at the hands of this court; and we do not think that the removal of these leaves from the covers between which they were found, and the subsequent preser-

vation and use that was made of them, constitutes a violation of their oaths, or of their duties as attorneys and counselors.

9. It is further charged that the defendants corruptly attempted to induce Mr. Hunsaker, local counsel of creditors of Naylor at San Diego, to withdraw from the prosecution of the action brought to set aside the assignment and for other relief against Naylor and others. The evidence fails to sustain the charge.

Some other, and, to our minds, minor, points, are made against the professional conduct of defendants, but those noted are all that are material to be discussed here. Our conclusion from the entire evidence is that the defendants are not guilty of unprofessional conduct, to-wit, the violation of their oaths, and of their duties as attorneys and counselors; and it is ordered and adjudged that this proceeding be dismissed, and that defendants have judgment for their costs against the complainant.

We concur: SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

83 Cal. 194

STANTON v. FRENCH, Constable.

(No. 13,186.)

(Supreme Court of California. Feb. 25, 1890.)

EXEMPTIONS—JOINT OWNERS—REMEDIES—
WAIVER.

1. The interest of one joint owner of property may be sold on execution against her, though the property is exempt as to the other joint owner.

2. In an action by the other joint owner for the value of such property sold on execution, instructions that acceptance by plaintiff of the balance of the proceeds of the sale, after the judgment is satisfied, is a ratification of the sale, are properly refused.

3. In order to recover attorney's fees, plaintiff need not show that he has paid them.

4. Where a man's wife is in the habit of transacting business for him, and of receiving and paying out money for him with his consent, payment to her in his presence, without objection from him, is a payment to him.

5. One who is engaged in delivering bread to the customers of his wife, who owns the bread and business, and collects and receives the proceeds of sale, is not a peddler, within the meaning of Code Civil Proc. § 690, subd. 6, exempting from sale on execution certain property of a peddler by means of which he earns his living.

6. In an action for the value of property sold under execution, and which plaintiff claims was exempt under such provision, a charge that it is necessary for plaintiff to prove that the property sued for was the only property of the kind owned by plaintiff is properly refused.

7. A notice of claim of exemption from execution, signed by two persons, is sufficient as a claim for either separately.

8. Failure to claim property levied on as exempt, within a reasonable time thereafter, is a waiver of the exemption.

Department 2. Appeal from superior court, Merced county; C. H. MARKS, Judge.

Action by John Stanton against H. W. French, constable, for the value of certain property sold by defendant under execution against plaintiff and his wife, Mary, and which plaintiff claimed was exempt from ex-

ecution, under Code Civil Proc. Cal. § 690, subd. 6, which exempts, *inter alia*, certain property habitually used by a peddler in earning his living. Defendant asked the following instructions:

"(3) If you find from the evidence that the property mentioned in the complaint was the property of plaintiff on the 25th day of January, 1887; and that he at that time, and prior thereto, was a peddler of bread, and habitually earned his living by the use of said property; and that defendant, as constable, levied on and took the same into his possession under a writ of attachment issued out of the justice court of No. two township, in the suit of Joseph Spinney against John Stanton and Mary Stanton, and that subsequently a judgment was recovered in said action by said Spinney against said John Stanton and Mary Stanton, and an execution was issued out of said court thereon, and placed in the hands of defendant, as constable, for levy; and that defendant, as constable, levied on and took into his possession, and sold, said property, as such constable, to satisfy said execution; and that he realized from such sale more than enough to satisfy said execution and costs and expenses of sale; and that he, as constable, paid said balance to said John Stanton and Mary Stanton, and they accepted and received said balance of the proceeds of the sale of said property, knowing that it was the balance of the proceeds of said sale,—then such acceptance of said balance was a ratification of the sale made by defendant, as such constable, and plaintiff cannot recover in this action.

"(4) If you find from the evidence that plaintiff and Mary Stanton jointly claimed the property, mentioned in the complaint of defendant as theirs, and exempt from execution, and defendant, after paying the judgment in the case of Spinney against John Stanton and Mary Stanton out of the proceeds of the sale of the property, and paid the balance of such proceeds over to plaintiff and said Mary Stanton, or to either or both of them, with the knowledge and consent of the other, and such balance was so accepted and received, then it was a ratification of the sale by defendant, and plaintiff cannot recover in this action.

"(5) If you find from the evidence that the property mentioned in the complaint was owned by plaintiff and Mary Stanton jointly, then, notwithstanding, plaintiff might have been a peddler of bread, habitually earning his living by the use of said property, defendant would have the right to levy upon and sell the interest of Mary Stanton to satisfy a judgment against her, and such sale would pass a valid title to all of her interest in the property, and plaintiff cannot recover such interest in this suit.

"(6) While the law exempts certain property of a judgment debtor from execution and forced sale, such exemption is a personal privilege which may be waived by the debtor,

and a failure to claim the property as exempt, when levied on to satisfy a judgment against him within a reasonable time thereafter, is a waiver of the exemption right, and the officer selling exempt property without such claim of exemption is not liable for the value thereof.

"(7) The burden of proving every material allegation of the complaint is on plaintiff, and, if he fails to prove the material allegations of his complaint by a preponderance of evidence, you should find for defendant.

"(8) If you find from the evidence that Mary Stanton, plaintiff's wife, was at and prior to February 11, 1887, in the habit of transacting business for plaintiff; that she was in the habit of receiving and paying out money for him with his consent,—then the payment of any balance from the proceeds of the sales of the property mentioned in the complaint to said Mary Stanton, in the plaintiff's presence and without any objection from him, was a payment to him.

"(9) If you find from the evidence in this case that defendant, after satisfying the judgment in the case of Joseph Spinney against John Stanton and Mary Stanton, paid the balance derived from the sale of the property sued for in this action to plaintiff, and he accepted and received it, knowing it was such balance, or if any one in his presence received it for him, with his consent, then he ratified the sale made by defendant, as constable, and waived his right to claim the property as exempt."

"(11) It is necessary, in order to entitle plaintiff to recover in this action, that he prove that the property sued for was the only property of that kind and character owned by plaintiff at the time it was taken possession of by defendant.

"(12) If you believe from the evidence in this case that plaintiff was simply engaged in delivering bread to the customers of Mary Stanton, and that she owned the bread and business, and collected and received the proceeds of the sale of this bread, then he was not a peddler, under subdivision 6 of section 690 of the Code of Civil Procedure, and is not entitled to the exemption of the property mentioned in the complaint.

"(13) In a suit of this character, plaintiff cannot recover attorney's fees unless he shows that he has paid attorney's fees, and if he fails to prove that he has paid such fees he cannot recover them in this action."

The court refused to give each and all of said instructions, and defendant excepted. The court then, at the request of plaintiff, instructed the jury as follows: "A notice of claim of exemption from execution, signed by two persons, is sufficient as a claim for either separately." To the giving of said instruction defendant excepted. Verdict for plaintiff, and defendant appeals.

J. K. Law, for appellant. Frank H. Far-rar and Breckinridge & Peck, for respondent.

McFARLAND, J. This action was brought to recover the value of two horses and a wagon and harness. They were taken by defendant, as constable, under an execution against plaintiff and his wife, and sold. Plaintiff claimed the property as exempt from execution under subdivision 6, § 690, Code Civil Proc.; the claim being that, as a peddler, he habitually used it to earn a living. (There was also in the complaint an item for the value of a certain "bread-box," which was afterwards withdrawn.) Plaintiff recovered judgment, and defendant appeals from the judgment, and from an order denying a new trial.

The judgment will have to be reversed for the refusal of the court to give certain instructions asked by appellant. Counsel for respondent contends that the record does not show that other instructions were not given by the court, either on its own motion or at the request of one of the parties; and that, in the absence of such showing, it must be presumed that other instructions, covering the matters contained in appellant's rejected requests were given. But, unfortunately for this contention, the record does show affirmatively that there were no such other instructions. It is true that at the beginning of the statement, on motion for a new trial, we find it stated that "the following among other proceedings were had and taken;" but the statement afterwards shows that defendant asked the court to give 13 instructions, marked, respectively, from 1 to 13; that the court refused to give those marked from 3 to 13, inclusive; that the court then gave a certain instruction asked by plaintiff; and that "the only other instructions given to the jury were numbered 1 and 2, asked for by defendant, and are as follows." As respondent had an opportunity to propose amendments to the statement, he should have seen to it that if there were other instructions they were put into it.

Instruction No. 7, asked by appellant and refused by the court, that "the burden of proving every material allegation of the complaint is on plaintiff, and if he fails to prove the material allegations of his complaint by a preponderance of evidence you should find for defendant," is so much of a truism that, perhaps, the refusal or neglect of the court to give it should not, of itself, work a reversal of the judgment. But the instructions asked by defendant, numbered 5, 6, 8, and 12, were correct and pertinent, and should have been given. The other instructions asked by defendant were properly refused. The instruction given at request of plaintiff was correct. We think that the document marked "Exhibit A" was a sufficient notification to the constable of a claim of exemption, and that it was not invalid because signed also by plaintiff's wife. Neither do we think that the receipt by the wife of \$13, surplus of the proceeds of the sale after satisfaction of the execution, as proved in the case, was a waiver of exemption. We see no other material

errors in the record, but, for the reasons above given, the judgment must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

(83 Cal. 361)

McALLISTER v. HAMLIN, Auditor. (No. 13,545.)

(Supreme Court of California. Feb. 27, 1890.)

STENOGRAPHERS—COMPENSATION—CONSTITUTIONAL LAW.

1. Pen. Code Cal. § 869, subd. 6, providing that the compensation of a reporter for taking the testimony of witnesses before an examining magistrate "shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county * * * in which the examination is had, on the certificate and order of the said magistrate," refers to Code Civil Proc. Cal. § 274, which declares that the official reporter shall receive as compensation for his services "a sum, to be fixed by the court, not exceeding \$10, per day," and is not affected by the unconstitutional amendment (Deer. Code Civil Proc. 70) making the compensation of stenographers in the superior courts to depend on a salary to be fixed by the judge.

2. Such section (869) is not a delegation of legislative power, and is constitutional.

3. It is the duty of the county auditor to draw a warrant for such compensation on the county treasurer, on the certificate and order of the magistrate, without allowance of the claim by the board of supervisors under Pol. Code Cal. § 4046, subd. 12, or the county government act of March 14, 1883, requiring such board to "examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor."

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Anderson, Fitzgerald & Anderson and J. M. Damron, for appellant. Del Valle & Munday and Hutton & Swanwick, for respondent.

FOOTE, C. This action is for a writ of mandate to compel Mr. E. W. Hamlin, the auditor for the county of Los Angeles, to draw a warrant on the treasurer of that county for the sum of \$34.40, the same being the amount of compensation allowed the petitioner, and respondent here, for services rendered as a short-hand reporter, under an appointment made by a justice of the peace of that county, in taking down in short-hand the testimony of witnesses examined before the justice of the peace as a committing magistrate, in a criminal action where the state of California was plaintiff and one J. J. Hedges was defendant. The court below granted the writ as prayed. From the judgment rendered in the premises this appeal is taken.

The point to be determined seems to be in what way, and at what rate, a short-hand reporter performing such services is to be paid. The petitioner's contention is that the method of his compensation, after being appointed to act, is fixed by section 869 of the Penal

Code, subd. 6, which is: "The reporter's compensation shall be fixed by the magistrate before whom the examination is had, and shall not exceed that now allowed reporters in the superior courts of this state, and shall be paid out of the treasury of the county, or the city and county, in which the examination is had, on the certificate and order of the said magistrate." Here the proper certificate and order were made. The legislative intent, to be gathered from the language of the statute, was that short-hand reporters appointed to perform such services as this were to be paid out of the county, or city and county treasury, by the magistrate, exercising a sound discretion in fixing the compensation for the services, after they were rendered; but such fixing to be within a certain prescribed limit, that is not to "exceed that now allowed reporters in the superior courts of this state." There is no question raised but what the auditor must draw the warrant, if the magistrate had the power to fix the compensation, and allow it, under the subdivision of the section, *supra*, without any action by the board of supervisors. This law went into effect on the 14th day of March, 1885. At that date, section 274 of the Code of Civil Procedure upon that subject ran thus: "The official reporter shall receive, as compensation for his services in civil actions and proceedings, for taking notes, a sum, to be fixed by the court, or a judge thereof, not exceeding \$10 per day, and for transcription a sum, to be in like manner fixed, not exceeding 20 cents per hundred words; provided, that * * * in criminal cases, when the testimony has been taken down or transcribed upon the order of the court, the fees of the reporter shall be certified by the court, and paid out of the treasury of the county, or city and county, in which the case is tried, upon the order of the court." So that, if no valid amendment to that section existed up to the time of the allowance made for the services rendered in this matter, such section would have limited the exercise of the discretion of the magistrate, and he could not have made an order for compensation exceeding \$10 per day for taking notes, and for transcription a sum not exceeding 20 cents per 100 words. On the 21st day of March, 1885, the legislature amended section 274, *supra*, (Deer. Code Civil Proc. 70,) and made the compensation for short-hand reporters in the superior courts to depend upon a salary to be fixed "by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time, as the salaries of county officers. * * *" It then appears that after the 21st of March, 1885, the legislature intended that the compensation of short-hand reporters in superior courts, instead of being on the basis of fees to be fixed by the judge, who could not exceed the limit fixed by the legislature, should be by a salary to be fixed by the judge, by an order duly entered on the minutes of the

court, to be paid out of the county treasury as the salaries of other county officers are paid; providing, also, that the salary should be graded on the basis of the population of the various counties. In *Smith v. Strother*, 68 Cal. 194, 8 Pac. Rep. 852, it was held that this method of compensation for short-hand reporters was unconstitutional; that the legislative act attempted to throw upon the judicial branch of the state government a legislative function. If the legislative intent was, as we think, in enacting subdivision 6 of section 869 of the Penal Code, on the 14th of March, 1885, that the compensation for such services as are here involved was to be fixed on the basis established by section 274, Code Civil Proc., as it stood then, at the time when subdivision 6 became a law, on the 14th of March, 1885, and the unconstitutional act of March 21, 1885, (section 274, Deer. Code Civil Proc.,) not being then in existence, was not intended to be referred to, when, in the section and subdivision first mentioned, the words, "not to exceed that now allowed reporters in the superior courts of this state," were used, it must be plain that the method of compensation and the amount are fixed by section 274, Code Civil Proc., before the amendment of March 21, 1885. If, however, it is to be gathered from all the acts, taken together, that the legislature intended subdivision 6 of section 869 of the Penal Code to be governed by the provisions of the act afterwards held unconstitutional, it is equally certain when that act was declared unconstitutional for the reasons assigned by the appellate court, heretofore referred to, that section 274, Code Civil Proc., as it stood before the passage of the unconstitutional act amendatory of it, remained the law; for "no repeal by implication can result from a provision in a subsequent statute, when that provision is itself devoid of constitutional force." *End. Interp. St. § 192.* Hence the petitioner had a right to his compensation as fixed by the magistrate, acting within the bounds of the legislative authority.

But it is urged, further, that the respondent was not entitled to have the auditor draw the warrant on the mere certificate and order of the magistrate; that the auditor could not be compelled to draw the warrant until the board of supervisors of the county had allowed the claim. The reason assigned in support of this contention is that the county government act (subdivision 12 of section 4046 of the Political Code) provides for the allowance of such demands as are here under consideration. The language of that subdivision, defining one of the powers of the board of supervisors, is: "To examine, settle, and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor." The county government act of March 14, 1883, contained the same provision exactly; and it was in force at the date of the decision of the appellate court in *Ex parte Reis*, 64 Cal. 233. From the

opinion delivered in that case, it will be seen that it was held it could not have been the legislative intent that a board of supervisors was to supervise a court with reference to matters confided to its judicial discretion by the legislature. We conclude, therefore, with reference to this matter, that it was not the legislative understanding that the subdivision and section, supra, of the county government act, was in conflict with subdivision 6 of section 869 of the Penal Code, where the last-mentioned declares that such a demand as here discussed "shall be paid out of the treasury of the county, or city and county, in which the examination is had, on the certificate and order of said magistrate." And no mention is made, or hint given, that any action is necessary on the part of the board of supervisors. Nor is it apparent that the legislature intended, when it enacted subdivision 6 of section 869 of the Penal Code, that its provisions should be of no avail, so far as the power given the magistrate was concerned, by reason of the subdivision and section above referred to in the county government act. The legislature did not intend, when it passed the section of the Penal Code, that, notwithstanding it authorized the fixing, by the exercise of judicial discretion by the magistrate, of the reporter's compensation, nevertheless it was left with the board of supervisors, in their discretion, as a superior supervising body, to unfix what had been confided by the legislature to the judicial tribunal. With this understanding, the county government act, and the section of the Penal Code, can both stand, and not conflict in any way. The demands and accounts to be allowed by the board of supervisors are not those which the legislature has expressly authorized the judicial branch of the government to certify to, and order paid out of the treasury of the county, or that of the city and county. No such supervisory power over the courts of the state was ever intended to be lodged with the board of supervisors by the county government act. "To the judge of the proper court the statute commits the discretion of making the orders for such payments. Where such a discretion is by law conferred upon a specific officer, such officer must exercise that discretion personally. * * * And, when properly exercised, the board of supervisors is not required to supervise the action of the court." *Society v. Reis*, 71 Cal. 634, 12 Pac. Rep. 796, and authorities there cited.

We therefore conclude that the function to be performed by the magistrate in such a matter is not legislative, but judicial; that the law under which he is authorized to act is not unconstitutional; and that the county auditor should draw the warrant on the treasury without any supervision by the board of supervisors of the properly performed judicial action of the magistrate. We therefore advise that the judgment be affirmed.

We concur: BELCHER, CC.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

83 Cal. 101

CUCAMONGA FRUIT-LAND CO. v. MOIR.
(No. 13,055.)

(Supreme Court of California. Feb. 1, 1890.)

SCHOOL LANDS — INDEMNITY SELECTIONS — DESCRIPTION.

1. Act Cong. March 1, 1877, (19 St. at Large, 267,) known as the "Booth Act," and relating to indemnity school selections in California, provides, in section 2, "that, where indemnity school selections have been made and certified to said state, and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States." *Held*, that the listment to the state of section 22, township 1 S., R. 7 W., S. B. M., in lieu of section 16, township 13 S., R. 3 W., S. B. M., which was only partly within a private grant, was within the above provision, and was thereby confirmed, and that its subsequent cancellation as to the W. $\frac{1}{2}$ of the section by the secretary of the interior, was void. *McFARLAND and PATERSON, JJ.*, dissenting.

2. An application for the purchase of such land under Act Cal. March 23, 1863, § 53, (St. Cal. 1867-68, p. 522,) which does not describe the land, in an affidavit, by legal subdivisions, as therein required, is invalid, though the land is properly described in the unsworn application. (By a divided court.)

3. As such land did not become the property of the state until confirmed by the Booth act, in 1877, the application is not cured by Act Cal. March 24, 1870, § 1, (St. 1869-70, p. 352,) nor by Act Cal. March 27, 1872, (St. 1871-72, p. 557,) both of which refer only to applications for the purchase of land belonging to the state. (By a divided court.)

4. Neither a certificate of purchase issued on such application, nor a United States patent issued after the passage of the Booth act, confers any title to the land, even as against one in mere naked possession.

In bank. On rehearing. For former report, see 22 Pac. Rep. 55.

H. T. Hazard and Chapman & Hendrick, for appellant. *Curtis & Otis and J. C. Lynch*, for respondent.

THORNTON, J. Ejectment. Judgment for plaintiff. Appeal by defendant from judgment and order denying his motion for a new trial. The land in controversy is the W. $\frac{1}{2}$ of section 22, of township 1 S., range 7 W., S. B. M. The plaintiff claimed under a patent of the United States for this land issued to one Marsicano, bearing date March 20, 1886, and a deed from Marsicano to it conveying this land, bearing date the 15th of December, 1886. The documents above mentioned were introduced in evidence by plaintiff, and it then rested.

This land was listed to the state of California on the 1st of July, 1870. On the 11th of December, 1885, the commissioner of the general land-office of the United States canceled this listing to the state for the reasons stated in his letter, which appears in the record. The reasons stated in this letter are

as follows: The whole of section 22, above mentioned, had been listed to the state of California on the date above mentioned in lieu of section 16, township 13 S., range 3 W., S. B. M., but a part only of this sixteenth section, viz., 343.13 acres, was within a private grant. The remainder of the said sixteenth section, viz., 296.87 acres, was surveyed in its proper place, according to the official plat of the township which had been filed on the 20th of October, 1875; that, as to this latter amount, (296.87 acres,) the selection was invalid, and the same was accordingly on that day canceled as to the W. $\frac{1}{2}$ of said section 22, under the provisions of section 2 of the act of congress of March 1, 1877.

It was stipulated that Frank Moir, the defendant, made an application to the state of California to purchase the W. $\frac{1}{2}$ of section 22, above mentioned; that this application bore date the 16th of February, 1883, and was filed in the office of the surveyor general of California on the 15th of March, 1883; that, at the time Moir made this application to purchase, he had filed his declaration of intention to become a citizen of the United States, was a resident of the state of California, and was of lawful age. It was further stipulated that Moir and another person were both living on this land, and claiming adversely to each other, at the time he (Moir) made his application to purchase. Moir's application, and his affidavit accompanying it, appear in the record. Moir claimed title under this application, which, and the accompanying papers, were put in evidence. The defendant also put in evidence the application of John Mullan to the state of California to purchase the whole of section 22, dated the 12th of January, 1869, and filed in the office of the surveyor general of this state on the 15th of the same month, and the accompanying affidavit. He also introduced in evidence the approval of Mullan's application, bearing date the 21st day of August, 1869. A certificate of purchase, issued to Mullan by the surveyor general of this state, dated 30th of October, 1869, is in the record; but, as it relates to a different tract of land from that in suit here, it need not be further noticed. It was stipulated that Mullan assigned his certificate of purchase for the land in controversy to Marsicano, the grantor of plaintiff, on the 20th day of October, 1881; that he executed to Marsicano a conveyance of the same land in the fall of 1884; and that plaintiff, prior to the commencement of this action, had succeeded to whatever title Mullan took by his certificate of purchase, and held it when this action was begun. It was further stipulated that the defendant was in the possession of the land in suit at the time this action was commenced, and was living on the land, claiming it adversely to the plaintiff.

Defendant contends that the patent to Marsicano, issued in 1886, is void, *ab initio*, and that he had a right to show this on his

mere possession as defendant. This contention is based on the admitted fact that the land had been listed to the state of California, in lieu of a sixteenth section, on the 1st day of July, 1870, which listment had been confirmed by the act of congress of March 1, 1877, commonly known as the "Booth Act." (19 St. at Large, 267,) relating to indemnity school selections in the state of California. By the second section of this act, it is provided "that, where indemnity school selections have been made and certified to said state, [of California,] and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States." We are of opinion that the listment to the state made in July, 1870, came within the above provision quoted from section 2 of the act of congress of 1877, and was confirmed by it. It having been so confirmed, the title passed to the state of California on such confirmation. It follows that the cancellation of the listment by the secretary of the interior made in 1885 was without authority; that when the patent to Marsicano was issued, in 1886, the United States had no title, and such patent was void. The plaintiff took no title to the land in controversy under the patent above mentioned.

The plaintiff also contends that he acquired title to this land by virtue of the application of John Mullan to purchase it from the state in 1869, and a certificate of purchase thereafter issued to Mullen in October, 1869. Mullan's application was made under the act of 28th March, 1868. St. 1867-68, §§ 53-58, p. 522. This section (53) requires that, in making application to purchase such lands as are mentioned in Mullan's application, he shall describe the same in an affidavit by legal subdivisions. The affidavit of Mullan contained no description such as is required by the statute, and in fact no description whatever. This, according to the decision in *Hildebrand v. Stewart*, 41 Cal. 387, is fatal to the application. In that case, as in this, the affidavit failed to describe the land by legal subdivision or otherwise, though the land was properly described in both cases in an unsworn paper accompanying the affidavit, and styled the "application." The court held the application invalid and nugatory. It was there said by SPRAGUE, J.: "The legislature has thought proper to require the above facts to be embodied in an affidavit of the applicant; and it is not for the court to determine that the same items may as well be embodied in a statement of the applicant not verified by his oath, or to sanction a different form or mode of proceeding in the purchase of these lands from that prescribed by the legislative department."

The application of Mullan must, then, be held to have been in its beginning void.

It is argued by plaintiff that the application was cured by the first section of the act of March 24, 1870. St. 1869-70, p. 352. But this section refers only to applications made for the purchase of lands belonging to the state; and, as we have seen, when Mullan's application was made to purchase, in 1869, the land sought to be purchased did not belong to the state, and did not become the property of the state until confirmed by the act of congress of March 1, 1877, above referred to. Nor is Mullen's application cured by the act of March 27, 1872, (St. 1871-72, p. 587,) for the reason that the land did not belong to the state when the act of 1872 was passed. For the reasons above given, the listment to the state of 1870 was void, and the land did not belong to the state until after the passage of the Booth act, in 1877. Rowell v. Perkins, 56 Cal. 226, is referred to as sustaining plaintiff's contention that the application of Mullan was cured by the act of 1872. But in that case, although the application was made in July, 1869, and the listment made to the state in July, 1870, still the court rested its ruling on the fact that the land belonged to the state when the act of March, 1872, was passed. After stating that the act of 1872 is very broad and comprehensive, the opinion proceeds thus: "It validates every application to purchase lands 'from the state' where payment has been made, in whole or in part, to the treasurer of the proper county. When the act of 1872 was passed, the state owned the land, and by that act disposed of it." The opinion then proceeds to declare that the act of 1872 validated an application, though the state did not own the land when the application was made. But it was not held in the case cited, nor has it ever been held, that it validated an application to purchase land not owned by the state when the curative act was passed. It could not have intended, by the act of 1872, to pass any title or right to land which the state did not own before the act of 1872 was passed.

No title could have passed to the land in controversy by the certificate of purchase to Mullan which appears in the record, for the reason above stated, that it had reference to a different parcel of land. A certificate of purchase to Mullan for the land in controversy, admitting that it is shown by the record that he had such certificate, was void for the defect in the application above pointed out, which defect has never been cured. The plaintiff derived no title, either by the patent to Marsicano or by Mullan's certificate to purchase. Each document was issued without authority of law, and is void against defendant; conceding that he showed no title except naked possession. Sutton v. Fassett, 51 Cal. 12; Pratt v. Crane, 58 Cal. 533; Kile v. Tubbs, 59 Cal. 192; Railroad Co. v. McCusker, 67 Cal. 67, 7 Pac. Rep. 122; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228,

and cases there cited. The judgment and order are reversed, and cause remanded for a new trial. So ordered.

BEATTY, C. J., I concur in the judgment.

We concur: WORKS, J.; SHARPSTEIN, J.

FOX, J. I concur in the judgment.

McFARLAND, J. I dissent.

PATERSON, J. I dissent. The plaintiff has purchased and paid for the title of the United States, and also that of the state; yet it is held that the defendant, although he has never connected himself with either of the paramount sources of title, and does not possess the necessary qualifications to purchase the lands in controversy, may prevail in an action of ejectment. The misfortune of the plaintiff seems to be, according to the theory of defendant and the decision of the majority, that when the United States sold it had no title, and when the state sold it had no title to convey; and, therefore, while the game of shuttlecock and battledoor for this land was going on between the officers of the land departments of the two governments, the plaintiff and its grantors gambled their money in vain. I venture to say that if the grantors had been individuals, instead of governments, there would be no question that a grant, bargain, and sale deed would convey to their grantees the title held by the grantors at the time of the grant, and that afterwards acquired, and that, as against an intruder,—one who did not have even a contract of purchase and sale from either,—the grantees would prevail in ejectment. For this reason, and for other reasons stated in the former decision of this court, affirming the decision of the court below, (22 Pac. Rep. 55,) I am unable to agree with the majority of the court in their final conclusion.

(Feb. 4, 1890.)

BEATTY, C. J. Three justices of the court concurred in the opinion filed in this case, and three dissented. I concurred in the judgment only. At the time of expressing this qualified concurrence, it did not occur to me that the result was to leave it uncertain what particular points had been decided. To relieve this uncertainty, I take occasion now to say that I concur in that part of Justice THORNTON's opinion relating to the claim of plaintiff based on the United States patent to Marsicano. As to the claim based upon Mullan's application to purchase from the state, I express no opinion, because the record does not show to my satisfaction that Mullan ever received a certificate of purchase covering the demanded premises, and the points discussed are not involved.

83 Cal. 187

CARTER *et al.* v. BACIGALUPI. (No. 13,463.)

(Supreme Court of California. Feb. 24, 1890.)

MINES AND MINING—DESCRIPTION OF CLAIM—ABANDONMENT.

1. A notice of the location of a mining claim, which recites that the locator claims 1,500 feet of

the lode or vein, together with 300 feet on each side thereof, to-wit, "commencing at a young black oak tree, about 400 feet northerly of an old cross-cut or drift in the ravine; thence running south-easterly 1,500 feet, to a black oak tree near a small ravine on the north side of T. creek,"—sufficiently describes the property, as it will be presumed that T. creek is a well-known natural monument.

2. Rev. St. U. S. § 2324, does not require a notice of a mining claim to be either posted or recorded, but intrusts that matter to local regulation, subject to the condition that, when a notice is required to be recorded, it shall contain, *inter alia*, a description of the property. *Held*, that where the local rules require that a notice shall be posted and recorded, and in reference to the notice to be posted repeat the requirements of the statute, the recording of a notice as it is posted is sufficient, provided that the posted notice itself sufficiently complies with the rules.

3. Civil Code Cal. § 1092, provides that an estate in land may be granted by specifying the name of the county and state wherein it is situated, together with a description thereof, or, if it has a descriptive name, it may be thereby described. *Held*, that where a mining claim has a descriptive name, which is known and described in the mining records, a description thereby in a deed of the claim, which recites that it is 1,500 feet in length by 300 feet in width on each side of the vein, and more fully described in the record of quartz mines, is sufficient.

4. An objection to a mining claim, on the ground that the land was not open to location when it was made, is without merit, where the prior locator testifies that he had abandoned his claim when the new one was made.

5. Nor can a deed of the claim be objected to on the ground that it is a conveyance of the old abandoned location, and not of the new one, where the deed merely refers to the old location for a description of the property.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

Action by George B. Carter and others against Luigi Bacigalupi, to determine the right to a mining claim. Civil Code Cal. § 1092, provides that an estate in land may be granted by specifying the county and state wherein it is situated, together with a description thereof, or, if it has a descriptive name, it may be described by the same. From a judgment for defendant, plaintiffs appeal.

Frank W. Street, for appellants. F. D. & G. W. Nicol, for respondent.

HAYNE, C. This was an action to determine the right to a mining claim. The defendant had judgment, and the plaintiffs appeal. The main points made for the plaintiffs relate to the sufficiency of the location of the defendant's grantor, and the sufficiency of the transfer to the defendant.

1. It was conceded at the trial that the plaintiffs' locations were properly made and maintained, if the ground was open to location. The defense was that the ground was not open to location, because the defendant had a prior, valid, and subsisting claim; and the question is whether he had such a claim. The provision of the federal statute of May 10, 1872, in relation to the matter, is as follows: "Sec. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the

location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." And then follows a requirement as to the amount of work which shall be done. This statute does not require that a notice shall be recorded. *Thompson v. Spray*, 72 Cal. 533, 14 Pac. Rep. 182; *Souter v. Maguire*, 78 Cal. 544, 21 Pac. Rep. 183. Nor does it require that a notice shall be posted on the claim. It leaves those matters to the regulation of the local laws. The local laws generally require that a notice shall be posted, and, even in the absence of such a requirement, it would be a very proper aid to the description. But the statute does not require it. The local regulations of the Tuolumne mining district, adopted in October, 1872, contain the following provisions: "Sec. 3. Mining claims hereafter located in said district, upon veins or lodes of quartz, or other rock, or veins of metal, or its ores, shall be located in the following manner, to-wit: By posting thereon two notices, written or printed upon paper, or some metallic or other substance, each to be posted in such manner as to expose to view the full contents of the notice, one of which shall be posted in a conspicuous place at each end of the claim. Said notices shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. Said notice may be in the following form, to-wit: 'Notice is hereby given that the undersigned have taken up ——— hundred feet of this vein or lode, and that the claim so taken up is described as follows, (here insert description.) Dated ——— day of ———, 187—. A. B., Locators. C. D.'" "Sec. 6. All claims hereafter located in said district, the notice of location of which shall not be filed for record with the mining recorder within thirty days from the date of such notice of location, shall be regarded as abandoned, and shall be open to location by any party in the same manner as though no location thereon had ever been made." The notice of location of the defendant's grantor was as follows: "The undersigned hereby gives notice that he claims fifteen hundred (1,500) feet of this quartz lode or vein, together with three hundred feet on each side of the vein. Said claim is described as follows, to-wit: Commencing at a young black oak tree, about four hundred feet northerly of an old cross-cut or drift in the ravine; thence running south-easterly fifteen hundred (1,500) feet, to a black oak tree near a small ravine on the north side of Turnback creek, and having this notice in

duplicate posted on a black oak tree at each extremity of said claim. This claim is designated as the Sunny South Claim; and is located and will be held and worked in accordance with the act of congress in the premises. FRANCIS CADEMARTORI. CHEROKEE, December 30, 1875. Recorded at request of H. Crepin, December 30, 1875."

This notice, as will be observed, is in the form prescribed by the local regulation above quoted. Two objections, however, are made to it:

(a) It is said that it contains no sufficient description of the property, and that, consequently, neither the posting nor the recording was sufficient. But we think that the description was sufficient. If the center line be sufficiently described, it is enough to state that the claim is for a certain number of feet on each side of it. The notice does not say 300 feet on each side of any one point of the line, but of the whole line,—that is to say, on each side of each of the succession of points which constitute the line; and the result is a tract inclosed within side lines parallel to the center line, and 300 feet from it and end lines at right angles to it. It is argued, however, that the center line is not sufficiently described. But if either end of the line may be located, the other may be found. Now, Turnback creek must, in the absence of evidence to the contrary, be held to be a known natural monument. In the case of *Hammer v. Mining Co.*, 130 U. S. 299, 9 Sup. Ct. Rep. 548, the starting point was located with reference to "Vaughn's Little Jennie mine." This was held to be sufficient, and the court, per FIELD, J., said: "The Little Jennie mine will be presumed to be a well-known natural object or permanent monument until the contrary appears." All that has to be done by one seeking information, therefore, is to go to Turnback creek, and follow it up until he comes to a black oak tree, near a small ravine on its north side, which tree has the above notice posted upon it, and which is 1,500 feet north-westerly from another black oak tree, which latter tree is a young one, and is 400 feet northerly of an old cross-cut or drift in the ravine, and has a copy of the above notice posted upon it. Looking at the description as it appears in the record, we cannot say that it is not amply sufficient. For all we can say to the contrary, those two trees may be the only black oak trees on the whole creek. If any latent circumstances existed which renders it impossible to locate the line, it should have been proved by the party attacking the notice.

(b) It is said that neither as posted or recorded does the notice state that the claim is within the Tuolumne mining district, or even in Tuolumne county, or the state of California. This is, in effect, saying that the claim is not sufficiently described. So far as the posting is concerned, the objection is manifestly untenable. The notice was posted upon the vein or lode itself, and stated that

it was for a specified portion of this vein or lode. That identified and fixed the lode, and it was not necessary to go on and give the geography of the locality. We also think that the record was sufficient. Under the rules of this district, the record is sufficient if it is the same as that posted, provided the latter is sufficient. As above stated, the statute does not require a notice to be either posted or recorded. It leaves those matters to local regulations, subject, however, to the provision that, when a notice is required to be recorded, it shall contain a description of the property and certain other matters. The language of the statute is repeated in section 3 of the local rules above quoted in reference to the notice to be posted. Consequently the notice as posted must comply with the requirements of the statute in relation to recorded notices. And the provision of the local rules in relation to recording merely requires that the notice posted shall be recorded. It says that all claims thereafter located will be regarded as abandoned, unless "the notices of location" shall be filed for record within 30 days from "the date of such notice of location." This language can only refer to the notice of location previously spoken of in the rules. Hence it must be held that under these rules, if the notice as posted is sufficient, it is sufficient as recorded. This is not necessarily the case in all districts. In some no notice is required to be posted, and it may be that in others less is required for the posting than for the recording. But in the Tuolumne district the notice posted is to be recorded, and if one is sufficient the other is. And here the notice posted was sufficient. It is true that, as recorded, it lacks the specific application which resulted from being affixed to the claim itself. But, aside from this, the notice posted contains, as we have seen, a sufficient description of the claim. And the phrase, "this vein or lode," must be held to be the vein or lode of which a portion is subsequently described in the notice. The notion that, where the part of the vein or lode which is claimed is sufficiently described in the recorded notice, the phrase, "this vein or lode," is not sufficient, unless accompanied with the information that the vein or lode in question is within a particular district, county, or state, is one that might arise in the mind of a lawyer, but would not be apt to occur to a miner. It certainly did not occur to the miners who adopted the rules of this district, for they prescribed the form of notice to be posted, (which was followed by defendant's grantor,) and then provided that the notice posted should be recorded. In construing notices like this, it must be remembered that, as a rule, miners are unacquainted with legal forms and requirements, and are frequently out of the reach of assistance; and in view of this it has been wisely held that their proceedings are to be regarded with indulgence, and liberally construed. In this case we think that the notice was sufficient, both as posted and recorded.

2. The description in the deed from Cademartori to the defendant was sufficient. It conveyed "all that certain mining claim situated near Cherokee, Tuolumne county, state of California, and being the Sunny South claim, being 1,500 feet in length by 300 feet in width on each side of the vein, and more fully described in volume 1, page 118, of Record of Quartz mines." The claim conveyed had a descriptive name, which was known, and was described in the mining records. This was sufficient. Civil Code, § 1092. The parol evidence in aid of the description was admissible, (*Thompson v. Mining Co.*, ante, 130, filed January 9, 1890,) though the description, under the circumstances shown in this case, was probably sufficient without it.

3. There is no merit in the point that the ground was not open to location when the defendant's grantor located it. The person who made the prior location testified that he had abandoned it at the time of the location of the defendant's grantor. Nor is there anything in the point that the deed to the defendant was of the old abandoned location, and not of the new one. It referred to the old one merely for a description of the property, and conveyed whatever right the grantor had. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 149)

PEOPLE *ex rel.* KERN COUNTY *v.* BAKER,
Treasurer.¹ (No. 13,542.)

(*Supreme Court of California.* Feb. 24, 1890.)

COUNTY BONDS—ELECTION.

The county government act of Kern county, Cal., (section 37,) provides that "the supervisors can only contract a bonded indebtedness other than such as is authorized by section 26 of this act, as follows: They shall by order specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue, and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose." *Held*, that an order for an election to determine whether bonds of a specified amount and kind shall be issued for several distinct purposes, but which fails to state the amount of bonds to be issued for each specific purpose, is void.

Commissioners' decision. In bank. Application for writ of mandate.

Alvin Fay, Dist. Atty., for petitioner.
Haggin, Van Ness & Dibble, for relator.

FOOTE, C. This is an application upon the part of the county of Kern for a writ of mandate against the treasurer of that county for the issuance of certain bonds. The county is represented by the district attorney and associate counsel. The respondent appears in person, and files his request for a submission

in this language: "The brief on behalf of the relator fully and fairly states the objections which have been made by counsel, whose advice I have availed myself of. I therefore desire to submit this cause upon such statement without further argument." The matter stands in the appellate court upon the petition of the relator, and the alternative writ of mandate issued by order of the chief justice, ordering the respondent to show cause, etc.

It is a matter of regret that an official so tenacious for the proper legal performance of his duty should have relegated the court to the relator's brief for argument to refute the relator's contentions. But we will endeavor to determine what should be done in the premises with the lights before us. The relator, in the only brief that has been filed by either side in the case, and the fairness of whose statements seems to be conceded by the respondent, says, at page 25: "The only question which has seemed to us open to argument, or entitled to consideration, is the construction of the clause in section 37 which requires that the supervisors 'shall by order specify the particular purpose or purposes for which the indebtedness is to be created.'" The section (37) of the county government act, under which the power is claimed on the part of the board of supervisors to contract a bonded indebtedness, is in this language: "The supervisors can only contract a bonded indebtedness, other than such as is authorized by section 26 of this act, as follows: They shall by order specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which they propose to issue, and shall further provide for submitting the question of the issue of said bonds to the qualified electors of the county at the next general election, or at a special election to be called by the board for that purpose. If a special election, none but qualified voters of the county shall be permitted to vote thereat; and it shall be held as nearly as possible in conformity with the general election law of this state. Notice shall be given of such election by publication in some newspaper or newspapers published in the county for four weeks prior thereto; if there be no newspaper so published, then by posting notices for the same time in each election precinct in the county, and at the court-house door. The ballots shall be printed, 'For the issue of bonds,' or 'Against the issue of bonds.' If two-thirds of the electors of the county, voting at such election, shall vote in favor of issuing bonds, and not otherwise, the board may proceed to issue the amount of bonds specified, in the manner provided in this act for funding the floating indebtedness of the county; and all the provisions of this act relating to the issue and payment of bonds in the latter case shall apply to bonds issued under this section, except that such bonds shall not run for more than twenty years; and the board shall levy the tax necessary to create a sinking fund for the payment of the principal of said bonds, in each and every year after

¹For opinion on rehearing, see post, 1112.

their issue, until finally paid. The revenue derived from the sale of said bonds shall be applied to the purpose or purposes specified in the order of the board, and no other. Should there be any surplus, it shall be applied towards the payment of said bonds."

We think that the requirements of the statute were not complied with. The order of the board of supervisors was that a special election should be held, at which should be submitting to the people "the question of the issue of the bonds of said county, to the amount of \$250,000, in sums of not less than \$100 nor more than \$1,000 each, having not more than twenty years to run, and bearing interest at the rate of 6 per cent. per annum, payable semi-annually; for the purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county, and for the purpose of erecting and maintaining a county jail and poor-house and hospital within the county." That is, the vote is to be taken for the purpose of determining whether bonds of the above amount and kind are to be issued for several distinct purposes; but it is not stated how many bonds, or of what denomination, for each specific purpose, are to be issued on the vote of the people at the special election. No one can ascertain from that order how many bonds are to be issued by the vote of the people for the purpose of constructing, grading, repairing, and maintaining bridges and public highways within the county, or how many for the purpose of erecting and maintaining a county jail and a poor-house and a hospital within the county. This, we think, was essential under the law. The voters should know that the board had determined and declared how many bonds for each specific purpose were to be issued before being called on to vote. It was not intended by that section that the board of supervisors might in such an order lump several specific schemes of bonded indebtedness in one amount, or that the voter should vote such bonds into existence for the board to distribute in their discretion. There is nothing in the order from which to determine what specific bonds, or their amount, are to be issued or created for any specific purpose. For these reasons, we think the order was of no effect; that the mandate prayed for should be denied, and the petition dismissed.

We concur: BELCHER, C.C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the mandate prayed for is denied, and the petition is dismissed.

(83 Cal. 203)

DOE v. SANGER *et al.* (No. 13,202.)

(*Supreme Court of California.* Feb. 25, 1890.)

MINING CLAIMS—LOCATION—RIGHT TO FOLLOW DIP.

1. The provision of Rev. St. U. S. § 2320, in reference to the location of mining claims, that "the end lines of each claim shall be parallel with each other," is merely directory, and a claim located substantially in compliance with that section, and

containing no more area than it authorizes, is not vitiated, even so far as to affect the right given by section 2322 to follow a vein beyond the side lines, by the fact that one of the end lines diverges.

2. In an action for damages for taking out ore within the surface lines of plaintiff's mining claim, which adjoined defendants' claim, evidence that less than a year after the original location of defendants' claim, and before the act complained of was committed, defendants rectified their lines by an official survey, so as to make them parallel, and applied for a patent on the official survey, is admissible to overcome any defect in the original location on account of the lines not having been made parallel.

Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Harris & Gregg, for appellants. *Charles J. Perkins* and *H. C. Rolfe*, for respondent.

McFARLAND, J. Plaintiff brought this action to recover damages for the alleged excavating, carrying away, and converting to their own use by defendants of large quantities of silver-bearing ore belonging to plaintiff. The verdict and judgment were for plaintiff, and defendants appeal from the judgment and from an order denying their motion for a new trial. There is one main question in the case which we will examine first, as the others are of comparatively little importance. Plaintiff is the owner of a ledge or lode location and mining claim known as the "Oriental." (A portion of this claim was sometimes called "Oriental No. 2," and another portion called "Oriental No. 7;" but, for present purposes, it is sufficient to call the whole the "Oriental.") Adjoining the Oriental, and lying to the north of it, is another ledge or lode location and mining claim owned by defendants, and called the "Silver King." The southerly side line of the Silver King is the northerly side line of the Oriental. (At one stage of the trial there seemed to be a question as to whether or not there was a small vacant strip between the two locations; but that question cuts a very little figure in the case, and we assume at present that the southerly line of the Silver King and the northerly line of the Oriental were identical.) The defendants, in working the Silver King at various depths beneath the surface, drifted across the common line of the two mines, and took out ore within the surface lines of the Oriental, and it was for the value of this ore so taken that this action was brought.

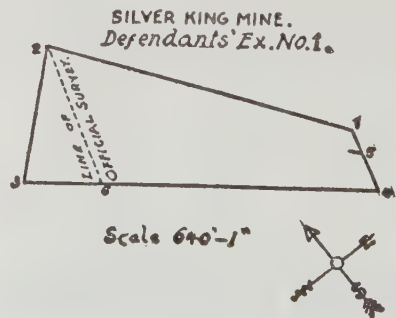
The defendants averred as a defense, and offered evidence to sustain it, that there is a vein or lode of silver-bearing ore, the top or apex of which is within the surface lines of the Silver King, extended downward vertically; that said vein, in its downward course, departs so far from a perpendicular as to extend outside the vertical southerly side line of the surface location of the Silver King, and to enter under the surface lines of the Oriental; and that whatever ore defendants may have taken within the side line of the Oriental was taken in the exercise of their right to follow the dip of the said vein, the apex of

which was within the surface lines of said Silver King. The court below ruled out this defense, and kept it away from the jury, for the reason—and for the sole reason—that in the original location of the Silver King the end lines were not parallel. There is no pretense, as we understand it, that the location was not sufficient, or that it did not comply with mining customs and the laws of congress, in every other respect. Neither is there any claim that the location was of moresurface ground than the law allows. As a matter of fact, it was less than 1,500 feet along the ledge, and considerably less than 600 feet in width. And it cannot be contended that the location was of such a shape that the end lines could not be readily distinguished from the side lines. It had only four lines,—two longer ones, running with and on either side of the course of the vein, and two shorter ones, running across it. It was evidently intended to be in the usual shape of a quartz location,—that is, a rectangular figure, with greater length than breadth; but T. C. Warden, who discovered and located the mine in April, 1881, failed to get the end lines parallel. The divergence from a parallel was about 250 feet; that is, for instance, the southerly end of the westerly end line should have been about 250 feet further east, in order to have been exactly parallel with the easterly end line. Moreover, defendants offered to prove that in March, 1882, less than a year after the original location by Warden, their west end line was “drawn in” so as to make it parallel with the east end line; that since then they were in the peaceable possession of the mining claim within the lines as they were after said west end line had been so made parallel; that the ore which they took from within the surface lines of the Oriental was part of the vein which had its apex within the surface lines of the Silver King after said west end line had been so made parallel; and that said ore was taken out after the said change of said west end line. The plaintiff objected to the offered evidence, and to any similar evidence, “on the ground that by reason of the surface form and shape of the Silver King claim, as testified to by said Warden, defendants have no rights, under the laws of the United States, or otherwise, to follow the lode in its downward course [beyond] the lines of the Silver King claim, and under the other claims; the end lines of such location testified to by said Warden not being parallel, but divergent.” The court sustained the objection, in these words: “The objection to any proof of justification or otherwise, under the location by Mr. Warden, as shown by map No. 1, of defendants to take subterranean ore from within the vertical side lines of the Oriental No. 2 and the Oriental No. 7 mining claims, extended downward, is sustained.” Defendants excepted. And so the court held that the location of the Silver King made by Warden in April, 1881, was totally invalid and void, so far as any right under it is claimed

to pursue a vein outside its vertical side lines, because its end lines were not parallel, and that such invalidity was not overcome by the said rectification of the west end line in March, 1882. The same ruling was made at many other stages of the trial, and the only matters submitted to the jury concerned the entry of defendants within the lines of plaintiff's ground, and the amount and value of the ore extracted; and in making these rulings we think that the court below erred.

For another purpose evidence was admitted which showed that at the time—in March, 1882—when the west end line was made parallel with the east end line, as aforesaid, the owners of the Silver King had made application for an official survey of their mine preparatory to applying for a United States patent; that J. C. Dunlap, a mining engineer and surveyor, at the request of the United States surveyor general, had made such survey, and that finding the end lines not parallel he ran a new west end line, commencing at the north-west corner of the original Warden location, and drawing it in easterly to the original southerly side line so as to make the two end lines parallel, as before stated; that in doing so he kept along and within the original lines, so as to make the surface ground less, and not more, than the original; and that he placed permanent monuments on the new south-west corner, and on the end line. There was also evidence admitted tending to show that from that time the new line run by Dunlap was recognized as the west end line, although there was also some evidence tending to show that some of the owners of the mine were, at first, dissatisfied with that line. But in 1885 an application for a United States patent was made, based on said survey made by Dunlap. None of this evidence, however, was allowed to be considered as a justification of defendant in following their vein outside of their side line. The defendants also offered to amend their answer so as to aver and prove that on July 20, 1887, less than one month after the commencement of this action, defendants made mineral entry and purchase of the Silver King, according to said Dunlap survey in the United States land-office of the district where the claim is situated. This offer was denied by the court.

The following diagram shows the shape of the Silver King surface ground:



The four outside lines are those originally made by Warden. The dotted line shows the alteration of the west end line made by Dunlap, who followed all the other lines made by Warden. The points at which defendants drifted under the Oriental are near the center of the southerly line of the Silver King.

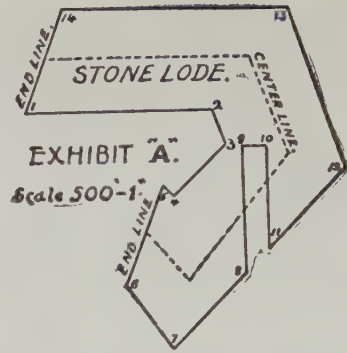
The theory of respondent, upon which the case was tried in the court below, is based on the last line of section 2320 of the Revised Statutes of the United States, which is as follows: "The end lines of each claim shall be parallel with each other;" and his position is that, as the end lines of the Silver King, as originally located, were not parallel, therefore its owners could not follow a vein beyond the vertical side lines of the location. We do not understand respondent to contend that such a location as that of the Silver King is void for all purposes. Indeed, we understand his counsel to admit that it is good for all purposes, except only for the purpose of going under ground outside of the surface lines. But—if the question were important here—it would be difficult to logically maintain that distinction. Section 2320, which provides for the parallel end lines, does not give the right to follow a vein beyond the surface lines. It does not provide that if the end lines are parallel the vein may be followed, and if they are not then the vein may not be followed. It deals merely with locations generally,—with locations for all purposes. But section 2322, which does give the right to so follow a vein, (and which is little more than a declaration of a previous mining custom,) says nothing about parallel lines. If, therefore, the provision of section 2320 about end lines is to receive the strict, literal, narrow, mandatory construction contended for by respondent, it is difficult to see why a location like that of the Silver King is not totally void for all purposes or for any purpose.

But we do not think such a construction of section 2320 is admissible in any view, or for any purpose. It would include absolute mathematical parallelism, for, if the divergence of a few feet in a distance of 600 feet would not vitiate a location, why should any reasonable divergence, which does not materially change the figure of the location from that of a parallelogram? The intention of the statute was to make the valuable property rights of lode miners to depend upon things more substantial and important than the mere trick of a perfectly correct measurement of surface ground, or a mathematically accurate survey. A substantial compliance with section 2320 is all that is required. In the Eureka Case, 4 Sawy. 302, Mr. Justice FIELD says: "In the second place, the provision of the statute of 1872, [the same as section 2320, Rev. St.,] requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction." But section 2322, which gives the right to follow veins beyond surface lines, does con-

tain some provisions about that right which are important. By that section a vein can be followed outside of the side lines only, and not outside of the end lines. And so a surface location might be made in such an irregular and many-sided shape as to destroy the right to go beyond the surface lines. That consequence, however, would not be because the end lines were not exactly parallel, but because it would be difficult, if not impossible, to tell which were side lines and which were end lines. In the Flagstaff Case, 98 U. S. 467, in *Elgin M. & S. Co. v. Iron Silver Min. Co.*, 14 Fed. Rep. 377, and in other decisions, it has been held that the provisions of the federal statutes relating to lode claims were passed with the understanding, founded upon the general practice of miners, that the surface locations of such claims will be made lengthwise along the general direction of the lode or vein in the general form of a parallelogram, with the side lines along the lode, and the end lines across it. But suppose that a surface location should be made, for instance in the shape of an octagon, (and such was nearly the shape of the location in the case reported in 118 U. S. Rep. 196, 6 Sup. Ct. Rep. 1177, hereinafter mentioned.) In such a case there would be no end lines and no side lines, and if the locator could go outside his lines in one direction he could do so in eight directions, and encroach upon his neighbors from every point of the compass. If, however, a location is made in substantial compliance with the intent of the statute,—that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct and apparent,—such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel as much as they did in the case of the Silver King. In the case at bar it is not pretended by respondent that the place in the Oriental where the ore in question was taken by appellants was not "between vertical planes drawn downward" through the end lines of the Silver King, and "continued in their own direction," or that such would have been the fact if said end lines had been perfectly parallel, or that he was injured in any way on account of said end lines not being parallel, or that the situation and state of facts between the two claims, so far as this issue involved is concerned, would not have been just the same if said end lines had been exactly parallel. What he contends for is the mere technical advantage of denying appellants' right of working their lode in the usual way on account of the said manner in which the end lines of the Silver King were originally located. His counsel argue as if the right of a quartz or lode miner to follow his vein laterally is a piece of extraordinary legislative grace and favoritism, different from the usual dominion which men have over their property, and therefore to be

contracted and circumscribed in every direction by strict construction. But this is a mistaken view of the subject. That which a lode miner locates, that which he seeks to secure, that which constitutes his valuable property in the mine, is the lode itself, and the right to mine it wherever it may go under ground between the end points of his location. This right was not given, in the first instance, by the act of congress. Of course, as the United States government owned the land, and the right to mine was a mere license from that government, congress might have greatly changed that right, or might have withdrawn the license entirely. But it did not do so. The statutes of congress upon the subject, except so far as they provided for patents, were little more than mere formal legislative declarations of what had before rested in unwritten consent. They followed mainly the customs which miners exercising the license had established among themselves, and which fixed the character and incidents of mining property. And one of the inherent and most valuable qualities of property in a lode mine, as fixed by those customs, was the right to mine the lode to indefinite depths, although it might so far depart from a perpendicular in its downward course as to extend outside the vertical side lines of the surface location.

Counsel for respondent, in support of their main contention, cite the case of *Iron Silver Min. Co. v. Elgin M. & S. Co.*, 118 U. S. Rep. 196, 6 Sup. Ct. Rep. 1177. The language of the opinion of the court in that case must be considered with reference to the facts of the case, and the points which were before the court for decision. The question involved was the right of the defendants therein, who were the owners of a lode location called the "Stone Claim," to follow a vein, the apex of which was within the surface lines of said claim, into an adjoining claim owned by plaintiffs, called the "Gilt-Edge Claim." When defendants offered evidence to prove their right to follow their vein into the Gilt-Edge ground, the plaintiffs objected, because, "by reason of the surface form or shape of the Stone claim, its owners had no right" to follow, etc., and because "no part of the Gilt-Edge claim or the mineral or lode within it was within vertical planes drawn downward through the end lines of the Stone claim, and continued indefinitely in their own direction." Pages 202, 203, 118 U. S., and 1181, 6 Sup. Ct. Rep. The objection there was not that the end lines of the Stone claim were out of parallel, and as a matter of fact what were claimed to be the end lines were parallel. The objection rested on the general "form or shape" of the Stone surface location, and on the fact that the disputed ore in the Gilt Edge was not within vertical planes drawn through the end lines of the Stone claim. The objection was very properly sustained, as a glance at the Stone surface location will at once show. The following is a diagram of that location, copied from page 203 of the report:



Here is a surface location with nearly a dozen exterior lines; with no distinguishable side lines or end lines; made in extreme violation of the usages and principles of location recognized by the statutes; and which, if it gave any right to follow a vein at all, would give the right to follow veins in nearly a dozen different directions. The lines which are designated as end lines are not end lines at all. The one designated as the south end line—from the figure 6 to the figure 5—would, if extended, run through the center of the location; and, as stated in the opinion, the ore taken from the Gilt Edge was not within planes drawn through the asserted end lines. As was said by the learned judge of the circuit court who tried the case: "With superficial attention to the letter of the law, and in utter ignorance and disregard of its principles, the two lines were made in equal length, and parallel with each other, but so arranged that they can never perform the office assigned to them in the law." It is true that in the opinion of the supreme court of the United States rendered in this case the language of the statute about end lines being parallel is restated; but the meaning of that language, as applied to a case like the one at bar, different entirely in its facts from the one then before the court, was not given, and was not before the court. And it may be noticed that the opinion of the court was delivered by the same learned justice who said in the *Eureka Case* that the said provision was only directory. A comparison of the two diagrams above given, of the *Silver King* and the *Stone*, will clearly show the difference between the two, and that the principle upon which the *Stone Case* was decided does not apply at all to the case at bar. Of course, where end lines diverge to any considerable extent from a perfect parallel they might, when extended in their own direction, include, on one side at least, greater length of ledge outside the side lines than within them; and in such case, if the owner undertook to mine outside ore on or near the diverging end line, some difficulty might arise. And it was, no doubt, the purpose of section 2320 to prevent a party from claiming more outside his lines than within them. But no such question arises in this case.

Moreover, we think that defendants should have been allowed to show, as a part of their

defense, that in March, 1882,—less than a year after the original location,—they rectified their west end line, by means of an official survey, so as to make it parallel with the east line; and that in 1885 they applied for a patent upon that official survey, provided that no injury was done thereby to plaintiff. And it is difficult to see how there could have been any such injury; because by such rectification defendants had less ground within their surface lines, and the vertical end lines extended in their own direction over plaintiff's claim included less of the ledge, than they did before, although both before and after the rectification they included the place where the disputed ore was taken out. Is it possible that a prospector, discovering a lode mine on a wild and rugged mountain side, and locating it in substantial compliance with mining customs and congressional laws, must inevitably lose what may be the most valuable part of his discovery simply because he failed, in the first instance, to run his end lines on a perfect parallel? Such a locator has the right, and perhaps it is his duty, to make such change as is necessary to parallel his end lines, the next day, or the next month, or within any reasonable time, if such change interferes with the substantial property rights of no other person. Any different rule would be a disgrace to justice, and an impeachment of the common sense of law-makers. For the foregoing reasons the judgment must be reversed; and, in looking again over the transcript, we see no other points made by appellants which seem to need special mention, or that will create any difficulty, if there shall be another trial of the case. The judgment and order are reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.
Hearing in bank denied.

(83 Cal. 264)

YOSEMITE STAGE & TURNPIKE CO. v.
DUNN, Comptroller. (No. 13,357.)

(Supreme Court of California. Feb. 28, 1890.)

GIFT BY STATE—PURCHASE OF ROAD—FRANCHISE.

13 U. S. St. at Large, 325, provides "that there shall be, and is hereby, granted to the state of California the cleft or gorge in the granite peak of the Sierra Nevada mountains, situated in the county of Mariposa, in the state aforesaid, * * * with the stipulation, nevertheless, that the said state shall accept this grant upon the express condition that the premises shall be held for public use, resort, and recreation; shall be inalienable for all time, but leases not exceeding ten years may be granted for portions of said premises. All incomes derived from leases of privileges to be expended in the preservation and improvement of the property, or the roads leading thereto; * * * the premises to be managed by the governor of the state, with eight other commissioners to be appointed by the executive." The second section of the act, on like terms and conditions, grants the land, not to exceed four sections, embracing what is known as the "Mariposa Big Tree Grant." *Held*, that roads laid out in the grant are not subject to the general road law of the state, which provides that when a franchise for a road has expired the road becomes a free public highway, and the purchase by the state, under an act of the legislature, of the interest of one holding an unexpired lease

of a road made after the expiration of a prior lease for 10 years, is not a gift of the purchase price, within the meaning of Const. Cal. art. 4, § 31, which provides that the legislature shall have no "power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal, or other corporation, whatever." PATERSON, J., dissenting.

Commissioners' decision. In bank. Application for writ of mandate.

Lloyd & Wood, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

FOOTE, C. This is an application for a writ of mandate to compel the comptroller of the state to draw his warrant upon the state treasurer for the sum of \$8,000 in favor of the petitioner. The comptroller refuses to draw the warrant, because, as he alleges, the legislature had no power, under the constitution, to pass the law by virtue of which the petitioner claims the right to draw the \$8,000 from the treasury. It is contended by the counsel for the respondent that the money voted to the petitioner by the act in question is a gift, and, as such, is inhibited by article 4, § 31, of the state constitution. The portion of the constitution under consideration is: "Sec. 31. The legislature shall have no power; * * * nor shall it have power to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual, municipal or other corporation, whatever." The Civil Code, § 1146, says: "A gift is a transfer of personal property made voluntarily, and without consideration." To be a gift, this voluntary transfer must be gratuitous,—a handing over to the donee something for nothing. Upon the face of the act of the legislature upon which the petitioner's contention is made, it appears that the legislature appropriated \$8,000 to purchase from the "Yosemite Stage & Turnpike Company its road," running from the line of the grant to the floor of the valley, by Inspiration and Artists' points, a distance of eight miles, and known as the "Yosemite and Wawona Road." Acts 1889, p. 142. It is clear, therefore, that, so far as the legislature was concerned, its intention was to purchase a road in which it believed the petitioners had an interest at least worth purchasing, and that no gratuitous donation was intended to be made.

Was one in fact made? The agreed facts in the case are: "(1) That heretofore, and on the 1st day of January, 1875, the commissioners to manage the Yosemite Valley & Mariposa Big Tree Grove made and entered into a contract and agreement with Washburn, Chapman & Co., hereto attached, and made part hereof, marked 'Exhibit A.' (2) That said Washburn, Chapman & Co. complied with their part of said contract or agreement, and fully performed the same, and constructed the road therein mentioned, and expended thereon the sum of \$16,000, or thereabout, and collected and received the tolls therein mentioned. (3) That the petitioner, the Yosemite Stage & Turnpike Com-

pany, has succeeded, by assignments and conveyances from Washburn, Chapman & Co., to all and every their rights and privileges under the lease and contract aforesaid; and said Washburn, Chapman & Co., and Yosemite Stage & Turnpike Company, have at all times since its completion been in the possession of said road, and using the same, in accordance with the terms of the several leases or contracts herein set forth. (4) That on December 17, 1885, and before the expiration of the aforesaid lease, the commissioners to manage the Yosemite Valley & Mariposa Big Tree Grove passed a resolution extending the terms of said lease, a copy whereof is hereto attached, marked 'Exhibit B;' and on June 6, 1888, said commissioners made and entered into the contract or lease hereto attached, marked 'Exhibit C.' (5) That said Yosemite Stage & Turnpike Company fully performed its part of said contracts or agreements, and is now in possession and use of said road therein mentioned, and has heretofore maintained, and is now maintaining, the same. (6) That after the passage of the act of the legislature in the petition mentioned, said Yosemite Stage & Turnpike Company made, executed, and tendered its deed for said road, and its release of said contract, to the State of California, in due form of law, and the board of examiners of said state thereupon accepted said tender, and audited, allowed, and ordered paid to said Yosemite Stage & Turnpike Company the sum of money appropriated by said act. (7) That, upon demand being made thereafter, said John P. Dunn, comptroller of the state of California, refused to draw the warrant mentioned in said act."

It is contended by the counsel for the respondent that the petitioner had no right or interest whatever in the road attempted to be purchased and paid for by the legislature; that, having nothing to sell, or which could be bought from them, the voting to them of \$8,000 by legislative act was a gift pure and simple, and nothing else. The first point which he makes in support of his contention is that, as the first 10-year lease expired in 1885, the turnpike road in possession of the lessees at once became, by operation of section 2619 of the Political Code, a free public highway. We do not think this view of the matter is correct, as no portion of the Yosemite grant is subject to the general road laws of the state. The act of congress under which the land included in the grant was made to the state of California is in this language: "That there shall be, and is hereby, granted to the state of California the cleft or gorge in the granite peak of the Sierra Nevada mountains situated in the county of Mariposa, in the state aforesaid, * * * with the stipulation, nevertheless, that the said state shall accept this grant upon the express conditions that the premises shall be held for public use, resort, and recreation; shall be inalienable for all time; but leases not exceeding ten years may be granted for

portions of said premises. All incomes derived from leases of privileges to be expended in the preservation and improvement of the property, or the roads leading thereto; * * * the premises to be managed by the governor of the state, with eight other commissioners, to be appointed by the executive of California, and who shall receive no compensation for their services." 13 U. S. St. at Large, 325. The second section of the act, on the like terms and conditions, grants the land, not to exceed four sections, embracing what is known as the "Mariposa Big Tree Grant." Thus it will be seen that by the terms of that act the grant was made to the state of California, to be put to a specific public use, and no other. It was to be managed by a board of commissioners, to whom were given certain defined and specific powers, to be exercised consistently with the conditions named in the grant. The roads laid out within the grant, being under the charge and supervision of the board of commissioners, were not to be managed as by a board of supervisors of a county, or a county and city; and the board of commissioners is not controlled by the state laws applicable to boards of supervisors. Hence the argument made for the respondent, that the commissioners "could not abandon the free public highways in the grant to any corporation," is without force; for the commissioners are expressly given the power, by the act of congress, to lease portions of the premises or grant for a period of time not exceeding 10 years; and they are not confined by the act to the leasing of portions for any specific purpose named in the act. The power to lease portions of the premises for a period not exceeding 10 years is a general one, so far as the purpose of the lease is concerned. The roads laid out in the grant by authority of the commissioners are not subject to the jurisdiction of boards of supervisors. They are the property of the state, and subject to the jurisdiction and control of a particular body, viz., the board of commissioners, whose action is controlled by the provisions of the act of congress authorizing their appointment. The state could not, under the terms of the act of congress, making the grant for a special public use, commit its management to any other body than the board of commissioners. *Ashburner v. California*, 103 U. S. 575, 578, 579. If the commissioners are authorized to lease portions of the grant, and are not limited as to what use the leased premises may be allowed by them to be put, it is not perceived but what they had the power to make the leases in controversy. If they possessed this power, then it appears to us that the legislature might very well, if it desired to do so, in the interests of the state, buy out the interests of the petitioners under an unexpired lease, and that the purchase money voted for that purpose was not a gift. It appears, therefore, that the prayer of the petitioners should be granted; and we advise that a peremptory writ of mandate issue, commanding

the respondent to issue the warrant for \$8,000, as prayed for.

We concur: BELCHER, C.C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the prayer of the petitioner is granted; and ordered a peremptory writ of mandate be issued, commanding the respondent to issue the warrant for \$8,000, as prayed for.

FOX, J. I concur in the order for the writ. There was no provision in the original lease that the road should revert to the state at the expiration of the term, or ever, but there was a provision that the state, or the board of commissioners, might become the purchaser thereof whenever it should so elect. The state or board did not purchase during the term, but permitted the petitioners to remain in possession for the time being, and subsequently made to them a second lease for 10 years. The board of commissioners, on behalf of the state, is now buying out the road, as it was originally provided it might do. I think they have the right to make the purchase. Of the policy of doing it, this court is not the judge.

SHARPSTEIN, J. I concur in the opinion of Mr. Justice FOX.

PATERSON, J. I dissent.

87 Cal. 109

JONES v. DUCHOW. (No. 13,219.)

(Supreme Court of California. Feb. 28, 1890.)

LIBEL—EVIDENCE—RES GESTÆ—IMPEACHMENT OF WITNESS.

1. In an action for libel, in publishing that plaintiff had been compelled to leave his former place of residence to escape punishment by a mob, a letter, not under oath, written and signed by reputable citizens of the place, four months before the alleged departure of plaintiff, giving him a good character, is neither admissible as part of the *res gestæ*, nor to contradict a witness for defendant, who testifies that plaintiff was, at the time of his departure, denounced by all good citizens.

2. Under Code Civil Proc. Cal. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it is improper to ask a witness, on cross-examination, whether he is not the person who was arrested for beating a woman of the town, and who appeared, pleaded guilty, and paid a fine therefor.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

F. D. & G. W. Nichel, F. W. Street, and E. A. Rodgers, for appellant. James Budd and I. M. Kalloch, for respondent.

FOOTE, C. This is an action for libel. The plaintiff, Jones, recovered, under the verdict of a jury, a judgment for \$2,500, from which and an order refusing a new trial the defendant appeals. One of the grounds of the alleged libel was that the defendant had published of the plaintiff that he had been compelled to leave his former place of resi-

dence between two days, in order to prevent a mob from riding him out of town on a rail. The defendant admitted the publication of this matter, and justified it on the ground of its truth. On the trial, Mr. Gift, a witness for the defendant, had testified, among other things, that he had denounced the character of the plaintiff, Jones, at Hollister, his former place of residence, in this state, "as any other good citizen used to and did," on account of divers acts of Jones at that place. The plaintiff then proposed to introduce in evidence before the jury a letter or certificate of good character for himself, signed by Judge Breen and others, who are admitted to be good citizens of Hollister. This was objected to by defendant's counsel, on the ground that it was irrelevant and incompetent for any purpose. It was admitted in evidence by the court as "legitimate cross-examination." The witness then further gave evidence which went to show that the time when this "denunciation" occurred was about July, 1883. The certificate was dated March 2, 1883. It is couched in the following language: "Superior Judge's Chambers, San Benito County, Cal., Hollister, March 2, 1883. The bearer of this, Mr. W. G. Jones, contemplates removing from this place with the view of establishing himself in business in Washington Territory. I take pleasure in commending him to all with whom he may meet in business or social relations. Mr. Jones has for some time past conducted the Hollister Democrat (newspaper) at this place, as the editor and proprietor. I have been well acquainted with him during all of said time, and I bear willing testimony to his uniformly good and correct business habits. He will, I am satisfied, be a gain to any community where he may locate. JAMES F. BREEN, Judge of the Superior Court of San Benito county, Cal. WM. T. BROWN, Ex-Sheriff. I concur in the above. T. S. HAWKINS, President Bank of Hollister. W. C. LANG, Cattle-Dealer." The letter was admitted in evidence, against the defendant's objection, as heretofore stated. The respondent argues that it was admissible to contradict the statement of Gift, inasmuch as it was part of the *res gestæ*; that it was contemporaneous with and illustrative of the thing done, of which Gift spoke, in alluding to the denunciation of Jones by all good citizens at Hollister, at a time when he (Gift) went there to look after a female relative. The letter is in itself merely a certificate of good character for Jones in March, 1883. The state of feeling as to Jones, of which Gift spoke, appears to have been in July, 1883, some months after the letter was given to him. The certificate of Judge Breen and others on March 2, 1883, was not contemporaneous with the main fact under consideration, which was the denunciation of Jones by all good citizens at Hollister, in July, 1883, the time when Gift went there for a purpose heretofore stated, nor was the certificate illustrative of the condition of public

sentiment relative to Jones in July. It was therefore inadmissible, as part of the *res gesta*, to contradict Gift's statement. The effect of its admission would be to prove on a trial good character for Jones at Hollister by the *ex parte* written statement of witnesses, not under oath or affirmation, and not in the presence and subject to the examination of all the parties to the action who chose to attend. Section 1846, Code Civil Proc. The letter was not the testimony of a witness, taken either by affidavit, deposition, or by oral examination. Section 2002, Code Civil Proc. It is clear that it was not admissible to prove good character for the plaintiff, by contradicting what Gift had said of Jones being generally denounced at Hollister in July, 1883. *People v. Eckman*, 72 Cal. 584, 14 Pac. Rep. 359.

It is further claimed, as error by the appellant, that the court below overruled his objection to a question asked by plaintiff's counsel of the witness Bradford, which was in this language: "Are you the W. F. Bradford who was arrested on the 29th day of January for beating, bruising, and battering one Maud Evans, a woman of the town, and appeared in Judge COOPER'S court and pleaded guilty, and paid a fine therefor?" The objection was made on the ground that it did not tend to impeach the witness, that the record was the best evidence. The witness was compelled to answer, "I am." The court stated that the witness had testified to a very material matter, and the only basis for demanding the answer of the witness must have been to impeach his testimony. We think the ground of objection was specific and clear enough to show that the objector had in mind and invoked the rule which does not permit a witness to be impeached by evidence of particular wrongful acts theretofore done by him. It was not proposed to show by his examination or by the record of his conviction that he had been convicted of a felony. "A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters." Code Civil Proc. § 2051; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. Rep. 26, 131, and authorities there cited. These comprise the main points of objection, as shown by the reply brief of the appellant, and we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

83 Cal. 398

In re ROSENHEIM et al. (No. 20,635.)

(*Supreme Court of California.* March 6, 1890.)

CRIMINAL LAW—EXCESSIVE PENALTY—HABEAS CORPUS.

1. Pen. Code Cal. § 1205, which provides that a judgment that defendant "pay a fine" may also direct that he be imprisoned until the fine be satis-

fied, does not apply to those cases in which the court has imposed a term of imprisonment and also a fine, but it applies only to those cases in which the fine stands alone as a punishment. *People v. Righetti*, 4 Pac. Rep. 1185, overruled. BEATTY, C. J., dissenting.

2. As the statute (Pen. Code Cal. § 182) defining and fixing the punishment for criminal conspiracy makes no distinction as to the penalties to be imposed on conviction of the various classes of conspiracy enumerated therein, the court may inflict the maximum penalty—one year's imprisonment and a fine of \$1,000—on persons convicted of a conspiracy to obtain money by false pretenses; nor can it be said, as a matter of law, that an additional penalty of imprisonment in the county jail at the rate of one day for every dollar of the fine, in case of its non-payment, makes the punishment excessive or cruel, within Const. Cal. art. 1, § 6.

3. On *habeas corpus*, an objection that the complaint under which petitioners were convicted does not state a cause of action will not be considered, where the complaint is not made a part of the petition, nor referred to in the return, and where no offer was made, on the submission of the matter, to make the complaint a part of the record.

In bank. On *habeas corpus*.

George A. Knight, for petitioners. Geo. A. Johnson, Atty. Gen., for the People.

PATERSON, J. The petitioners are before us on a writ of *habeas corpus*. They were convicted in the police court of the city and county of San Francisco, December 10, 1888, of the crime of conspiracy, and sentenced, respectively, to serve a term of one year in the county jail, and to pay a fine each of \$1,000, and, in default of payment thereof at the expiration of the one-year term of imprisonment, to be confined in said jail until the fine be paid at the rate of one day for every dollar thereof.

The first point made by counsel for petitioners is that the complaint under which they were prosecuted and convicted does not state facts sufficient to constitute a cause of action, and the judgment is therefore void. This point cannot be considered, because the complaint is not before us. It is not made a part of the petition, it is not referred to in the return, no objection was made to the sufficiency of the return, and no offer was made at the time the matter was submitted to make the complaint a part of the record for our consideration.

The next point urged against the validity of the judgment is that the court below abused its discretion, and imposed a fine which is excessive, within the meaning of article 1, § 6, of the constitution. The court imposed the maximum penalty allowed by law. It is contended that the punishment for this offense—conspiracy to obtain money by false pretenses—was never intended to be as great as that inflicted upon those found guilty of conspiracy to murder. Yet the court has in this case visited upon the petitioners a penalty as great as could have been imposed upon them if they had been charged with and found guilty of conspiracy to murder. It is sufficient to say, in answer to this suggestion, that the court acted within the powers conferred upon it by the statute, and the statute itself makes no distinction—gives no direc-

tion—as to the penalties to be imposed in cases of conviction of the various offenses enumerated in the statute. It cannot be said, as a matter of law, that four years' imprisonment, upon conviction of the crime charged, is excessive, or that the punishment is cruel, within the meaning of article 1, § 6, supra.

The petitioners claim that, having served the one-year term of imprisonment imposed by the judgment, they cannot now be imprisoned for failure to pay the fine of \$1,000. They contend that section 1205 of the Penal Code does not apply to cases in which the judgment is for a fine, coupled with a sentence of imprisonment, but applies only to cases in which a fine stands alone as the punishment. In *People v. Righetti*, 66 Cal. 184, 4 Pac. Rep. 1063, 1185, the court in department held that said section does apply to cases of fine, whether the fine be coupled with a sentence of imprisonment, or stand alone as the only punishment. In *Re Neustadt*, ante, 124, we took occasion to express a doubt as to the correctness of the decision in that case, but, the question not being directly involved, no decision was made in relation to it. In *Re Wadleigh*, ante, 190, Justice McFARLAND expressed a doubt as to whether a defendant could be imprisoned in a county jail beyond the maximum term of imprisonment prescribed by the statute as a punishment for the offense of which he has been convicted, and gave his reasons therefor. Upon a further consideration of the question we are led to believe, and so decide, that section 1205 is inapplicable to cases in which the court has imposed a term of imprisonment and also a fine. That section provides that "a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, and which must not exceed one day for every dollar of the fine." There is nothing in the letter of this statute, we think, which indicates an intention to make it applicable to cases in which the court itself fixes a term of imprisonment absolute, and then imposes a fine. Section 1214 of the Penal Code provides that, "if the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action." Section 1215 provides that if the judgment is for imprisonment the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with, and, if the judgment is for "fine and imprisonment until it [the fine] be paid, the defendant must forthwith be committed to the custody of the proper officer, and by him detained until the judgment is complied with." The provisions of the sections are in the disjunctive, "if the judgment is for imprisonment, or a fine and imprisonment until it is paid," etc.

Here cases of fine, cases of imprisonment, and cases of fine and imprisonment until the fine is paid are provided for; but the Code nowhere expressly provides for imprisonment, and fine coupled with imprisonment,

until the fine be paid, after the expiration of the fixed term of imprisonment. The provisions of sections 1214 and 1215, supra, were not considered by the court in *People v. Righetti*, but they strengthen the theory that the legislature did not intend section 1205 to apply to judgments for both imprisonment and fine. If those who framed and adopted section 1205 had intended it to apply to judgments that the defendant be imprisoned for a certain term fixed by the court, and pay a fine, it would have been easy to have so declared. In other sections in the same title the distinction between judgments of fine alone and imprisonment until it be paid, and judgments for both fine and imprisonment, is carefully preserved. "A judgment that the defendant pay a fine may also direct," etc., says section 1205. The judgment before us is not, correctly speaking and fully expressing it, a judgment that the defendant pay a fine; it is a judgment that he be imprisoned, and that he pay a fine. Within the letter of the statute, therefore, there is no authority for its application to cases of this kind, and it is only by judicial grafting upon legislation that the section can be made to support the additional penalty imposed by this judgment. While it is true the rule of the common law that penal statutes are to be strictly construed has been abrogated by the Code, which provides that "all its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice," it is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute, and we think the least that can be admitted fairly by those who claim the application of section 1205 to judgments of this kind is that the intention of the legislature to make it applicable to such cases is not clearly and with certainty expressed in the language used. The construction we place upon it brings it in harmony with other provisions of the same title which prescribe the manner in which penal judgments shall be executed, and is consistent with the "fair import of its terms" and the object of the Code. The legislature fixes in all cases the maximum term, and in some cases the minimum term of imprisonment to be imposed by the court, and never intended, we think, to authorize the court, under the guise of a fine, and the collection thereof, to extend the maximum term of imprisonment, as was done in this case, to a term several times greater than the term fixed by the statute. Of course the legislature might, if it saw fit to do so, provide for the collection by imprisonment of all fines, whether the judgment be one of fine alone, or one of both fine and imprisonment. But has the legislature so provided? We think it has not, and unless it has clearly conferred upon the court authority therefor it is our duty to hold that the additional penalty cannot be imposed, and that

the judgment to that extent is void. It is ordered that the petitioners be discharged from custody.

We concur: McFARLAND, J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.

I dissent: BEATTY, C. J.

(83 Cal. xix)

In re COLLINS. (No. 20,652.)

(Supreme Court of California. March 7, 1890.)

In chambers. On habeas corpus. *Spencer & McEnerney*, for petitioner. *Geo. A. Johnson*, Atty. Gen., for the People.

BEATTY, C. J. The petitioner was convicted in the superior court of San Francisco of "assault with a deadly weapon," and sentenced to be imprisoned one year in the county jail, and also to pay a fine of \$360, or, in default of such payment, to be further imprisoned until the fine should be satisfied at the rate of a dollar a day. He has been imprisoned a full year, and was, at the date of the issuance of the writ, detained in satisfaction of the unpaid fine. Under the authority of *In re Rosenheim*, ante, 372, (just decided by the court,) I am bound to order his discharge, notwithstanding my dissent from the prevailing opinion in that case. Ordered that the prisoner be discharged.

(83 Cal. 163)

DE NOON v. MORRISON *et al.* (No. 13,435.)

(Supreme Court of California. Feb. 22, 1890.)

MINING CLAIMS—ANNUAL EXPENDITURES.

Act Cong. 1872 (Rev. St. U. S. § 2324) provides that, on each mining claim thereafter located, there shall be annually expended in labor or improvement \$100, but where such claims are "held in common" the expenditure may be made upon any one claim. In an action to recover possession of a mine, plaintiff proved location and transfer of the claim to herself, and performance of the requisite assessment work down to 1888. She proved that she was in possession of, and had made improvements on, an adjoining mine, in 1888, amounting to \$306. Her title to this adjoining mine was not questioned. Held, that under Code Civil Proc. Cal. § 1963, subds. 11, 12, making proof of possession and improvement presumptive of ownership, plaintiff showed that the two claims were held in common.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Thomas S. Ford, for appellants. *Fred Searls and Cross & Denson*, for respondent.

FOX, J. Action to recover the possession of the Gordon placer mine, in Nevada county. Trial by jury. Verdict and judgment for plaintiff. Motion for new trial made and denied, and defendants appeal from both the judgment and order.

One of the grounds of motion for new trial was that the evidence was insufficient to justify the verdict. This point is incidentally discussed on the appeal, but it is difficult to determine whether appellants still rely upon that ground or not. We have, however, examined the evidence, and find that there is some evidence to support the verdict upon every issue of fact involved in the case. Under the well-established rule of this court, the verdict will not, therefore, be disturbed on that ground.

Defendants claim the mining ground under a relocation, authorized, as they claim, by a failure of plaintiff to do the required assessment work for the year 1888. No work was done within the lines of the Gordon claim in that year; but the plaintiff claimed to be the owner, and was in possession, of two or more adjoining mining claims, of which the Gordon was one. Of this claim she proved regular location and transfer to herself, and performance of the requisite assessment work down to and including the year 1887, and also that the \$500 of work necessary to procure a patent for the Gordon claim had been done prior to 1888. She also claimed to be the owner, and was in possession, of the Morton placer mining claim,—a claim adjoining the Gordon on the east. In 1888, she expended \$306 in running a tunnel on the Morton claim in close proximity to the line of the Gordon. It was claimed that this tunnel was run for the benefit of both mines, and proved that it would tend to develop both. Defendants, however, claim that, at the time the work was done, its purpose was to complete the work necessary to entitle the plaintiff to a patent of the Morton, and not for the benefit of the Gordon, in any sense. That is a question of fact submitted to the jury, and their verdict upon that question will not be disturbed. As a matter of law, the plaintiff had the right to do the work necessary for the protection of both claims on one of them; both being held by her in common. This question seems to be settled by the decision of the supreme court of the United States in *Smelting Co. v. Kemp*, 104 U. S. 654, 655, where the court, speaking through Justice Field, says: "The statute of 1872 provides that, on each claim subsequently located, until a patent is issued for it, there shall be annually expended, in labor or improvements, \$100, and on claims previously located an annual expenditure of \$10 for each 100 feet in length along the vein; but, where such claims are 'held in common,' the expenditure may be made upon any one claim. * * * Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed, or the improvements are made, for its development,—that is, to facilitate the extraction of the metals it may contain,—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the *débris* or waste material."

But appellants claim that plaintiff is not entitled to have part of the expenditure made on the Morton in 1888 credited to the assessment work of the Gordon, for the reason that she did not prove that she was the owner of the Morton, and consequently there was a failure of proof to show that the two claims

were "held in common." It is true that plaintiff did not attempt to prove the location and record title of the Morton claim. She was not called upon to do it. Her title to that claim was not in dispute. She did prove actual possession and improvement of the same. From that the law presumes that she was the owner. Code Civil Proc. § 1963, subds. 11, 12. Such, also, has been the uniform ruling of this court in a line of decisions running through and found in nearly every volume of the reports, from the fourth to the present time. That presumption, of course, may be rebutted, in a proper case; but in this case there was no attempt to rebut this presumption of law. The case of *Jackson v. Roby*, 109 U. S. 444, 3 Sup. Ct. Rep. 301, cited by appellant, is not in point. There it was shown and held that the particular work claimed as development was not such, and was not of a character to develop the claim. None of the other cases cited by appellant are in conflict with the conclusion here reached.

It is also insisted by appellants that the court erred in refusing to give the fifth instruction asked by defendants. That instruction was to the effect that, even if plaintiff had expended \$500 in work on the Gordon claim prior to 1888, she was not thereby excused from the necessity of doing the \$100 of assessment work in 1888, to prevent the claim from being subject to relocation. It was not error to refuse this instruction, for the reason that the court had already instructed the jury, (1) of its own motion, that, under the laws of congress, the party holding the claim must make an annual expenditure of \$100 on each claim; and, " * * * if you shall find that the plaintiff did not make the expenditures on the Gordon claim in 1888, your verdict will necessarily be for the defendants: "On each claim located since May 10, 1872, not less than \$100 worth of labor must be performed, or improvements made, each year; and upon failure to do so the claim is open to relocation in the same manner as if no location was ever made." Either of these instructions was less confusing, and more favorable to defendants, than the one refused. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

82 Cal. 595

DURGIN v. McNALLY *et al.* (No. 13,135.)

(Supreme Court of California. March 1, 1890.)

APPEAL—REHEARING.

Under Const. Cal. art. 6, § 2, which provides that, after a judgment in a cause has been pronounced by a department of the supreme court, an order for rehearing before the court in bank "must be made within 30 days after such judgment," a petition for rehearing which does not reach the court in bank until 31 days after judgment has been pronounced by the department will be denied, though the petition was filed in the department within the 30 days.

In bank. On petition for rehearing. See ante, 133.

Action by plaintiff, Durgin, against defendants, Neal, McNally, and Young, for injury to plaintiff's merchandise caused by defendants' alleged negligence in flooding a cellar wherein the same were stored. The case was dismissed as against Neal, but a judgment was obtained against the other two defendants. They appealed, and the judgment was reversed. Const. Cal. art. 6, § 2, provides: "The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within 30 days after such judgment."

BEATTY, C. J. The petition for a rehearing in this case must be denied, irrespective of its merits, for the reason that, although filed in Los Angeles before the expiration of the 30 days after the judgment of the department was pronounced, it did not reach the hands of the court until one day after the expiration of the 30 days within which the order for a rehearing in bank must be made, if made at all. Const. art. 6, § 2.

83 Cal. 153

IN RE BOWMAN. (No. 13,393.)

(Supreme Court of California. Feb. 22, 1890.)

INSOLVENCY—EXEMPTIONS.

Where a petitioner in insolvency claims certain posts as exempt as fire-wood, in good faith, the fact that he thereafter sells them, their value being small, is no ground for reversing an order of discharge.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

W. P. Sowden and G. D. Buckley, for appellants. P. F. Simonds, for respondent.

PATERSON, J. This is an appeal by certain creditors of the insolvent debtor, Bowman, from a judgment granting him a discharge in insolvency, and from an order denying their motion for a new trial of the issues raised by their opposition to his petition for a discharge. The first point made by appellants is that the petitioner falsely claimed that he was a teamster, and thereby secured property to which he was not entitled, he being at the time the petition was filed a blacksmith. The petition alleges that petitioner had, "since the 1st day of January, 1885, been engaged in the business of teaming," and the opposition filed by the creditors admitted that he was a teamster. At the trial counsel for the creditors proposed to amend the opposition so as to aver that Bowman was a blacksmith, and counsel for insolvent stated he had no objections to such an amendment; but no such amendment

was made. It is unnecessary, therefore, to review the evidence bearing upon the question whether Bowman was a teamster or a blacksmith. A finding of the court was unnecessary, because not within the issues. It is claimed, also, that Bowman fraudulently claimed certain property as exempt which was not exempt; that he did not include in his schedule 141 posts, 1 wagon-sheet, and a pair of 6-horse lines. The court found that the posts referred to were a part of his firewood, actually provided for his family use, and that the assignee never claimed them as part of the assets. The evidence shows that they had been put in his wood-shed "as a part of his firewood, actually provided for family use, prior to his contemplating becoming insolvent; that the sheriff, upon taking possession of insolvent's property, allowed him to keep said wagon-sheet and 6-horse lines and firewood as property exempt from execution. All of said property was included in his petition, schedule, and inventory, as property exempt from execution." After he filed his petition, Bowman sold the posts for \$9.87. It is not shown whether he turned the proceeds over to the assignee; but, assuming that he did not, the property having been claimed in good faith as exempt, there being no fraudulent intent or concealment, and the value of the property being small, the order should not be reversed. *Smith v. His Creditors*, 59 Cal. 268. The insolvent, being a teamster, was entitled to the wagon-sheet and lines as property exempt. The evidence showed that the "6-horse lines were useful and convenient to use with two horses," and there is nothing to show that Bowman had other lines or another wagon-sheet. The findings of the court on every issue were in favor of the petitioner, and it is sufficient to say, without reviewing the evidence in detail, that they are all supported by material and competent evidence. Judgment and order affirmed.

We concur: FOX, J.; WORKS, J.

83 Cal. 440

MECHANICS' BUILDING & LOAN ASSOCIATION v. KING. (No. 13,449.)

(*Supreme Court of California.* March 12, 1890.)

HOMESTEAD—LIENS ON—CLAIMS AGAINST DECEDENTS.

1. Civil Code Cal. § 1265, provides that, if the selection of a homestead was made by a married person from the community property, the land, on the death of either spouse, vests in the survivor, subject to no other liability than such as exists, or has been created, under the provisions of the title on "Homesteads." Code Civil Proc. § 1474, provides that, if the homestead was selected from the community property, it vests, on the death of the husband or wife, absolutely in the survivor, and subject to no debt or liability contracted by the husband and wife, or either of them, previous to, or at the time of, the death of such husband or wife, except as provided in the title on "Homesteads." *Held*, that land owned by a husband and wife as community property, and which had been laid off to them as a homestead, vested on the death of the husband in the wife, not merely as community

property, but as still retaining its character of a homestead, and that it was protected to the wife in the same manner that it had been to the family before the death of the husband.

2. Under Code Civil Proc. Cal. § 1475, which requires all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as prescribed for other claims against the estate, a mortgage executed by a husband and wife on a homestead owned by them as community property cannot be foreclosed after the death of the husband without presenting the claim for allowance against the estate of the decedent within the time prescribed by law.

3. Code Civil Proc. Cal. § 1500, provides that "an action may be brought by any holder of a mortgage or lien, to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." Section 1475 provides that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate." *Held*, that section 1475 relates only to mortgages on homesteads, and does not affect liens on other property, and that a lien on building and loan stock may be foreclosed though the claim was not presented against the estate of the deceased mortgagor within the time prescribed by law for the presentation of claims.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by the Mechanics' Building & Loan Association against Josephine M. King to foreclose a mortgage. Civil Code Cal. § 1265, provides that, if the selection of a homestead was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists, or has been created, under the provisions of the title on "Homesteads." Code Civil Proc. § 1474, provides that, if the homestead was selected from the community property, it vests, on the death of the husband or wife, absolutely in the survivor, and subject to no debt or liability contracted by the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the title on "Homesteads."

D. E. Alexander, for appellant. *Grove L. Johnson*, and *Albert M. Johnson*, for respondent.

BELCHER, C. C. The plaintiff, a corporation, commenced this action on the 24th day of October, 1888, against Josephine M. King, in her individual capacity, and as executrix of the last will and testament of Manuel J. King, to foreclose a mortgage on certain real property, and a lien on five shares of plaintiff's capital stock. The court below refused to grant a decree of foreclosure, and the plaintiff appealed. The case comes here on the judgment roll.

The facts found by the court are, in substance, as follows: In March, 1877, Manuel J. King and Josephine M. King were husband and wife. They owned and resided upon certain community property, and on the 14th day of that month jointly executed, acknowledged, and filed a declaration of homestead thereon. From that time until the death of

the husband the premises continued to be their homestead. On the 2d day of February, 1885, they made their joint promissory note to the plaintiff for \$1,000, payable two years after date; and, to secure payment of the note, they on the same day executed to the plaintiff a mortgage on their homestead property. At that time they were subscribers to and owned five shares of the plaintiff's capital stock, and this stock they also pledged to plaintiff as further security for the payment of their note. The stock pledged was to be paid for in installments of \$1 per share per month; and the plaintiff's by-laws provided "that, if any stockholder shall neglect or refuse to pay his monthly installments of interest, he shall pay a fine of 5 per cent. per month upon the amount of the delinquency." At the time of the trial, installments upon the stock amounting to \$180 had been paid, and there were unpaid installments amounting, with the fines for delinquency, to \$167.45. In December, 1885, Manuel J. King died, leaving a will, which was thereafter admitted to probate. Josephine M. King was duly appointed the executrix of the will, and gave due and legal notice to the creditors of the decedent to present their claims against the estate to her as such executrix. The claim on which this action is based was never presented to the executrix for allowance or rejection, and the time allowed by law for such presentation had expired when the action was commenced. On the 4th day of May, 1888, the property described in the declaration of homestead and mortgage was by the court set apart for the use of the family of the deceased; and on the 8th day of October following, the estate was settled, and the whole thereof was distributed to the said executrix, in trust for herself and children, according to the terms of the will, but no order was ever made or entered formally discharging the executrix. From these facts the court concluded that the \$180 paid as installments upon the stock should be treated as a payment upon the principal of the note in suit; and the sum was so credited, without any judgment or order for the sale or other disposition of the stock. The court also concluded that, by reason of the failure of the plaintiff to present its claim against the estate of decedent, its mortgage lien was extinguished, and it was entitled only to a personal judgment against the respondent, which was accordingly entered. The appellant contends that it was entitled to a decree foreclosing its mortgage on the real property, and its lien on the personal property, and that the court erred in refusing to grant the relief sought.

1. It is true, as claimed, that the title to the mortgaged premises vested absolutely in the respondent on the death of her husband. But, as said in *Re Ackerman*, 80 Cal. 209, 22 Pac. Rep. 141, "so much of it as was at the time impressed with the character of homestead went to the survivor, not merely as community property, but as a homestead, subject to no other liability than such as ex-

isted, or had been created, under the provisions of the title on homesteads. Civil Code, § 1265. It was protected to the survivor of the family in the same manner that it had been to the whole family, and was still a homestead. See, also, Code Civil Proc. §§ 1474, 1475. The death of one of the spouses did not alter in any way the estate, or character of the homestead." In *Camp v. Grider*, 62 Cal. 20, where a husband died, leaving a homestead incumbered by a mortgage which was executed by himself and wife, it was held that the mortgage could not be foreclosed unless the claim was presented for allowance against the estate of the decedent. The result was reached by reading together sections 1475 and 1500 of the Code of Civil Procedure. And in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375, this decision was approved and followed. In *Camp v. Grider* the note was not signed by the wife; but, if it had been, we think the result would have been the same. The court said: "The purpose of the legislature in providing, by section 1475, that, if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead, if possible." And in *Bollinger v. Manning*, where it was claimed that section 1475 was not applicable to the case, because there were no assets, other than the mortgaged premises, out of which the note and mortgage could be paid, it was held that the section did apply, and, there having been no presentation, that the mortgage could not be foreclosed. The court said: "The provision of the section is general, that claims secured by liens or incumbrances on the homestead, selected and recorded prior to the death of the decedent, must be presented and allowed as other claims against the estate. * * * As well might any mortgagee claim, under section 1500, that he could maintain his action without presenting his claim, and without waiving all recourse against the other property of the estate, if he could show that there was no other property belonging to the estate." As the plaintiff's claim was not presented, the court was right, we think, in holding that it was not entitled to a decree foreclosing its mortgage.

2. As to the five shares of stock, section 1500, Code Civil Proc., provides that "an action may be brought by any holder of a mortgage or lien, to enforce the same, against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." The plaintiff had a valid lien on the stock, and made the waiver required. Section 1475, Id., and the rule declared in *Camp v. Grider*, relate only to mortgages on homesteads, and do not affect mortgages or liens on other property. Under these circumstances, we are unable to see why the plaintiff was not entitled to have its lien foreclosed, and the stock sold. It may be that it would suffer no

great detriment from the course adopted by the court below. Still, we think it was entitled to claim and insist, as it does now, upon its legal rights. We therefore advise that the judgment be reversed, and the cause remanded, with directions to enter judgment against the defendant for the amount due on the note, without crediting thereon the \$180, and a decree foreclosing the plaintiff's lien on the five shares of stock, and directing a sale thereof, and the application of the net proceeds arising from such sale in payment of the said judgment.

We concur: HAYNE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to enter judgment against the defendant for the amount due on the note, without crediting thereon the \$180, and a decree foreclosing the plaintiff's lien on the five shares of stock, and directing a sale thereof, and the application of the net proceeds arising from such sale in payment of the said judgment.

83 Cal. 453

PEOPLE *ex rel.* TRAVERS *v.* FREESE. (No. 13,433.)

(Supreme Court of California. March 20, 1890.)

REMOVAL OF OFFICERS.

Pol. Code Cal. § 368, provides for the appointment of pilot commissioners "by the governor, with the consent of the senate." Section 369 provides that their term of office shall be "during the governor's pleasure." Section 2440 provides that these commissioners are to be appointed "by the governor, by and with the advice of the senate." And section 2442 provides that they shall "hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions." Held, that a commissioner cannot be removed by the governor without the consent of the senate. FOX, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Geo. A. Johnson, Atty. Gen., Geo. N. Williams, and John N. E. Wilson, for appellant. Stanly, Stoney & Hayes, for respondent.

McFARLAND, J. This is an appeal from a judgment of the superior court of the city and county of San Francisco in favor of respondent, in a proceeding in the nature of *quo warranto*, which was instituted to test the right to the office of member of the board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia. The respondent, Freese, was appointed to said office by the then governor of the state, in January, 1887, was confirmed by the senate, and, having duly qualified, entered upon the discharge of the duties of the office. Between March 1, 1887, and March 18, 1889, and while the legislature was in session, the present governor nominated the appellant to the senate for the said office, but the senate failed to concur in the said nomination. On March 18, 1889, while the legislature was not in session,—and it has not been in session since,—

the present governor attempted to appoint the appellant to the office, and issued to him a commission which shows that he was appointed "*vice* A. C. Freese, removed."

If the question presented here were an open one, it might fairly be said to be a debatable question. The provisions of the Code upon the subject are conflicting, and it is somewhat difficult to reconcile them. Whether the occupant of the office holds it during the pleasure of the governor; whether the governor, of his own motion, can remove him at any time by appointing another in his place; or whether he can so appoint and remove only with the consent of the senate,—these are questions which could be well argued on either side of the controversy. Either side could, no doubt, be strongly stated. But we decline to again enter upon the discussion of these questions. They were thoroughly discussed, and, after mature consideration and consultation, were determined by a majority of this court adversely to the contention of appellant in *People v. Freese*, 76 Cal. 633, 18 Pac. Rep. 812, a case precisely like the one at bar. We see no good reason why the rule of *stare decisis* should not govern this case; and, looking ahead, we see good reasons why it should. It is not a matter of much importance who should temporarily have the office struggled for here; but it is a matter of considerable importance, in order to avoid uncertainty and disorder in the future, that those exercising power in the premises may have a settled rule to go by. We therefore adhere to the judgment and opinion in the said case of *People v. Freese*. The judgment appealed from is affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

FOX, J. I dissent. I do not think there is any substantial conflict in the provisions of the different parts of the Code bearing upon the question. But, if there is, the legislature, in the Code itself, has prescribed the rule by which such conflict must be settled, and by which it must be determined which provision must prevail. Pol. Code, §§ 4481-4483. Acting upon that rule, the questions stated in the prevailing opinion must be resolved by the provisions of chapter 3, tit. 1, pt. 3, of the Political Code. The office contended for here is one of those included in the section of this chapter giving the number and designation of the civil executive officers of the state. Section 343. Sections 368 and 369 are also a part of the same chapter. The former provides that this officer shall be "appointed by the governor, with the consent of the senate," and the latter provides that his term of office shall be "during the governor's pleasure." The provisions of the Code which are claimed to be in conflict with these are found in title 6 of this part,—a title on an entirely different subject-matter, and into which it was not necessary to interject anything on the subject of

the appointment or tenure of these officers. There we find, in section 2440, that these commissioners are to be appointed "by the governor, by and with the advice of the senate," and in section 2442, that they shall "hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions." While there is a slight difference in phraseology, there is none in legal effect; but, if there was, the first, and not the last, must prevail, according to the rule prescribed by the Code itself.

I fully agree that it is more important that there should be a settled and established rule for the guidance of those exercising the power of appointment and removal than it is that the office should for the time being be awarded to any particular person. But it seems to me that we had such a settled and established rule, and that such a rule was for the first and only time unsettled by the decision of this court in the case of *People v. Freese*, 76 Cal. 633, 18 Pac. Rep. 812, now cited and relied upon as *stare decisis*. Under language more favorable to the contention of respondent than that used in either of the provisions of our Code, it has been settled in the United States for more than 100 years, by both legislative and judicial construction, that the power of removal was vested in the executive alone. See *Marshall's Life of Washington*, 196; *Sergeant's Const. Law*, 372, 373; *Ex parte Hennen*, 13 Pet. 230; *U. S. v. Avery*, Deady, 204-215; *McElrath v. U. S.*, 12 Ct. Cl. 201; *Com. v. Bussier*, 5 Serg. & R. 451. In this state, as early as *People v. Hill*, 7 Cal. 97, it was held that the power to remove is incident to the power to appoint, and that the only way in which this power of removal can be limited is by first fixing the duration or term of office. It cannot be questioned that the power of appointment is in the governor. The senate may approve or not, but it cannot appoint. The only time in the history of the state, so far as I have been able to discover, where the power of the governor to remove an appointee of the executive, even though the appointment had been confirmed by the senate, when there was no fixed term of office, has been questioned, was in the case of *People v. Freese*, supra. I do not, therefore, think that we ought to accept, upon the principle of *stare decisis*, a decision which unsettles a rule of construction and of practice, in both the nation and the state, as old as the government itself.

I am not unmindful of the fact that several cases are cited in the opinion referred to, claimed to be in support of the rule there announced; but every case so cited, except one, was in relation to an office to which there was a fixed term attached. The exception was in the case of a local office, where it was held that the governor had never been vested with power to appoint. Not one of them is a case where the officer held, as here, "at the governor's pleasure," or "at the pleasure of the appointing power."

PEOPLE *ex rel.* ELDRIDGES *v.* BULGER. (No. 13,427.)
(Supreme Court of California. March 20, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Geo. A. Johnson, Atty. Gen., and Page & Ells, for appellant. Stanly, Stoney & Hayes, for respondent.

PER CURIAM. On the authority of *People v. Freese*, ante, 373, (No. 13,433,) this day decided, it is ordered that the judgment appealed from in this case be, and the same is hereby, affirmed.

Fox, J., dissenting.

In re STEVENS' ESTATE. (No. 13,381.)

(Supreme Court of California. Feb. 28, 1890.)

GIFTS—EVIDENCE—WIDOW'S ALLOWANCE—WILLS
—OMITTED CHILDREN—ADOPTION.

1. After the death of an employee of a railroad company, the latter paid money to the widow and executrix on a voucher reading: "To Mrs. A. J. S., Dr.: For amount allowed, which would equal the salary of the late A. J. S. for the months of," etc., and indorsed: "For allowance." *Held*, that the money did not belong to deceased's estate, but was a gift to his widow, and it was immaterial that she did not know that it was a gift.

2. Code Civil Proc. § 1464, provides that the widow of a decedent is entitled to a reasonable provision for her support, to be allowed by the superior court or a judge thereof. Section 963, subd. 3, makes the order of allowance appealable. *Held* that, where all the facts are before the court when the order is made, it is final, and, no appeal being taken, cannot thereafter be changed in amount.

3. The fact that the widow hired out rooms in a rented house in which she lived, does not show that the order of allowance was unreasonable.

4. Under Civil Code Cal. § 1307, providing that, "when any testator omits to provide in his will for any of his children, * * * unless it appears that such omission was intentional, such child * * * must have the same share in the estate of the testator as if he had died intestate," the declarations of a testator are not admissible to show that his children were intentionally omitted from his will. *Garraud's Case*, 35 Cal. 339, followed.

5. Where a will leaves all of testator's property to his wife, with a request that she invest a certain sum for a designated grandson, and does not in any way refer to or mention a certain child of testator's, it does not show on its face that the omission of such child was intentional.

6. As the legislature has full power over the adoption of children, Civil Code Cal. div. 1, pt. 3, tit. 2, c. 2, authorizing county judges to perform the ceremony of adoption, is not an unconstitutional interference with the judicial power.

In bank. Appeal from superior court, Sacramento county.

S. C. Denson and C. H. Oatman, for appellant. Catlin & Blanchard, for respondent.

THORNTON, J. Appeal by executrix, Lydia M. Stevens, from a judgment settling her accounts as executrix of the above-named decedent. The appellant is the widow of the testator. The testator died on the 11th of February, 1888, and she was appointed and qualified as executrix of the last will of the testator on the 17th of March following. The testator was for many years prior to his death in the employment of the Southern Pacific Company, as its general master mechanic, at a salary of \$500 per month. He had drawn his salary for the month of Jan-

uary, 1888, and his full salary for the month of February was paid in the usual mode, without any deduction on account of his death, on the 11th day of that month. On the 17th of June, 1888, the sum of \$1,000 was paid Mrs. Stevens by the company. On application of May S. Hubbard, Mrs. Stevens was charged with this sum as part of the estate of her testator. This is assigned here as error. On consideration of the evidence, we are of the opinion that the point is well taken. It was paid to Mrs. Stevens on a voucher, of which the following is a copy: "Southern Pacific Company, San Francisco, June 7, 1888. To Mrs. A. J. Stevens, Dr.: For amount allowed which would equal the salary of the late A. J. Stevens, Esq., for the months of March and April, 1888, two months, at \$500, \$1,000. San Francisco, June 11, 1888. Received from Southern Pacific Company \$1,000 in full for above account. [Signed] MRS. A. J. STEVENS." There are several indorsements on this paper. Among others, these: "Name, Mrs. A. J. Stevens." "For allowance." The language of the voucher indicates unmistakably an allowance by the company. There was no obligation on the company to pay it. It was clearly a gift by the company. The allowance is clearly to Mrs. Stevens. The language used is, "To Mrs. A. J. Stevens, Dr.;" not to Mrs. Stevens, executrix, or as executrix of her deceased husband. It does not purport to be for salary. The amount is fixed by the salary which the testator would have earned had his services continued during the months named in the voucher. The salary is referred to for the sole purpose of fixing the amount. We see nothing in the other evidence changing this purport of the voucher. It is all consistent with the fact that the allowance or gift was made to Mrs. Stevens personally, and this we think the evidence clearly shows. It was intended by the company as a grateful recognition of the services of one who had served it long and faithfully, to whom its representatives had no doubt been strongly attached, and was with great propriety made to the one of all the world who most felt his loss. It makes no difference that Mrs. Stevens did not know whether it was a gift to her or not. It was all the more gracefully done in that the fact that it was a gift was veiled from her. It was made to her in the mode employed, that she might feel no embarrassment in accepting it. It thus shocked no feeling of the recipient, and the gift was enhanced in her estimation when she regarded it as a tribute to the worth of one who had for long been to her the cherished object of honorable pride and devoted affection. The intent of the donor to make a gift to Mrs. Stevens is that the most to be regarded, within the rule, *cujus est dare, ejus est disponere*. The giver of a gift has the right to regulate its disposal, (Broom, Leg. Max. 464;) *a fortiori*, has he a right to designate the donee. Of the intent of the donor here, we think there can

be no doubt. We think the court erred in charging Mrs. Stevens with this sum.

In fixing the allowance to the widow, the sum of \$200 a month for 12 months was designated. It appears from the bill of exceptions that Mrs. Stevens lived in a hired house, for which she paid the monthly rent of \$55, and that she had, during the period for which this allowance was made, rented out rooms in the house, for which she received the sum of \$300. With this last sum she was charged as executrix by the court below. It is urged that this charge was erroneous, and we are of that opinion. The widow is entitled to a reasonable provision for her support, to be allowed by the superior court or a judge thereof. Code Civil Proc. § 1464. In making this allowance the court must take into consideration all the circumstances bearing upon the reasonableness of the amount to be allowed. No doubt this was done in this case. The court is not restricted in making this allowance to a bare support of the widow. Regard should be had, and no doubt was had, to the mode in which she lived during the life-time of her husband. Such regard should be had in a case like this, when it appeared without doubt that the estate was amply sufficient to pay the amount allowed. We say no doubt this was done when the court originally determined what the allowance should be. It appears, further, from this bill of exceptions, that on the hearing at which this allowance was made, the court, among other things, heard and considered evidence to the effect that the rental of the house which was being paid by the executrix was the same paid by the deceased husband in his life-time, and that the rooms were rented by the executrix during the time she was receiving this allowance. The court, having considered all these facts, made the order of allowance. Why should not this order be held final, unless facts, not disclosed to the court when the order was made, subsequently are brought to the attention of the court? The order is appealable, (Code Civil Proc. § 963, subd. 3,) and we are of opinion it should be regarded as final. On an appeal from the order of allowance, all these facts could have been brought to the attention of this court, the ruling reviewed, and the error, if any, corrected. The time for appeal was allowed to pass, and under such circumstances the power of the court over its order is at an end. The court below cannot sit as an appellate court to review its own orders. It may be that, if it had appeared that the court below had been imposed on by a studied withholding of material facts bearing on the subject-matter of inquiry, the court might deal with the order, and change it so as to make it conformable to what would have been a fair determination on the facts withheld being made to appear. But there is no such case before us. All the facts on which the court acted were before it when it first acted. Under these circumstances, we think the

charge which involved a change in the order should not have been made. We add, nor do these facts show that the order of allowance when originally made was not reasonable. It was none the less reasonable because the widow elected to deprive herself of comforts or conveniences to which she was entitled, and, in the exercise of a judicious and commendable frugality, have incremented her income by hiring to others some of her income. This does not show, or tend to show, that the court below in its order of allowance lent any countenance to a needless waste of the estate then in the course of administration.

There is also an appeal in this case from the judgment distributing one-fourth of the estate to Mrs. May S. Hubbard. Mrs. Hubbard's claim is based on the fact that she was unintentionally omitted from the will of her father, the decedent above named. The will, which was olographic, is as follows: "Considering the uncertainty of life, being of sound mind, and enjoying good health, I make this my will. I will to my wife, Lydia M. Stevens, all of my property, of every kind and nature; also all moneys that may become due at my death, as insurance policies held by me in any life insurance company or association. She is to collect, for her sole use and benefit, all moneys that may become due at the time of my death, or that may become due thereafter. I request, however, that she will set aside, and cause to be invested in some good and safe interest-paying securities, one thousand dollars (\$1,000) for the benefit of my grandson, William A. Stevens, both principal and interest accumulations to be paid to him when he shall have arrived at the age of twenty-one years; but in this matter my wife may use her own judgment. I appoint my wife, Lydia M. Stevens, sole executrix of my estate, to act without bonds. ANDREW JACKSON STEVENS. SACRAMENTO, September 22, 1885."

At the time the will became operative by the death of the testator, in February, 1888, the following section of the statutory law of the state was in force. The section referred to is embodied in the Civil Code, and numbered therein 1307: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." Mrs. Stevens offered to show, by the declarations of the testator made contemporaneously with the writing and execution of his will, that his children were intentionally omitted. The argument that the intent of the testator is apparent on the face of the will; that the will clearly discloses his intent to leave his entire estate to his wife, and thus displaces any intent to leave it to any one else; and that those declarations are consistent with the intent dis-

closed by the words of the will, and do not alter or add to the will in any respect,—has great weight. It does seem to be illogical to declare that the intent of the testator must be declared in the will, and still that you cannot show any fact or declaration consistent with and supporting that intent. But this court in April, 1868, (see *In re Garraud*, 35 Cal. 339,) held that such declarations were inadmissible under a statute then in existence, substantially the same, in fact, almost identical in words, with the one in operation when the will involved in this case was executed. The precise question made here has not arisen in this state since the case of *Garraud's Estate* was decided. It has been accepted as a sound and correct exposition of the law ever since it was decided, as is apparent from *In re Utz*, 43 Cal. 201; *Bush v. Lindsey*, 44 Cal. 121; *In re Wardell*, 57 Cal. 481. *Pearson v. Pearson*, 46 Cal. 609, was on another section of the statute. The case of *Wilson v. Fosket*, 6 Mete. 400, is much relied on by counsel for appellant. That case was commented on in the case in 35 Cal., and shown, as clearly appears, to have been decided on a statute very different from the statute in this state; as was *Whittemore v. Russell*, decided by the supreme court of Maine, and reported in 14 Atl. Rep. 197. This last case seems to have been rested very much on the authority of *Wilson v. Fosket*. In line with the decision in *Garraud's Estate* are *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; and *Chace v. Chace*, 6 R. I. 407. Each of these cases, just cited, refers to and comments on *Wilson v. Fosket*, as rested upon the peculiar language of the Massachusetts statute. The decision of this court in *Garraud's Case* has stood too long without challenge to be overruled without very strong reasons. It is sustained by very powerful reasoning in the able opinion of Justice CROCKETT. We think it our duty to follow it, and, in accordance with the rule there declared, we must hold that the court below did not err in excluding the offered declarations of the testator.

It is further argued that the will itself shows on its face that the omission of Mrs. Hubbard in the will was intentional. As to this contention we think that the significance of the decision of this court in *Garraud's Estate* is that it must appear on the face of the will, and it must there appear from words which indicate such intent directly, or by implication equally as strong. Any other rule would lead to guesses or to inferences merely conjectural, which would be too unsubstantial to base a judgment on. We do not think that we can say with any reasonable certainty that the words used in the will indicate that Mrs. Hubbard was in the mind of the testator when he wrote his will, and that he intentionally omitted to mention her. We think that the correct rule is that the words of the will must show, as above pointed out, that the testator had the person

omitted in his mind, and, having her so in his mind, had omitted to make any mention of her. The rule here laid down is plain and simple, and we think in accordance with the statute, as interpreted in the *Garraud Case*. It is an easy matter to put the question beyond a doubt by naming the children or grandchildren in the will, with a nominal legacy or none at all, from which it will clearly appear that these persons are in the mind of the testator, and therefore the omission to leave them anything must have been intentional. We are of opinion that the court below did not err in holding that the will itself did not show on its face that the omission of Mrs. Hubbard was intentional. We add that we have examined the cases cited by counsel on the point just discussed, and make no further allusion to them, for the reason that on questions of mere construction one case, unless in all respects similar to the case under discussion, cannot be regarded as an authority. None of the cases cited are similar to the case here.

Another point remains to be considered. In 1878, Andrew D. Billings, son of May S. Billings, (the May S. Hubbard a party to this case,) and her then husband, A. D. Billings, was, with all the forms of law required by division 1, pt. 3, tit. 2, c. 2, Civil Code, adopted by the testator and his wife as their child. The adoption was made before Hon. R. C. CLARK, county judge of Sacramento county. It is here contended that the statute under which this adoption was made is unconstitutional. It is said that the adoption of the child was a judicial act, and therefore must be done by a court, and cannot by the constitution be done by a judge, as was the case here. The adoption of children is purely a matter of statute, pertaining to the legislature, with which a judge or a court has nothing to do, unless the power is conferred on them by statute. The matter of adoption belongs to the legislature, and not to the judicial department of the government. We know of no rule of law which ever enabled any person or tribunal, whether notary public, clerk of a court, judge, or court, to perform the ceremony of adopting a child, unless such authority was conferred by a legislature. As the legislature has full power over this matter, it may invest any person or officer or court with the power of receiving, witnessing, and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it is to be celebrated. It may make the ceremony so simple that its celebration only requires the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and filing such paper with a public officer. These rules are so evident that it is unnecessary to refer to any authority to sustain them. The authorities on the subject are abundant. See *Abney v. De Loach*, (Ala.) 4 South. Rep. 757; *Succession of Vollmer*, 4 South. Rep. 254.

The case of *Water Co. v. Vallejo*, 48 Cal. 70,

related to the exercise of the right of eminent domain, which can only be exercised through the medium of a court. The exercise of the right of eminent domain has always been had by means of courts invested with judicial power. It has never been exercised otherwise in England, or any of the states of the American Union, that we are aware of. The exercise of this power may be regulated and restricted by the legislature, but its exercise is to be had through the judicial tribunals of the country. The case referred to, involving in its very essence the exercise of the judicial power vested in courts by the constitution, is no authority in this case, where no judicial power is called for, and the whole matter is intrusted by a valid law to a designated officer or person. *Weber v. Santa Clara Co.*, 59 Cal. 265; *Trahern v. San Joaquin Co.*, Id. 320. It may be and is true that the county judge in this case must have exercised judgment, and was authorized by the statute to employ his judgment. This may be so, and in such case the act is one of judgment, and in that sense judicial; but this does not make it any part of the judicial power spoken of in the constitution, and by it vested in courts. The distinction is pointed out in *People v. Board of Education*, 54 Cal. 377. It may be conceded that the legislature could have made this adoption a judicial case, and the jurisdiction over it conferred on a court. It may be further conceded that then the exercise of the power by the court would have been an exercise of the judicial power vested in it by the organic law. But the legislature has been careful here to place this jurisdiction in a person designated as "county judge," and has not conferred it on a court. The legislature has done all in its power to signify that it was not dealing with any matter pertaining to the judicial power, or the judicial department, by investing a county judge with jurisdiction over the matter. The court below erred in holding the statute in regard to adoption unconstitutional and void. *A. D. Billings* was legally adopted by Mr. and Mrs. Stevens, and has all the rights springing from such adoption. The judgment or decree of the court below is reversed, and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

Hearing in bank denied.

(32 Cal. 635)

WHITBY v. ROWELL *et al.* (No. 13,398.)
(*Supreme Court of California*. Feb. 28, 1890.)

APPEAL—REHEARING.

The failure of the court, on appeal, to notice and pass on points in the record to which counsel have neglected to call their attention, is no ground for a rehearing.

In bank. Petition for rehearing. For former report, see ante, 40.

PER CURIAM. In their petition for a rehearing of this cause counsel for appellant

complain that the department in its decision has failed to notice several points arising upon the record. This may be so, but it is certainly true that the department noticed and decided—correctly, as we think—the only point which was mentioned in the appellant's brief. If parties appealing to this court do not take the trouble to call attention to the points upon which they rely, they cannot reasonably expect us to search the record in order to find them, or to order rehearings for the purpose of considering them by piecemeal. The case of *City of Los Angeles v. Signoret*, 50 Cal. 298, was not referred to in the opinion; but there is a clear distinction, we think, between that case and this case, and between that case and *Emeric v. Tams*, 6 Cal. 156, referred to in the opinion. Rehearing denied.

(33 Cal. 420)

GOLDTREE et al. v. THOMPSON et al. (No. 13,539.)

(Supreme Court of California. March 10, 1890.)

APPEAL—PARTY AGGRIEVED.

In a suit, by the trustees under a will, to determine whether the children of certain parties named therein take the *corpus* of the estate, or only the income, an order allowing a fee to the attorney and guardian *ad litem* of minor defendants, to whom the *corpus* of the estate is awarded, does not concern the trustees, and they have no right of appeal under Code Civil Proc. Cal. § 933, providing that "any party aggrieved may appeal."

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

J. M. Wilcoxon and W. H. Spencer, for appellants. Wm. Shipsey and Graves, Turner & Graves, for respondents.

PATERSON, J. The plaintiffs are trustees under the will of Jonathan Thompson, deceased. After the property had been distributed to the trustees by a decree of the proper court, they commenced this action to obtain, for their direction, a construction of certain clauses of the will. The defendants are the legatees and devisees named in the will. The question upon which the trustees were in doubt was whether the children of certain parties named in the will were entitled to take the *corpus* of the property which was left in trust, or only the revenue thereof. The case came to this court on appeal from the judgment of the court below, and that judgment was affirmed. 79 Cal. 613, 22 Pac. Rep. 50. Several of those to whom the *corpus* of the estate was awarded were minors; and they were represented in the superior and supreme courts by William Shipsey, Esq., guardian *ad litem*, appointed by the superior court. On the return of the *remittitur* to the court below, notice was served upon the plaintiffs and their attorneys, and all defendants not named as minors and their attorneys, that the minor defendants would move the court for an order allowing the guardian *ad litem* and attorney of the minor defendants a reasonable compensation for his serv-

ices. After a hearing upon the motion, the court made an order allowing said William Shipsey the sum of \$250, and directing the amount to be paid by the trustees, plaintiffs herein, out of any funds in their hands belonging to the estate. From this order the trustees have appealed. Respondent has moved, on several grounds, to dismiss the appeal.

Section 938, Code Civil Proc. provides that "any party aggrieved may appeal." Are the plaintiffs aggrieved by the order of the court allowing the attorney and guardian *ad litem* for the minor heirs a fee for his services? Executors, administrators, receivers, and trustees are, in their official capacity, indifferent persons, as between the real parties in interest. They are appointed by the court or by will, and act on behalf of all the parties who claim any interest in the estate. The funds which come into their hands are held in *custodia legis*, to be distributed by the court to those who show themselves entitled to them; and it is their duty to distribute the money coming into their hands as the court shall direct. The trustees herein cannot litigate the claims of one heir against those of another; and it is immaterial to them whether certain devisees take the *corpus* of the residuary estate, or only the income thereof. They have no concern in the question as to who shall bear the costs of litigation, and are not, therefore, aggrieved parties, we think, within the meaning of section 938, *supra*. *Adams v. Woods*, 8 Cal. 315; *Bates v. Ryberg*, 40 Cal. 465; *Estate of Wright*, 49 Cal. 550; *Rosenberg v. Frank*, 58 Cal. 420; *Roach v. Coffey*, 73 Cal. 282, 14 Pac. Rep. 840. Appeal dismissed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.; THORNTON, J.

(3 Cal. Unrep. 244)

SMITH et al. v. PHENIX INS. CO. (No. 13,514.)

(Supreme Court of California. March 10, 1890.)

INSURANCE—CONDITIONS OF POLICY—CHANGE OF TITLE AND POSSESSION.

1. To put a lessee in possession of insured property under a contract that he shall buy the property on the termination of the lease, or, at his option, at any time during its continuance, is a breach of a condition of the policy that it shall become void if any change takes place in the title or possession.

2. Notice to the insurance company, before destruction of the property by fire, of the lease and change of possession, but not of the agreement to convey contained in the lease, cannot affect the company's right to afterwards insist on the enforcement of such stipulation.

PATERSON, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Van Ness & Roche, for appellant. Barclay, Wilson & Carpenter, for respondents.

WORKS, J. This was an action on a policy of fire insurance. Trial by the court, and finding and judgment for the plaintiffs. The

defendant appeals from the judgment, and the case comes up on the judgment roll. The policy sued on contained the following clause: "If the interest of the assured in the property be other than an absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured or containing the property insured by this policy stands on leased ground, or if there be a mortgage or other incumbrance thereon, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void. When the property shall be sold or incumbered or otherwise disposed of, written notices shall be given to the company of such sale or incumbrance or disposal, and its assent thereto indorsed thereon; otherwise this insurance on said property shall immediately terminate.

* * * If the property be sold or transferred, (in whole or in part,) or upon the commencement of foreclosure proceedings against or a sale under a deed of trust, or the existence of a judgment lien upon, or the issue or levy of an execution against, any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in the title or possession, (except in case of succession by reason of the death of the assured,) whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance, or if the title or possession shall be changed from any cause whatsoever, * * * then there shall be no liability whatever under this policy for any loss or damage resulting from fire or fires, whether such loss or damage be immediate or remote." Subsequent to the issuance of the policy, the assured leased the property to one Jerome D. Stewart for the term of five years, and the lease also contained an agreement between the respondent and said Stewart for the sale of said property, as follows: "It is further agreed that said party of the second part may, at any time during the said term of five years, purchase said hotel, lots, and premises for the sum of \$25,000 cash, and likewise purchase said carpets, gas fixtures, and range at cost price. It is further agreed that said party of the second part will purchase said hotel, lots, and premises on or before five years from this date for the sum of \$25,000, together with the said carpets, gas fixtures, and range at their cost price." It was further agreed that the said Stewart should pay one-half of the insurance on the property. Stewart took possession under this lease.

It will be observed that the policy is rendered void if at the time of the issuance thereof any other person or persons have any interest whatever in the property. So if, "after the policy takes effect, the property be sold or transferred, * * * or any change takes place in the title or possession, * * * or the title or possession shall be changed from any cause whatsoever." The

sole question in the case is whether the contract above mentioned, and the change of possession thereunder, was within these prohibitions, and worked a forfeiture of the policy. These forfeiture clauses in the policy should be strictly construed, and, where the prohibition is against a sale or alienation or conveyance of the property, an agreement to sell is not within its terms. *Hitchcock v. Insurance Co.*, 26 N. Y. 68; *Jackson v. Insurance Co.*, 23 Pick. 418; *Gingrich v. Foltz*, 19 Pa. St. 38; *Masters v. Insurance Co.*, 11 Barb. 624; *Orrell v. Insurance Co.*, 13 Gray, 431; *Trumbull v. Insurance Co.*, 12 Ohio, 305; *Hill v. Protection Co.*, 59 Pa. St. 474; *Insurance Co. v. Kelly*, 32 Md. 421. And it has been held that, so long as the assured retains an insurable interest in the property, he is entitled to recover to the extent of such interest. *Stetson v. Insurance Co.*, 4 Mass. 330; 3 Kent, Comm. 262; *Trumbull v. Insurance Co.*, supra.

But the question before us is not whether there had been a sale, alienation, or conveyance of the property, or whether the assured had an insurable interest at the time of the loss, but whether "any change" had taken place in the title or possession. About this it seems to us that there can be no doubt. The agreement between the parties gave the vendee the option to buy at any time during the five years for which his lease ran, and absolutely bound him to buy and pay the purchase money at the end of that time. This gave him an equitable title in the land. *De Rutte v. Muldrow*, 16 Cal. 505-512; *Hall v. Center*, 40 Cal. 63; *Dowd v. Clarke*, 54 Cal. 48; *Pelton v. Insurance Co.*, 77 N. Y. 605; *Davidson v. Insurance Co.*, (Iowa,) 32 N. W. Rep. 514; *Germond v. Insurance Co.*, 2 Hun, 540; *Ramsey v. Insurance Co.*, 2 Fed. Rep. 429; 2 Amer. Law Reg. (N. S.) 438; *Moore v. Burrows*, 34 Barb. 173.

If an attempt had been made to recover the possession of the property during the term for any violation of the terms of the lease, he could have defeated such recovery by exercising his option to buy. He was entitled, under his agreement, to continue in the possession of the property either before or at the end of his tenancy by paying the purchase money, and upon such payment he would have been entitled to a conveyance. Having bound himself absolutely and unconditionally to purchase and pay for the property at the end of his tenancy, he would have been bound to purchase and make such payment, notwithstanding the destruction of the building by fire. *Davidson v. Insurance Co.*, supra; *McKechnie v. Sterling*, 48 Barb. 330. His only right would have been to look to the respondent for the insurance if it had been paid. It has been held that in such cases the insurance recovered belongs, in equity, to the vendee, and that the vendor holds it in trust for him. *Reed v. Lukens*, 44 Pa. St. 200. Therefore there was not only a change in the title, but a very important and material one, which took away from the respondent, in a

great measure, the incentive every one has to preserve his property and prevent its loss by fire. In some of the cases it is held that such a contract constitutes a sale of the property, where, as in this case, nothing is to be done on the part of the vendor but to execute the deed. *Davidson v. Insurance Co.*, supra. In this case the court said: "The precise language of that portion of the policy which is alleged to have been violated is in these words: 'In case any such property shall be sold, conveyed, or incumbered * * * without the written consent of this company is obtained, * * * this policy shall immediately thereafter be null and void.' It is manifest from the above that the policy contemplated that there might be a sale without a conveyance. The provision is the same as if the word 'or' had been expressed between the words 'sold' and 'conveyed,' and as if the policy read: 'In case any such property shall be sold or conveyed,' etc. In either case the policy would be void. We come, then, to the question as to whether, where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does. Lint was the real owner of the house that was burned. The loss was his loss. The plaintiff lost nothing, unless he needed the house for security. If Lint is responsible, or the property without the house is sufficient security for the balance of the purchase money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not been burned. If he is allowed to collect the insurance and the purchase money both, he will profit by the destruction of the property. That the insured shall not by his own voluntary act come to have an interest in the destruction of the insured property is forbidden, not only by public policy, but by all the maxims of insurance, and is precisely what this defendant attempted to guard against."

It is uniformly held that a vendee in possession under an agreement to purchase real estate is in equity the owner of the property, subject to the payment of the purchase money; and the vendor a trustee, with the right to hold the legal title until payment thereof, and then to convey to the vendee. *Baldwin v. Pool*, 74 Ill. 97; *Roberts v. Wilkinson*, 34 Mich. 138; *Derr v. Dellinger*, 75 N. C. 300; *King v. Ruckman*, 21 N. J. Eq. 599; *Holbrook v. Betton*, 5 Fla. 99. And such an interest will be regarded as an absolute interest, where the assured has represented his interest to be such. *Hough v. Insurance Co.*, 29 Conn. 10; *Insurance Co. v. Wilgus*, 88

Pa. St. 107; *Insurance Co. v. Dyches*, 56 Tex. 565; *Insurance Co. v. Crockett*, 7 Lea, 725. The respondent could not have conveyed the property to another, even if the agreement could be construed as one not, in terms, binding him to convey. If the contract left the purchase at the option of Stewart, the respondent could not convey away the property until the time for exercising such option had expired. *Kerr v. Day*, 14 Pa. St. 112. In this case the purchase was not left to the option of the vendee. He had the option to buy at any time before the expiration of the term, but was bound absolutely to purchase at the end of his term. We think it is clear, therefore, that there was such a change of title here as to avoid the policy. The fact that the agreement to convey was coupled with a lease of the property, under which alone the vendee might have taken possession, does not seem to us to be at all material. The equitable title passed, and he was as much in possession under the agreement to convey as under the lease. The court found that the appellant had notice before the loss that Stewart was in possession of the property under the lease, but that it had no knowledge of the fact that the agreement to convey was contained in such lease. We do not think that such notice to the company could affect its right to insist upon the enforcement of the express provisions of its contract, or constituted a waiver of such right. Judgment reversed, with instructions to the court below to render judgment on the findings in favor of the defendant.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

I dissent: PATERSON, J.

THORNTON, J. I concur in the judgment, on the ground that there was a change of possession by the lessee's (Stewart's) taking possession under the lease, and when this change took place all liability under the policy sued on was, by its terms, at an end.

SMITH v. AMERICAN FIRE INS. CO. (No. 13,513.)

SAME v. PENNSYLVANIA FIRE INS. CO. (No. 13,515.)

(*Supreme Court of California*. March 10, 1890.)

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, JUDGE.

WORKS, J. This is an action to recover on a policy of fire insurance, and is the same in all respects as *Smith v. Insurance Co.* ante, 383, (opinion filed this day;) and upon the authority of that case the judgment is reversed, with instructions to the court below to render judgment on the findings in favor of the defendant.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment herein for the reasons expressed in my concurring opinion in *Smith v. Insurance Co.*, ante, 383, (No. 13,514.)

WILHOIT et al. v. TUBBS. (No. 13,185.)*(Supreme Court of California. Feb. 28, 1890.)***ADVERSE POSSESSION.**

From the time a person obtains a patent from the state, the statute of limitations will run in favor of one in possession, and claiming adversely, against the patentee, and all claiming under him.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

J. B. Hall and J. M. Kile, for appellants. James H. Budd, for respondent.

GIBSON, C. This was an action of ejectment, brought by the executors of Joseph Kile, deceased, to recover the possession and the rents, issues, and profit of two parcels of land in the county of San Joaquin, being the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, in township 4 N., of range 5 E., M. D. M., containing 80 acres, and a portion of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the same section, containing 5 acres, together with damages for the withholding thereof. Plea, general denial, and affirmative defenses of adverse possession, with and without color of title, and a former adjudication as to the five-acre tract. Judgment for defendant, from which plaintiffs appeal upon the judgment roll, which contains a bill of exceptions.

The township lines, including the land in controversy, were surveyed and established, under the authority of the United States, in June, 1853; and, by the same authority, the subdivisional survey of the township was made in April, 1864. The field and descriptive notes, together with a plat of said survey, were approved and certified by the United States surveyor general for the state of California on June 30, 1864. The township plat was prepared in triplicate; one of which, together with a transcript of the field and descriptive notes, properly certified, was forwarded by the surveyor general to the general land-office of the United States. One was retained in the office of the surveyor general, and the other was filed in the United States district land-office at Stockton, July 1, 1864, which was then the proper office. Upon the approved plat, the greater part of the land of township 4, including all of section 11, was colored green, and upon the face of this portion the words "Swamp and overflowed lands" were written, and the lands so designated were excluded from the estimated aggregate area of "public lands," and included within that of "swamp and overflowed lands," as shown by the marginal table of acres forming a part of said plat. In June, 1865, the plat which was on file in the Stockton land-office was withdrawn therefrom by the surveyor general in compliance with an order of the commissioner of the general land-office. Thereafter, on February 20, 1868, a true copy of the plat then on file in the general land-office, together with a marginal table of areas, and certificate of approval thereon, as above mentioned, was made and certi-

fied to as a correct copy by the commissioner, and was also certified to by the surveyor general, and in the same month filed in the United States land-office at Sacramento within the Sacramento land-district, to which the township in question had been transferred. The copy was the same, in all respects, as the plat which was withdrawn from the land-office at Stockton, except as to the certificate of the commissioner.

In September, 1860, one John Thompson purchased from the state, as swamp and overflowed lands, the S. W. $\frac{1}{4}$ of section 11, and in the month of November following paid the state in full therefor, and received from the register of the state land-office a certificate of purchase. The subdivisional survey, made for the purpose of segregating the land so purchased by Thompson, was made by the county surveyor of San Joaquin county, whose plat and field-notes of such survey were approved, and first recorded by him in his office, and were then approved by the surveyor general of the state, who transmitted a copy of such approved plat and field-notes to the register of the state land-office. Thompson afterwards assigned his certificate of purchase to Joseph Kile and R. B. Thompson, who, upon the presentation and surrender thereof, received from the state a patent for the land described in the certificate. On September 21, 1863, R. B. Thompson, for a valuable consideration, conveyed all his interest in the land described in the patent to Joseph Kile. Joseph Kile, in August, 1864, made an application to purchase, and on December 30th of the same year did purchase, from the state, as swamp and overflowed land, the S. E. $\frac{1}{4}$ of section 11, and on August 5, 1865, received a patent from the state for the same. The subdivisional survey of the land so purchased was made and recorded in the same way as that in the case of John Thompson. The surveyor-general, in May and June, 1867, and in May, 1870, by notices in writing, notified the United States general land-office that the state claimed the land in controversy, under the act of congress of July 23, 1866, above referred to, as the state had selected and sold the same as swamp land to *bona fide* purchasers prior to the passage of said act. In January, 1862, the defendant, Tubbs, then being possessed of all the qualifications requisite to enable him to acquire title to land as a pre-emptor, made an actual settlement upon the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11. He erected a dwelling-house thereon, in which he and his family resided; and he in person, with his family, have ever since occupied and cultivated the land. On July 10, 1862, his declaration of intention to pre-empt the same was received and filed by the register of the United States land-office. At the time of defendant's entry and declaration of intention to purchase, as stated, he had knowledge of the prior state survey and sale of the S. W. $\frac{1}{4}$ by the state to John Thompson as swamp and overflowed land. On May 7, 1873, the defendant made final proof of his

pre-emption entry for the S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 11. May 8, 1873, the defendant made an original homestead entry, under the laws of the United States, of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 11; and on November 18 of the same year he commuted the same to a cash entry, and on the 1st of October, 1879, received a patent for each tract from the United States. No other homestead or pre-emption entries, or settlement of, for, or upon the lands in controversy, excepting the entries and settlement of the defendant, were ever made.

Except as to defendant's claim of title by prescription, an identical state of facts, as far as the 5 acres in controversy here are concerned, appeared in the case of *Tubbs v. Wilhoit*, 73 Cal. 61, 14 Pac. Rep. 361, and, as to the 80-acre tract involved here, the facts are very similar to those of that case, except as to the claim of title by prescription. That was an action of ejectment, in which the plaintiff relied upon a patent of the United States issued upon a commuted homestead entry made on May 8, 1873, on which date whatever right the plaintiff thereby acquired attached; and, in support of his patent, he claimed that the land described in his patent was, on September 28, 1850, the date of the swamp-land act, dry land. The defendants, who were the executors of one Joseph Kile, relied upon a patent for the same tract, as swamp and overflowed land, issued to their testator by the state of California on the 5th day of August, 1865, upon an application to purchase the same made to the proper state authorities in August, 1864, and claimed, in support of such patent, that the tract was swamp and overflowed land on the date of the swamp-land act, and had been conclusively established to be such before the plaintiff had acquired any right to the land. This court, following the case of *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, held that, under the acts of congress of September 28, 1850, known as the "Swamp-Land Act," and of July 23, 1866, entitled "An act to quiet land titles in California," "the plat of the survey of the township, including the lot in controversy, approved by the United States surveyor general for California, was conclusive between the state and the United States, and vested the title in the state of California as of the 28th of September, 1850, the date of the passage of the swamp-land act." It further appears from the findings in this case, as it did in *Tubbs v. Wilhoit*, that in 1874 a hearing was ordered by the commissioner of the general land-office as to whether the land in controversy was dry, or swamp and overflowed, which hearing resulted in a determination to the effect that it was public, and not swamp and overflowed, land. "But," as was said in the case last referred to, "the order for a hearing was made after the title had vested in the state, and therefore the decision of the federal land department, that the land was not swamp and overflowed, was of no validity whatever." The alterations made

in December, 1870, upon the plat of the survey of said township 4, in changing the segregation line between the swamp and public lands, as shown on the plat on file in the office of the United States surveyor general, so as to make it appear therefrom that the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of section 11 was public, and not swamp and overflowed, land, and also the same alterations made upon the plat of the same township in the office of the register of the Stockton land-district, all of which were made pursuant to instructions received from the United States general land-office, as shown by another finding in this case, were of no effect, for the reason last quoted. It is, therefore, clear that, as the title to all the land involved here had passed from the United States to the state of California as early as September 28, 1850, the date of the swamp-land act, the several patents subsequently issued by the United States to Tubbs, the respondent here, upon his pre-emption and commuted homestead entries, did not convey anything, as there was nothing for them to operate upon.

But the court also found, upon the issue tendered by the respondent by his plea of adverse possession and the statute of limitations, that he (the defendant, Tubbs) had, ever since his entry upon the land, on or about January 1, 1862, been in the open, notorious, and exclusive possession and occupation of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, containing 80 acres, claiming the same adversely to Kile, his predecessors in interest, and all others; and ever since October, 1879, such adverse possession has been continuous, and he has based it upon a claim of title, exclusive of other right, upon the patent to the land issued to him by the United States; and he has, since the date first mentioned, paid all taxes levied or assessed upon the above-described land, and was on the 23d of May, 1884, the time of the death of Kile, and ever since has been, the owner of the land by a title by prescription, and entitled to the possession, and rents, issues, and profits, of the land. And, as to the five acres, which consist of a portion of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 11, the court found that he (defendant, Tubbs) has been in the open, notorious, continuous, and exclusive possession and occupation thereof since May 8, 1873, claiming the same adversely to Kile, his predecessors in interest, and all others, and has ever since October, 1879, maintained such adverse possession, upon a claim of title, exclusive of other right, based upon the patent issued to him by the United States; and since May, 1873, he has paid all taxes levied or assessed on the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 11, and was on May 23, 1884, the date of the death of Kile, and ever since has been, the owner of the said five acres by a title by prescription, and entitled to the rents, issues, and profits of the said five acres. Another finding is that Joseph Kile died on May 23, 1884, and was not on the day before, nor at any time thereafter, the owner of either tract of land in controversy, or entitled to the rents, issues, and profits thereof; nor since

his death have the plaintiffs, as his executors, been entitled to the possession of said land, or the rents, issues, and profits thereof.

Now, as to the title by prescription, the appellants contend that it cannot prevail, because their testator claimed both tracts in dispute by title derived from the state, through the patents issued therefor, as swamp and overflowed lands; and, as respondent claimed adversely to him, and his predecessors in interest, including the state, to avail himself of a plea in bar against the state, and her successors in interest, he should have pleaded section 315 of the Code of Civil Procedure, or the similar provision of the statute of limitations of 1850, c. 2, § 3, as they were and are the only laws under which the defendant could acquire a prescriptive title. It may be conceded that, if section 315, *supra*, is the only limitation that applies in this case, as the defendant failed to plead it, or the facts necessary to bring himself within its terms, he cannot derive any benefit from it. We are of the opinion, however, that neither section 315 nor 316, Code Civil Proc., also relied upon by appellant, applies in this case. Hence, the case of *Railroad Co. v. Slaughter*, 1 N. Y. Supp. 554, in which similar provisions of the laws of New York were applied, cited by appellants, is not in point. It is quite clear that a state, as a sovereign, is not precluded from exercising the prerogative as such, with regard to her property, except in so far as she has expressly restricted herself in her legislative enactments. Such a restriction is found in section 315, *supra*, which reads as follows: "The people of this state will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless (1) such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or (2) the people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years." See *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; and *People v. Clarke*, 9 N. Y. 349, therein cited; also *Weber v. Commissioners*, 18 Wall. 57, in which the same provision of the statute of limitations of 1850, of this state, is commented upon. Section 316, Code Civil Proc., next referred to, is also the same as section 4, c. 2, of the statute of limitations of 1850, except the word "shall," in section 4 of the latter statute, has been changed to the word "can" in section 316. By the terms of section 316, patentees or grantees of the state are precluded from maintaining an action respecting the real property granted unless the same might have been maintained by the people, as specified in section 315, in case the patent had not been issued, or the grant made. Or, in other words, if the right of the people to maintain such an action is barred at the time the patent is issued, or the grant made, the

right of the patentee or grantee is also barred. If, however, when the state patent is issued, or its grant made, not more than 5 of the 10-year limit prescribed in section 315 has run, the patentee or grantee can maintain an action to recover the property, or the mesne profits thereof, at any time within the period of 5 years, as provided in sections 318, 319, and 321, and subdivision 2, § 336, Code Civil Proc. All of these sections, together with sections 323-325 of the same Code, defining the different kinds of adverse possession, were set up by defendant, in his answer, in bar of appellants' right to maintain this action for the recovery of the premises involved, or the mesne profits thereof. We apprehend that the distinction between sections 315 and 316, and the other sections mentioned, is that, as the state cannot be disseised of its lands by the adverse occupancy of another, (Civil Code, § 1006,) a mere assertion by it of ownership by legislative enactment or otherwise, as well by a judicial proceeding, as indicated in *Weber v. Commissioners*, *supra*, will prevent the time specified in section 315 from running, and ripening into a presumptive title in favor of the adverse occupant; while, under the other sections, between individuals, nothing short of an actual re-entry upon, or the commencement of an action to recover the possession of, the property of which he has been disseised under an adverse claim, will avail the true owner in preventing the adverse occupant from acquiring a title by prescription, except an acknowledgment of the true title by the adverse occupant.

As the title of the United States to the swamp lands within this state, of which the land involved here was a part, passed to this state on the passage, and by virtue, of the act of congress of September 28, 1850, it follows that, when the state subsequently sold the several tracts in dispute,—one, the 80-acre tract, to the predecessors of Kile, and the other, embracing the five acres, to Kile himself,—upon their several applications made to purchase the same as swamp lands under the act of April 21, 1858, and the amendments thereto of April 18, 1859, and afterwards issued its patents for such tracts on the 26th of June, 1862, and on the 5th day of August, 1865, respectively, the state parted with all its title to the several tracts so patented, and the statute of limitations commenced to run on those dates, respectively, in favor of the defendant against all persons claiming title under such patents. *O'Connor v. Fogle*, 63 Cal. 9; *Reed v. Ybarra*, 50 Cal. 465; *Irrigation Co. v. Jansen*, 66 Cal. 300, 5 Pac. Rep. 486; *Henshaw v. Bissell*, 18 Wall. 255.

This action was not commenced until the 14th day of December, 1887; and the respondent, having maintained his adverse possession from the 26th of June, 1862, the time when the state's patent to the 80-acre tract was issued, until the 23d day of May, 1884, the date of the death of Kile, a period of nearly

22 years, and thence to the commencement of this action, and paid all the taxes levied or assessed thereon, had, nearly 17 years before the last-mentioned date, acquired a prescriptive title to the tract, which extinguished the legal title Kile had acquired from the state. Civil Code, § 1007. So, too, as to the 5-acre tract. The respondent initiated his adverse possession of, and claim of title to, it, on the 8th of May, 1873, the date of his homestead entry, and maintained the same, and paid all taxes levied or assessed upon the land up to the commencement of this action, and thereby acquired a prescriptive title to it, sufficient against Kile, six years before the latter's death.

There is a finding to the effect that, in a certain action in which the appellants' testator, Kile, and one Reese B. Thompson, were plaintiffs, and the respondent here was defendant, involving the title to the 5-acre tract in question here, judgment was rendered in favor of the defendant on April 25, 1866, and was subsequently, on appeal therefrom to this court, affirmed, and that the same still remains in force, but the conclusion we have reached regarding the prescriptive title acquired by the respondent to the same land renders it unnecessary to consider its effect. The record does not disclose any error, and we therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Hearing in bank denied.

(33 Cal. 368)

BEWICK *et al.* v. MUIR *et al.* (No. 12,437.)

(Supreme Court of California. March 1, 1890.)

MINES AND MINING—LIENS—FORECLOSURE—SUMMONS—VOLUNTARY CONVEYANCES.

1. A summons showing that the action is to recover money, and to foreclose liens, contains "a statement of the nature of the action in general terms," within Code Civil Proc. Cal. § 407, subd. 2, though it does not show the nature of the liens, or for what, or on what, they are claimed.

2. In an action to foreclose liens on a mine, allegations that plaintiff performed labor, etc.; that defendant promised to pay therefor at a fixed price; and that the sum due was unpaid,—were denied. *Held*, that findings that the labor was performed, and that on a certain day, before action brought, there was due for said work and labor a certain amount, were not sufficient to sustain a judgment for a lien against a mortgage. It was necessary to find that there was a promise to pay at a given rate, and that the amount was due and unpaid when the action was begun.

3. The complaint alleged that a certain mortgage, antedating plaintiffs' liens, was without consideration, and in fraud of plaintiffs. *Held*, that a mere finding that the mortgage was without consideration would not support a decree adjudging plaintiffs' liens prior thereto, under section 3442, Civil Code, providing that mere want of consideration shall not be proof of fraud.

4. The term "mining claim," as used in section 1183, giving a lien on a mining claim to persons performing labor, etc., applies to a mine, the title to which has been acquired in fee, as well as to a mining claim in its technical sense.

5. The fact that the owner held under a Spanish grant will not prevent the attaching of a lien, if the land is in fact mineral land.

6. There can be no lien for materials furnished unless they were used in the work done.

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

R. Percy Wright, for appellants. C. A. & F. P. Tuttle, Naphtaly, Friedenrich & Ackerman, and Gray & Haven, for respondents.

SHARPSTEIN, J. This was an action to foreclose a number of liens upon a mine for labor and materials, under the act of 1880. There were 45 plaintiffs, each claiming a separate lien. Judgment was given for the plaintiffs, and two of the defendants appealed.

1. The summons is sufficient. It states the nature of the action in general terms, and this is all the statute requires. It is apparent from the statements of the summons that the action in which it was issued was to recover money, and to foreclose liens. This is the general nature of the action. It is unnecessary to state whether the right to the money sought to be recovered accrued from work and labor, or from goods sold and delivered, or to state the kind of lien, or on what property the lien attached. All these things appear in the complaint on file, of which filing he is notified by the summons; and, if he is not notified, he is bound in law to know it. He is bound to know that a complaint has been filed, for otherwise a summons could not issue. It makes no difference that a copy of the complaint is not served on the party moving. The above is in accordance with the *dictum* in Lyman v. Milton, 44 Cal. 631. The summons states what the statute requires, and all that is needful. The cases decided in Lyman v. Milton, *supra*, as also Ward v. Ward, 59 Cal. 141, were different from this; and, as said above, there is a compliance with the *dictum* in the former case, and with the statute. Why require that to be inserted in the summons which must appear in the complaint? Our practice is cumbersome enough without its being made more so by judicial decision. We cannot understand how it can be said that the summons does not contain "a statement of the nature of the action in general terms." The Code of Civil Procedure provides, which is equivalent to a command to all of the courts of the state, that all its provisions are to be liberally construed, with a view to effect its objects, and to promote justice. Code Civil Proc. § 4. The objects of the requirements of the statute as to what the summons shall contain are carried out by serving it with a general statement, which is specialized in the complaint; and it is injustice to turn a party out of court, or reverse a judgment, on a view of the summons merely technical, when the summons points to the complaint where the particular statement is

¹ Code Civil Proc. Cal. § 407, subd. 2.

made; and, if a copy of the complaint is not served on the moving party, he knows where to find it. When the motion was made at the bar of the court, the complaint was, no doubt, within reach, or it could have been procured in a moment. *King v. Blood*, 41 Cal. 316, is precisely in point, and treats the question as it is here, as a perusal will at once show. The court did right in denying the motion.

2. The findings are insufficient to support the judgment against the appellant Trumbo. In each count, it was alleged that the plaintiff performed labor, etc.; that the defendant promised to pay therefor at a fixed rate; and that the sum due therefor was unpaid. These allegations were denied in each case; and the findings are simply of the performance of the labor, and that on a certain day, before the commencement of the action, "there was due for said work and labor an unpaid balance of \$——," naming it. A finding that a certain sum was "due and unpaid" at a day anterior to the beginning of the action was not a finding of a promise to pay at a fixed rate, or any rate, or that any amount was due and unpaid at the commencement of the action. The money thus due and unpaid might have been paid before the day last mentioned; and the court cannot say, as matter of law, that any amount was due when suit was commenced. The precise question in issue should be found, as also that a sum of money was due and unpaid on the day the action was brought. These issues are material. As to the latter, as showing its materiality, it may be observed that plaintiff could only have a lien for the money which was due and unpaid on the day he began his suit.

3. The appellant Trumbo was alleged to claim a lien upon the property by virtue of a mortgage which appears to have been made before most of the plaintiffs' liens attached. The complaint alleged that this mortgage was without consideration, "and in fraud of the plaintiffs." The question as to the priority of this mortgage over the plaintiffs' liens was a material one. The court found that it was without consideration, but made no finding as to fraud. The decree was that the property should be sold, and the proceeds applied first to the payment of the plaintiffs' claims. In this there was error. Assuming, for the purposes of the opinion, that the bare statement of the mortgage was "in fraud of the plaintiffs," is a sufficient averment that it was made for the purpose of hindering, delaying, or defrauding creditors, the court should have found upon the question of fraud. Those of the plaintiffs whose liens were subsequent in point of time to the mortgage could attack it only upon the ground that it was made to hinder, delay, or defraud creditors. The mere fact that it was without consideration is not the equivalent to this. Civil Code, § 3442. It was error, therefore, to decree that all the plaintiffs should be first paid out of the proceeds of sale, in the absence of a finding of fraud.

4. The appellants make certain points which turn upon the meaning of the term "mining claim," as used in the statute. See Code Civil Proc. § 1183, as enacted in 1880. It is said that it appears that the owners of the mine had obtained a patent therefor, and that therefore it was not a "mining claim," properly so called; and that the term "mining ground," used in the findings is not the equivalent to "mining claim." We think that, for the purposes of the law, it makes no difference whether the owners had obtained a patent or not. If this is not so, it would follow that a laborer upon a mine for which a patent had issued from the government has no lien. This is not the meaning of the law. The words "mining claim," as used in the law, have no reference to the different stages in the acquisition of the government title. In our opinion, it includes all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title.

It may not make any difference if the title to the mine had passed under a Spanish grant. The decision in *Williams v. Association*, 66 Cal. 193, 5 Pac. Rep. 85, is not in conflict with this. Although there are some expressions in the opinion in that case which seem to countenance the opposite view, we think that what was decided was merely that the adjacent land, which the defendant held under a Spanish grant, was not mineral land, or appurtenant thereto. Such land was, therefore, not a mine or a mining claim in any sense, and consequently was not liable as such. If it shall turn out that some of the land involved here was of that character, then it is not liable. But its inclusion in the notice of lien does not vitiate it, if any part of it was a mine. The court can adjust the rights of the parties by its decree. *Malone v. Mining Co.*, 76 Cal. 583, 18 Pac. Rep. 772. We think also that the phrase "mining ground," used in the findings, is sufficient to designate and include the property upon which liens were claimed.

There should be a finding that the materials furnished had been used in the work done. If not used, there can be no lien by the material-man against the owner. *Silvester v. Mine Co.*, 80 Cal. 510, 22 Pac. Rep. 217.

The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; THORNTON, J.; MCFARLAND, J.; FOX, J.; PATERSON, J.

83 Cal. 373
BEWICK *et al.* v. MUIR *et al.* (No. 12,390.)
(*Supreme Court of California.* March 1, 1890.)

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Naphthal, Friedlenrich & Ackerman, for appellants. C. A. & F. P. Tuttle, for respondents.

SHARPSTEIN, J. The general features of this case are the same as in No. 12,437, ante, 389, (which has just been decided.) One of the defendants

Susman, who was alleged in the complaint to have some interest in or claim upon the property which was subject to the interest of the plaintiffs, filed an answer in which he averred that he had a mortgage which had priority over the plaintiffs' claims, and that he had commenced a suit to foreclose said mortgage, joining all the plaintiffs herein as defendants therein, and that said suit was then pending; and he annexed a copy of his complaint in such suit, and prayed for judgment as in said complaint. He also denied that the sums claimed by the plaintiffs were unpaid. As has been stated in the companion case, the findings are insufficient upon the issue of payment, which issue arises upon the answer of this appellant. Upon a retrial the decree in the foreclosure suit, if one has been obtained, as seems to be conceded, can be set up by supplemental answer, and the question as to its effect tried and determined. The judgment is therefore reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

(83 Cal. 374)

PEOPLE v. CLINE. (No. 20,585.)

(*Supreme Court of California.* March 3, 1890.)

CRIMINAL LAW—PLEA—LARCENY—EVIDENCE—INSTRUCTIONS—APPEALABLE ORDERS.

1. Where the record shows nothing to the contrary, it will be presumed that defendant was present when the plea of not guilty was entered for him by his counsel.

2. Defendant, having testified that he bought the horse, which he was alleged to have stolen, from one R., was asked, on cross examination: "Where is R. now, do you know?" "When did you last hear from him?" "Have you made any effort to procure his attendance?" Held proper questions, as his ability or expectation to have R. corroborate his statement might throw some light on its truth.

3. Evidence that R. had stolen other horses in the neighborhood, about the same time that the horse in controversy was stolen, was properly excluded as irrelevant and immaterial.

4. The court properly refused to instruct that "the fact that the defendant did not produce R. as a witness is not to be considered by the jury as a circumstance of guilt," as it was a circumstance which the jury had a right to consider.

5. An instruction that "the testimony of R., if he had been called as a witness to prove that he had sold the horse to the defendant, would have been entitled to no more weight than the defendant's, all other things being equal," was properly denied, because it related to the weight to be attached to evidence.

6. An instruction that "the possession, or even recent possession, of stolen property, is not alone sufficient evidence to find the possessor guilty of the crime of having stolen the property, unless there is some other evidence in the case tending, with this fact of possession, to establish his guilt," was not prejudicial to defendant.

7. An order denying a motion in arrest of judgment is not appealable.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Grady, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was tried and convicted of grand larceny. From the judgment rendered in the premises, an order overruling his motion in arrest of judgment, and an order refusing him a new trial, he appeals. The order denying the motion in arrest of judgment is not appealable. *People v. Majors*, 65 Cal. 100, 3 Pac. Rep. 401.

It is claimed that the record does not disclose the fact that the defendant personally pleaded not guilty to the information filed against him; that for this reason it does not appear that the court below had jurisdiction to try him. The record shows that the defendant was arraigned, and asked for further time in which to plead. A demurrer was then filed by his counsel, and overruled by the court. "Whereupon W. D. Grady, of counsel for defendant, in open court pleads not guilty of the offense charged in the information for and on behalf of the defendant, J. G. Cline." There is nothing, therefore, in the record which goes to show that the defendant was not present when (after due arraignment theretofore had) his counsel entered the plea of not guilty. In *People v. Huff*, 72 Cal. 118, 13 Pac. Rep. 168, it was contended that the judgment should be reversed, because at "a view" had by the jury of the premises where the crime was committed it did not affirmatively appear that the "sworn officer" in charge of the jury was the sheriff, "or that the place where the offense was charged to have been committed was shown to the jury by a person appointed by the court for that purpose, or that the defendant's counsel and the judge of the court were present." But the appellate court, in refuting the argument made in that behalf, said: "The settled rule is that error is not to be presumed, but must affirmatively appear in the record, and all omissions and uncertainties in a bill of exceptions are to be construed against the party presenting it. * * * It will be presumed, therefore, in the absence of a showing to the contrary, that the sworn officer who accompanied the jury was the sheriff or his deputy; that the place which the jury were sent out to view was properly shown to them by a person appointed by the court for that purpose; and that, if need be, the counsel and judge were present." We think it clear that in this case it must be presumed that the defendant was present when the plea of not guilty was entered for him by his counsel. He was in no worse condition than if upon his arraignment, which was properly had, he had stood mute, when the court could have ordered his plea of not guilty to be entered for him. All the charges of the information against him were thus put in issue, he was present at the trial, and testified in his own behalf, and none of his rights suffered any prejudice by reason of the plea thus entered.

The defendant, in his effort to account as to how he honestly came by the property, had testified that he bought the horse he was alleged to have stolen from one Robles. The prosecution, on cross-examination, asked him: "Where is Robles now, do you know?" "When did you last hear from him?" "Have you made any effort to procure his attendance?" These questions were objected to, but the objection was overruled. We do not perceive any force in the objection. It was competent to show, as a circumstance in the case, the probability or improbability of the

defendant's statement, by making it evident whether or not he could have had, or expected to have had, Robles to testify in corroboration of defendant's statement. Thus some light might be shed upon the matter as to whether the defendant was telling the truth, or the contrary, about his getting the horse innocently from Robles.

It is further claimed that the court erred in not allowing the witness Strivens to state in evidence that Robles had been arrested by him for stealing other horses in the immediate neighborhood where the horse in controversy was stolen, and about the same time as that of the last theft, and that Robles was placed under arrest and taken to a justice's court on charge of stealing said other horses. How the fact that Robles about the same time had stolen other horses could affect the defendant's alleged theft of the horse here involved, or could be pertinent or material to the issues here made and tried, we cannot perceive. All the evidence of that kind which was offered to be proven by Strivens or Hensley was properly prevented by the court from going to the jury.

It is further assigned for error that the court refused this instruction requested by the defendant, viz.: "The fact that the defendant did not produce Guadalupe Robles as a witness is not to be considered by the jury as a circumstance of guilt." The instruction had no application to the instance of a defendant neglecting or refusing to testify, which the statute says is not to prejudice him. Section 1323, Pen. Code. The fact that Robles, from whom the defendant claimed to have bought the horse alleged to have been stolen, was not present to testify as a witness in the defendant's behalf was a circumstance which the jury could consider, as a matter of evidence, in determining the probable truth or falsity of the defendant's statement as to how he came by the horse. But the instruction, in the form asked for, virtually assumed to take away the consideration of this circumstance from the jury, in determining the guilt or innocence of the defendant, which was improper. While it is true that the fact of Robles not being present would not prove the defendant to be guilty as charged, it was nevertheless a circumstance which the jury might consider. In addition, the language of the instruction, as asked, is somewhat inaccurate, and might have misled the jury.

It is also claimed that the court erred in refusing this instruction: "The testimony of Robles, if he had been called as a witness to prove that he had sold the horse to the defendant, would have been entitled to no more weight than the defendant's, all other things being equal." This was an instruction as to the weight to be attached to evidence, and was properly refused.

The court below is also complained of for granting of its own motion this instruction: "The possession, or even recent possession, of stolen property, is not alone sufficient evi-

dence to find the possessor guilty of the crime of having stolen the property, unless there is some other evidence in the case tending, with this fact of possession, to establish his guilt."

We do not perceive any impropriety in the instruction. It directed the jury that they could not convict the defendant on the evidence alone of the recent possession of the property alleged to have been stolen; that they must have some other evidence before them in addition to such possession, tending, at least, to show the defendant's guilt, before they could convict him of the crime charged against him. This was an instruction of caution, was in the defendant's favor, did not prejudice him in any way, and was in entire harmony with the other instruction given. We perceive no prejudicial error in the record, and advise that the appeal from the order denying the motion in arrest of judgment be dismissed, and the judgment and order refusing a new trial be affirmed.

I concur: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the order denying the motion in arrest of judgment is dismissed, and the judgment and order refusing a new trial are affirmed.

83 Cal. 415

In re COOK'S ESTATE. (No. 13,396.)

(Supreme Court of California. March 10, 1890.)

DIVORCE—RENDITION OF JUDGMENT—DEATH OF PLAINTIFF.

A judgment of divorce, entered in the minutes, takes effect from its rendition, and may be entered *nunc pro tunc* after plaintiff's death, on motion of her second husband, whether the failure to enter it before was due to plaintiff's own neglect, or to that of her attorneys, or of the clerk of the court. Following *In re Cook's Estate*, 19 Pac. Rep. 431.

Department I. Appeal from superior court, city and county of San Francisco; J. V. CORFEE, Judge.

Eugene M. Deuprey and *Alfred Clarke*, (Geo. W. Chamberlain, of counsel,) for Theodore T. Cook. *James M. Seawell* and *Henry C. McPike*, for William E. Miller, assignee of William W. Richards.

PATERSON, J. This is an appeal from a decree of distribution. The case has been in this court before. 77 Cal. 220, 17 Pac. Rep. 923, 19 Pac. Rep. 431. The question to be determined is whether Theodore T. Cook or William W. Richards is the surviving husband of Emma Cook, deceased. Each claims that he is entitled to one-half of her estate by virtue of such relation. Cook was married to the deceased, December 26, 1873. Richards, believing that she had been divorced from Cook on April 23, 1880, was married to her in due form of law, on May 30, 1880, and thereafter lived and cohabited with her as her husband until her death, November 30, 1883. At the former hearing of the contest the court below

decided in favor of Cook, holding that, as the decree of divorce had not been actually entered, he had never been divorced from Emma. On appeal we reversed the decree, and remanded the cause for a new trial. On the last trial the court below admitted the judgment roll in Cook v. Cook in evidence, held that the parties were divorced in that action, adjudged Richards to be the surviving husband, and entered a decree distributing one-half of the estate to his assignee, Miller. From this decree Cook has appealed. In the former opinion it was said: "Of course, we have no commendation for the neglect of the clerk to enter the judgment in Cook v. Cook immediately after it was pronounced, or for the failure of the attorney for the plaintiff in that action to see that the judgment was then entered. But many of the most perplexing questions presented here arise out of the want of care or the want of capacity of attorneys and other officers of the courts. It is the duty of the court, however, to protect the rights of litigants even against the incapacity of their agents, except where such incapacity has placed those rights beyond the reach of legal justice." Acting upon the theory that the neglect of the clerk without fault of Emma Cook was the basis upon which the court rested its decision, counsel for Cook, against the objection of respondent, proved at the last trial, and the court found, "that after the rendition of said decree in Cook v. Cook the attorney for said Emma Cook in said action notified her that she was not and would not be divorced from said Theodore T. Cook until said divorce was entered; and that, in order to have said decree entered, it was necessary for her to pay the fees of the clerk of said court for entering said decree, amounting to the sum of \$4, but that said Emma Cook wholly neglected to pay said fee; that the failure to enter said decree of divorce was wholly the fault of said Emma Cook, and not the fault of the court, or any of its officers, or her attorneys." It is said that without the judgment which was entered *nunc pro tunc* there would have been no evidence of a decree of divorce, and that the validity of the order for a decree *nunc pro tunc* rested upon the fact that it was the fault of Emma Cook's attorneys, or of the clerk, and not any fault of her own, which led to the delay in the entry of the decree. Therefore, it being made to appear that the failure to enter the decree until after the death of Emma was due to her own neglect in her lifetime, it is claimed the decree *nunc pro tunc* is invalid, and should have been excluded.

There are two answers to this contention of appellant:

1. We do not think that the court in the former appeal placed its decision upon the ground that the failure to enter the decree was due to the fault of the attorneys of Emma, or to the clerk, or that it considered the question as to whose fault caused the delay at all material. An examination of the opinion rendered by Mr. Justice McFARLAND

will show that the decision went upon the grounds that the record in Cook v. Cook established the fact that a judgment of divorce had been rendered by the court on April 23, 1880, and entered in the minutes; that, thus entered in the minutes, it was as valid and binding as if had been written and signed by the court, and, being so, took effect at the time of its rendition; that, the judgment having been rendered in the life-time of Emma, there was no error in entering it after her death, it being the duty of the clerk to enter the judgment at any time after its rendition upon payment of fees, and the entry being but the evidence of the judgment already in operation and effect. These being the grounds of the decision, we are bound to hold that the distinction sought to be made by appellant between the facts of the case as they appeared on the former trial and in this record is an immaterial one, and therefore, under the rule as to the law of the case, the judgment should be affirmed.

2. If it be true that the court could not enter a decree *nunc pro tunc* unless the delay was caused by the fault of an officer of the court, the question remains, where and how is the cause of the delay to be determined? It must be done in the court in which the entry is to be made. In this matter it appears that the court which rendered the decree heard evidence and ordered a decree entered *nunc pro tunc*. If proof of the fact that Emma Cook was not in fault was required, we must presume that such proof was offered. In other words, so long as the decree stands it is conclusive as to all matter of evidence necessary to its validity. But it is claimed that the decree as entered is void on its face because made on application of Richards, a stranger to the record and without notice. These contentions were urged upon the court on the former hearing. If they, or either of them, had been deemed sound, the judgment would not have been reversed; if the decree was void, it would have been declared to be inadmissible evidence. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.

83 Cal. 423

In re HILLIARD'S ESTATE. (No. 13,476.)

(Supreme Court of California. March 10, 1890.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—INTEREST.

1. Where, on final accounting of executors, evidence is admitted, without objection, as to the contents of letters which were not produced, acknowledging the payment of two contested items, and one of the executors testifies that he actually paid the same, the items are sufficiently vouched, in the absence of contradictory evidence, to warrant the court in allowing them.

2. Though there is no evidence that the executors derived any benefit from the use of money belonging to the estate, they are chargeable with legal interest, with annual rests, after a year from the time of their appointment, where it appears that the administration might have been closed within that time, and the only excuse offered for the delay was the negligence of the executors' at-

torney, who died six or seven years before the commencement of the present suit; that until about two years before that time they supposed the estate was all settled, but never inquired about it; that they did not succeed in loaning the money on satisfactory security the first two or three years; and that since then they did not try to do so, but one of them kept it separate in his safe for three or four years, and used it whenever he needed or wanted it, but had never put it out at interest.

Commissioners' decision. Department 1. Appeal from superior court, Amador county; C. B. ARMSTRONG, Judge.

E. C. Farnsworth and *John F. Ellison*, for appellant. *D. B. Spagnoli* and *C. H. Lindley*, for respondents.

VANCLIEF, C. Chester Hilliard died testate in Amador county in April, 1879, leaving real and personal property of the value of about \$2,355, which he devised and bequeathed to his two minor sons, Albert and George Hilliard. The will appointed Samuel W. Bright and Martin Dotta executors, without requiring them to give bond or security for the performance of their duties, and authorized them to sell and convey all the property of the estate, and convert it into money, without any order of court, and, after paying the lawful debts of his estate, to invest the residue of the money for the benefit of his said sons. The will also nominated and appointed the same persons—Bright and Dotta—guardians of the persons and estates of his said minor sons, without requiring any bond or security for the performance of their duties as such. The will was proved, and Bright and Dotta were appointed executors, May 12, 1879. Within one year after their appointment the executors sold all the property, and paid all the debts, of the estate, but appear to have reported to the probate court no account thereof, nor of any of their transactions in regard to the estate, until, in obedience to an order of that court, they filed their final account on the 15th day of July, 1889; whereby it appeared that they had received in cash from the estate \$2,355.43, of which they had disbursed \$1,764.85, leaving in their hands \$590.58. A portion of the disbursements was for the support and care of the minor sons; among them, four items of \$150 each, paid, respectively, November 3, 1879, November 3, 1880, November 16, 1881, January 22, 1883, to Mrs. J. D. Oaks. On July 29th, after the filing of this final account, A. C. Hilliard, one of said sons, being then over 21 years of age, filed in the probate court his written objections to the following items charged in the account: The item of \$150 charged as having been paid Mrs. Oaks on November 16, 1881, and to the item of \$150 charged as paid Mrs. Oaks, January 22, 1883,—on the ground that neither of these items had been paid. He further claims that the executors should be charged with interest on all money received by them from May 15, 1880, for the reason that 12 months was a reasonable time within which to settle the estate, and that no reason existed why the estate should not have been set-

tled and distributed within that period. The issues thus raised were regularly tried, and the court overruled the objections of A. C. Hilliard, and approved and allowed the final account of the executors in all respects as rendered by them. From the order approving and allowing the final account of the executors, A. C. Hilliard appeals upon a bill of exceptions.

1. As to the two items of \$150 each, charged as paid to Mrs. Oaks, the bill of exceptions states that "there were no vouchers produced, and none filed, but satisfactory evidence was introduced before the court, by said executors, showing and proving that all said items were paid by said executors." Immediately following this the bill of exceptions proceeds: "In further support of said account, S. W. Bright, one of said executors, was sworn, and testified in substance as follows, to-wit: '* * * There were two minor sons of said deceased, and they remained on the ranch of said deceased about ten months after the death of said deceased. We were appointed the guardians of said minors by the will of deceased. About ten months after the death of said deceased I took said minors to their aunt, Mrs. J. D. Oaks, in Tehama county, Cal., according to the request of said Chester Hilliard in his lifetime, and agreed to pay her \$150 a year for the support and maintenance of both said minors, and told her I thought I could do so for three or four years. I paid her \$150 in advance, November 3, 1879. On November 3, 1880, I paid her \$150. On November 16, 1881, I paid her \$150. On January 22, 1883, I paid her \$150. I think Mrs. Oaks died just before this last sum was paid, and this last sum was paid to her husband. I received letters every time the money was paid, acknowledging the receipt of the same, but do not know where those letters are now. Some of the money paid to the Oaks I advanced from my own money.'" There appears to have been no objection or exception to the testimony of the witness as to the contents of the letters from Oaks acknowledging the receipt of the money, on the ground that the proof of the loss of those letters was insufficient, nor upon any other ground; therefore it does not appear that the court erred in holding that the items of payment objected to were sufficiently vouched. The contents of those letters, acknowledging the receipt of payment, supplemented by the testimony of the executor that he actually made the payments, constituted sufficient vouchers, in the absence of any counter-evidence, to justify the court in allowing them as proper charges. Estate of Rose, 63 Cal. 349; In re Moore, 72 Cal. 344, 13 Pac. Rep. 880.

2. It is contended by appellant that the executors should be charged with legal interest, with annual rests, on the money of the estate in their hands, for the reasons that they delayed the settlement of the estate and the distribution of money for an unreasonable length of time, and during that time

they had mingled the money with their own, and used it in their business. Mr. Bright, one of the executors, testified that the administration might have been closed within one year from the date of the appointment of the executors; and the only excuses offered for not having closed it within that time are that their attorney was negligent, and did not proceed with the business as they had requested him to do; that their attorney died six or seven years before the trial of this matter; that until about two years before this trial they supposed the estate was all settled, as they had paid all the debts of the estate, contracted by their testator, within a year after their appointment, but never inquired into it, and never asked their attorney about it. As to the use of the money, he testified that they had tried during the first two or three years to loan the money, but could not get the kind of security they wanted; that the money had been kept separate in his safe most of the time, but they had not tried to loan it since January 22, 1883; that whenever he (witness) needed or wanted the money he used it, but was always ready to pay it over when necessary, but they had never put it out at interest, and that for three or four years he kept the money separate from his own. It is stated in the bill of exceptions that "no evidence was introduced showing that the executors derived any benefit by the use of such money."

It appears by the account rendered that the executors charged themselves with interest on money of the estate \$75 a year for each of the three years,—1880-81-82,—amounting to \$225. Mr. Bright testified that these charges were for interest on deferred payments for real estate sold by the executors. I think the court should have charged the executors with legal interest on all the money for the time it remained in their hands after May 15, 1880, with annual rests. All the money appears to have been received by the executors before May 12, 1880, except \$930, purchase money for real estate, upon which they have charged themselves with interest for three years, at \$75 a year, ending November 8, 1882. This interest should not be recharged. With this exception the final account rendered by the executors furnishes all the data necessary for the computation of the interest by the rule above indicated. The delay of the settlement and distribution of the estate after May 15, 1880, was unreasonable, and not sufficiently excused by the alleged negligence of the attorney for the executors, as it appears by the testimony of Mr. Bright that he "never inquired into it, and never asked Mr. Porter [his attorney] about it." Mr. Bright testified that "whenever he needed or wanted the money he used it," though he thinks he kept it in his safe separate from his own money three or four years, but never tried to loan or invest it, as directed by the will, after January, 1883. A fair construction of all this is that he kept the money to be used by himself whenever he

wanted or needed it, and that he so used it. It makes no difference that there was no evidence "showing that executors derived any benefit by the use of such money." It is enough that they kept it for their own use, and used it whenever they had use for it. The law requires executors and guardians to account not only for all profits they realize from the use of the money intrusted to them, but also for both principal and interest, in case of loss by their unauthorized use of such money. In re Estate of Stott, 52 Cal. 403; Estate of Clark, 53 Cal. 355.

I think the cause should be remanded, with directions to the lower court to modify the order appealed from by charging the executors with interest in accordance with this opinion.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to the court below to modify the order appealed from by charging the executors with interest in accordance with this opinion.

83 Cal. 460

In re SPENCER. (No. 20,632.)

(Supreme Court of California. March 24, 1890.)

ALIMONY—HABEAS CORPUS.

1. Though, in a technical sense, there can be no alimony where the relation of husband and wife has ceased to exist, yet, as Civil Code Cal. § 4, requires the Code to be liberally construed, with a view to effect its object and to promote justice, a permanent future allowance to a divorced wife will not be defeated because granted under the misnomer of "permanent alimony," where it is a lawful grant under Civil Code, § 139, which provides that where a divorce is granted for an offense of the husband the court may compel him to make such suitable allowance to the wife for her support for life, or for a shorter period, as it may deem just, having regard to the circumstances of the parties, respectively, which allowance may be modified from time to time by the court.

2. Under a writ of *habeas corpus*, the court can only inquire into the jurisdiction, but not into the correctness of the findings on which the conviction is based.

PATERSON, J., dissenting.

In bank. Application for discharge on *habeas corpus*. For former report, see ante, 37.

Jordan & Bull, for petitioner. Dorn & Dorn, for respondent.

Fox, J. This is an application for discharge upon *habeas corpus*. The return to the writ shows that the respondent is imprisoned under an order of the superior court of the city and county of San Francisco, made upon conviction for contempt, in refusing to obey an order of the court theretofore made, requiring him "to pay the sum of twenty-five dollars per month as alimony" to Josephine M. Spencer, his former wife. From the return and records introduced, it appears that on August 25, 1884, in the suit of Thomas M. Spencer, plaintiff, v. Josephine M. Spencer, defendant, a decree of divorce was granted

to the defendant, upon her cross-complaint; the custody of a minor child was awarded to her; the household goods and personal property at the residence occupied by her was set apart to her; and it was further decreed that the plaintiff should pay to the defendant, "as permanent alimony, the sum of \$50 per month on the 1st day of September, 1884, and on the first day of each and every month thereafter." On May 13, 1887, on the motion of plaintiff, this decree was modified, and the amount of alimony so fixed reduced to \$25 per month. In December, 1888, petitioner having failed for some time to make payment, he was cited to appear before the court, and show cause why he should not be punished for contempt. On the return-day of that citation, the defendant, this petitioner, was examined under oath touching his ability to pay the moneys so required of him, and his reasons for not paying the same; and the court found that there was then due and unpaid the sum of \$225; that demand therefor had been made; that he had been and was abundantly able to pay the same; and that he had permanent and lucrative employment. Upon these findings, the court adjudged him guilty of contempt, and ordered that he be committed to the custody of the sheriff, and confined in the county jail until he obeyed the said order, and paid the said sum of \$225 so found due and unpaid under said decree, or until discharged according to law.

These proceedings seem to have been regular, and in accordance with the provisions of title 5, pt. 3, Code Civil Proc. And the order of imprisonment was in accordance with the provisions of section 1219, a part of that title; the court having found that the party convicted was able to make the payment required of him, and consequently that it was in his power to perform the act required. It is insisted here, however, that the court erred in this finding; that there was no evidence to support it. That is a matter into which we cannot inquire upon this writ. Under the writ, the court can only inquire into the jurisdiction to find, not into the correctness of the findings upon which the conviction is based.

The only remaining inquiry is whether the judgment or order which the petitioner is found guilty of having disobeyed was a lawful judgment or order. Upon this point it is insisted that in divorce proceedings, when the court reaches its final judgment, and grants a decree of divorce under our statutes dissolving the bonds of matrimony, it has no jurisdiction or power to decree the payment of permanent, or, indeed, any future, alimony; that the only provision on the subject of "alimony" is that found in section 137, Civil Code, and relates entirely to what may be done *pendente lite*; that alimony grows out of that obligation of support which arises from the relation of husband and wife, and proceeds only from husband to wife; that the moment the decree of divorce is granted the

relation of husband and wife has ceased. There is then no husband, no wife, and hence there can be no alimony. It is true that "alimony," in its strict technical sense, proceeds only from husband to wife, and that, where the relation of husband and wife does not exist, strictly speaking, there can be no alimony. It is true, also, that the legislature has used the term only in its strict legal sense, and has therefore used the word "alimony" only when prescribing the provision which the court might make for the support of the wife *pendente lite*. But the courts have not always been as careful in their use of the word. They have frequently used it as a mere name for another and different allowance, made, and authorized to be made, under section 139, Civil Code. It was manifestly so used in this case, and has been so used in many others. By that section it is provided: "Where a divorce is granted for an offense of the husband, the court may compel him to * * * make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties, respectively; and the court may from time to time modify its orders in these respects." That is exactly what the court did in this case, falling, however, into the quite common error of calling the allowance "permanent alimony." If such an allowance is lawfully made, the simple misnomer of it would not justify a court, even upon appeal, much less under this writ, in setting it aside. If it was excessive, or if the court erred in determining that it was a case in which such an allowance is authorized by law, the error was one to be corrected on appeal, not one to be set aside as for want of jurisdiction to make it. Under the Code, which must "be liberally construed with a view to effect its object, and to promote justice," (section 4,) the court will look at the substance of the thing, and not defeat its object merely because somebody has misnamed it. Alimony rests upon the obligation of the husband to support the wife. Allowance for future support has been held to be in consideration of, and as a substitute for, her interest in the community property, or her right of dower or inheritance in the property of the husband; but, under our Code, it is something more, and something which the legislature had a right to authorize, and the court to grant,—compensation for a wrong done to her. It will be observed that this allowance cannot be made when the divorce is granted for the offense of the wife,—only when it is for an offense of the husband; so expressly provided by the statute, and so held in *Everett v. Everett*, 52 Cal. 383. It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled

her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation he must make her compensation. The court is to fix the measure of that compensation by "having regard to the circumstances of the parties, respectively;" those circumstances furnishing the best means for determining the extent of her loss. As these circumstances may differ at different times, "the court may from time to time modify its orders in that respect." This allowance may be entirely independent of the property then *in esse*. It is the duty of the court, at the time of dissolving the marriage, to make proper division of the community property (sections 146, 147;) and, as we understand the law, it may, under section 139, in its discretion, compel the husband, in addition, to make what it deems suitable allowance for the future support of the wife during life, or for a shorter period, having reference to their circumstances, etc. This by way of compensation for the deprivation growing out of his own wrong. In fixing this compensation or allowance, the court may regard the earnings of the husband, or his ability to earn money, (*Eidenmuller v. Eidenmuller*, 37 Cal. 364,) and may subsequently reduce the amount, (*Id.*) or increase it, (*Ex parte Cottrell*, 59 Cal. 417,) as in its opinion the changed circumstances of the parties shall warrant, and may enforce compliance with the order by imprisonment for contempt, (*Ex parte Perkins*, 18 Cal. 60; *Ex parte Cottrell*, *supra*;) and the husband may purge himself of contempt by showing that he is unable to obey the order, and that his inability to pay the sum directed has not been occasioned by his own act, for the purpose of avoiding payment, (*Galland v. Galland*, 44 Cal. 475; *Ex parte Cottrell*, *supra*; *In re Wilson*, 75 Cal. 580, 17 Pac. Rep. 698.)

The question of whether or not disobedience of the order for the payment of this allowance is contempt which may be punished by imprisonment, so ably discussed by counsel for petitioner, is no longer an open one in this state, as will be seen by the cases above cited, and perhaps others. The order for such allowance, or any subsequent order made in modification thereof, is subject to review upon appeal, (*Eidenmuller v. Eidenmuller*, 37 Cal. 364;) but, until reversed, it must be obeyed, or the party must purge himself of contempt by showing his inability to pay it, and that the inability is not occasioned by his own act, for the purpose of avoiding payment.

The remaining questions presented in this case were fully considered in *In re Wilson*, 75 Cal. 580, 17 Pac. Rep. 698, and we see no reason to depart from the conclusion there reached. Let the writ be dismissed.

WE CONCUR: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; THORNTON, J.

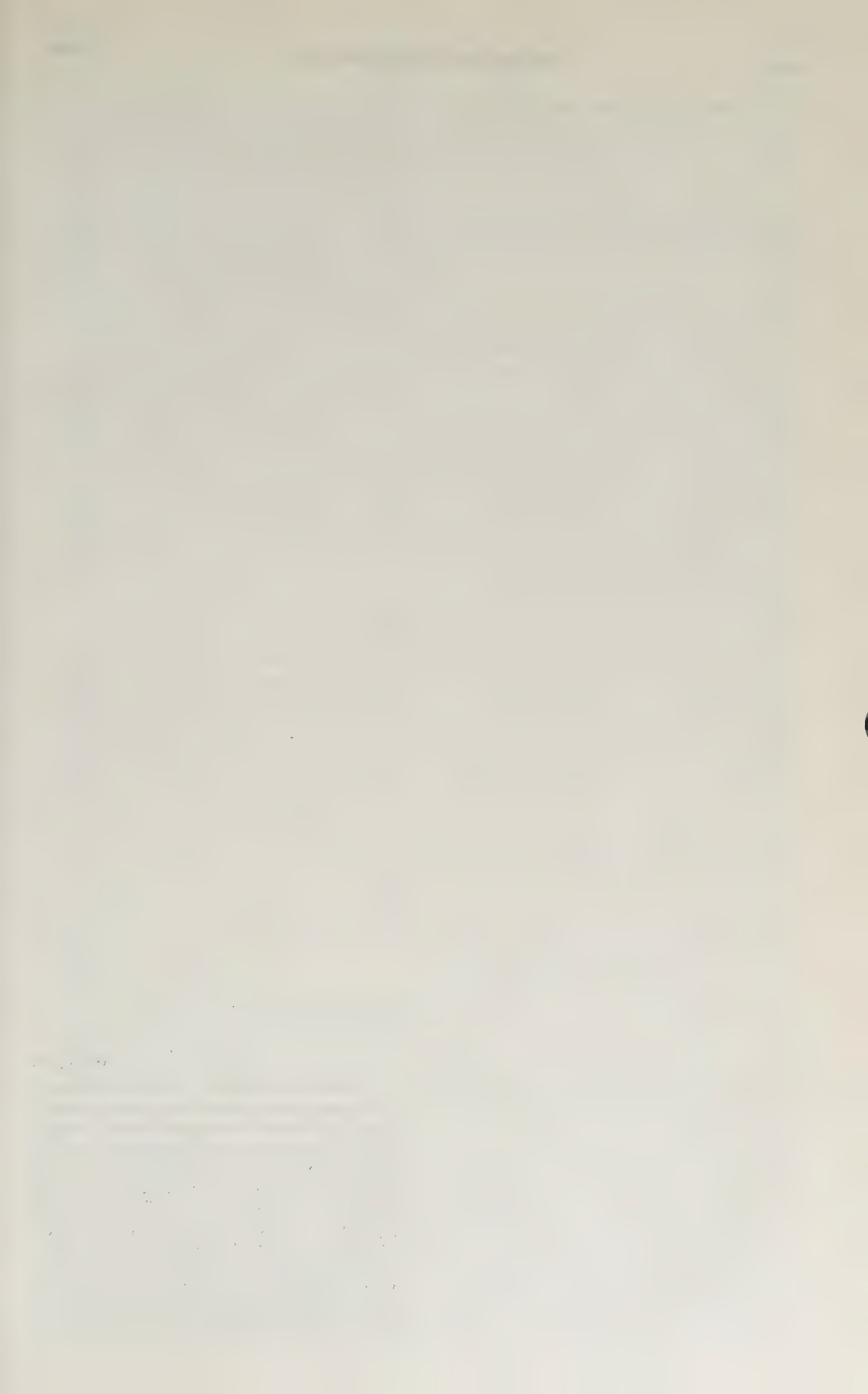
PATERSON, J., (*dissenting*.) For the reasons given by me when this matter was be-

fore me in chambers, I dissent. In *re Spencer*, ante, 37. I do not believe that the legislature intended to provide that the immediate daily earnings of a man, having a wife and child dependent upon him for support, should be taken to support the wife of another, because he may have had, at some prior period of his life, the fortune or misfortune to be her husband; yet to that extent the exigencies of the conclusion reached by my learned associates carry us. It is a construction which seems to me to be at variance with the entire scope and spirit of the law governing the subject of personal relations. Such a law, if it exist, should be repealed, or the right to an absolute divorce and privilege of remarriage be abolished. The case of *Eidenmuller v. Eidenmuller* was based upon statutes entirely different from the provisions of our Code. At that time, divorces were granted from bed and board, and there was no provision like that of section 141, Civil Code, viz., that "in executing the five preceding sections, the court must resort—*First*, to the community property; then, *second*, to the separate property of the husband." The meaning of these provisions I attempted to point out in the opinion above referred to.

In view of the construction given to the provisions of the Code by the majority, a word as to the policy—impolicy, rather—of such a law may not be out of place, as a suggestion to the legislative department; not, however, in an attempt to show that the construction adopted by the court is erroneous. The law encourages the marriage of persons competent to assume the marriage relation, and fosters its continuance. All contracts and conditions in restraint of marriage are void, being against public policy. In this state, divorce is absolute. There is no such thing as divorce from bed and board, under the law as it now exists. When a marriage is dissolved, each party is relieved from all the obligations of the bond. From the time of the dissolution, they are single persons; and their acts are, as between themselves, the acts of strangers. No obligations or duties are due from one to the other. They are free to marry again. Indeed, as stated above, the law encourages them in the assumption of marital rights and obligations. Perhaps one good effect of the court's construction will be to discourage them in the future. Recognizing the fact that the marriage relation, in some instances, should no longer exist, six different grounds are prescribed, upon any one of which, in a proper case, the relation may be dissolved. In certain cases, penalties are fixed to be imposed upon the guilty party; but they all relate to the property, separate and community. No personal penalty is provided, such as imprisonment, or forfeiture of, or limitation upon, the privilege of remarriage. Under these provisions, a divorced man marries a second or third time. The divorced wife does the same thing. The man upon whom devolves the duty of supporting his family is dependent

upon his daily earnings to perform this duty. The woman, who has by the decree of divorce been released from all duties towards him, demands that his earnings, or a portion of them, shall be devoted to her support, and his lawful wife and their children must take what is left. If he refuse to take the bread from them, and give it to her, who owes him no duty, he may be thrown into jail, and be thus deprived of the power to support any of them. Such a law as this—a law which permits and encourages a man to assume the responsibilities of husband and father, and imposes at the same time such inconsistent conditions, and such unequal and inequitable burdens—ought not to blister the pages of our statute-books. Either absolute divorce should be denied, and the privilege of remarriage be abolished, or it should be provided—as I believe our laws, under proper construction, do now provide—that only the property, separate and community, in existence at the time the marriage is dissolved, may be taken for the support of the divorced wife. It is an anomalous condition of domestic affairs which requires a man who has been permitted and encouraged to assume new marital duties and obligations, to support a legal relict, who is not only matrimonially dead to him, but is perhaps married to another, who is unable or unwilling to support her.

The leading opinion does not discuss the question whether or not the subject before us can be tested properly on *habeas corpus*. I deem it unnecessary, therefore, to investigate or consider that matter.



81 Cal. 616

PEOPLE v. RUSSEL. (No. 20,576.)

(Supreme Court of California. Dec. 4, 1889.)

ARSON—INFORMATION—DESCRIPTION OF OFFENSE.

An information which charges, in the language of Pen. Code Cal. § 447, defining arson, that defendant did willfully and maliciously burn "a building" with intent to destroy it, is sufficient, without describing the building, according to the definition of section 448, as one "capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted."

Commissioners' decision. In bank. Appeal from superior court, Sonoma county.

Ira C. Jenks, for appellant. *Atty. Gen. Johnson*, for the People.

FOOTE, C. The defendant was convicted of the crime of arson in the first degree. From the judgment rendered against him in the premises, and an order denying him a new trial, he has appealed. He claims that his demurrer to the information should have been sustained, as that pleading did not charge him with any public offense. His argument in this connection is that, although the information is drawn substantially in the language of section 447 of the Penal Code,¹ it was fatally defective, because it did not go further, and declare, in the language of section 448² of the same Code, that the building the defendant is alleged to have burned was "one capable of affording shelter to human beings, or appurtenant thereto, or connected with an erection so adapted." It has been frequently held by the appellate court of California that an information or indictment drawn, substantially, in the language of the statute which defines the offense, is sufficient. *People v. White*, 34 Cal. 183-188; *People v. Cronin*, Id. 191, 208-210; *People v. Lewis*, 61 Cal. 366, 367; *People v. Turner*, 65 Cal. 541, 542, 4 Pac. Rep. 553. It has also been decided that an information for arson is sufficient if it follows the language of section 447, and that it need not set out the language of section 448, which the defendant claims to have been necessary to the sufficiency of the information in the present instance. The offense was stated in accordance with the language of section 447 of the Penal Code, and was sufficiently stated. As well might the provisions of sections 449 to 452 be held necessary to be stated as those of 448. Section 447 declares the offense, and the following sections relate to circumstances of its commission. *People v. Giacomella*, 71 Cal. 48, 49, 12 Pac. Rep. 302. Nor is it necessary, if the information or indictment charges arson in the language of section 447, that it should state in what degree the crime was committed. That is for the jury to determine from all the facts and circumstances developed in evidence. Pen. Code, § 1157; *People v. King*, 27 Cal. 507-512; *People v. Nichol*, 34 Cal. 211-217.

The further point is made that the court erred in not suspending the judgment, so that the defendant might obtain proof of the truth of an oral unsworn statement he made when called up for sentence, as to what a boy named Bryant had confessed that he had seen another boy, named Cramer, do. We perceive nothing in the action of the court in refusing the request, and the motion for a new trial, which indicated any abuse of discretion. Perceiving no prejudicial error in the record,

we advise that the judgment and order be affirmed.

BELCHER, C. C., and VANCLIEF, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(8th Cal. 296)

ANTHONY *et al.* v. JILLSON *et al.* (No. 12,665.)

(Supreme Court of California. Feb. 28, 1890.)

MINES AND MINING—PLACER CLAIMS—LOCATION—ADVERSE CLAIMS.

1. Under Rev. St. U. S. § 2319, providing that all mineral deposits in public lands shall be free, and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States, and those who have declared their intention to become such, one who is not a citizen, and who has not declared his intention to become such, acquires no rights by posting a notice of claim.

2. Failure to mark boundaries invalidates an attempted location of a placer mining claim. Following *White v. Lee*, 21 Pac. Rep. 363.

3. On proceedings to determine the validity of respective claims to a patent for a placer mine under Rev. St. U. S. § 2326, the answer must set forth the facts on which defendant bases his claim, and show his right as against the government, as well as against plaintiff.

4. A finding that for five years persons under whom defendants claim were in possession and working a certain claim, which is shown to be a part of the land surveyed for defendants on their application for a patent, does not show that it is a part of the piece claimed by plaintiffs, where that is but a small portion of the land surveyed for defendants.

5. Where a finding contains three specific statements of fact, a specification of error, designating it by numbers simply, as not sustained by the evidence, is insufficient.

6. An allegation, in a specification of error, that an alleged locator had "fully complied with the laws and statutes of the United States with reference to the location of placer mining claims," states a mere legal proposition, and points to no finding of fact.

In bank. Commissioners' decision. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

W. K. Boucher and Reddick & Solinsky, (P. Reddy, of counsel,) for appellants. Ira Hill Reed and J. Warren Reed, for respondents.

HAYNE, C. This was an action to determine the right to a patent to certain placer mining ground. The defendants applied for a patent to a tract of 36.17 acres, called the "Rough Diamond Mine." The plaintiffs claimed a tract of 30 acres which overlapped a corner of the defendants' claim to the extent of 7.44 acres. This latter piece is the one in controversy. An adverse claim was filed by the plaintiffs; and thereupon such proceedings were had that the present action was brought under section 2326 of the Revised Statutes, to determine the validity of the respective claims. The trial court gave judgment for the defendants, and the plaintiffs appeal.

¹Pen. Code Cal. § 447, defines arson as "the willful and malicious burning of a building with intent to destroy it."

²Section 448 defines the word building, as used in section 447, as "any house, edifice, structure, vessel, or other erection capable of affording shelter for human beings, or appurtenant to or connected with an erection so adapted."

1. The plaintiffs' mine is made up of two claims,—one of 20 acres, alleged to have been located by Severino Gobbi in 1878; and the other of 10 acres, alleged to have been located by the plaintiff Frank Anthony in 1885.

In relation to the Gobbi claim, the court found as follows: "That on December 6, 1878, one Severino Gobbi, a foreigner, sought to locate a placer mining claim by posting on the premises a notice, claiming, in his own name, twenty acres of ground situated in Chili Gulch mining district, in said county and state; said notice containing no description of boundaries other than giving the legal subdivision thereof, viz., being the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 25, township 5, N., R. 11, E. M. D. M. That on the next day thereafter, viz., December 7, 1878, he declared his intention of citizenship, and caused a copy of his notice of location to be recorded in the county mining records of said Calaveras county; but whether such notice was recorded before or after making such declaration of intention does not appear." The evidence justifies this finding. It shows that Gobbi did not file his declaration of intention to become a citizen until the day after he posted his notice of location; and it does not show that he did anything else after his declaration of intention, except, perhaps, to record his notice of location. The appellants assert in their specification that "there were no local rules or laws in force," and their counsel maintain in their brief that there were none. Certainly, there is no evidence of any local rules of any particular tenor; none requiring notices to be recorded, for example. Therefore, recording the notice was not required, (*Thompson v. Spray*, 72 Cal. 533, 14 Pac. Rep. 182; *Souter v. Maguire*, 78 Cal. 544, 21 Pac. Rep. 183;) and, not being required, it was useless. Leaving the record out of consideration, we see nothing that Gobbi did to effect a location except the posting of his notice, and at the time he posted his notice he was not a citizen, and had not declared his intention to become such. Under these circumstances, we do not think he acquired any right. Rev. St. U. S. § 2319;¹ *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, 8 Pac. Rep. 621. There is another reason why he acquired no right. The court finds "that said Gobbi did not mark out on the ground the boundaries of such attempted location, nor did he set any stakes or marks defining the limits of said claim." There is no specification attacking this finding; and, if there had been, we see no evidence against it. The failure to mark the boundaries is fatal to the validity of the claim. *White v. Lee*, 78 Cal. 593, 21 Pac. Rep. 363.

In relation to the claim alleged to have been located by the plaintiff Frank Anthony,

the court finds that he "did not mark out upon the ground the limits of such claim by either stakes or monuments defining his boundaries." The only specification attacking this is as follows: "Finding 4 is contrary to the evidence in this, to-wit, that the evidence shows that plaintiff Frank Anthony, in locating the ground therein described, fully complied with the laws and statutes of the United States with reference to the location of placer mining claims, and that there were no local rules or laws in force." The finding designated as "4" contained three specific statements of fact; and, this being the case, the mere designation of it by number, as not sustained by the evidence, was not sufficient as a specification. *Eddelbittel v. Durrell*, 55 Cal. 278, 279; *Parker v. Reay*, 76 Cal. 105, 18 Pac. Rep. 124. And the clause that the evidence showed that the locator had "fully complied with the laws and statutes of the United States with reference to the location of placer mining claims" amounted merely to a legal proposition, and did not point to any finding of fact. *Moyes v. Griffith*, 35 Cal. 556; *Coveny v. Hale*, 49 Cal. 552; *Thorne v. Hammond*, 46 Cal. 534; *Doherty v. Mining Co.*, 50 Cal. 187. But, if it be assumed in favor of the appellants that the specification is sufficient, the result would be the same, because the evidence does not show that the locator marked any boundaries upon the ground. Neither of the plaintiffs' locations, therefore, were of any validity.

2. Did the defendant show any right to a patent to the piece in controversy? In this regard, it is to be remembered that each party is to establish his right against the government as well as against his adversary. As was said concerning the plaintiff in *Gwillim v. Donnellan*, 115 U. S. 50, 5 Sup. Ct. Rep. 1110: "His location must be one which entitles him to possession against the United States, as well as against another claimant." And, if it appears that neither had acquired a right, judgment should be given against both. *Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301. And we think that the pleading of each should set forth the facts upon which he relies. This is the rule in reference to the pleadings in actions to determine the right to purchase other kinds of public lands. In *Woods v. Sawtelle*, 46 Cal. 389, *RHODES, J.*, delivering the opinion, said: "The action is brought to determine which of the parties has the better right to make the purchase, and it becomes necessary for each party to state directly all the facts upon which he relies to show that his is the better right." So, in *Cadierque v. Duran*, 49 Cal. 356, the same learned Justice, speaking for the court, said: "Each must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of, and secure, his right to make the purchase." The rule applies to the answer as well as to the complaint. *Christman v. Brainard*, 51 Cal. 536; *Ramsey v. Flournoy*,

¹ This section provides that all mineral deposits in public lands shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, etc.

58 Cal. 260; *Dillon v. Saloude*, 68 Cal. 269, 9 Pac. Rep. 162; *Gilson v. Robinson*, 68 Cal. 543, 10 Pac. Rep. 193; *Garfield v. Wilson*, 74 Cal. 177, 178, 15 Pac. Rep. 620. And we think that it applies to actions to determine contests concerning the right to patents to mining land. Upon this theory, it was held in *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. Rep. 97, 8 Pac. Rep. 621, that the complaint in such an action must allege that the plaintiff was a citizen; and, as a matter of course, where the party claims under a location made by another, he must show that the location was properly made by a qualified person. The defendants' answer in this case fails to show any right in them to a patent to the tract in controversy. They claim under two locations,—one known as the "Green & Guy Claim," and the other known as the "A. K. Smith & Co. Claim." The answer does not mention either, and does not show that either Green or Guy, or any one from whom they may have purchased, or Smith, was a citizen of the United States. There is nothing definite averred concerning either of the locations, unless what appears at folio 41 be considered such. The requirement that a certain amount of work be done each year is imperative. *Morgan v. Tillotson*, 73 Cal. 520, 15 Pac. Rep. 88; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301; *Chambers v. Harrington*, 111 U. S. 353, 4 Sup. Ct. Rep. 428. But, beyond a general statement that a great deal of valuable work was done, nothing is averred. The evidence in relation to the claims is meager and unsatisfactory; but it is unnecessary to examine it in detail, because the matters above referred to are sufficient to dispose of the appeal. It is sufficient to say that, in our opinion, there are several particulars in which it clearly fails to make out a case of right in the defendants against the United States. In fact, hardly anything that was required is shown to have been done.

The defendants contend, however, that they were in possession of the ground for a sufficient time to entitle them to a patent without reference to any location; and they rely upon the following provisions of the Revised Statutes: "Sec. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state, * * * evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter." The appellants contend that the evidence does not show that the defendants or their predecessors were in possession of the property for the period prescribed by the above provision; and the respondents reply that possession is found, and that there is no specification attacking the finding. But we do not think that there is any finding of possession of the tract in controversy. The finding is that, for five years prior to 1877, Green and Guy had been in pos-

session and working a "hill claim of 1,080 feet in length on the channel under Tunnel ridge, between Chili gulch, on the west, and Old Woman's gulch, on the east," and that transfers of the possession were made through various persons to the defendants. Now, aside from any other objection, there is nothing to show that the "1,080 feet in length" was a part of the 7.44 acres in controversy. It is found that it was a part of the 36 acres surveyed for the defendants on their application for a patent. But that might well beso, and yet it not be a part of the smaller piece in controversy. There is nothing in the pleadings or the findings which throws light on this subject. If this piece of 1,080 feet be in fact a part of the tract in controversy, the record should make the fact appear. Similar observations apply to the A. K. Smith & Co. claim, of 600 feet.

But, if the possession were otherwise sufficient, the showing would still be defective, because it is not pleaded or found that the persons whose possession is relied on were citizens of the United States, or had declared their intention to become such. That class is the only one that can acquire mineral land from the government. *Rev. St. U. S. § 2319*; *Lee Doon v. Tesh*, supra. The section above quoted provides an additional mode of acquisition, but does not enlarge the class who can acquire. Upon the record before us, we think that none of the parties showed a right to a patent for the tract in controversy; and we therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial, with leave to the parties to amend their pleadings, if so advised.

(83 Cal. 380)

PEOPLE v. BOLING. (No. 20,582.)

(Supreme Court of California. March 3, 1890.)

HOMICIDE—CHALLENGE OF JUROR—INSTRUCTIONS
—HARMLESS ERROR.

1. Pen. Code Cal. § 1170, giving defendant, on trial of an indictment, the right to take exception to a decision of the court in disallowing a challenge to a juror for implied bias, or in admitting or rejecting testimony on the trial of a challenge for actual bias, etc., does not authorize an exception to a decision disallowing a challenge for actual bias.

2. On a trial for murder, resulting in a conviction of manslaughter, an erroneous instruction as to malice, not having been prejudicial, is no ground for reversal.

3. On such trial an instruction that, "when the act is proved to have been done by defendant, if it be an act itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this presumption," does not require defendant to overcome such presumption by a preponderance of the evidence, and is not erroneous; *Pen. Code Cal. § 1105*, though not requiring a preponderance of evidence, does require de-

fendant to prove circumstances in justification of the homicide.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Pen. Code Cal. § 1170, referred to in the opinion, provides that, "on the trial of an indictment or information, exceptions may be taken by the defendant to a decision of the court (1) in disallowing a challenge to the panel of the jury, or to an individual juror, for implied bias; (2) in admitting or rejecting testimony on the trial of a challenge to a juror for actual bias; (3) in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging or instructing the jury upon the law on the trial of the issue."

Ernest Graves and Wm. Graves, for appellant. *Geo. A. Johnson*, Atty. Gen., for the people.

FOOTE, C. The defendant was convicted of the crime of manslaughter, under an information charging him with murder. From the judgment and an order denying a new trial he appeals. His first point is that the court erred in not allowing his challenges as to three persons, sworn to answer questions as jurors, on the ground of actual bias. There was no exception taken to the decision of the court in the admission or rejection of testimony upon the trial of the challenges. It has been often held by the appellate court that no exception can be taken to a decision disallowing a challenge to a juror for actual bias; that section 1170 of the Penal Code does not authorize it. *People v. Riley*, 65 Cal. 108, 3 Pac. Rep. 413, and cases there cited.

It is also urged that the court erred in giving, of its own motion, a part of instruction 8, which is: "When the act is proved to have been done by the defendant, if it be an act itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption." And also in giving in the same way this part of instruction 9: "Malice is implied by law from any deliberate, cruel act, committed by one person against another, however sudden; as when a man kills another suddenly, without any considerable provocation, the law implies malice, and, unless overcome by preponderating proof the other way, it must be held murder. If malice be proved to the satisfaction of the jury, beyond all reasonable doubt, to have existed a short time before the crime was committed, if any there was, it will be presumed to have continued down to the actual commission, unless modifying circumstances are shown to have taken place, or the defendant is in some other way proved to have acted under fresh controlling motives." As to the last-mentioned instruction, it may be said that, even conceding it to have been erroneous under the rule laid down in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, we do not per-

ceive that the defendant suffered any injury. He was not convicted of murder, where the ingredient of malice is necessary to be proven, but was convicted of manslaughter. The instruction could not have prejudiced him, as he was acquitted of malice in the killing. *People v. O'Neal*, 67 Cal. 379, 7 Pac. Rep. 790, and case cited.

The first-mentioned instruction, it is urged, shifts the burden of proving that the killing was justifiable on the defendant, after it is proved that the killing charged was done by him, which is in itself unlawful. The instruction does undoubtedly require that the defendant shall remove by some kind of evidence in the case (whether appearing in his own or the people's evidence, is not important) the presumption which arises from his having killed the deceased, and to that extent the law does shift the burden of proof on him; but the instruction does not declare that it shall be incumbent on him to remove the presumption by a preponderance of evidence, which was the vice found in the instruction declared erroneous in the *Bushton* case, *supra*. As was said in that case, page 164: "The section [1105, Pen. Code,] casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged."

An unlawful act is presumed to have been done with unlawful intent. Subdivision 2, § 1963, Code Civil Proc. But such intent may be controverted by other evidence, and in a case of this sort, as we have seen, the intent may be rebutted by any evidence which may raise in the minds of the jury a reasonable doubt of its existence, but such rebuttal it is incumbent on the defendant to make somewhere in the evidence. The jury were directed in instruction 5, given on the part of the court, that they could not convict the defendant of manslaughter unless they were convinced beyond a reasonable doubt that the deceased was killed, that the killing was unlawful, and that it was done by the defendant. The instruction complained of did not conflict with this fifth instruction, but simply stated in addition that, the killing by the defendant once proved, there must appear from the evidence something to rebut the presumption that it was unlawful, and still left the fifth instruction unimpaired as to the requirement that all the concomitants of manslaughter must be proved beyond a reasonable doubt. In fact, in various other portions of the instructions, the necessity that the defendant should not be found guilty under

the information, unless the jury were satisfied from the evidence beyond all reasonable doubt that all the elements necessary to constitute his guilt of such crime existed, was fully and forcibly expressed. As to the point that the evidence shows without conflict that the defendant acted in self-defense, and was innocent of all crime, and was improperly convicted, it is simply to be said that such a state of facts does not so clearly appear as to warrant us in declaring that the jury convicted the defendant against all the evidence. What was said, what appearance the witnesses presented, and how they impressed the jury by their acts and language, the jury were in a better position to appreciate than an appellate court can be, and we do not think their verdict on that account should be disturbed. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hiram D. Tuttle, John Reynolds, and C. D. Wright, for appellant. *J. B. Lamar*, for respondent.

FOOTE, C. This action was instituted for the purpose of condemning a right of way for a railroad through the lands of John Mayne, the defendant and appellant. The cause was tried with the intervention of a jury, to whom were referred special issues of fact for determination. Upon the verdict of the jury on the special issues—adopted by the court—judgment was entered, and a final order of condemnation made by the trial court. The amount of money awarded by the jury as compensation for the land taken, and also that awarded for damages to the land not taken, was paid into court by the plaintiff, and accepted by the defendant upon the following terms: "And I hereby abandon all defense to this action, except as to the amount of damages that I may be entitled to in the event that a new trial shall be granted herein;" signed by the defendant and his attorneys of record. This last proceeding is in accordance with the provisions of section 1254 of the Code of Civil Procedure. A motion for a new trial was made and denied. From the order made in the premises and the judgment the defendant appeals. He claims that the court erred in deciding that the defendant was not entitled to prove the value of the land proposed to be taken at the date of the summons issued in the case. From the transcript it appears that John Ryan, a witness for the plaintiff, was asked what would be a fair price for the defendant's land, taking it all together. He was allowed to answer over the defendant's objection, one of the grounds of which was that the question related to the present value of the land, and not to its value at the date of the summons. The court overruled the objection, on the ground, as stated, that the present value of the land, and not the value at the date of the summons, must be ascertained; to which ruling the defendant excepted. Again, the defendant proposed to prove, by competent evidence, "what the value of the land proposed to be condemned was at the date of the summons in this case, to which plaintiff objected, on the ground that the present value, and not the value at the date of the summons, must be taken in determining the value by the jury." The court sustained the objection, and the defendant duly excepted.

It appears, therefore, that the question decided was, at what specific time, for the purpose of assessing compensation and damages, the right thereto shall have accrued, and at what date its actual value shall be proven as a measure of compensation? This contention seems to be settled by section 1249 of the Code of Civil Procedure, which declares that the right to the assessment of compensation and damages accrues at the date of the summons, and that the actual value at that date shall be the measure of compensation and damages. This statute was held to be

83 Cal. 566

SAN JOSE & A. R. CO. v. MAYNE. (No. 12,059.)

(*Supreme Court of California.* April 21, 1890.)

EMINENT DOMAIN—DAMAGES—EVIDENCE.

1. In condemnation proceedings it is error, under Code Civil Proc. Cal. § 1249, making the value of the land at the date of the summons the measure of damages, to permit a witness to answer as to the present value.

2. The admission of evidence as to the benefits to defendant by the location of a railroad on his land, and an instruction thereon, though error, is not prejudicial, where the jury finds that there are no benefits.

3. Written statements describing property for the purpose of assessment for taxation, (Pol. Code Cal. §§ 3629-3633,) signed by the owner, but in which the value is fixed by the assessor's clerk, are inadmissible on the question of value in condemnation proceedings.

4. A land-owner cannot recover the value of his counsel fees as part of his compensation.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

constitutional in *Railroad Co. v. Kimball*, 61 Cal. 91. In *Tehama Co. v. Bryan*, 68 Cal. 57-65, 8 Pac. Rep. 673, a similar decision was rendered, and the principle determined that the true measure of damages is to be that fixed by the statute, *supra*. The ruling of the court below, being in opposition to the plain terms of the law above referred to, was erroneous.

It is also urged that the witness Spencer was unlawfully permitted by the court to give evidence in favor of the plaintiff as to "benefits" which might result to the defendant by reason of the location of the railroad on his premises. In this connection it is proper, also, to notice the objection which is made to the fourth instruction given by the court, which is: "The jury must find separately how much the portion of defendant's said land not sought to be condemned in this action will be benefited, if at all, by the building of the railroad proposed by plaintiff." It was said by the appellate court in *Railway Co. v. Porter*, 74 Cal. 262, 15 Pac. Rep. 774: "(1) It is argued for the appellant that evidence should have been admitted of the benefits accruing to the remaining land, and that such benefits should have been deducted from the amount of damage assessed. But the constitution expressly provides that 'no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation.' Article 1, § 14. (2) Under this provision, the benefits supposed to result to the remainder of the land cannot be considered. An exception to this rule is provided when the corporation for whose use property is taken is a 'municipal corporation.' The cases of *Butte Co. v. Boydston*, 64 Cal. 110, and *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673, fall within this exception; for, as is well said by respondent's counsel, the word 'municipal,' as used in the provision, refers to such corporations as are for public government, and therefore includes counties. Unless the cases mentioned proceed upon this ground, we do not see how they can be sustained." But while it is clear that the evidence admitted was improper, as also the instruction, it appears that the jury, in answer to the question of "benefits" submitted to them, declared there were none accruing to the defendant, so that the error worked no prejudice to him, and the matter is only discussed here in view of the retrial of the cause.

The court allowed the plaintiff, against the objection of the defendant, (that the same were incompetent and irrelevant,) to introduce in evidence certain statements signed by the defendant for the years 1884, '85, '86. The assessor who had them in charge, as a witness on the trial, stated: "The deputy who made the assessment fixed the values, and returned the statements with the values

as fixed by him, and, if the values fixed by him were not satisfactory, they were changed at the office; and that was the general custom in his office, but he could not remember what was done with reference to these particular statements." The statements were evidently those required under sections 3629-3633 of the Political Code. Nowhere in them, or in any other sections of that Code which have been called to our attention, is there any provision which requires the person whose property is to be assessed to fix the value thereof. The record here shows that such fixing of value, if made, was by the assessor, and not by the defendant. We cannot, therefore, perceive what relevancy the statements had to the question of value of the land to be taken. They were not in any way declarations by the defendant as to the value of his land, and, even if they have the same force and effect as an assessment roll made by the proper officer, they are inadmissible. "The assessment of property for taxation being made for another purpose, and not at the instance of either party, and not usually at the market value of the property, is not admissible as evidence of value in condemnation proceedings." *Lewis, Em. Dom.* § 448; *Railway Co. v. Eddy*, 42 Ark. 527; *Brown v. Railroad Co.*, 5 Gray, 35.

The contention of the defendant that he was entitled to put in evidence the value of counsel fees, and to recover for the same as part of his compensation or damage, is untenable. There is no statute in this state which establishes any such rule.

Neither was he entitled to have included in the judgment the sum of \$40 allowed by the jury for "cross-fences, fruit-trees, and inconvenience of the curve," and appended to their answer to the fourth special issue. The jury had determined the special issue by their verdict, "No damage on the east side to lands," and the allowance made after that was not in response to the issue tendered, or in accordance with the finding first quoted, and the court acted properly in not including it in the judgment.

No further prejudicial error is shown, but for the reasons heretofore stated we advise that the judgment and order be reversed.

We concur: BELCHER, C.C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

83 Cal. 433

STEPHENS v. SOULE *et al.* (No. 13,313.)
(*Supreme Court of California.* March 12, 1890.)

SPECIFIC PERFORMANCE—PLEADING.

A demurrer is properly sustained to a bill for specific performance which alleges that defendant authorized a firm of brokers to sell his land at \$45 net per acre if sold without the growing crops, and for \$47.50 net if sold with the growing crops, and further alleges that the brokers sold to plaintiff for a lump sum, without showing the number of acres, or whether it was sold with or without the growing crops.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

J. C. Ball and Craig, Harding & Hawkins, for appellant. *Charles W. Thomas and G. P. Hurst*, for respondent.

HAYNE, C. This was a suit for specific performance. The trial court gave judgment for the defendants upon demurrer to the sixth amended complaint, and the plaintiff appeals.

Instead of alleging the ultimate fact that the contract relied upon was made by the owner, the complaint alleges secondary facts tending to show it. It is alleged that the property was the community property of the defendants W. H. Soule and Mary Soule; that W. H. Soule gave written authority to a certain firm of real-estate brokers to sell it for the "net price of not less than \$45 per acre if sold without the crop then growing thereon, and at a net price of not less than \$47.50 per acre if sold with the crops then growing thereon;" that said brokers had authority to agree upon the other conditions of sale, "subject to the limitations above stated." The agents being limited as to price, it is plain that, in order to show that the contract made by them was within their authority, the complaint must show that the sale was for not less than the required price. *Holbrook v. McCarthy*, 61 Cal. 216. But the complaint did not show this. The allegation is that the agents "bargained and sold the said land, and the whole thereof, to this plaintiff for the sum of \$29,100." This does not show that the contract was within the agents' authority. What was the price per acre? Was such price, whatever it was, the "net" price? Was the land sold with or without the growing crops? We have tried to figure out what was the price per acre by comparing the lump sum above mentioned with the number of acres. It is doubtful, however, what the number of acres was. The complaint first gives the general boundaries of a tract owned by W. H. Soule, "containing about 600 acres of land," and then proceeds to give a specific description of this tract by courses and distances. Then follows a specific description of "that certain other parcel of land adjoining the above," "containing 234 acres, more or less." It is a matter of some uncertainty whether this piece of 234 acres, "more or less," is a part of the piece of "about" 600 acres first described. Assuming, however, that it is, and that this was what was sold to the plaintiff, we might, perhaps, arrive at the fact that the price per acre was \$47.50. Was this with or without the growing crop? If it was without the crop, there would be a margin to cover the brokers' commission and other expenses of sale, though we are left to guess at the amount of these. But, if it was with the crops, there would be no such margin. We are therefore unable to ascertain from the complaint that the contract made by the brokers was within their authority.

Whatever the word "net" may mean, it was incumbent upon the pleader to show that the condition imposed by it was fulfilled.

There are other objections to the complaint, but it is unnecessary to consider them. We therefore advise that the judgment be affirmed.

We concur: **BELCHER, C. C.; FOOTE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed

(83 Cal. 445)

ROVEGNO v. HUNT, Judge. (No. 13,609.)

(*Supreme Court of California.* March 14, 1890.)

EQUITY—CONSENT DECREE—ASSISTANCE.

1. Where, under an interlocutory decree entered by consent, a referee is appointed to sell land, the sale is confirmed, and a deed executed, a writ of mandate will not issue directing the judge of the superior court to fix the amount of a bond staying the execution of a writ of assistance in the purchaser's behalf.

2. An order directing the issuance of a writ of assistance, made before final judgment in the cause, is interlocutory, and not appealable.

In bank. On petition for a writ of mandate.

A. D. Splivalo, for petitioner. *T. M. Osmont*, for respondent.

PATERSON, J. This is an application for a writ of mandate commanding the respondent herein, Hon. John Hunt, judge of the superior court in and for the city and county of San Francisco, to forthwith proceed to fix the amount of a bond to be given by the petitioner herein in an action pending in said superior court entitled *Levins et al. v. Rovigno et al.*, sufficient to stay the execution of the writ of assistance issued in said action. Upon the petition filed an alternative writ was issued herein, returnable on the 13th day of January, 1890. On that day respondent filed an objection to the sufficiency of the petition, and at the same time set up certain matters, most of which, however, appear in the petition. The objection to the sufficiency of the petition is well taken.

1. The interlocutory decree mentioned in the petition was given, made, and entered by consent of all the parties to the action, including petitioner. No appeal therefrom was taken by any party to the action, and the time for appeal has expired. Under that decree, which was entered under a stipulation of all the parties, Cerf was appointed sole referee to make a sale of the premises, and report the same to the superior court. The sale was confirmed, and he was required to execute and deliver to the purchaser a deed of the premises, and to let the purchaser into possession thereof. The sale was confirmed on the 17th day of May, 1889, and the decree of confirmation required the referee to make, execute, and deliver to the purchaser his deed to the premises, and upon the delivery of the deed to put the purchaser, Ferroggiaro, into possession thereof. The purchaser received

his deed on May 24, 1889. No further proceedings were had in the case until December 3, 1889, when said superior court ordered a writ of assistance to issue to place said Ferruggiaro, the purchaser, in possession of the premises. On the 9th of December, 1889, the petitioner and his co-defendants in said action of *Levins v. Rovegno* appealed from said order granting a writ of assistance; and on the following day they applied to respondent for an order fixing the amount of a bond to be given on appeal sufficient to stay the execution of said writ. The interlocutory decree having been entered upon written stipulation of the parties, and in accordance with its terms, and no appeal therefrom having been taken, there is no merit in this application.

2. The order directing the issuance of a writ of assistance was not an order made after final judgment in the cause, and therefore is not appealable. The decree was interlocutory, and not final. Application denied.

We concur: BEATTY, C. J.; FOX, J.; MCFARLAND, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the denial of the application herein.

83 Cal. 432

ROMINE v. CRALLE *et al.* (No. 13,117.)

(*Supreme Court of California.* March 13, 1890.)

APPEAL—PRACTICE—SUPERSEDEAS.

Where, after notice to and a hearing of respondent, the supreme court permits the appellant to file a bond staying proceedings on a judgment pending an appeal from both judgment and an order denying a new trial, the dismissal of the appeal from the order does not justify the respondent in issuing execution on the judgment, though the proceedings on appellant's application for leave to file the stay-bond may not have been strictly regular, and though respondent may not have known of the making of the order permitting the bond to be filed.

In bank. On motion to punish for contempt, and to compel the repayment of money collected on an execution in violation of an order of the supreme court.

John F. Burris, (*Carroll Cook* and *R. M. Swain*, of counsel,) for appellants. *Laughlin & Thompson*, for respondent.

WORKS, J. Several appeals have been taken in this case by the defendant Hirschler, one of which is still pending, the others having been dismissed. *Romine v. Cralle*, 80 Cal. 626, 22 Pac. Rep. 296.

On the 25th day of April, 1889, the attorney for said Hirschler filed in this court a petition for leave to file a stay-bond, and for an order of stay, in which it was alleged, in substance, that a bond had been given in the court below, but that, for technical reasons, the judge of that court had declined to receive the justification of the sureties, or approve the bond. At the time this application was made there were at least two appeals pending,—one from the judgment, and one

from the order denying a new trial. It is also claimed by the respondent in this proceeding that there had been two appeals from the judgment, and that, because the first was undisposed of, the second one, which was the one relied upon by the appellant, and the one then being prosecuted by him, was void. The petition for leave to file a stay-bond did not designate in which appeal it was desired to file the same, but it was recited as a fact that an appeal from the order denying a new trial had been taken, and that the transcript was then ready to be filed. On the filing of this petition the following order was made: "On reading and filing the verified petition of John F. Burris herein, showing that a judgment had been heretofore entered in the above-entitled action in the superior court of the county of Sonoma, in favor of the above-named defendant, Ed. Hirschler; that said Hirschler had appealed therefrom to this court; that said judgment is a money judgment; that, in order to secure a stay of execution on said judgment, said Hirschler filed an undertaking under and in pursuance of the provisions of section 942 of the Code of Civil Procedure of this state, with sureties sufficient in fact to comply with said provisions; that, on exception being taken to their sufficiency as such sureties, said sureties attempted to justify before the county clerk of said county of Sonoma, and before the judge of said superior court; that for technical reasons the said undertaking has been rejected by the judge of said court; that in consequence thereof an execution has been, or is about to be, sued out on said judgment, and placed in the hands of the sheriff of the city and county of San Francisco, and thereupon by him extended against the appellant's property now being in said city and county; and praying for leave to file in this court a new undertaking on appeal, under section 942 of the Code of Civil Procedure, staying all proceedings on said judgment, as allowed by law, in the sum of \$3,743.02, with John F. Burris and Martin Sachs, both of said city and county, as sureties. Now, the premises considered, ordered that the above-named respondent show cause before the chief justice of this court, at his chambers, No. 121 Post street, in said city and county, on Tuesday, 2d day of May, 1889, at 10 o'clock A. M. of that day, or as soon after as the matter can be heard, why the said appellant should not be allowed to file said undertaking in this court, and why said sureties, or others in their places, should not be then and there permitted to justify as to their sufficiency on said undertaking; and why, thereupon, an order of this court should not be made staying all proceedings on said judgment, and superseding any execution already issued on said judgment, during the pendency of this appeal. Further ordered, that all proceedings on said judgment, and the extension of any execution or executions, if any, already issued on said judgment, be, and they are, in the mean time stayed. Also, that a copy of

this order be served on said respondent, or her attorneys, three days at least before said 2d day of May, 1889."

The respondent, by her attorney, W. R. Thompson, appeared at the time named in this order, and resisted the petition, contending that the appeals had not been properly taken; that no proper efforts had been made to justify the sureties in the court below; and that the appeals were taken for delay. These facts were set out in an affidavit made and filed by Mr. Thompson. The objections to the filing and approval of the bond were overruled, and the bond allowed to be filed. The sureties justified, and the following order was made by the court: "The defendant and appellant Ed. Hirschler, having been allowed, on application therefor, to file in this court a new undertaking on his appeal herein, with sureties, who have satisfactorily justified as to their sufficiency: Now ordered that all proceedings on the judgment herein be stayed till the determination of said appeal, and that the execution now in the hands of the sheriff of the city and county of San Francisco, issued upon said judgment, be, and the same is hereby superseded." The bond given was to stay proceedings under both the appeal from the judgment and from the order denying a new trial. This bond was never indorsed "Filed" by the clerk; but it was received and accepted by the court, placed with other papers in the case in the clerk's office, and acted upon by the court as shown by the above order. Subsequent to these proceedings a motion was made to dismiss the appeals. The motion to dismiss the appeal from the order denying a new trial was allowed, and the appeal dismissed, and the motion to dismiss the appeal from the judgment was denied; leaving but the latter appeal pending. Thereupon the attorney for respondent, above-named, applied to the clerk of this court for, and procured to be sent down, a *remittitur* upon the order dismissing the appeal from the order denying a new trial. He then caused an execution to issue from the court below on the judgment and enforced payment thereof, notwithstanding the giving of the stay-bond and the proceedings and order of this court, above recited. The attorneys for said Hirschler have filed in this court a petition for an order requiring the said Thompson to repay the money collected on said execution, and that he be punished for contempt for having caused the issuance and enforcement of said execution in violation of the order of this court staying proceedings. The said Thompson has filed his answer to said petition, in which he renews his claim, made in opposition to the stay of proceedings, that the appellant was not entitled to such stay, and attempts to show that the proceedings and order of this court only stayed proceedings on the appeal from the order denying a new trial, and did not affect his right to enforce the judgment after said appeal was dismissed; avers that he believed his client had the right to issue

execution notwithstanding the giving of the bond; that the bond was never in fact filed; that he acted in good faith, and did not intend to violate any order made by this court. He further alleges that he was present at the application to be allowed to justify the sureties in this court, but says that he "denies that he at that time, or at any time subsequent thereto, until the commencement of this proceeding, knew, or suspected, or had reason to suspect, that any such order of this court in that behalf was made, and that no copy of the order was ever served on him." He also denies that he knew that execution on the judgment was stayed.

We think none of these allegations can avail the respondent. We cannot, in this proceeding, stop to inquire whether the steps taken in this court which resulted in the order staying the execution were strictly regular or not. Nor can the respondent be allowed to question their regularity in justification of his conduct in causing the enforcement of the judgment. It is enough to say that this court had jurisdiction to make the order, and that it was made. Having been made, it should have been respected and obeyed until set aside. Nor can the respondent excuse himself by showing that he had no notice of the making of the order. He had notice of the application therefor, and was present, and resisted it. No further notice to him or his client was necessary. Considering the respondent's good standing in the profession and his claim that he acted in good faith in this matter, we are not inclined to inflict any penalty upon him in case the money wrongfully collected is repaid. But, conceding his good faith, and that he believed he could avoid the effect of the order on technical grounds, his conduct cannot be excused or overlooked. The order of the court is that the said W. P. Thompson repay to the appellant, Hirschler, within 30 days, the amount collected on said judgment, with legal interest, from the date the same was collected, and that he furnish to this court satisfactory evidence that such payment has been made.

We concur: BEATTY, C. J.; FOX, J.; McFARLAND, J.; THORNTON, J.

3 Cal. Unrep. 250

KELLOGG v. COLGAN. (No. 12,895.)

(Supreme Court of California. March 25, 1890.)

APPEAL—EVIDENCE.

Where the evidence is conflicting, an order granting a new trial will not be disturbed on appeal.

Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

S. K. Dougherty, Albert G. Burnett, and R. F. Crawford, for appellant. E. S. Lippitt, for respondent.

SHARPSTEIN, J. This is an appeal from an order granting plaintiff a new trial in an action for the conversion, by the defendant,

of a mare alleged to belong to plaintiff. The answer of the defendant denies all the allegations of the complaint, and for a further defense alleges that the mare was taken by him as sheriff of Sonoma county upon an execution against one Merchant, in whose possession the mare then was. The verdict of the jury was in favor of the defendant. Plaintiff moved, upon a statement of the case, for a new trial, which was granted, and, as before stated, this appeal is from that order. We cannot disturb the order. The evidence is conflicting. Order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

(83 Cal. 450)

MAZKEWITZ v. PIMENTEL *et al.* (No. 12,792.)
(Supreme Court of California. March 18, 1890.)

APPEAL.—RECORD.—EXCEPTIONS.

1. When the transcript on appeal fails to show any exception by either party on the trial, an order granting a new trial for "errors of law occurring at the trial, and duly excepted to by the defendant," will be set aside.

2. A motion for a new trial on the grounds that the evidence is insufficient "to support the judgment," and that "the judgment is against law," is not equivalent to a motion for a new trial for the "insufficiency of the evidence to justify the verdict or other decision, or that it is against law," as specified in Code Civil Proc. Cal. § 657, subd. 6.

3. The supreme court cannot assume, in the face of a bill of exceptions containing a copy of the notice of intention to move for a new trial, that another notice was given, designating other causes of motion than those contained in the notice brought up by the bill.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Herrmann & Soto, for appellant. Alex. Campbell and O. F. Meldon, for respondents.

SHARPSTEIN, J. This is an appeal from an order granting a motion for a new trial. It appears, by a bill of exceptions on the order granting the new trial, that the grounds designated in the notice of intention as those upon which the motion would be made were: "(1) Insufficiency of the evidence to support the judgment; (2) the judgment is against law; (3) errors of law occurring at the trial, and duly excepted to by the defendants."

The last is the only one of the designated grounds above stated upon which the court could grant the motion. Neither of the other designated grounds are by the Code¹ made a cause for granting a new trial. We are unable to discover in the transcript that any error in law occurred at the trial to which defendants, or either of them, excepted. In fact, we do not find that anything that occurred at the trial was excepted to by either party. It was, therefore, error to grant the

¹Code Civil Proc. Cal. § 657 provides that a new trial may be granted for either of the following causes: "Subd. 6. Insufficiency of the evidence to justify the verdict or other decision, in that it is against law. Subd. 7. Error in law occurring at the trial, and excepted to by the party making the application."

motion for a new trial on this ground, and *a fortiori*, on either of the grounds designated in the notice of intention to move for a new trial. Sawyer v. Sargent, 65 Cal. 259, 3 Pac. Rep. 872; Martin v. Matfield, 49 Cal. 42; Quinn v. Smith, Id. 165; Kelly v. Mack, Id. 524; Coveny v. Hale, Id. 555; Little v. Jacks, 67 Cal. 165, 7 Pac. Rep. 449; Young v. Wright, 52 Cal. 407. In the face of these decisions, we cannot feel at liberty to hold that the first and second causes designated in this motion are equivalent to the sixth cause enumerated in the Code. Nor can we, with a bill of exceptions in the record which contains what purports to be a copy of the notice of intention given in this case, presume that there was another notice given which designated other causes than those designated in the notice brought here in such bill of exceptions. We are, therefore, constrained to reverse the order appealed from in this case. Order reversed.

We concur: THORNTON, J.; MCFARLAND, J.

(83 Cal. 559)

NORTON *et al.* v. STURLA. (No. 12,691.)
(Supreme Court of California. April 10, 1890.)

LANDLORD AND TENANT.—SALE.

Where a sale of the leased premises is made by a landlord to his tenant, and time is of the essence of the contract, the refusal of the tenant to make payment when due, and accept the deed, puts an end to the contract, at the option of the landlord, and he may bring his action for unlawful detainer.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

A. D. Splivalo and Chas. E. Nougues, for appellant. E. F. Preston, for respondent.

BEATTY, C. J. Action for unlawful holding over after rent due. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. There are two, and only two, material questions in this case: *First*. What was the character of defendant's holding of the demanded premises subsequent to June 21, 1887? Did she hold as vendee in possession under contract of sale, or as a lessee under a verbal lease? *Second*. What extension of time did plaintiffs give her to make payment of the agreed price of the premises,—one year from June 21, 1887, as she claims, or one month, as they claim? There is a substantial conflict in the testimony on both points, and the findings of the superior court, which are against the defendant, cannot be set aside. Time was expressly made of the essence of the contract of sale, and the time of payment expired June 21, 1887. We must accept the finding of the superior court that it was extended only until July 21st,—one month. When the deed was tendered August 15, 1887, and payment demanded, the defendant distinctly refused to pay before June 21, 1888, and she persisted in this attitude when the offer of the deed

was renewed on the trial; at least she did not at that time offer or agree to accept it and make payment. This refusal to perform upon her part put an end to the contract of sale at the option of the plaintiffs, and left them at liberty to pursue their remedy as landlords. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

84 Cal. 107

In re GRIFFITH'S ESTATE. (No. 13,528.)
(Supreme Court of California. March 31, 1890.)

ADMINISTRATOR—APPOINTMENT—REMOVAL.

1. An order granting letters of administration is an adjudication that all facts existed that were necessary to give the court jurisdiction of the decedent's estate, and that all steps had been taken that were necessary to the issuance of such letters.

2. Code Civil Proc. Cal. § 1373, provides that upon the filing of a petition for letters of administration the clerk must post notices thereof in certain public places 10 days before the hearing. *Held* that, on an application to remove an administrator, the plaintiff, in the absence of averments that such notices were not posted, will not be permitted to deny that he had notice of the application.

3. In a proceeding to remove an administrator, six affidavits that the deceased was not a resident of the county where the appointment was made were filed with the petition, but were not refuted with the amended petition. Four affidavits to the contrary were filed upon the amended petition, and the fact was found for the defendant. *Held*, that there is no ground for disturbing the finding.

4. The fact that an applicant for letters of administration "offered" to divide commissions with a relative of the deceased if the latter would allow him to procure the appointment, and that he knew deceased was not a resident of the county in which the application was made, and failed to so inform the court, is not sufficient to maintain an action to set aside the appointment on the ground of fraud.

5. Where the deceased had property in two counties, a valid appointment of an administrator in one rendered void a subsequent appointment in the other.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

Louitt, Woods & Levinsky, Hall & Earl, and Morrow & Stratton, for appellants.
Baldwin & Campbell, for respondent.

HAYNE, C. This was an application by James Stanley, public administrator of Alameda county, to the superior court of San Joaquin county, for the revocation of the appointment of John Gambetta, the public administrator of San Joaquin county, as administrator of the estate of Richard Griffith, deceased. The amended petition showed, substantially, the following facts: Richard Griffith died intestate in San Joaquin county, leaving estate therein and also in Alameda county, and being at the time of his death a resident of Alameda county. The petition of Gambetta for administration was filed in the superior court of San Joaquin county on June 24, 1889. Two days afterwards, Stanley filed his petition for administration in the superior court of Alameda county. The petition first filed came on to be heard first, and on July 6th the San Joaquin court appointed Gambetta administrator of the estate, and is-

sued letters to him. Two days afterwards the Alameda court appointed Stanley administrator, and issued letters to him. The two courts, apparently, were in ignorance of each other's proceedings; and Stanley "did not know, or receive any notice, or have any knowledge, of the said petition of John Gambetta, or of the hearing of the same, and only first heard of the same on the 9th day of July, 1889." The petition for revocation also alleges certain facts for the purpose of showing fraud on the part of Gambetta, which will be considered below. Gambetta filed a demurrer to the petition for revocation, and also certain affidavits. The court sustained the demurrer, and afterwards made an order denying the petition; and Stanley appeals.

The petition for revocation does not allege that the notice required by law was not given. It alleges, merely, that Stanley received no notice and had no knowledge of the proceeding. But the law does not require that he should receive notice, or that any should be sent to him. It requires, merely, that a certain notice should be posted. Code Civil Proc. § 1373. That was all the notice that was necessary; and, as the petition does not allege that it was not posted, it must be presumed that it was. Nor does the petition for revocation allege that Gambetta's petition for administration was in any way defective; and, therefore, it must be presumed that such petition for administration set forth all the facts necessary to give jurisdiction, among which was the fact of residence in San Joaquin county. And the order made upon such petition was an adjudication that such fact existed. And, while such residence was jurisdictional, it was one of those jurisdictional facts which the court must determine from evidence produced before it, and whose determination is valid until set aside in some proper manner, notwithstanding that it was mistaken in its view of the evidence, or that other evidence could have been produced which would have required a different determination. The judgment cannot be attacked collaterally. This precise point was decided in *Irwin v. Scriber*, 18 Cal. 500, (see, also, *Freem. Judgm.* § 608,) and seems clear upon principle.

The appointment of Gambetta being valid until set aside, it follows that the subsequent appointment of Stanley, upon a petition filed after Gambetta's was void; for there cannot be two valid administrations at the same time in this state. Compare *Estate of Hamilton*, 34 Cal. 468. And, in a case like this, the court which first gets jurisdiction by proper proceedings has the authority to act. The proceedings of the Alameda court, therefore, do not aid the petitioner. This is conceded by the counsel for the appellant. But, as they proceed to remark, he "is in no worse position by virtue of a void appointment than if the latter had never been made;" and the question arises whether the first appointment, which, as we have seen, is not void, can be set aside in this proceeding.

In this regard it is to be observed that there is no provision in the part of the Code relating to probate practice which authorizes the proceeding. There is a provision which authorizes certain specified persons to file a petition for the revocation of letters of administration granted to other persons. Code Civil Proc. § 1383. But the appellant is not one of the persons therein specified, and his counsel concede that the provision does not apply to the case. If, therefore, relief is to be had under any provision of statute, it must be by virtue of some general provision of the Code of Civil Procedure; and, as the proceeding is certainly not a motion for new trial, the only provision which can possibly apply is section 473 of the Code of Civil Procedure, which provides, among other things, for relief against judgments by default. We do not think it necessary to express an opinion as to whether that section applies or not. If it be assumed in favor of the appellant that it applies, and, further, that the petition here can be considered as a proceeding under it, we are not prepared to say that the order should be reversed upon the evidence. The petition first filed was accompanied by the affidavit of six persons, which stated, in a somewhat general way, that the deceased was a resident of Alameda county, and had his home and place of business there. These affidavits were not renewed with the amended petition. The counsel for the appellant expressly state that they "were not renewed with the amended petition," and it is impossible to say that they were considered as before the court upon the amended petition. The respondent, however, filed four affidavits upon the amended petition tending to show that the deceased was a resident of San Joaquin county. In this condition of affairs, even if it be assumed that the proceeding is an application for relief under section 473, it cannot be said that the decision of the court was wrong upon the evidence. In order to avoid this, the counsel for the appellant treat the petition as a pleading whose allegations are admitted by demurrer. They refer to the affidavits as "seemingly being filed to give moral support to the application" and say: "The affidavits never should have had a place in the case; and, both by reason of the action of the court, and upon principles of law, they must pass out of consideration. The demurrer, however, admits the facts as charged to be true, and it is upon this showing that the appellate court must pass."

Now, since there is no provision in the probate procedure authorizing the proceeding, the only theory upon which the allegations of the petition could be admitted by a demurrer is that the petition is, in effect, a complaint in a separate proceeding; and upon this theory the application could not be under section 473, for that section contemplates a motion in the cause in which the default was taken, and not a separate suit, with separate pleadings, and all the attendant machinery and delay. Upon the theory of counsel,

therefore, the petition is to be passed upon as if it were a complaint in a separate suit to set aside a judgment. Then, does the petition set forth facts upon which a suit to set aside a judgment could be maintained? We do not think that it does. It is entirely clear that a separate suit cannot be maintained by reason of mere errors of law or fact in a matter which was examined in the first suit. *Collins v. Butler*, 14 Cal. 226. The petition, however, attempts to show more than this. Aside from want of jurisdiction, which we have already considered, it seems to proceed upon the ground of fraud. But the only circumstances which can possibly be claimed to constitute fraud are two. In the first place, it is alleged that before Gambetta applied for letters he offered to divide his commissions with a nephew of the deceased, if such nephew "would allow said Gambetta to procure administration upon said estate in San Joaquin county." But, if it be assumed that such an arrangement, if carried into effect, would constitute fraud against the petitioner, it is not alleged that it was carried into effect, or that it was agreed to be. The petition is silent as to whether the proposal was accepted or rejected. In the second place, it is alleged that Gambetta knew that the deceased was not a resident of San Joaquin county, and knew that his name appeared on the Great Register of Alameda county, and did not disclose the same to the court. But the failure of a party to give evidence, known to him to exist, tending to overthrow his case, is not ground for a suit to set aside the judgment. *Allen v. Currey*, 41 Cal. 318. It is not a fraud which is extrinsic or collateral to the matter examined in the first suit. The rule in this regard was laid down in the important case of *U. S. v. Throckmorton*, 98 U. S. 61. There it was held that a suit could not be maintained to set aside a judgment confirming a Mexican grant, although it appeared that the conferee had procured the grant to be falsely and fraudulently antedated, and had supported it by perjured testimony suborned by himself; and *MILLER, J.*, delivering the opinion, said: "The acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered." The principle laid down in this case is in accordance with the weight of authority, and is required by far-reaching considerations of public policy. In the case before us, the question as to the residence of the deceased was alleged in the petition and passed upon by the court; and the decision in the *Throckmorton* case applies. It makes no difference that the petitioner did not know of the proceeding in the San Joaquin court. If the notice required by the statute was given, the judgments of probate courts bind everybody, whether they had actual knowl-

edge or not, except where it is otherwise expressly provided; and, as we have seen, it must be held, upon the allegations of the petition, that the notice required by the statute was given. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(83 Cal. 447)

BALLERINO v. MASON et al. (No. 13,239.)
(*Supreme Court of California*. March 14, 1890.)

ASSESSMENT FOR TAXES—VALUATION.

1. Pol. Code Cal. § 3627, provides that "all taxable property must be assessed at its full cash value," and defines this to be "the amount for which the property would be taken in payment of a just debt due from a solvent debtor." *Held* that, in a suit against an assessor for damages for excessive valuation of lands, an averment that their "actual value for agricultural purposes" never exceeded a certain lesser amount, states no cause of action, as it expresses a standard of valuation different from that of the statute.

2. The presumption is that official duty has been regularly performed; and, in a suit against an assessor for damages for breach of official duty, an averment that he "willfully and against law" overvalued certain property, does not charge that intent to injure the owner which is necessary to sustain the action.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Horace Bell and Horace Allen, for appellant. *Chapman & Hendrick, Allen & Miller*, and *Stephens & Eldridge*, for respondents.

BELCHER, C. C. This is an action to recover damages for alleged violation of official duty. The facts stated in the complaint are, in substance, as follows: The plaintiff, for 20 years, has been the actual occupant and sole owner of a tract of land in Los Angeles county containing 134 acres. During the time plaintiff has been such owner, the said tract of land "has never been of a higher actual value for agricultural purposes than from \$150 to \$250 per acre," and "said tract of land has never been of higher actual aggregate value for agricultural purposes than from \$20,100 to \$33,500." At the general election held in November, 1886, the defendant Mason was duly elected county assessor in and for Los Angeles county, and thereupon, as such officer, he took the oath and executed the bond required by law, and the other defendants became his sureties on the bond. For the fiscal year 1887, Mason, as such assessor, "did willfully, and against law, levy an assessment on the said tract of 134 acres of land, property of this plaintiff as aforesaid, at the unlawful and false valuation of \$96,200," which was \$62,700 above the actual and lawful valuation of said property; and the said Mason "did thereby extort from this plaintiff unlawfully the sum of \$940.50, by way of taxes, in violation of law, and to this

plaintiff's damage of the sum of \$940.50." Then follows a similar averment, that, for the fiscal year 1888, defendant Mason willfully, and against law, assessed the plaintiff's said tract of land "at the false and unlawful valuation of \$100,500, and that this valuation was \$67,000 above the actual and lawful value of the said tract of land, and that said defendant C. C. Mason, in his official capacity as such assessor, did thereby extort from this plaintiff the sum of \$804, by way of taxes, in violation of law, to this plaintiff's damage of \$804." The prayer is that plaintiff have "judgment upon the said official bond of the defendant C. C. Mason as assessor, and that plaintiff do have and recover of and from defendants thereupon the sum of \$1,744.50 damages, and plaintiff's cost of this action." A general demurrer to the complaint was interposed and sustained; and, plaintiff declining to amend, judgment was thereupon entered dismissing the action. From that judgment the appeal is prosecuted.

1. The Code provides that "all taxable property must be assessed at its full cash value," (Pol. Code, § 3627,) and it defines the meaning of "full cash value" to be "the amount at which the property would be taken in payment of a just debt due from a solvent debtor." *Id.* § 3617. The words "actual value for agricultural purposes" are not the equivalent of "full cash value." This is evident, for the reason that the value of property for the purposes named may be, and often is, less than its value for other purposes, and less than it would be taken for in payment of a just debt from a solvent debtor. The averment as to the value of plaintiff's property was, therefore, insufficient to sustain his contention.

2. The county assessor is a public officer, and the assessment complained of was made in the discharge of official duty. An assessor is required to exercise his best judgment in determining as to the value of property to be assessed, and the presumption is that official duty has been regularly performed. Code Civil Proc. § 1963, subd. 15. The averment that Mason "willfully, and against law," assessed plaintiff's property at too large a sum, does not imply that he acted maliciously, or with intent to wrong or injure the owner; and, in the absence of some averment to this effect, we must assume that he simply erred in his judgment. But for such an error the only remedy is by application to the board of equalization. *Gas Co. v. January*, 57 Cal. 614. The law applicable to the case as made, was, in our opinion, correctly stated in *Kendall v. Stokes*, 3 How. 98, by Chief Justice TANEX, as follows: "A public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even although an individual may suffer by his mistake." In our opinion, the demurrer was properly sustained, and the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

83 Cal. 490

FITZPATRICK v. FITCH *et al.* (No. 12,686.)
(*Supreme Court of California.* March 31, 1890.)

APPEAL—TRANSCRIPT.

The certificate of the clerk to the transcript is not a sufficient identification of papers therein as those on which the court below based its action, when it does not so appear by a bill of exceptions or certificate of the judge.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Geo. C. Ross, for appellant. *Mastick, Belcher & Mastick*, for respondent.

FOOTE, C. This is an appeal from an order changing the place of the trial of an action. The papers in the transcript upon which the action of the court below is alleged to have been based are not shown, either by bill of exceptions or certificate of the judge, to have been used on the hearing of the motion, which was granted. The certificate of the clerk appended to the transcript is in no sense such identification as is necessary. (Von Glahn v. Brennan, 81 Cal. 261-264, 22 Pac. Rep. 596; Walsh v. Hutchings, 60 Cal. 228, 229; Nash v. Harris, 57 Cal. 243, 244; Larkin v. Larkin, 76 Cal. 323, 324, 18 Pac. Rep. 396,) and the presumption is that the action of the court below was correct. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

83 Cal. 452

O'CONNOR v. ELLMAKER *et al.* (No. 12,322.)

(*Supreme Court of California.* March 19, 1890.)

JUDGMENT—DEFAULT—DISCRETION.

Plaintiff's attorney answered "Ready" on call of the calendar, but when the case was reached for trial both plaintiff and her attorney were absent, and it was continued to a later day. When then reached, both being again absent, judgment by default was entered. *Held* not an abuse of discretion to refuse to set aside the default on the ground that the attorney had mistaken the date of the number of a journal in which the calendar was published.

Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Frank O'Connor, (*Sullivan & Sullivan*, of counsel,) for appellant. *W. T. Baggett*, for respondents.

McFARLAND, J. This is an appeal from an order of the superior court denying a motion of plaintiff to vacate and set aside a judgment rendered in favor of defendants on the ground that said judgment was taken

against defendants through their mistake, inadvertence, surprise, and excusable neglect. It appears from the certificate of the judge of the superior court that the trial calendar of said court was regularly called on August 30, 1886; that the case at bar was on said calendar, and being regularly called, was answered "Ready;" that, by order of the court then made, five cases were set for each day; that the case at bar was regularly reached on September 16, 1886, and that, neither plaintiff nor her attorney being present, the trial was continued to September 20, 1886, and that on said last-named day, plaintiff and her attorney being again absent, the case was taken up and heard, and judgment rendered for defendants. The excuse set forth in the affidavit of appellant's attorney is that he did not think that the case would be reached so soon; that he was deceived by mistaking the date of a certain number of the San Francisco Law Journal, in which the calendars of the various courts of the city are published daily; and that he did not think that the case at bar would be heard on the said day when judgment was rendered. Under these circumstances, we cannot say that the court below abused its discretion in denying the motion. The facts are essentially different from those of *Dodge v. Ridenour*, (62 Cal. 263,) and the other cases cited by appellant. Order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

83 Cal. 457

COTTRELL v. COTTRELL. (No. 12,310.)

(*Supreme Court of California.* March 21, 1890.)

DIVORCE—VACATION OF JUDGMENT—ABSENCE OF DEFENDANT.

1. Where, after issue has been joined in a divorce suit, the cause is removed from one department of the superior court of San Francisco to another, without notice to defendant, a judgment therein rendered against him on the same day, and in his absence, should be set aside on his motion.

2. It is not necessary, in setting aside a judgment obtained by default in divorce proceedings, to impose costs on defendant as a condition of relief.

3. Nor need the motion be supported by an affidavit of merits. Following *McBlane v. McBlane*, 20 Pac. Rep. 61.

4. No affidavits are required in such case.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLOR, Judge.

Robt. Ash and Ash & Mathews, for appellant. *Taylor & Craig*, for respondent.

McFARLAND, J. This is an appeal by plaintiff from an order setting aside a judgment in her favor. The action was for divorce, and the defendant had filed a verified answer denying all the averments of the complaint. On May 24, 1887, the presiding judge of the superior court of San Francisco made an order transferring the case from department No. 1 of said court, in which it was pending, to department No. 8 of said court. On the same day the case was taken

up for trial in department 8, in the absence of defendant or his counsel, and judgment was on said day entered for plaintiff. Notice of the judgment was immediately served on defendant's counsel, who on the same day (May 24, 1887) gave notice to plaintiff's counsel of a motion for an order to set aside the proceedings "on the ground that the transfer of said cause from department No. 1 to department No. 8 was made without notice to or the consent of said defendant, and all proceedings had in said department No. 8 were without notice or knowledge of defendant or his counsel." On the day set for the hearing the order was granted, and from this order plaintiff appeals.

Matters such as that involved here are largely in the discretion of the trial court, and we see in this case no abuse of discretion. While the various departments of the superior court of San Francisco constitute, theoretically, one court, still, practically, for the purpose of trial of causes, they are distinct as are other superior courts; and to transfer a case from one department to another, and try it on the same day, without any notice whatever to the opposite party, is a very abrupt proceeding, from which, in a divorce case at least, it is not improper to relieve the absent party.

The order was not erroneous because no costs were imposed on the moving party. The cases cited by appellant on that point were made when section 473 of the Code of Civil Procedure and section 68 of the former practice act expressly required the payment of costs as a condition of the relief. There is no such requirement now.

No affidavit of merits is required on a motion of this character in a divorce suit. *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. Rep. 61.

The order was not erroneous because "no affidavits were made or used." As above stated, no affidavit of merits was necessary; and there is no statutory provision requiring that proof of any other fact shall be made by affidavit, nor is there any decision of this court to that effect. The bill of exceptions states that "it was then and there shown that on the 24th day of May, 1889, there were on the trial calendar of that day, in department No. 1 of this court, twenty-five cases ahead of this cause; that on that day this cause was reassigned to department 8 of this court, and then brought to trial by plaintiff without notice to defendant or his counsel, and in the absence of defendant and his counsel." This, as before said, is an action for divorce; and the following language of Mr. Justice PATERSON in delivering the opinion of the court in *McBlain v. McBlain*, supra, may well be restated here: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce. The policy and the letter of the law concur in guarding against collusion and fraud, and it should be the aim of the court to afford the fullest pos-

sible hearing in such matters." The order appealed from is affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

(83 Cal. 468)

CHASE *et al.* v. SOUTH PAC. COAST R. CO.
(No. 12,319.)

(Supreme Court of California. March 25, 1890.)

VENUE—SUIT AGAINST CORPORATIONS.

1. Under Const. Cal. art. 12, § 16, providing that a corporation may be sued in the county where the obligation or liability arises, or where its principal place of business is situated, a railroad company may be sued for damages for its wrongful refusal to receive and transport plaintiffs' lumber, in the county where there was a tender and refusal, though the complaint alleges that such refusal was due to a conspiracy, not shown to have been entered into in the county, between the company and other lumber dealers, who do not reside in the county, and are not made parties defendant to the suit. The action, in such case, is for damages for the wrongful refusal, and not for the conspiracy.

2. Where the court in which an action is brought has jurisdiction of the subject-matter, the burden is on defendant to show that the cause of action did not arise within its jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Pillsbury & Blanding, for appellant. D. M. Delmas, for respondent.

GIBSON, C. This is an appeal from an order of the superior court of the county of Santa Cruz denying the defendant corporation's motion for a change of venue to the city and county of San Francisco. The grounds of the defendant's motion are that the obligation or liability sued upon did not arise in the county of Santa Cruz, and that the defendant's principal place of business is in the city and county of San Francisco. Article 12, § 16, of the constitution of this state, declares: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The appellant contends that the action is upon a tort arising from a conspiracy between it and certain lumber dealers, which prevented plaintiffs from carrying on their business, and could only be properly brought in the county where the liability arose, or where the defendant's principal place of business is situated; and, as the complaint does not show where the conspiracy was formed, and the defendant, by the affidavit of its president, having shown that none of the defendant's alleged co-conspirators reside, or ever have resided, in the county of Santa Cruz, and that defendant's principal place of business is at the city and county of San Francisco, the court erred in denying its motion for a change of venue to the city and county where it has its principal place of business.

Counsel for respondent concedes that the principal place of business of the defendant is correctly set forth in the affidavit, but argues that the cause of action is misconstrued by counsel for appellant; that it is for damages resulting from defendant's wrongful refusal to receive and transport plaintiff's lumber upon and over its railroad; and that as defendant's affidavit does not show that such refusal was not made in the county where the action was brought, the motion was properly denied.

The question arising on this contention is, what is the cause of action? The allegations of the complaint are, in substance, as follows: That plaintiffs, who were and are partners under the firm name of S. H. Chase & Co., on July 7, 1886, and for more than a year prior thereto, have since been, and still are, the lessees of certain timber lands and the owners of certain saw-mills, known as the "Day Mills," located in the Santa Cruz mountains, and were engaged in the business of manufacturing sawed lumber at said mills, and selling the same along the line of the defendant's railroad; that the said railroad, at all times mentioned and referred to, extended from the Santa Cruz mountains to San José, and was owned and operated by the defendant, which was during all said times a railroad corporation organized and existing under the laws of this state, and was a common carrier of goods for hire to and from any point on its railroad; that, in order for plaintiffs to carry on their business profitably, it was indispensable for them to transport their manufactured lumber to market upon defendant's railroad, and from the beginning of the lumber season of the year 1886, to-wit, May 1st, until the 7th of July of the same year, they shipped their manufactured lumber upon the said railroad, and defendant had carried the same for them to all points along the line designated by them; that on or about July 1, 1886, defendant entered into an illegal combination and conspiracy with certain manufacturers and venders of lumber for the purpose of inflating the prices of lumber upon the market, and to give the parties to the conspiracy a monopoly of the lumber trade; and it was agreed by and between the conspirators, including the defendant, that unless the plaintiffs should enter into the conspiracy the defendant should refuse to carry any of their lumber; that on the 7th day of July, 1886, after the formation of the conspiracy against plaintiffs, they brought a load of lumber containing 2,000 feet to the station on the line of said railroad known as "Boulder Creek Station," and which is the nearest station to their saw-mills, and during the day-time of said day, while the office of the defendant at the station was open for the transaction of business, the plaintiffs offered the lumber to defendant for the purpose of having the same carried thence to San José, upon the line of the said railroad, and made a demand of defendant that it should so carry the same, and the

plaintiffs at the same time offered to pay, and were ready and able to pay, to the defendant, the customary and reasonable charges for such transportation; although the defendant was then able to carry the lumber, and then and there had the necessary engines, cars, and other appliances for such purpose, it refused to carry the lumber on account of the conspiracy aforesaid, and then and there declared to plaintiffs that it would not carry the lumber unless the plaintiffs joined and became members of the conspiracy aforesaid, which they then and ever since have refused to do, and the defendant has ever since refused to carry any lumber for plaintiffs; that, by reason of the aforesaid refusal of said defendant to carry said lumber, and its expressed determination not to carry any for the plaintiffs, it became and was, and has continued to be, impossible for them to profitably carry on their business of manufacturing lumber at their mills, and, as a result of their business being thus rendered unprofitable, and of their inability to ship lumber on defendant's railroad, they have been compelled to shut down their mills, discharge the men whom they had employed in connection therewith, and to forfeit contracts which they had entered into for the sale of lumber, and also the good-will of their business, whereby they suffered general and special damages.

These allegations, we think, clearly show that the gist of the action is the injury resulting from the defendant's wrongful refusal to carry plaintiffs' lumber to market, because by such refusal plaintiffs were unable to sell their lumber, and consequently could not profitably operate their mills. It is to be observed, also, that the action is not prosecuted against any of the alleged conspirators, except the defendant, who committed the wrong by which plaintiffs claim to have been injured. The conspiracy, it is true, led up to the refusal which caused the injury; but it is merely stated, as introductory matter, to show how the refusal originated, and therefore consists of mere matter of inducement. Gould, Pl. § 9, c. 3; 1 Chit. Pl. 296. And the employment of it in this case seems to be peculiarly appropriate as showing that the refusal of defendant to carry plaintiffs' lumber to market was not an unexplained act, but one performed in the furtherance of an illegal combination, of which the plaintiffs became the victims because they refused to join it.

The only venue laid in the complaint is in the title thereof; there is nothing in the body of it to show within what county the defendant refused to perform its duty as a common carrier towards plaintiffs; but, as the court has jurisdiction of the subject-matter of this action, (Const. Cal. art. 6, § 5; Code Civil Proc. § 76,) and as an action upon the breach of such an obligation may be brought in the county where the breach occurred as well as in the county where the defendant has its principal place of business, (article 12, § 16,

Const., supra,) the action was presumptively brought in the proper county, and it devolved upon the defendant to show, upon its motion, that the breach of its obligation as a common carrier declared upon by plaintiffs did not occur in Santa Cruz county. Having failed to do this, the motion was properly denied; and we therefore advise that the order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in foregoing opinion the order is affirmed.

(83 Cal. 473)

CASE V. SUN INS. CO. (No. 12,598.)

(Supreme Court of California. March 26, 1890.)

INSURANCE—CONDITIONS OF POLICY—LIMITATION OF ACTION.

Where a policy of insurance against fire provides that the loss shall not be payable until 60 days after the assured shall have completed all requirements of the policy, and also that suit must be brought thereon within 12 months after loss, the 12-months limitation does not begin to run until the expiration of the 60 days.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Rhodes & Barstow, for appellant. *Haggin, Van Ness & Dibble*, for respondent.

SHARPSTEIN, J. The policy upon which this action is based contains, among others, the following clause: "It is mutually agreed that no suit or action for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until appraisal shall be had, if demanded by this company, and in accordance with the printed conditions of this policy, nor unless such suit or action shall be commenced within twelve months next after the fire shall occur." The fire is alleged to have occurred on the 12th day of September, 1884; and this action was commenced on the 22d day of November, 1885, more than 12 months next after the fire occurred.

The contention of appellant is that at the time of the commencement of the action it was barred by the terms of said stipulation. That contention must prevail unless the clause upon which it is based is modified by some other clause or clauses of the policy. One clause reads as follows: "The amount of loss or damage to be estimated according to the actual, cash, marketable value of the property at the time of the loss, which in no case shall exceed what it would then cost to replace the same, deducting therefrom a suitable amount for any depreciation of such property by reason of age, wear and tear, location, change of style, lack of adaptation to profitable use, or other causes. The adjusted claim under this policy shall be due and payable at the company's office in San Francisco, Cal., sixty days after the full completion by the assured of all the requirements herein contained." Among the requirements therein

contained were the following: "The assured, his, her, and their agents and servants, shall, whenever required, submit to an examination or examinations, under oath, by any person appointed by this company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of this company in San Francisco as often as required, and permit extracts and copies thereof to be made. The assured also shall produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the said property, damaged or not damaged, for examination, to any person or persons named by this company, and shall also furnish such further particulars, and such certificates of a magistrate or officer charged with the duty of investigating fires, as may be required. The proofs of loss shall be made by the party insured in regular form." It is alleged and proven that appellant exacted a compliance by the assured with all of these requirements, and that the insured complied therewith as rapidly as he was able to, and that he was unable to fully comply therewith before the 16th day of October, 1885,—more than 13 months after the fire occurred, and more than 1 month after the expiration of the time within which an action could be commenced, according to the construction which the appellant's counsel insist should be given to the policy. The adjusted claim under the policy was payable 60 days after the full completion by the assured of all the requirements contained in the policy. No right of action accrued until more than 3 months after it was barred by the 12-months limitation clause, unless that clause is modified by some other clause.

In *Spare v. Insurance Co.*, 9 Sawy. 142, 17 Fed. Rep. 568, the court, DEADY, J., said: "On the authority of adjudged cases (*Davidson v. Insurance Co.*, 4 Sawy. 594; *Riddiesbarger v. Insurance Co.*, 7 Wall. 389; *May, Ins.* § 478) it is admitted by counsel for the plaintiff that this clause in the policy limiting the time within which a suit may be commenced thereon against the defendant is valid, but they contend that it must be read in connection with that other clause which provides that a loss does not become payable until 60 days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that, the right to sue on the policy being postponed until the loss is payable, namely, sixty days after proof thereof, the twelve-months limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and, in my judgment, is correct on principle." *Mayor, etc., v. Insurance Co.*, 39 N. Y. 45; *Hay v. Insurance Co.*, 77 N. Y. 241; *Barber v. Insurance Co.*, 16 W. Va. 658; *Chandler v. Insurance Co.*, 21 Minn. 85; *Steen v. Insurance Co.*, 89 N. Y. 315; *Killips v. Insurance Co.*, 28 Wis. 472; *May, Ins.* § 479. "In

Steen v. Insurance Co., *supra*, 323, the policy contained two similar conditions; and the court, in construing them, said: 'We think the intention of the defendant was to give the insured a full period of 12 months, within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in a condition to bring an action. Under any other construction the two conditions are inconsistent with each other.'" This case is distinguishable from *Garido v. Insurance Co.*, 8 Pac. Rep. 512, in which the plaintiff had ample time after his right of action accrued to have commenced it within 12 months after the loss occurred. In this case it was more than 12 months after the fire before an action could be commenced. We must concede, however, that *Garido v. Insurance Co.*, *supra*, is not altogether in harmony with the cases which we follow in this case. Under the construction which we give to the policy, we think the complaint states a cause of action not barred by the provisions of the policy; and the evidence is sufficient to justify the verdict of the jury. Judgment and order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

Hearing in bank denied.

83 Cal. 553

TROPE v. KERNS. (No. 11,186.)

(Supreme Court of California. April 5, 1890.)

MORTGAGE—FORECLOSURE—ATTORNEYS.

1. A mortgagee who purchases the mortgaged premises at foreclosure sale is not restricted in gaining possession of the premises to a writ of assistance, but may bring ejectment.

2. Plaintiff and defendant stipulated as to what the judgment in a foreclosure suit should be. Afterwards plaintiff's attorney, in the absence of plaintiff and without his knowledge or consent, changed the stipulation by agreement with defendant and his attorney so as to make the judgment include less land than it originally included. The decree, by inadvertence, was drawn according to the original stipulation. *Held*, that the judgment would not be disturbed, as the power to make such a change was not within the implied authority of an attorney.¹

3. Where a mortgage purports to convey the whole of a lot in fee, but the mortgagor has made a prior conveyance of a part of it to a third person on condition that he would maintain a well and water-tank on the premises, and the well is afterwards closed and the tank removed, the mortgagee who purchases at a subsequent sale under a decree of foreclosure acquires title to the whole of the premises under Civil Code Cal. § 2930, which provides that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

In bank. On rehearing. For former opinion, see 20 Pac. Rep. 82.

Action of ejectment by F. H. Trope against Peter Kerns. Defendant appeals. For for-

mer report see 20 Pac. Rep. 82. Civil Code Cal. § 2930, provides that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

R. M. F. Soto, (*Herman & Soto*, of counsel,) for appellant. *Geil & Morehouse*, for respondent.

McFARLAND, J. Ejectment for a lot of land in Salinas city. Judgment went for plaintiff, and defendant appeals upon the judgment roll. Plaintiff claimed title through the foreclosure of a mortgage executed to him by defendant which included the said lot. Plaintiff was the purchaser at the sale under the decree of foreclosure, and, the time for redemption having expired, he received a sheriff's deed for the premises.

1. Defendant, in addition to a denial of the averments of the complaint, made a plea in abatement founded on the point that, as plaintiff might have had a writ of assistance in the foreclosure suit, therefore he cannot maintain ejectment. This point is not tenable. A writ of assistance is a summary proceeding which a plaintiff may sometimes advantageously avail himself of; but such proceedings are not *res adjudicata* as to many questions that may arise, and a right to the writ does not deprive a party of the fuller remedy afforded by an ordinary action. The cases cited by appellant are not in point, and we have been referred to no case which restricts a party to a writ of assistance.

2. Defendant filed a cross-complaint, which stated certain facts upon which he contends the decree of foreclosure should have omitted a certain part of the eastern end of the lot, and that, by mistake, such part was included in the decree, and that the mistake was not discovered until the commencement of this action. With respect to this matter the court finds these facts: In the foreclosure suit the defendant herein, Kerns, and his assignee in insolvency, Franks, and certain other persons were made parties defendant. All the defendants suffered default except Kerns and Franks, who filed demurrers to the complaint. Afterwards an agreement was made between the plaintiff and said Kerns and Franks "that said demurrers were to be withdrawn, and plaintiff was to be permitted to take a judgment and decree for the sale of the land described in the complaint herein; and thereupon findings and decree were drawn up in accordance with said agreement, and also a stipulation embodying the agreement of said parties as aforesaid; that afterwards, on the 27th day of April, 1880, the attorneys of the respective parties, and also defendant Kerns, appeared in open court, and said attorneys agreed to alter and change said stipulation by inserting therein these words: 'To the base of J. B. Iverson's tank frame. 'And the same was so altered and changed, and then and there the same was signed by said attorneys of plaintiff and defendants; but neither the

¹ Concerning the extent of the implied authority of an attorney, see *Daniels v. City of New London*, (Conn.) 19 Atl. Rep. 573, and note; *Lock Co. v. Harwell*, (Ala.) 6 South. Rep. 750, and note; *Haverty v. Haverty*, (Kan.) 11 Pac. Rep. 364, and note.

said F. H. Trope nor the said Franks, assignee, were in court, or at any time consented thereto or had any knowledge thereof." The mortgage also included other land than that described in the complaint. It is further found that the judgment was entered in accordance with the original stipulation of the parties, which embraced the whole of the lot, and not in accordance with the change which the attorneys made or attempted to make, by which a part of the lot would have been excluded from the decree. The attorneys intended the decree to conform to their alteration of the stipulation, but by inadvertence of the said attorneys it followed the original stipulation; and "at no time or place did plaintiff, Trope, or defendant, Franks, assignee, know of any change in said stipulation, or authorize said change, and the said judgment and decree was entered as they intended and as they had agreed, and not otherwise."

Waiving the questions whether defendant lost by laches any right which he might have had to reform the judgment, and whether the matters set up in his cross-complaint could be used as a defense or remedy in this present action, we think that the judgment in the foreclosure suit should not be disturbed. To what extent, and under what circumstances, an attorney can compromise and give away the rights or property of his client is not entirely clear. The subject will be found fully discussed, and many authorities cited, in *Preston v. Hill*, 50 Cal. 43. The decisions which go the furthest in maintaining such power on the part of an attorney admit that as an abstract proposition a mere general retainer does not give the power, but go upon the theory that, nothing appearing to the contrary, it will be presumed that the attorney acted with the consent and under the direction of the client. But the attorney has no power to make the compromise against or without the consent of the client, if that want of consent is known to the opposite party. *Id.* And we think that the case at bar comes fairly within the latter principle. Here the defendant had made an express stipulation with plaintiff himself as to what the judgment should be. He knew what the latter's mind was in the premises, and he knew that plaintiff went away with the expectation that judgment would be entered in accordance with the stipulation. Under these circumstances he had no right to presume that the attorney changed the stipulation with the consent of his client.

3. A few years before the execution of the mortgage the defendant Kerns conveyed to one Iverson a small piece of the eastern end of said lot upon condition that Iverson would erect, keep, and maintain a well, water-tank, and appurtenances necessary to supply the tank with water, and permit Kerns, his heirs and assigns, to use all the water that he or they might require, the estate granted to terminate when Iverson ceased to maintain said well and tank and supply such water. Iverson

constructed the well and tank, and furnished the water until January, 1883, when he closed the well, removed the tank, and ceased to use the land. Under these facts appellant argues that plaintiff, by virtue of his mortgage and its foreclosure, did not acquire any title to the part of the lot thus conveyed to Iverson upon condition as aforesaid; and a good deal of learning is ingeniously expended on the point. But appellant mortgaged the whole lot in fee, and is estopped from denying that the estate mortgaged is less than an estate in fee-simple, and the sale under the decree carried any subsequently acquired title. *Association v. Viera*, 48 Cal. 572; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. Rep. 693. Plaintiff also claims title under a sale from Franks, assignee in insolvency of defendant; but it is unnecessary to discuss that title. The findings were sufficient, and we see no error in the record. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; FOX, J.

83 Cal. 539

HOWELL v. SLAUSON. (No. 13,218.)

(Supreme Court of California. March 31, 1890.)

INDEMNITY SCHOOL LANDS—FILING TRANSCRIPT.

1. A list of lands selected by the state as indemnity for the loss of school lands, prepared and certified by the general land-office of the United States, and transmitted by it to the local land-office, vests the title to the lands in the state as effectually as a patent, and the title so transferred relates back to the date of the selection of the land by the state. *McCreery v. Haskell*, 7 Sup. Ct. Rep. 176, followed.

2. A transcript of the original list of the indemnity lands selected by the state, which transcript is prepared in the general land-office, and transmitted by it to the local land-office, and which is subsequently treated as properly authenticated both by the local and general land-offices, cannot be attacked because of the alleged spurious signature of the commissioner of the general land-office in an action to quiet title by a patentee of the United States against a purchaser from the state of a quarter section of the listed land.

3. An indorsement on the transcript, "Received and filed December 5, 1871," and testimony by the register of the local land-office that he received the transcript from the general land-office, and that it was deposited as part of the records of the office, is sufficient evidence of filing in the local land-office, though it lacks a file-mark.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

W. T. Williams, for appellant. *Houghton, Silent & Campbell*, for respondent.

GIBSON, C. This action was brought to quiet title to a portion of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 18, township 2 S., range 13 W., S. B. M., and to recover the possession thereof. Defendant had judgment; from which, and an order denying a new trial, plaintiff appeals.

The plaintiff claims title by virtue of mesne conveyances from L. Ketchum, a patentee of the United States; and the defendant, under similar conveyances from F. S. Clough and

P. H. Newbill, patentees of the state of California, and also by his own adverse possession, and by virtue of a judgment of the late district court of the seventeenth judicial district, rendered in an action involving the right to the possession of the premises in dispute, prosecuted by Clough and Newbill against Ketchum. The facts, as shown by the findings, are these: April 22, 1868, the plat of the survey of the land in question was filed in the United States land-office at San Francisco; the land then being within the San Francisco land-district. Afterwards, on the formation of the Los Angeles land-district, which included the same land, the plat was, on November 21, 1871, transferred to and filed in the office of that district at Los Angeles. On the same date that the plat was filed in the San Francisco office, the state of California selected the quarter section, including the land in question, in lieu of other lands, which selection was approved on November 24, 1871, and on the same date duly listed and certified over to the state as an indemnity in lieu of school lands granted to the state, which were included within a private land claim. L. Ketchum, on September 10, 1869, being then entitled to pre-empt land under the laws of the United States, entered and settled upon the quarter section above mentioned; and on April 5, 1876, upon payment of the government price, he received a certificate of purchase for it as such pre-emptioner. Subsequently, on the 13th of November, 1880, a patent for the land was issued to him by the United States. An application to the register of the state land-office to purchase the same quarter section was duly made by one Charles Whipple, a competent person, prior to the 18th day of April, 1872, on which date a certificate of purchase therefor was issued to Whipple. This certificate was assigned and transferred to Clough and Newbill, July 16, 1872. It appears, from the evidence, that on May 24, 1873, a patent for the land was issued by the state to Clough and Newbill. The findings further disclose that L. Ketchum remained in possession of the premises until September 12, 1873, on which date he was removed by the sheriff on a writ of execution issued upon a judgment of the late district court of the seventeenth judicial district, rendered in an action brought by Clough and Newbill against him to recover the possession of the property, since which time Clough and Newbill and their grantees have retained the exclusive possession of the property.

The question arising upon these facts is whether the United States parted with its title to the quarter section in controversy before L. Ketchum, through whom appellant claims, entered and settled upon the land as a pre-emptioner. The assumption of the appellant with regard to this question is, and it constitutes his main contention, that as the document received in evidence, against his objection, as proof of the listing of the land in

question to the state of California, was not shown to be the original record, nor a certified copy of the original record, no other evidence of such listing having been offered, there was no evidence that the land had ever been listed to this state. The certificate and approval appended to the list are as follows: "Department of the Interior. General Land-Office. 24th November, 1871. It is hereby certified that the tracts described in the foregoing lists are embraced in the original lists now on file in this office of lands selected as indemnity for deficiencies in the townships named, which indemnity school selections are authorized in the above-cited acts of congress of March 3, 1853, February 26, 1859, and July 23, 1866. It is further certified that said tracts have been examined and compared with the township's plat of tract-books of this office, and that the indemnity is improperly due to the townships for which selected, are found to be subject to selection, and are free from conflict, and it is therefore recommended that the lists be approved, subject to any valid interfering rights which may have existed at the date of selection. WILLIS DRUMMOND, Commissioner. Department of the Interior, 24th November, 1871. The foregoing list is hereby approved, subject to any valid interfering rights which may have existed at the date of selection. C. DELANO, Secretary." The foregoing certificate shows that the document is a transcript of the original list retained on file in the general land-office, and is, we think, sufficient in form. The second paragraph of the certificate is not clear, but it is evident that the word "improperly" used in it is either a clerical or typographical error, as, taken in connection with the context, the negative prefix to the word should be omitted. When so read, its meaning is clearer. Regarding the reception of the document from the general land-office, H. C. Austin testified: "I was register of the land-office of Los Angeles in 1871, and for two years before that time. I remember that there was in the office a list, No. 1, Indemnity School Selection. [Upon being shown a list introduced in evidence,] I believe that to be the original document, as filed in the district land-office by myself, some time in 1870 or '71. I received it as register of the United States land-office of Los Angeles district from the commissioner of the general land-office at Washington." J. D. Bethune, the register of the land-office at Los Angeles, who produced the document, testified that, although he did not find any filing mark upon it, he found it on file in his office; that it was delivered to him as a part of the records of said office, and "was much worn, soiled, and torn, and no seal appeared upon it." In an attack upon the genuineness of the signature of Commissioner Drummond, J. L. Ayers testified that he was familiar with the signature of the latter, had frequently seen him write, and had corresponded with him, and the sig-

nature referred to, purporting to be that of Willis Drummond, was not genuine. Ex-Register Austin's testimony tended to corroborate this witness as to the character of the same signature. Whether the signature was genuine or not, it is now too late to attack the document on account of any defect in the authentication of it. It was made in, and transmitted from, the department of the United States government, where the duty to make and transmit it resided. The register of the land-office at Los Angeles treated it as having been properly authenticated, and it is evident that it was so regarded by the general land-office, from the fact that the commissioner, by a letter of instruction to the register and receiver of the Los Angeles district, filed in their office May 25, 1885, attempted to cancel the list to the extent of the quarter section in contest here.

We think the state had a right to rely upon the presumption that the officers of the general land-office properly performed their official duty in listing and certifying the lieu land in question to it. The Eureka Case, 4 Sawy. 319.

It is also urged that the list was never filed in the land-office at Los Angeles, but this indorsement appears upon it: "Los Angeles Land-District, List No. 1, received and filed December 5, 1871;" and that it was so received and filed is established by the testimony of ex-Register Austin, above quoted. His testimony would be sufficient without the indorsement, because a paper is deemed to be filed when presented at the proper office, and deposited with the papers therein. *Tregambo v. Mining Co.*, 57 Cal. 501. When the list was made, certified, and transmitted in this case, it conveyed the legal title to the state as effectually as a patent would have done; and the title so transferred related back to the date when the selection was made, and reported to the local land-office. *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. Rep. 176. In that case it was said: "Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified operates upon the selection as of the day when made and reported to the local land-office, and cuts off, as would a patent in such cases, all subsequent claimants." The facts of that case and this are somewhat similar. There the plaintiff's claim of title rested upon a patent of the United States dated October 29, 1879, based upon an alleged pre-emption of the land, upon which he had settled December 21, 1869, filed his declaratory statement therefor November 28, 1871, and received his certificate of purchase in April, 1876; while that of one of the defendants, who was the real party in interest, was deraigned from the state of California through a patent of the latter to one Keller, dated March 4, 1874, which was based upon a certificate of purchase of the land given December 21, 1871. The selection of the land was made by the state on the 22d

of April, 1868; as the court said: "Nearly one year and eight months before the alleged settlement of plaintiff." It was accordingly held that plaintiff had no title. It does not appear in the report at what time the land was listed and certified over to the state; but, as the land was actually listed and certified over, the date was immaterial, in view of the fact that the selection by the state had been made prior to plaintiff's attempt to pre-empt the land. In the case at bar the selection of the lieu land in question was made by the state on the 22d of April, 1868, and the subsequent listing of it by the United States vested the title in the state as of that date; consequently, Ketchum acquired no right to the land by his attempt made thereafter to acquire the same as a pre-emptioner, and the patent of the United States issued to him as such pre-emptioner conveyed nothing. *McCreery v. Haskell*, supra; *Pratt v. Crane*, 58 Cal. 533.

The attempt of the commissioner of the general land-office to cancel the state's selection of the land and the listing of the same to the state by the United States, above referred to, made 13 years after the state had sold the land to Whipple, was fruitless, because the United States had, as we have seen, parted with all its title to the land when the same was listed to the state. *Tubbs v. Wilhoit*, 73 Cal. 61, 14 Pac. Rep. 361. The same result would follow even if we assume with appellant, in accordance with the certificate of the commissioner and the approval of the secretary of the interior, appended to the list, that the approval of the state's selection of the land was subject to valid interfering rights at the date of the list, because, as we have seen, Ketchum, through whom appellant claims title, had made no connection with the title of the United States prior to the date when the state initiated its right by selecting the land, and reporting the same to the proper authorities.

From the foregoing, we think it apparent that the trial court was correct in its conclusion of law to the effect that at the commencement of the action the defendant held the legal title to the land, and was rightfully in possession of it.

The other conclusion reached with regard to the title acquired by the defendant and his predecessors by adverse possession adds nothing to defendant's legal title, because such possession was held under the legal title; and, as the plaintiff and his predecessors had no title to the land, there was no title in them that an adverse possession could overcome. Again, as the claim of title made by them was not coupled with the possession of the land claimed, it therefore amounted to nothing more than a mere assertion of an adverse claim that time could not ripen into a prescriptive title; for no claim of title without actual and exclusive possession for the period prescribed by the statute of limitations will create a title by prescription.

We advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

83 Cal. 521

JACKSON *et al.* v. TORRENCE *et ux.*, (two cases. Nos. 13,133, 13,175.)

(*Supreme Court of California.* March 31, 1890.)

HUSBAND AND WIFE — COMMUNITY PROPERTY — SPECIFIC PERFORMANCE.

1. Though Civil Code Cal. § 164, which provides that land acquired after marriage by either husband or wife is community property, unless purchased with the separate estate of either, raises a presumption that property conveyed to a wife after marriage is community property; yet the record of a deed conveying land to the wife for a recited consideration is notice to third persons of the extent of her claim to the property, whatever it may turn out to be, and, if she has paid for it out of her separate estate, either in whole or in part, she may hold it in the same proportion on making proof of the fact.

2. In an action against a husband and wife for the specific performance of a contract for the sale of land conveyed to the wife after marriage, the fact that the intending purchasers caused the contract of sale to be drawn up in terms which would bind the wife as well as her husband, that they left the contract with her to be executed, and that she took a leading part in the preliminary negotiations, conclusively shows that the purchasers had actual notice that the wife claimed an interest in the land; and a finding to the contrary will be rejected.

3. Evidence that a wife, out of her separate estate, furnished four-fifths of the money used in making the first payment on land purchased, and that the balance was paid for out of the income of the property, warrants a finding that the wife owned such an undivided proportion of the property as the funds furnished by her bear to the whole price.

4. A wife to whom land is conveyed after marriage is not estopped from asserting her title thereto by the fact that during negotiations by her husband for its sale she stood by without informing the intending purchasers of her interest; it being the policy of the law (Civil Code Cal. §§ 1093, 1186) to permit no alienation of a married woman's land except by deed acknowledged by her on examination separate and apart from her husband, and after its contents have been fully explained to her.

5. Under Civil Code Cal. §§ 1093, 1186, which provide that no estate in the land of a married woman shall pass "by any grant purporting to be executed or acknowledged by her," unless her acknowledgment is taken after an examination separate and apart from her husband, and after she has been informed of the contents of the instrument, an unacknowledged executory contract by a married woman for the sale of her land will not be specifically enforced.

6. Where a husband and wife, owning separate and undivided interests in an hotel and saloon business, enter into an executory contract for its sale as an entirety for a fixed sum, and the contract is void as to the wife because not acknowledged by her, the husband will not be compelled to convey his undivided interest, as it cannot be inferred that when he entered into the contract he intended to leave his wife a co-tenant with the purchasers.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTE, Judge.

F. E. Baker and *E. R. Bush*, for plaintiffs.
Geo. P. Harding and *A. L. Hart*, for defendants.

BEATTY, C. J. The defendants are husband and wife, and the suit is to compel specific performance of the following agreement: "For and in consideration of the sum of \$500 to us in hand paid by C. F. Thomas and George H. Jackson, the receipt whereof is hereby acknowledged, we, the undersigned, do hereby agree that on the 1st day of February, 1886, we will execute and deliver to said C. F. Thomas and George H. Jackson, or their assignees, a good and sufficient deed to all that real property in the town of Woodland, county of Yolo, and state of California, known as the 'Capital Hotel Property,' bounded on the north by Otto Schluer, east by Galbraith, south by Main street, and west by First street, together with all and singular the furniture, fixtures, busses, harness, and all the personal property belonging to said hotel, whether enumerated or not, except one piano, sewing-machine, feather bed, two chairs, and on that day to give to said C. F. Thomas and George H. Jackson possession of the same. The said property to be clear of all taxes, assessments, commissions, liens, or incumbrances whatsoever: provided always, and this agreement is upon the express condition, that the said C. F. Thomas and George H. Jackson, or their assigns, shall on that day pay to us the further sum of nineteen thousand five hundred dollars, (\$19,500;) and, if the said C. F. Thomas and George H. Jackson, or their assigns, shall fail or neglect to pay the said sum on that day, then and in that case we agree to return to them the said sum of \$500, without interest, on said day, and, after the said sum is so returned, this agreement to be void. Dated Woodland, January 8, 1886. M. H. TORRENCE. ESTHER TORRENCE." The superior court found that the wife and the community owned separate interests in the premises, and made a decree compelling a conveyance by the husband of the community interest upon payment of its estimated proportion of the agreed price, but refused a decree as to the interest of the wife, upon the ground that she, not having acknowledged the execution of the contract to sell, was not bound by it. The husband, in Case No. 13,133, appeals from the decree compelling him to convey, and from an order denying his motion for a new trial. The plaintiffs in Case No. 13,175 appeal from so much of the decree as adjudges the wife to be the owner of a separate interest in the premises, and denies them any relief as against her. Both appeals have been submitted, and will be considered together.

The facts upon which the controversy depends are as follows: The Capital Hotel, referred to in the contract, is a three-story building situated on lot 1, in block 2, of the town of Woodland. This lot is a rectangle, and fronts south 60 feet on Main street, and west 150 feet on First street. It is bounded on the north by the lot of Schluer, and on the east by the lot of Galbraith. But, although it is a single lot, and covered by one building, it was not all acquired by the defendants

at the same time, and is subdivided in a very unusual manner. In December, 1880, and subsequent to the marriage of the defendants, John Smith, by grant, bargain, and sale deed, conveyed all of said lot to Esther Torrence, saving and excepting the first story of the building standing on the east 20 feet of the south 60 feet of said lot, known as "Dickinson's Saloon." Subsequently, on September 5, 1881, David Burns, by grant, bargain, and sale deed, conveyed to M. H. Torrence and his wife, Esther Torrence, the east 20 feet of the south 60 feet of said lot. Neither of these deeds contained any expression as to how the granted premises should be held by the grantees; but the first recited a consideration of \$10,000 paid by Esther Torrence, and the second a consideration of \$3,500 paid by M. H. and Esther Torrence. Both deeds were recorded in Yolo county long before the date of the contract with the plaintiffs above set out. There was some conflict in the evidence as to whose money paid for the property, but the court found that, of the \$10,000 paid for the parcel first described, \$3,200, 8-25, was of the separate property of the wife, and the balance was of the community funds. As to the second parcel, the saloon, it was found that the entire purchase price was paid out of the community funds. As a conclusion from these findings, it was held that the wife owned as her separate estate 8-25 of the hotel property, including the two upper stories over the saloon, with the furniture, busses, etc., and that the balance belonged to the community. It was found that the saloon property was worth \$4,000, and the hotel property, \$16,000. The husband, in support of his appeal from the order denying his motion for a new trial, assails these among other findings of the superior court; but, as they are attacked upon the ground that they are injurious to his wife, in awarding her a smaller separate interest in the property than she was rightfully entitled to, and as she has not appealed, it is doubtful if he could be heard to make the objection. At all events, it will be assumed for the present that the wife and the community owned the property in the respective proportions as found by the superior court. Such being the case, on the 6th day of January, 1886, they entered into the following written agreement with one W. M. Coward: "Woodland, January 6, 1886. W. M. Coward is hereby employed, exclusively, to sell our hotel, complete, with furniture and buss and harness, situated on the north-east corner of Main and First streets, Woodland, Cal., on or before three months from date. Price, \$20,000. Cash, \$——. Secured by mortgage on the property, \$——. Interest on deferred payments, —— per cent. per annum. Term of credit, ——. Agent's commission, $2\frac{1}{2}$ per cent. I hereby agree to advertise the above property, and use all diligence in effecting a sale of the same. M. H. TORRENCE. ESTHER TORRENCE. W. M. COWARD." Indorsed: "Property reserved,—piano; two chairs, plush covered; one sewing-

machine; one feather bed." On the following day, Coward notified them that he had made a sale of the property for \$20,000 to the plaintiffs, and that he had received \$500 on account of the purchase. The parties were brought together, and discussed some details as to time of giving possession, division of accruing rents, etc., whereupon plaintiffs drew up, or procured to be prepared, the contract above set out, which was left with the defendants for their examination. On the following morning, the day it bears the date, they delivered the contract to the plaintiffs, signed but not acknowledged. Mrs. Torrence was never asked by either of the plaintiffs to acknowledge her execution of the contract, and it would seem that none of the parties at that time supposed an acknowledgment was necessary in order to make it binding upon her. The \$500 mentioned in the agreement was not paid to the defendants, but was retained by Coward, pending the consummation of the transfer. Within a few days after their execution of the contract the defendants manifested a disposition to repudiate it. The plaintiffs and Coward were claiming that it embraced the saloon as well as the hotel property, but the defendants claimed that they had understood and intended that the saloon should be reserved. The superior court finds that this was a mere pretense on their part, put forward as an excuse for evading performance of their contract; and we accept this conclusion, although, when the situation of the property, and the mode of its acquisition, are considered with reference to the terms of the written authority to Coward and the written contract with plaintiffs, the claim of defendants does not appear to be wholly unreasonable.

On the 1st of February, 1886, at the time stipulated, the plaintiffs made a tender to defendants of the balance of the agreed price of the property, \$19,500, and demanded of them a deed conveying the entire premises, which demand the defendants, and each of them, refused. The findings are not perfectly explicit as to this demand and refusal; but we do not understand that there was any offer by plaintiffs to pay except upon the express condition that both defendants should unite in a conveyance sufficient to transfer all the interest of each of them in the entire property, viz., the whole of said lot 1, with the whole of the buildings and the personal property used in connection with the hotel. Their tender and demand having been refused, plaintiffs commenced this action. In their complaint they alleged, *inter alia*, that M. H. Torrence was on and prior to January 8, 1886, the owner of the whole of said lot 1. They set out the contract of that date in terms; alleged that the premises therein described were the same as said lot 1, and that Esther Torrence, although not the owner of any interest therein, was asserting some claim of interest. They prayed for a decree compelling both defendants to convey, and quieting their title as against Esther Torrence. The

defendants answered, denying that M. H. Torrence was the exclusive owner of the property, and alleging that Esther Torrence was sole owner of the hotel property, and joint owner with M. H. Torrence of the saloon property. They also alleged that they did not know the contract embraced the saloon property, or they would not have signed it, and that Esther Torrence, discovering that mistake, and divers misrepresentations in regard to the sale, had, without the advice or procurement of her husband, refused to acknowledge her execution of the contract, or to perform it. Other matters of defense were alleged which it is not necessary to mention.

Upon most of the matters put in issue by the pleadings the findings of the superior court were in favor of the plaintiffs, and the defendant Torrence attacks many of the findings as being wholly unsupported by the evidence. We shall have occasion to notice one or two of these specifications in discussing the legal questions presented by the case, but in this general statement shall mention only one point upon which we think the court failed to find correctly.

Finding 14 is as follows: "That the said deed from said Smith to Esther Torrence was a deed of grant, bargain, and sale, and purported to convey the premises described therein to said Esther Torrence in consideration of the sum of \$10,000, without any specification therein that she should take, or have, or hold the same as or for her separate property or estate, or as a gift from her said husband, or from said Smith; that said deed was duly recorded in the office of the county recorder of Yolo county on the 17th day of December, 1880, and plaintiffs had notice of the record of said deed, but neither of the plaintiffs had any notice, either actual or constructive, of a claim on the part of defendant Esther Torrence, of any separate interest in or to any of the property in controversy, until after the commencement of this suit." This finding, in addition to being in conflict with the allegation contained in complaint, that Esther Torrence was asserting a claim to an interest in the property, is self-contradictory. It is simply impossible that the plaintiffs could have been without constructive notice of her claim, with the deeds of record purporting to convey it to her. All intending purchasers or incumbrancers were bound to take notice that the property was hers in the proportion that it had been paid for with her funds, and what that proportion was they were bound to know at their peril. It is true that, with respect to conveyances to married women expressing a valuable consideration, and made prior to the recent amendment to section 164¹ of the

Civil Code, (St. 1889, p. 328,) the presumption is that the property conveyed belongs to the community, and is subject to the control and disposition of the husband alone. But this is a mere rule of evidence, fixing the *onus probandi* in cases where the question of ownership is in litigation, and is entirely consistent with the doctrine that every purchaser has notice, her deed being of record, of the extent of her claim to the property, whatever it may turn out to be, and that if she has paid for it out of her separate estate, either in whole or in part, she may always claim it and hold it in the same proportion upon making proof of the fact. *Ramsdell v. Fuller*, 28 Cal. 44, 45. And so, also, it will be her separate property if paid for by her husband with community funds, and by his direction, and for the purpose of a gift, conveyed to her. *Peck v. Brummagin*, 31 Cal. 441. And see *Kraemer v. Kraemer*, 52 Cal. 302; *Moore v. Jones*, 63 Cal. 12; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. Rep. 719; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. Rep. 347; *Loring v. Stuart*, 79 Cal. 200, 21 Pac. Rep. 651. In view of these authorities it certainly cannot be denied that plaintiffs were put upon inquiry as to the claims of Mrs. Torrence; and there is not a *scintilla* of evidence, nor any pretense, that plaintiffs ever made any inquiry whatever, or that the defendants, or either of them, ever volunteered any information by which they were misled. But, besides this constructive notice, the testimony shows very conclusively that both of the plaintiffs knew at and before the execution of the contract that Mrs. Torrence claimed an interest in the property. They do not even deny that they knew she made some claim. Jackson, it is true, says that during the negotiations about the property neither of the defendants informed him what interest Mrs. Torrence had in the property, and that nothing was said about any separate interest; and Thomas testifies that he had no knowledge of any separate interest of Mrs. Torrence. But this means nothing more than that they made no inquiry, received no information, and, therefore, did not know what her interest was. It does not mean that they were ignorant that she made some claim; and it is very evident they could not, consistently, have taken such a position. According to the most obvious construction of the findings, they had not only constructive notice of the form of the conveyances. They had actual knowledge of the contents of the record. But whether this is the meaning of the finding or not, and whether or not the plaintiffs had seen the written authorization given to Coward to negotiate the sale, which, as we have seen, was signed by both husband and wife, the plaintiffs show by their own testimony that she took a leading and active part in the negotiations preceding the drawing of the contract; that they caused the contract to be drawn up in terms which would make it her contract as well as her husband's; that they left it with her to

¹ Civil Code Cal. §§ 162, 163, provide that all property owned by either husband or wife before marriage, and that acquired afterwards, with the rents and profits thereof, or by gift, devise, or descent, shall be separate property. Section 164 provides: "All other property acquired after marriage, by either husband or wife, or both, is community property."

be executed. Why should they have done these things if they were ignorant that she made any claim to a separate interest in the property? Evidently, they were not ignorant. They had both actual and constructive notice; and so much of the fourteenth finding as declares the contrary must be rejected in considering the appeal.

With this general statement of the facts of the case we will proceed to consider such of the assignments of error as require discussion. By the decree, the defendant M. H. Torrence is compelled to convey to the plaintiffs all of the community interest in the property as found by the court upon payment of the agreed price of \$20,000, less 8-25 of the estimated value of the hotel property, less also the \$500 paid at the date of the contract, and less the community interest in the estimated value of the rents and profits of the whole property from the 1st day of February, 1886, the date when, by the terms of the contract, the plaintiffs were to have possession. It is further decreed that the plaintiffs be let into possession of the property, to hold the saloon exclusively, and the hotel and personal property in common with Esther Torrence, 17-25 to them, and 8-25 to her.

The first point made by plaintiffs in support of their appeal is that the superior court erred in not finding that the whole of the property belonged to the community. We think the findings of the court on this point are not only fully sustained by the evidence, but that it would have sustained findings much more favorable to the wife. She is found to be the owner of only 8-25 of the hotel property. But the evidence shows that the price of this parcel was \$10,000, paid \$4,000 in cash, balance on time. Of the cash payment, she contributed out of her separate funds \$3,200, and her husband only \$800. In other words, she paid in cash 8-25 of the whole price, and four-fifths of the cash payment. The balance was paid out of what they jointly earned in keeping the hotel. Certainly, she owned no less proportion of the property than her cash payment bore to the whole price. Indeed, she was entitled to more. She was entitled to interest on her cash payment, and to have the amount of such interest computed as a part of her contribution to the purchase. And the court might have found, upon the testimony of the husband, that he intended to and did make his wife a gift of the whole hotel property. His testimony is to the effect that he so intended, and that the deed was made to her by his direction. There is no evidence that he was indebted to any one at the time; and, if he was free from debt, he had the right to give her the property, and could make the gift effectual by simply directing the conveyance to be made to her. *Peck v. Brummagem*, 31 Cal. 441; *Dow v. Mining Co.*, Id. 653; *Ingersoll v. Truebody*, 40 Cal. 603; *Woods v. Whitney*, 42 Cal. 359; *Higgins v. Higgins*, 46 Cal. 263. This evidence of the defendants, to the effect that it was intended

between themselves that the wife should be sole owner of the hotel property, is the only direct evidence of their intentions, and is diametrically opposed to the contention of plaintiffs that Esther Torrence intended to contribute her \$3,200 to the common stock, and that on the purchase of the hotel everything became, and continued thenceforth to be, community property. There is nothing in the case to sustain this theory.

But it is contended by plaintiffs that Esther Torrence is estopped from making any claim to the property because she did not, during the negotiations for the sale of it, distinctly inform them of the nature and extent of her interest. The argument is that a grant to a wife expressing a valuable consideration creates a presumption that the granted premises are community property; that an intending purchaser has a right to rely on this presumption, and, in the absence of express notice from the wife that she claims some definite interest, he is at liberty to infer, and act upon the inference, that she has no interest; that this is especially so when she is informed that her husband is negotiating a sale or other disposition of the property; and that if under such circumstances she keeps silence, she must not afterwards be allowed to assert her claims, however well founded. We think that, even in the strongest case that can be supposed, this is a dangerous and unnecessary doctrine. The intending purchaser of land which has been conveyed to a married woman is under no compulsion to take it and pay for it without getting her deed, properly acknowledged. He knows her husband has no title to it except through the deed purporting to convey it to her, and that he can get no clear and perfect title himself without a deed from her. If she is willing, deliberately, and with full knowledge of her rights, and of the effects and consequences of her acts, to disclaim all interest in the property, she will be willing to sign and acknowledge a deed. If she is not willing to sign and acknowledge a deed, no other sort of admission should be held to bind her. The clearly expressed purpose and policy of the law is to permit no alienation of a married woman's real property except by deed acknowledged by her on examination, separate and apart from her husband, and after its contents have been fully explained to her by the officer whose sworn duty it is to see that she not only understands what she is doing, but does it without any constraint due to the presence of her husband. In place of all these safeguards for her independence and freedom of volition, the doctrine contended for would substitute the testimony of witnesses that when her husband had asserted a right to dispose of her property she had failed to contradict him. How dangerous a breach upon the policy of the law designed for the protection of married women from marital influence would be made by the establishment of such a doctrine is too obvious to require comment. And, in addition to its danger, how utterly inexpedient it

would be! Its only effect would be to encourage honest purchasers to rely upon uncertain and doubtful admissions in place of the certain, authentic, and secure admission of an acknowledged deed, and to encourage dishonest husbands to enter into fraudulent combinations with simulated purchasers in order to defraud their wives. In other words, the establishment of the doctrine contended for would merely tend to the multiplication of unnecessary litigation, in which fraud and perjury would often carry the day. We had better hold strictly to a law with which compliance in all cases is not only possible, but easy, and which, being observed, leaves no room for litigation in which the most easily manufactured testimony may overwhelm the right. If a purchaser cannot get a married woman's acknowledged deed for property the title of which stands in her name, let him keep his money, and wash his hands of the business.

But, aside from this view of the legal branch of this proposition of the plaintiffs, it is to be observed that in this case it rests upon no basis of fact. There is not a particle of evidence that M. H. Torrence ever did in fact represent himself to be the sole owner, or to have the sole right of disposition, of this property, to plaintiffs or to any other person; and there was, consequently, never an occasion when his wife was called upon to contradict such an assertion. The authorization to Coward to make the sale was signed by both husband and wife. The oral negotiations that ensued with the plaintiffs were conducted by both husband and wife. The written contract prepared by plaintiffs, in terms, implied her concurrence. It was left by plaintiffs to be executed by her, and it was signed by her. There is no suggestion, from beginning to end, that M. H. Torrence claimed, or that plaintiffs understood him to claim, a right to dispose of the property without his wife's concurrence. On the contrary, the evidence leaves no room to doubt that plaintiffs all along understood that Mrs. Torrence was claiming an interest in the property, and a voice in its disposition. For that reason, they sought to bind her by a written contract to convey; and no doubt they then thought, as their counsel still contend, that she was bound by the contract though she had not acknowledged it. Considering themselves secure of getting her deed, they did not care to inquire what her interest was, and they never did inquire. They did not intend to pay for the property without a deed from her and her husband, which they knew would operate a transfer of the whole of it, whatever the respective interests of the grantors might be. What they relied on was not an admission by her that her husband had power to convey, but the promise of her conveyance; and they simply made the mistake of not getting her promise executed in a form to bind her. We conclude that there was no estoppel against Esther Torrence to assert her rights,

not only because the law would not raise an estoppel on the facts assumed, but because the facts assumed had no existence.

We ought not, perhaps, to leave this branch of the case without noticing the argument of counsel, repeated so often, and with such variation of statement, by which they seek to found an estoppel on a legal fiction. Every one, they say, is conclusively presumed to know the law; and, if it be the law, which they deny, that a married woman's executory contract to convey land does not bind her unless it is acknowledged, why then we must impute to Esther Torrence knowledge that the contract signed by her husband was his sole contract, and therefore she knew that it was not what its terms imported, but was an assertion by him of a right to dispose of the whole of the property without her consent,—an assertion which she indorsed, or, at least, failed to deny when she ought to have denied it. We think this is putting the legal maxim relied on to a use never intended, and to which it is wholly inadequate. All that it means is that no one can screen himself from the legal consequences of his acts or omissions by pleading ignorance of the law; and it has no sort of application to a case of this kind, where the question relates to actual knowledge, motives, and intentions.

The last proposition made by plaintiffs on their appeal is that the contract bound Mrs. Torrence to convey, notwithstanding it was not acknowledged; and in support of this proposition they make a long and very ingenious argument. They cite the provisions of the Code, which confer upon married women the power to make contracts of all kinds, and call attention to the fact that there is no provision making an acknowledgment essential to the validity of an executory contract of a married woman to convey. But we think they give to the statute too narrow and literal a construction. The following sections of the Civil Code are referred to: "1093. No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191." "1186. The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband, nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution." An executory contract to convey, if not within the precise letter of section 1093, as being a technical grant, is within its meaning, and also within the policy of the law. Such a contract, if enforceable, has the effect of vesting the equitable estate in the vendee, leaving in the vendor the dry legal title. It is, in effect, a grant of the whole beneficial interest in the land; and, unless

we are to hold that the law deals with the shadow and not the substance of things, we must conclude that such instruments are embraced by the section referred to. Besides, the specific enforcement of contracts is allowed as a matter of grace, and not of right, and a court of equity will never lend its aid to accomplish by indirect means what the law, or its clearly-defined policy, forbids to be done directly. Of the California decisions cited by plaintiffs on this point, we think *Bodley v. Ferguson*, 30 Cal. 516, and *Racouillat v. Sansevain*, 32 Cal. 377, are not in point; and *Love v. Watkins*, 40 Cal. 562, is opposed to their contention. We hold that specific performance of the unacknowledged executory contract of a married woman to convey her real property cannot be compelled, and that there is no error in the decree of the superior court prejudicial to the plaintiffs.

We come next to consider the appeal of the defendant M. H. Torrence. He contends that the superior court erred in compelling him to convey his interest in the property on receipt of its proportion of the agreed price. He says that in so decreeing the court compelled him to perform a contract which he never made, or intended to make; and in this position, we think, he is sustained by the facts above stated. The case is peculiar. A husband and wife own separate, undivided interests in a house and lot, where they live and carry on a business. They agree together that they will sell the whole property for a fixed sum. Necessarily, they intend, among other things, to take up their abode in some other place, and transfer their business, if they continue in business, to some other establishment. They do not intend to separate themselves,—one to go, and the other to stay. Neither intends to sell out his interest, and leave the other a tenant in common with strangers, especially when the property, as here, consists of both realty and personalty, together with the good-will of an hotel and saloon business. That the sale shall be complete as to both must in all such cases be a highly material consideration; and certainly it cannot be inferred from the fact that the husband is willing to unite with the wife in making a complete disposition of their common property and business that he is also willing to dispose of his share of the property and business for a share of the price, leaving his wife a co-tenant with the purchasers. The effect of this decree, however, in just such a case, is to compel the husband to do what he never agreed to do, and what it cannot be supposed he would ever have been willing to consent to do. The only contract he executed, or intended to execute, was a contract, in which his wife was to join, for the conveyance of the whole property for a round sum. Until this contract was completed by the accession of his wife, there was no contract of which there could be any breach or failure to perform. As we have seen, the wife never did execute, and it never became binding upon the husband, because it

never bound her. *Barber v. Burrows*, 51 Cal. 404. His delivery of the contract to the purchasers, if he did deliver it, can make no difference in this conclusion. He probably did not know that it was defectively executed on the part of his wife; but, if he did know that her acknowledgment was necessary, he also knew that it was the business of the purchasers to procure her acknowledgment to be taken without his presence and hearing, and he had a right to rely upon their doing what was necessary to be done for their own protection. It was not his fault that she was not bound; and, as his agreement was dependent on her concurrence, he cannot be compelled to convey without first making a contract for him, and then enforcing compliance. As against the appeal of the plaintiffs, the judgment of the superior court is affirmed; but on the appeal of M. H. Torrence the judgment and order appealed from are reversed, and the cause remanded.

We concur: SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.; THORNTON, J.; FOX, J.

Rehearing denied.

(83 Cal. 507)

MONTEREY COUNTY *v.* CUSHING. (No. 12-535.)

(*Supreme Court of California.* March 31, 1890.)

APPEAL—EMINENT DOMAIN.

1. A statement on appeal from an order granting a new trial showed that the notice of intention to move for a new trial set forth as ground therefor that the evidence was insufficient to justify the decision as to value. The notice of intention, which is not required by the Code of California to be presented on appeal, was by stipulation made part of the record, and did not set forth such ground. *Held*, that this did not overcome the presumption that the statement was correct, as an amended notice of intention corresponding to the one shown in the statement may have been given.

2. As Code Civil Proc. Cal. § 1244, providing what the complaint in proceedings in eminent domain shall contain, does not mention value or damages, the burden of proving value is on defendant, and, where there is no direct evidence of value, a finding for defendant is ground for a new trial.

3. The term "private road" as used in Pol. Code Cal. § 2692, providing for "private or by-roads" designates a particular kind of public road. Following *Sherman v. Buick*, 32 Cal. 241.

4. Proceedings in eminent domain to procure a right of way, which Pol. Code, § 2690, authorizes the supervisors of the county within which the road is to be located to institute, are properly brought in the name of the county, rather than in the name of the people.

5. Proceedings in eminent domain for a right of way over land of a decedent's estate are properly brought against the executrix within Code Civil Proc. § 1582, providing that actions for the recovery of any property, or the possession thereof, may be maintained by or against executors where the same might have been maintained by or against their testators, as the word "recovery" does not here imply previous possession.

6. Proceedings in eminent domain may, on the death of the owner of the land be continued against the executrix from the stage at which they then stood.

7. Under Pol. Code, § 2690, providing that, in proceedings to acquire a right of way, the board of supervisors shall, by order, direct proceedings in eminent domain against all the land-owners

who shall not accept the award of damages, an order merely stating, in general terms, that suit be brought against the non-consenting land-owners, is sufficient; and the fact that the order directed suit against a decedent who, before his death, had been before the board, and had refused to accept the award of damages, will not render the suit against his executrix void.

8. Pol. Code, § 2686, provides that, in proceedings to acquire a right of way, the report of the viewers to the supervisors shall contain "the estimate of damages to the owner." It says nothing of the items of damage. *Held* that, as the report was not binding on the owner as to damage, it was sufficient to report a lump sum as the proper amount to be paid.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Chas. S. Wheeler, for appellant. *Geil & Morehouse*, for respondent.

HAYNE, C. This was a proceeding to condemn land for the purposes of a road. The trial court gave judgment for the defendant, but subsequently made an order granting a new trial; and the defendant appeals from that order.

1. At the trial the plaintiff put in evidence the preliminary proceedings before the board of supervisors, the report of the viewers, and the proceedings confirming such report, but gave no evidence of the value of the property sought to be condemned, or of the damage resulting from the segregation. The findings show that the court, in deciding the case, did not consider that the proceedings mentioned constituted any evidence of value, etc.; and it is to be inferred it was of the opinion that the burden of proof as to value was upon the plaintiff. One of the grounds of the motion for a new trial was the insufficiency of the evidence to justify the decision as to value; and, upon well-settled principles, it must be assumed that this was one of the grounds upon which the motion was granted. The appellant makes a preliminary objection to the consideration of this ground because, as she alleges, it was not set forth in the notice of intention. But the statement shows that the notice did set forth this ground. The appellant contends that this portion of the record is overcome by the copy of the notice of intention, which is printed in the transcript, which copy, she claims, was made a part of the record on appeal by the stipulation at the end of the transcript. But, assuming that the stipulation has the effect claimed, it does not follow that the statement is to be disregarded. It imports absolute verity, and must be reconciled with other portions of the record, if that be possible. Now, it is not at all impossible that within the time allowed by law, perhaps on the same day, the notice may have been amended by consent; or another notice, corresponding to the one shown by the statement, may have been given. Such a notice would not be part of the record on appeal, (*Pico v. Cohn*, 78 Cal. 384, 20 Pac. Rep. 706,) and, therefore, would not have to be brought up, and would not be inconsistent with the

stipulation. The preliminary objection should, therefore, be overruled.

The question, then, is whether the decision of the court in favor of the defendant was justified by the evidence. In examining this question, we shall assume, in the defendant's favor, that the proceedings before the board of supervisors did not constitute evidence of the value of the land, etc. But it does not follow that the decision in favor of the defendant was right. If no direct evidence be introduced upon any issue, the finding should be against the party who had the burden of proof. (*Leviston v. Ryan*, 75 Cal. 294, 17 Pac. Rep. 239; *Speegle v. Leese*, 51 Cal. 415; *Connolly v. Hingley*, ante, 273, (filed January 27, 1890.)) To say that the burden of proof is upon a party is equivalent to saying that the presumption is against him. A presumption is indirect evidence, (Code Civil Proc. § 1957;) and if not controverted, "the jury are bound to find according to the presumption," (Id. § 1961.) A finding against such a presumption is a finding against evidence, and is to be reviewed upon the ground we are considering. Then was the burden of proof upon the defendant in relation to value, etc.? The authorities in relation to the burden of proof as to value in proceedings in eminent domain are conflicting. See *Lewis, Em. Dom. § 426*. In California the burden as to value is on the defendant. Section 1244 of the Code of Civil Procedure provides what the complaint shall contain, and it does not mention value or damage; and if the plaintiff is not required to allege value or damage, he is not required to prove it. This was the view taken in *California S. R. Co. v. Southern Pac. R. Co.*, 67 Cal. 63, 64, 7 Pac. Rep. 123. There it was objected by the defendant that the value found was less than that alleged in the complaint, and that, therefore, the finding was contrary to the pleadings; but the court said: "The plaintiff is not required to state the value in the complaint. Code Civil Proc. § 1244. The allegation of the complaint as to value is an immaterial and impertinent allegation, which the plaintiff was not required to prove." It results that the decision of the court was wrong upon the evidence, and that the order granting a new trial was right, unless there is some other reason which shows that the plaintiff had no case. It is argued for the defendant that there are such reasons, and we proceed to consider the positions taken in this regard.

2. It is said that the road was a private road, under section 2692 of the Political Code, providing for "private or by-roads," and that land cannot be condemned for such a purpose. This point is disposed of by the case of *Sherman v. Buick*, 32 Cal. 241, in which it was held that the term "private road" was used merely to designate a particular kind of public road, and that, notwithstanding the somewhat inaccurate language, the use was public. It is true that the decision of this point was not strictly necessary to the disposition

of the appeal; but it arose in the case, and was the main question discussed by counsel. The decision has stood for over 20 years; and, as the statute has been in force during that time, it is probable that many such roads have been opened under it. Under these circumstances, the decision should be followed, even if its soundness be questionable, which, however, we are not prepared to say is the case.

3. It is contended that the suit was not properly brought in the name of the county, but should have been in the name of the people of the state. Counties, however, are "bodies corporate and politic," (County Government Act, § 1,) and may sue and be sued, (Id. § 40;) and this particular suit was a county matter, it being expressly provided that the suit shall be brought under the direction of the board of supervisors. Pol. Code, § 2690. Compare *Kimball v. Alameda Co.*, 46 Cal. 19. The practice is to bring such suits in the name of the county, (see *Humboldt Co. v. Dinsmore*, 75 Cal. 604, 17 Pac. Rep. 710; *Tehama Co. v. Bryan*, 68 Cal. 57, 8 Pac. Rep. 673; *Butte Co. v. Boydston*, 64 Cal. 110;) and we have no doubt of the correctness of the practice.

4. It is argued that the action was not properly brought against the executrix. But we think that the executrix was the proper party. Section 1582 of the Code of Civil Procedure provides that "actions for the recovery of any property, real or personal, or for the possession thereof, * * * may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates." This provision was considered, and its validity impliedly asserted, in *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. Rep. 467, and 4 Pac. Rep. 486, in relation to the foreclosure of a mortgage; and we think that a proper construction requires that it should be held to apply to cases like the one before us. The word "recovery," as used in the section, does not imply that the plaintiff had at some previous time owned, or been in the possession of, the property. If, for example, the owner conveys to another land which is then in the possession of a trespasser, there can be no doubt that the grantee may maintain ejectment against such trespasser, or that it would be correct to describe such action as for the "recovery" of possession, although the plaintiff never was in possession. So it is usual to speak of an action for the "recovery" of money under a contract when, as a matter of course, the plaintiff was never in possession of the money. Taking the word in this sense, we think that proceedings for the condemnation of land fall within the provision of the section; and this is the construction to which other considerations lead. The money awarded as compensation is to be paid to the defendant in the proceeding. Hence the proceeding should be against the person entitled to receive the money; and, as it is clearly a

part of the estate, and may be required to pay creditors, the executrix is, manifestly, the person entitled to receive it.

5. It is said that "the cause of action does not survive." As the plaintiff is not dead, the expression is, perhaps, not entirely accurate. If it means that the action was not properly brought against the executrix, we have already disposed of the point. If it means that upon the death of the owner the proceedings against his estate had to be commenced all over again, we think that the point is manifestly untenable.

6. It is urged that, inasmuch as the order of the board was that suit should be brought against "V. Cushing," the fact that he had died 20 days before the order was made rendered the whole proceedings void. We do not think, however that section 2690 of the Political Code makes the board of supervisors the judge of the question as to who are the proper parties to the action, or requires it to determine what persons are to be joined as defendants. All that is essential is that the board should give its sanction to the commencement of the suit; and we think there can be no doubt that an order which merely stated, in general terms, that suit should be brought against the non-consenting land-owners, would be sufficient. The designation of such land-owners by name might be proper, as matter of description. But, as such designation is not essential, we do not think that a mistake in the name is of vital importance, provided it can be gathered from the proceedings what interest was to be acquired. Now, in the present case, Cushing's name appeared throughout the proceedings before the board as the owner in question. The report of the viewers states that the road described takes 4.13 acres of the lands of V. Cushing and specified quantities of the land of three other designated persons; that such other persons consented to the opening of the road, but that Cushing did not consent; and that the amount assessed as compensation to him was \$20.65. Cushing was notified of the hearing of this report, and appeared and contested it; but it was confirmed, and an order was made that, "the sum of \$20.65 as damages be, and is hereby, awarded to Volney Cushing, the non-consenting land-owner, whose land is crossed by said road, and that upon payment to said Cushing of said sum," the road should be opened for travel, etc. The money was tendered to Cushing, but was refused by him, and he subsequently died. Shortly after his death, the order that suit should be commenced against him, was made. This order should be read in connection with the prior proceedings, and when so read, the interest to be acquired sufficiently appears, and we think that, upon any rational construction, the order must be held to authorize the suit against his representative.

7. It is said that the report of the viewers is insufficient, in that it makes no estimate of the amount of damages to be awarded to the owner; and the learned counsel seem to argue

that the damage resulting from the taking is a different thing from the value of the land taken, and that the report of the viewers should state the items separately. It is quite true that the Code of Civil Procedure requires that this distinction should be drawn by the court in its findings. Section 1248. But that provision has nothing to do with the proceedings before the board of supervisors. They are regulated by the Political Code, which provides that the report of the viewers shall contain, among other things, "the estimate of the damage to the owner." Section 2686. It makes no distinction between the items of damage. For example, it says nothing about the value of the land to be taken. But, as this is an important element of the damage, it must be included in the phrase quoted. It seems clear, therefore, that all that was required of the viewers was to report a lump sum, which, in their judgment, was the proper amount to be paid to the owner. If this be the true construction, we think that the report should be held sufficient. We do not think that the report of viewers to lay out a county road, to a body like the board of supervisors, should be construed with any great degree of strictness; and it is to be remembered that such report is not binding upon the owner, who may wait until he is brought into court, where he may prove whatever damage he may have sustained.

There is nothing in the respondent's point that the answer should have been verified. The plaintiff was neither the state, "nor an officer of the state in his official capacity." (Compare *City and County of San Francisco v. Atsell*, 80 Cal. 60, 22 Pac. Rep. 74. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

83 Cal. 547)

STONE v. HAMMELL. (No. 13,024.)

(Supreme Court of California. April 2, 1890.)

PRINCIPAL AND SURETY—LIMITATIONS.

1. Where a surety gives his note for his contributive share to his co-surety, who has paid the debt of the principal, after the co-surety's right of action against the principal is barred by limitation, he cannot recover the amount of the note from his principal.

2. Although a surety's absence from the state will prevent the running of the statute against the right of his co-surety, who has paid the entire debt, to recover from him his contributive share, the statute will continue to run against his right to recover from the principal from the time the debt was paid by his co-surety.

In bank. On rehearing. Reversing 22 Pac. Rep. 203.

Wells, Guthrie & Lee and *S. W. Bouton*, for appellant. *B. F. Thomas*, for respondent.

McFARLAND, J. After further consideration, upon argument on rehearing, we are satisfied that the judgment in this case should be reversed.

The plaintiff, with three other persons,—Newhall, Hamilton, and Hayman,—were sureties on a promissory note made by defendant, Hammell, to one Byron Stevens for \$3,000, dated July 1, 1877, and payable one year after date. Plaintiff claims that one of said sureties, Newhall, paid on said note something over \$2,000, and that plaintiff paid to Newhall, as his *pro rata* contributive share, \$1,000; and this action was brought to recover said \$1,000 of defendant, the principal on the note. There are a number of interesting questions in the case which, under the views which we take of it, need not be determined. For instance, defendant contends that he gave a mortgage to the sureties to secure them, and that the mortgage should have been foreclosed, and that the mortgaged property was sufficient in value to satisfy the note; that defendant was discharged from the liability sued on by a decree in insolvency; and that the \$1,000 was more than plaintiff's contributive share. We will assume, however, that the property was not held by way of mortgage, and was faithfully applied by Newhall, as far as it would go, to the payment of the note; that the decree in insolvency did not include the liability sued on; and that \$1,000 was the correct amount of plaintiff's contributive share.

It is not averred in the complaint, or found by the court, that the plaintiff, Stone, ever paid to his co-surety Newhall any money, or gave him any property, in satisfaction of Newhall's claim for contribution. The only averment on the subject is as follows: "That on the 1st of March, 1884, this plaintiff, in full satisfaction of the amount of money which he should contribute to said P. N. Newhall for his aforesaid payments on the aforesaid note, made, executed, and delivered to said P. N. Newhall his promissory notes in the sum of \$1,000, whereupon the said P. N. Newhall gave to plaintiff his receipt in full for plaintiff's liability to contribute to him for the aforesaid payments on said promissory note." This is not a very clear averment that Newhall took the notes in absolute payment of his former claim, but we will assume it to be sufficient for that purpose. There is no averment that plaintiff ever paid the notes, or any part of either of them. It appears from the findings that they were payable two years after date, and would not mature until more than a year after this action was commenced. The court below held that the giving of these notes, and their acceptance as payment by Newhall, constituted a cause of action in favor of plaintiff against defendant. In this holding, under the facts in the case at bar, at least, the court, in our opinion, erred. The general rule is, undoubtedly, that a surety can recover of the principal only the amount or value which the surety has actually paid. If

he has paid in depreciated bank-notes taken at par, he can recover only the actual value of the bank-notes so paid and received. If he has paid in property, he can recover only the value of the property. If he has compromised, he can recover only what the compromise cost him. The rule is that he shall not be allowed to "speculate out of his principal." *Brandt*, Sur. § 182, and cases there cited; *Estate of Hill*, 67 Cal. 243, 7 Pac. Rep. 664.

There is authority, however, and perhaps a preponderance of authority, to the point that if a surety, by giving his negotiable promissory note, satisfies the claim of the creditor, and extinguishes the debt of the principal to the creditor, he may recover from the principal the amount of the debt without showing that he has paid his promissory note. *Brandt*, Sur. § 181, and cases cited. But the authorities are not uniform upon the subject. In Indiana and North Carolina, and some other states, it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not sufficient. *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, Id. 307; *Romine v. Romine*, 59 Ind. 351, and cases there cited. Many of the cases hold that, if the surety discharges the debt by a negotiable note, he can maintain an action against the principal, while, if he does so by means of a bond, or any non-negotiable instrument, he cannot, upon the theory that a negotiable note is analogous to money,—a distinction which is founded upon no apparent good reason. *Boulware v. Robinson*, 58 Amer. Dec. 117; *Peters v. Barnhill*, 1 Hill, (S. C.) 237. The rule is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had discharged it by actually paying the money. Its weakness lies in the possibility of the surety recovering the whole amount of the principal, and never paying his own note; thus violating the cardinal rule that the surety shall not speculate out of the principal. But, if we assume the rule to be as first above stated, it is not so clearly commendable as to deserve pushing further than adjudicated cases have already carried it; and in all cases to which our attention has been called the rule has been enforced against the principal in favor of the surety who has extinguished the debt to the original creditor. We have seen no case in which the rule has been applied to a surety who had not satisfied the original debt, but had only given his note to another surety, who had satisfied it. Moreover, the reason of the rule, if it be held to be the rule, is that the principal is benefited to the extent of the original debt or liability which has been extinguished by the new obligation of the surety; and the reason ceases when there is no such benefit. Now, in the case at bar, defendant was in no manner benefited by the notes given by plaintiff to Newell, nor was any debt or liability of defendant thereby

extinguished, because, at the time the notes were given, there was no legal liability from the defendant to Newell, for the reason that any cause of action which the latter might have had against the defendant for moneys which he had paid to Byron Stevens had long been barred by the statute of limitations. The last payment made by Newell on the note to Stevens, as averred and found, was on January 10, 1881; and, as his cause of action for the payments which he had made was not "founded on a written instrument," it was barred in two years,—that is, on January 10, 1883. *Chipman v. Morrill*, 20 Cal. 136. But plaintiff did not give his notes to Newell until March 1, 1884. At that time, defendant was under no legal obligation to any one which plaintiff could discharge by giving said notes. The original note given to Stevens had itself been long since outlawed. Therefore, by giving said notes, plaintiff acquired no cause of action against the defendant herein.

We think, also, that the cause of action averred in the complaint would have been barred by the statute of limitations, which was pleaded by defendant, even though plaintiff, on March 1, 1884, had actually paid Newell the \$1,000 in money. Plaintiff seeks to avoid the running of the statute through the fact that, within a month after the original note to Stevens matured, he left the state, and resided out of the state for several years. His contention is that, as Newell's cause of action against him for contribution would not be barred while he remained out of the state, therefore his cause of action which he had against defendant, or which he proposed at some future time to have, by paying his contributive share to Newell, would not be barred during his absence from the state, though such absence should be for 50 years. He contends that by returning at any time, and subjecting himself to Newell's claim, and paying it, he could recover his part of it against defendant, although in the hands of Newell it had been outlawed for a quarter of a century. We do not think that the law of limitation of actions contemplates any such an anomaly. When a man leaves the state, the statute of limitations does not run during his absence as to any cause of action against him, but his absence does not prevent the statute from running as to any cause of action in his favor. At any time within two years after Newell had paid the original note, plaintiff could have paid his contributive share to Newell, and maintained an action for it against defendant. But he could not wait until the whole of Newell's cause of action against defendant was barred, and then revive one-half of the claim by coming back years afterwards, and making a real or pretended payment of it to Newell. The whole claim was, as to defendant, dead; and the breath of life could not be blown into one-half of it by any such legal hocus-pocus. For the reasons above stated, the judgment and order appealed from are reversed, and

the cause remanded for such further proceedings as respondent may be advised to take.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.

BEATTY, C. J. I concur. A surety who pays the debt of his principal has an undoubted right to recover the amount paid. But such is not the case here. The liability of the principal had been extinguished by the statute of limitations before any payment by the surety. The absence of the plaintiff from the state had kept the claim alive as to him, though it was extinguished as to the defendant. The plaintiff, therefore, did not pay the defendant's debt. He merely paid his own debt. By so doing, he could not possibly acquire a right of action against the defendant.

83 Cal. 423

ORD v. BARTLETT *et al.* (No. 12,419.)

(Supreme Court of California. March 12, 1890.)

MORTGAGE FORECLOSURE — RIGHTS OF ADVERSE CLAIMANTS.

Adverse title to mortgaged premises, asserted by alleged prior grantees of the mortgagor, cannot be determined in the foreclosure suit; the proper course being either to dismiss the suit as to them, or to specify in the decree that it is made without prejudice to their rights.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

A. S. Kittredge, for appellants. L. N. Goldsby, for respondent.

BELCHER, C. C. On the 24th day of January, 1877, William M. Ord executed to the plaintiff, then Mrs. Anne E. Williams, his promissory note for \$700, and a mortgage to secure payment of the same. Subsequently the plaintiff became the wife of Ord, and there was born to them a child named Anne Victoria Ord. On the 26th of April, 1882, Ord died intestate, leaving, him surviving, the plaintiff, his widow, and the child, Anne Victoria, as his only heirs at law. Administration on the estate of the decedent was taken out, and S. A. Bartlett was duly appointed the administrator thereof. The plaintiff commenced this action to foreclose her mortgage, making Bartlett, as administrator of the estate, and other parties, defendants. As to the defendants other than Bartlett, the complaint alleged that they had, or claimed to have, some interest in or claim upon the mortgaged premises, which interests or claims were subsequent and subject to the lien of the plaintiff's mortgage. Bartlett allowed a default to be entered against him. The other defendants answered, and, among other things, denied that their interest in or claim upon the mortgaged premises was subsequent or subject to the lien of the mortgage. They then, "for a separate answer and defense," alleged that, under a deed executed by the decedent, Ord, in April, 1873,

—of which deed the plaintiff had full notice when she took her mortgage,—they became the owners, and "have continuously been, and are now, seised and the owners of all the right, title, interest, and estate of said grantor in and to the whole of said premises; that the said claim, interest, and estate of these defendants, and each of them, is, and always has been, prior to and superior to the lien or any lien of said mortgage, and is not, and never was, subsequent to or subject to the same." To this last defense a general demurrer was interposed and sustained. The case was then tried, and judgment was rendered foreclosing the mortgage as against all of the defendants. A motion for new trial was made and denied, and the appeal is from the judgment and order.

The principal question presented for decision relates to the action of the court in sustaining the demurrer. It is claimed that the ruling in this respect was erroneous because, if the averments were true, the appellants "should have been allowed to show it; for that would have dismissed the action as to them." It is well settled that adverse titles to the mortgaged premises, held by parties claiming by conveyance from the mortgagor prior to the mortgage, are not the proper subjects of determination in a suit for foreclosure. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. *San Francisco v. Lawton*, 18 Cal. 474. If one who sets up a claim to the land adverse and paramount to that of the mortgagor is made a co-defendant in an action to foreclose a mortgage, his adverse claim cannot properly be tried, and he may refuse to appear and put it in issue; or, if he does appear and put it in issue, the court may refuse to pass upon it. In either event the decree rendered will in no way affect his rights of priority. *McComb v. Spangler*, 71 Cal. 418, 12 Pac. Rep. 347; *Johnston v. Savings Union*, 75 Cal. 135, 16 Pac. Rep. 753. In such a case the proper course, undoubtedly, would be to dismiss the action as to the adverse claimant, or to specify in the decree that it is made without prejudice to his adverse rights. Here the appellants' rights under the deed set up in their answer were not tried or determined; and they cannot, therefore, be impaired or affected by the decree. This being so, appellants suffered no injury by the ruling upon the demurrer, and they have nothing to complain of.

The other points made by appellants relate to the admission of evidence. They sought to prove that plaintiff's note had been paid in whole or in part. But they set up and claimed no interest in the property except the adverse interest before mentioned; and it was, therefore, a matter of no concern to them whether the note had been paid or not. We find no error in the record prejudicial to the appellants, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

ON REHEARING IN BANK.

(April 5, 1890.)

It is ordered that the petition for rehearing herein be, and the same is hereby, denied; but the judgment of the department No. 2 herein is modified by the addition of the following: Provided, that nothing in this judgment, or in the judgment appealed from, shall be construed or held to prejudice or affect any rights of the appellants in or to the mortgaged premises derived from William M. Ord, the mortgagor and common grantor, prior to January 24, 1877, the date of plaintiff's note and mortgage, described in the complaint herein. BEATTY, C. J.; THORNTON, J.; FOX, J.; MCFARLAND, J.

83 Cal. 477

GLIDE v. DWYER et al. (No. 12,882.)

(Supreme Court of California. March 27, 1890.)

MORTGAGE—FORECLOSURE—TRUSTEE.

1. A complaint to set aside a decree of foreclosure alleged that H. and G. executed a trust mortgage to M. and F. to secure certain notes, (3,200 in number,) in whosoever hands they might be. It further alleged on information and belief that "not more than" 1,440 of them were issued. It also alleged that, on the day of filing the complaint, plaintiff was the holder of certain of said notes, which were past due. There was no averment either that any of said notes were ever issued or as to when or from whom he received the notes he was holding. Held, that he did not show any interest which would entitle him to attack the foreclosure, as the presumption was that they passed to him from the makers on the day of filing the complaint.

2. Where an action to foreclose a trust mortgage is prosecuted by and in the name of the trustees for the benefit of the beneficiaries, whosoever they may be, as Code Civil Proc. Cal. § 369, provides may be done, the beneficiaries, though not named as parties to the record, are privy, and are estopped by the decree in the absence of fraud.

3. Where a trustee under a mortgage buys in with his own means a first mortgage on part of the premises covered by the trust mortgage, it is within the jurisdiction of a court of equity, on foreclosure of the trust mortgage, to award him the amount so paid out of the proceeds of the entire premises.

4. The mere fact that at a mortgage foreclosure sale the property was sold to a mortgagee for a sum much below its value is no evidence of fraud.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

A. P. Catlin and Add C. Hinkson, for appellant. J. H. McKune, (Beatty & Denson, of counsel,) for respondents.

FOX, J. This is a bill in equity, in the nature of a bill of review, brought to set aside a decree of foreclosure and proceedings subsequently had thereunder, on the alleged ground of fraud. Defendants demurred to the complaint that the same did not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to relief, and specified many particulars wherein it was insuffi-

cient; among others, that, as to many of the allegations, the plaintiff was barred by lapse of time, and laches. The demurrer was sustained. The plaintiff declined to amend, and judgment was entered for the defendants, from which plaintiff appeals.

This is a case where the rule that a pleading must be construed most strongly against the pleader, clearly applies; but, coming up, as it does, on demurrer, all the allegations of fact therein not inconsistent with other allegations in the same count must be taken as true. The deductions to be drawn from them are for the court, and it does not follow that such as are drawn by the pleader are admitted to be correct. From the allegations of the complaint, it appears that on the 15th day of April, 1880, the defendants H. T. Holmes and William Gwynn made and executed to the defendants Frank Miller and Daniel Flint, as trustees, their certain mortgage, covering 2,437.38 acres of land, in Lisbon district, Yolo county, in this state, to hold the same in trust as security for the sum of \$80,000 to the holders of any and all of certain promissory notes in said mortgage described, to-wit, 3,200 in number, for \$25 each, with interest thereon at the rate of 8 per cent. per annum, divided into four series, severally marked and known as "Series A, B, C, and D," with 800 notes in each series. All the notes were to be in the same form, except that those of series A were to be payable on or before the 15th day of April, 1881; those of series B, on or before the 15th day of April, 1882; those of series C, on or before the 15th day of April, 1883, and those of series D, on or before the 15th day of April, 1884. All were, or were to be, signed "H. T. HOLMES & Co.," and made payable to "William Gwynn or bearer." The said H. T. Holmes and William Gwynn were partners, doing business under the firm name of "H. T. Holmes & Co." There is no averment that all, or in fact any, of the said \$80,000 series of notes were ever issued. There is an averment, upon information and belief, that, "of the said 3,200 promissory notes, not more than 1,440 were issued. That is to say, there were only issued 360 notes of each of said several series, making an aggregate of \$36,000." According to the well-settled rules of construction, we have here an entire failure of allegation that any of the notes were ever issued, with an affirmative allegation putting a limit upon the number, if any, that were issued. This is followed by an averment that "said notes so issued were by * * * said trustees delivered to said Holmes and Gwynn, who, before the same matured, used them, in whole or in part, in the payment of their debts and liabilities, and in discharging the claims and demands of their creditors." In another portion of the complaint it is averred that the purpose of the parties to the mortgage was to enable Holmes and Gwynn to pay off their debts, etc., "and that said promissory notes were received by said Holmes and Gwynn,

and used by them, for said purpose, and other purposes." The complaint must be construed as a whole. So construing it, the averment last quoted must not be held to refer to the whole \$80,000 of said notes, but only to such of them as were actually issued. Without any direct averment showing that any were ever issued, there is a limitation placed upon the amount, if any were so issued; and no averment is made from which the fact could be found that any were issued before their maturity, or before the trust created by the mortgage was closed by operation of law, under the decree of foreclosure hereinafter mentioned, except a few that seem to have been in the hands of the defendant McCarty before such foreclosure, and which will be hereafter referred to. There is an averment in the complaint that on the day of the filing thereof, April 11, 1888, nearly four years after maturity of the last of the series, the plaintiff is the holder of certain of said notes, and of each of the four series thereof, which are due and unpaid, with interest thereon from the 15th day of April, 1880,—the day of their date. There is no averment as to when, or from whom, he received them. Assuming that they were ever executed, all that the complaint shows is that they were in the hands of Holmes & Gwynn, their makers, until they passed to plaintiff. So long as they remained in the hands of their makers, they were unissued, and were not notes secured by this mortgage. Under every rule of construction of pleadings, we are bound to assume that they passed from the hands of the makers to this plaintiff on the day of the filing of this complaint, and not before. On that day, and for at least 15 months before that time, if in the hands of the makers, they were mere waste paper, so far as the security of this mortgage was concerned, for the mortgage had already been foreclosed, and the trust under it had ceased. They could not acquire new life by being transferred to plaintiff; and he could not at that time have acquired any rights under them greater than that held by the person from whom he received them, whoever that might have been. Of the \$36,000, which he declares was the limit of the notes issued, he claims that, at the date of filing his complaint, he is the owner and holder of \$17,825, nearly equally divided between the several series; but he does not claim that he, or the person from whom he received them, held them before maturity, or before the foreclosure of the mortgage by which he alleges that they were secured. It is, therefore, apparent that he has not alleged in this regard facts sufficient to entitle him to attack that foreclosure, or any of the proceedings anterior thereto.

The complaint further shows that 846.26 acres of the land described in the mortgage hereinbefore mentioned was at the time subject to a prior mortgage, made March 28, 1879, by said William Gwynn to William Russell, to secure the payment of a promis-

sory note of even date, made by said Gwynn to said Russell, with interest thereon at the rate of 10 per cent. per annum. This note matured two years after its date. It is averred that one-half the principal and interest of this note had been paid prior to the execution of the \$80,000 mortgage, but it is not stated when or by whom; and, as militating against that averment, and inconsistent with it, it is further shown by the complaint that, at or about the time of the execution of the \$80,000 mortgage, Russell made an assignment of his mortgage to the National Gold Bank of D. O. Mills & Co., of which bank it is alleged said Miller was cashier and manager, which bank agreed to assign the same to the trustees upon payment of \$3,500 and interest; and at the same time the trustees gave to Russell a written agreement to deliver to him \$4,200 of "the proposed" trust mortgage notes, when received, in full satisfaction of the balance of his claim under the mortgage. It will be borne in mind that the Russell mortgage was not yet due, and that these two sums amount to just the principal of said mortgage, with the then accrued interest thereon. The law presumes that when the bank received the assignment it paid a consideration therefor. Code Civil Proc. § 1963, subd. 39. It also presumes that in dealing with that mortgage the ordinary course of business was followed. *Id.* subd. 20. From these two declared presumptions of the law, this additional presumption follows: That no part of the note secured by that mortgage had been paid at that time,—it being before maturity; that, upon surrendering it, Russell demanded and received in money and notes the full amount then accrued in his favor under it, \$7,700. As he accepted the agreement of the trustees for the delivery of the \$4,200 in notes, and the bank only agreed to assign to the trustees upon the payment to it of \$3,500 with interest, and that was the balance represented by the mortgage, presumably that was the amount which the bank paid, and Russell received for it. Stripped of mere invective, this was all consistent with honesty and fair dealing, and with the purpose for which the \$80,000 mortgage was made,—that of facilitating the settlement of the affairs of Holmes & Gwynn. It is further alleged, in this connection, that Miller subsequently acquired control of this mortgage, and had it foreclosed in the name of another person, but in his own interest, and upon the sale thereof, under foreclosure, had the property bid in, and the title taken in the name of his wife, and that all this was in fraud of the holders of the trust mortgage notes. We can conceive it possible, and even quite probable, that upon the maturity of that mortgage, held, as it was, by a national bank of which Miller was cashier and manager, he was compelled to take it up, and, as it does not appear that he ever received a dollar of trust funds with which to do it, that he had to do

it from his own funds. If so, he was entitled to be protected, and to protect himself, for the advances which he was compelled to make to preserve the trust property. The method of doing it may not have been the wisest, under the circumstances, that could have been adopted. But, whether good or bad, the plaintiff has failed to show that he has any ground to complain of it—*First*, because he has failed to show that he or his assignor was the holder of any notes or had any interest under the trust mortgage, or as a creditor of Holmes & Gwynn; *second*, because the entire transaction, including the foreclosure and sale, was a matter of public record, of which he was bound to take notice, and of which he is conclusively presumed to have had knowledge, and was concluded more than three years before the commencement of this action; *third*, if there was any fraud or error in that foreclosure, or in the sale under it, or in the acquiring of the title by Miller's wife, or by Miller in the name of his wife, it was all corrected upon the foreclosure of the trust mortgage, which was concluded 15 months before the commencement of this action, and in which the sale under the former mortgage was set aside, and the property subjected to foreclosure in the latter case,—all of which, the complaint alleges, was done with the consent of Miller, acting as the executor of the will of his wife, then deceased. Whether with his consent or not, he has taken no exception to said last decree, nor any appeal therefrom. It is further alleged that on the 3d of March, 1883, the defendant McCarty commenced a suit against the defendants Gwynn, Holmes, Miller, and Flint, and against one Wilson, the person who is alleged to have held the assignment of the other mortgage for Miller, to recover judgment against Gwynn and Holmes upon 18 of said trust mortgage promissory notes, amounting to \$450, with interest thereon, and for a decree of foreclosure and sale of sufficient of said mortgaged premises to satisfy the same, and that on the 9th day of April, 1885, judgment and decree was entered in accordance with the prayer of said complaint. Further, that on the 5th day of July, 1884, the defendants Flint and Miller commenced an action against Holmes, Gwynn, Wilson, and McCarty to foreclose said \$80,000 mortgage, alleging that McCarty and Wilson had or claimed some interest in the mortgaged premises which was subsequent and subordinate to the lien of said mortgage; that in that action McCarty appeared and answered and filed a cross-complaint in which he claimed to be the holder of 45 of said trust mortgage notes, and set up all the facts about the Russell mortgage, and Miller's connection therewith, the foreclosure thereof and sale thereunder, and claimed that such foreclosure and sale were in fraud of the rights of the holders of the trust mortgage notes; that Wilson did not appear, and was never served with summons; that Sarah E. Miller,

wife of Frank Miller, intervened, setting up her title; that she afterwards died, pending the action, and Frank Miller, as the executor of her will, was substituted as such intervenor in her stead; that afterwards an order was made, with the consent of all the parties, J. H. McKune, Esq., appearing for McCarty, and Beatty and Denson for all the other parties, consolidating the two foreclosure cases; that the parties then, other than Holmes and Gwynn, with fraudulent intent, procured an order to be entered in the McCarty foreclosure suit setting aside the decree which had been entered therein; and that on the same day "all the parties to said suit, [the consolidated foreclosure suit,] in the further prosecution of the fraudulent designs herein stated, procured a final decree in said action to be made and entered, of which the following is a copy;" and then follows a copy of the decree. It does not show upon its face that it was a consent decree, but declares that the case was tried in open court, all the parties thereto appearing by counsel, and was tried and submitted upon the pleadings and proofs adduced. It then proceeds to decree and order the sale of all the land covered by the trust mortgage, thus setting aside or disregarding the foreclosure and sale under the Russell mortgage, and directed the disposition of the fund arising therefrom. It provided that any party to the action might become a purchaser at the sale, and that the funds arising therefrom should be distributed as follows: *First*, to the payment of the costs and expenses of sale; *second*, to the payment of the costs of suit; *third*, to the payment to Frank Miller, executor of the will of Sarah Edna Miller, of the sum of \$6,395.50; *fourth*, to the payment of the sum of \$500 to Flint and Miller for their services and commissions in executing the trust; *fifth* and *sixth*, to the payment of counsel fees to the several counsel of McCarty and the trustees, of sums amounting in the aggregate to \$1,000; *seventh*, to McCarty the sum of \$3,041.50, "in full satisfaction and payment of the notes held by him against said Gwynn and Holmes;" and, *eighth*, that any further sum that might be realized be brought into court, to be distributed to the holders of notes issued under the trust mortgage as they should make their respective rights appear.

The entire decree seems to have been within the equitable jurisdiction of the court. If there was error in it, or in any of the awards made by it, it was open to correction, upon application of any party interested, by motion in the court below, and then by appeal. It does not appear that any motion to correct it was ever made in the court below. No appeal was ever taken, and more than the full time allowed by law for appeal expired before this action was brought. That action was brought and prosecuted, by and in the name of the trustees, for the benefit of the beneficiaries under the trust, whosoever they might be, as the statute expressly provides

may be done. Code Civil Proc. § 369. There is no pretense that the plaintiff or his assignor was without notice of the pendency of that action, or of any of the acts which are alleged to have been fraudulent or collusive. The presumption is that he had such notice. Though not named as a party to the record, he had a right, assuming that he (plaintiff or his assignor) was a party in interest, to have himself made a party to the record, by intervention or motion, at any stage of the proceedings. But he preferred to let the whole matter be conducted by his trustees. Though not a party to the record, he was privy, if he was the holder of any of these trust mortgage notes, and is estopped by that decree, unless there was fraud of which he had no notice, or was not by law charged with notice; and it is not pretended in the complaint that such was the fact. See *Freem. Judgm.* § 181; *Pom. Rem.* § 400; *Robbins v. City of Chicago*, 4 Wall. 657; *Castle v. Noyes*, 14 N. Y. 332.

But the fallacy of this charge of fraud, if the plaintiff was or is in position entitling him to be heard on such a charge, is sharply illustrated by reference to one point made and insisted upon in connection with this part of the case. It is insisted upon as perhaps the strongest and most perfect badge of fraud in this case that the plaintiff Miller caused and procured this decree to be so framed and entered as to give the intervenor Miller a lien upon the entire mortgaged premises for the amount awarded in his favor, and to be paid out of the proceeds of the sale of the entire premises, instead of upon the part thereof covered by the Russell mortgage only, and to be paid out of the proceeds of the sale of that part. As we have already said, it does not appear from the record that Miller had anything to do with the framing of this decree. Whether he did or not, there was neither error nor fraud in that part of it which is so insisted to have been fraudulent. This award was not made in satisfaction of the Russell mortgage. On the contrary, the lien of the Russell mortgage was ignored. According to the facts set up in the complaint, that mortgage had been satisfied and extinguished. The court evidently found, and the facts set up in this complaint would support such a finding, that the moneys claimed by the intervenor were moneys paid out and expended under the trust, and for the benefit of all the beneficiaries thereunder, to relieve the trust property of this prior incumbrance. For the moneys so expended the party was entitled to a return, with interest and costs necessarily incurred in that behalf, and to have the same returned out of the whole trust fund. It was as much a first lien on that trust property as any other expense legitimately incurred by the trustees, and could not, in law or in equity, be so limited as to be a lien upon a moiety only of the trust property. The amount to be allowed on account of that expenditure was for the court

to determine; and in doing it the court seems to have fixed the amount at only about two-thirds the sum claimed and allowed in the former suit for the foreclosure of the Russell mortgage.

One further fact, insisted upon as one tending to show fraud, remains to be considered. At the sale had under the foreclosure of this trust mortgage, the defendant McCarty bid in the property in one parcel at the sum of \$11,500. This occurred March 5, 1887. He afterwards assigned an interest in it to the defendant Dwyer, and in due course the sheriff issued his deed to McCarty and Dwyer. It is alleged, upon information and belief, that the property was then worth \$35,000, and that the property was allowed by the parties to the action, other than Gwynn and Holmes, to be struck off to McCarty for this smaller sum, for the purpose of defrauding the other holders of the trust mortgage notes; but it is not alleged that either the plaintiff or his assignor was one of the holders of such notes, or was injured thereby. We are aware of no law which compels judgment creditors to bid upon property upon which they have a lien any higher than they please. The sale was at public auction, under a decree of court, and, presumably, conducted according to law. There is no allegation that it was not first offered in separate parcels, or that any of these defendants did any act which prevented, or tended to prevent, any other person from bidding at the sale any sum that he pleased for the whole or any part of the land. Plaintiff says he is now willing to bid for the property a sum sufficient to cover such awards as the court may, upon a new trial, make in favor of the other parties to the action, and the amount due him upon the notes which he claims to hold. He had the opportunity of doing so at that sale; and, if he was then the holder of these notes, or any of them, it was his interest to see that the property brought all that it was worth.

It thus appears to us, upon a careful examination of all the allegations of fact contained in this complaint, as distinguished from mere invective and conclusion, that it fails to show a case of fraud, in which a court of equity would be justified in interposing to set aside this decree of foreclosure, which has been allowed by not only the parties to the record, but by all the parties in interest, to become final. It also fails to show that the plaintiff or his assignor was or is a party who could or can maintain such an action—*First*, because it fails to show that he or his assignor is or was the holder of any note, secured by said mortgage, issued before the mortgage was foreclosed and the trust extinguished; *second*, if it be assumed that the notes now claimed by him were outstanding at the time of the foreclosure, then he was privy to the action, and is estopped by the decree, on the authorities and for the reasons already stated. It follows that the demurrer was prop-

erly sustained, and the judgment must be affirmed. So ordered.

I concur: SHARPSTEIN, J.

PATERSON, J. I concur. It must be presumed, in the absence of objection to the contrary, that plaintiff and his assignors had full notice of the pendency of the action, and of all the facts now relied on to show fraud and collusion. Having such notice, it was their duty to appear in the action to protect their rights. Freem. Judgm. § 181; Pom. Rem. § 400; Robbins v. City of Chicago, 4 Wall. 657; Castle v. Noyes, 14 N. Y. 332. Furthermore, under the allegations of the complaint, plaintiff must be deemed to be an assignee without consideration after judgment of foreclosure and sale. He cannot, therefore, avail himself of this remedy. Thompson v. Maxwell, 95 U. S. 397; 2 Smith, Ch. Pr. 49. For these reasons I concur in the affirmance of the judgment.

McFARLAND, J. I concur in the judgment for the reasons stated in the opinion of Mr. Justice PATERSON.

83 Cal. 505

HERRLICH v. McDONALD. (No. 12,235.)
(Supreme Court of California. March 31, 1890.)

APPEAL—REHEARING.

Motion to recall a *remittitur* was properly denied where, within the 30 days after the filing of the opinion in department, no petition or order for a rehearing of the cause in bank was filed, as required by Const. Cal. art. 6, § 2, though within that time a motion to strike out the damages from the judgment was made and denied, but not shown on the record. PATERSON and Fox, JJ., dissenting.

In bank. On rehearing. For former opinion, see 22 Pac. Rep. 298.

W. H. Sears, for appellant. Chas. F. Hanlon, for respondent.

McFARLAND, J. This case is before the court upon a motion of appellant to recall the *remittitur*. The cause was heard in department 1, and the judgment of the court below was affirmed, with 15 per cent. damages, the opinion of the court in department having been filed September 7, 1889. 22 Pac. Rep. 298. At the end of 30 days the *remittitur* issued as usual, no petition for hearing in bank having been filed. The motion to recall the *remittitur* is based on an affidavit of appellant's counsel to the effect that on September 16, 1889, he made a motion in department 1 to modify the judgment by striking off the said 15 per cent. damages, and that said motion had never been decided. The records of the court do not show that any such motion was made. As a matter of fact, however, counsel did make such a motion or request orally, but it is also true that the court (department 1) did consider the motion and decided against granting it, although that decision does not appear on the records. So the record does not show anything about the

matter. But, assuming the facts to be as stated in the affidavit, as there was no order made that the cause be heard by the court in bank, the judgment became final, under the constitution, art. 6, § 2, in 30 days, and the *remittitur* in usual course went down to the lower court. The pendency of appellant's said motion—assuming that it was pending—could not prevent that result; and when a *remittitur* issues in regular course the rule is that the jurisdiction of this court ends. Whether or not the court would have power to recall a *remittitur* issued through its own inadvertence it is not necessary here to determine. There was no such inadvertence in this case. As there was no petition for hearing in bank under rule 30, there was nothing for this court to act upon within the 30 days, and at the expiration of that time the *remittitur* issued regularly, and not inadvertently. See Adams v. Dohrmann, 63 Cal. 420. Motion to recall *remittitur* denied.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

PATERSON, J., (*dissenting*.) I am unable to concur in the conclusion of the majority. The 15 per cent. damages were imposed without notice to the appellant, and upon learning the fact her counsel, before the expiration of the 30 days, came in and moved the court to modify the judgment by striking out the damages which it had added without a hearing. The motion was submitted, and I think he had the right to assume that the court would control its *remittitur* until all matters affecting the judgment had been passed on. But it is said the motion was decided, although no record was made of it. This is true, but it was the duty of the court to make a record of its action, which would give the party affected by it notice and an opportunity to be heard. If such record had been made, he could have petitioned for a rehearing before the *remittitur* issued. When a party thus loses a right which but for the mistake of the court would have been preserved to him, it seems to me we ought to say the *remittitur* was issued through inadvertence, and should be recalled. The fact that no petition for a rehearing was filed within the 30 days does not seem to me to be material. The moving party sought only to have the damages (amounting to over \$1,000) stricken out. If the department had granted the motion which was submitted to it, there would have been no necessity for a rehearing.

Fox, J. I concur with PATERSON, J.

3 Cal. Unrep. 250

STAPLES v. MAY. (No. 12,167.)

(Supreme Court of California. March 31, 1890.)

MORTGAGES—DESCRIPTION—RECEIVERS—TRESPASS.

1. Where a mining company operates its various mines under one system, and the proceeds of the ore extracted from each are used indiscrimi-

nately, for the common benefit of all, a receiver appointed on the foreclosure of mortgages covering a part only of the company's property, with power to take possession of the mortgaged premises and to carry on the mines, who is permitted by the company to take possession of its entire property, and to work all its mines, rendering them more valuable and more capable of paying creditors, cannot be considered a trespasser, and is not personally liable to a general creditor of the company for sums realized by him from a mine not covered by the mortgage.

2. A mortgage of specifically described land, together with all the lands, mines, and minerals of every kind belonging to the mortgagor in a designated county, covers all mineral lands in that county shown by proper evidence *denors* the mortgage to have belonged to the mortgagor at the time of its execution.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; D. S. BELDEN, Judge.

T. I. Bergin, for appellant. *S. F. Leib*, for respondent.

FOOTE, C. This appeal is taken from a judgment in favor of the plaintiff, and from an order denying the defendant a new trial. From the record, it appears that Henry May was appointed the receiver of the property belonging to the Santa Clara Mining Association of Baltimore, whose lands and property were in the county of Santa Clara in this state; that the lands owned or possessed by this association contained mines of quicksilver; that the association was without means to work the mines, by which alone its then numerous debts could be paid; and that, to that end, May was authorized by the court which appointed him to borrow money, and use and expend it in working the mines, etc. He was originally appointed receiver in an action brought by the executors of the estate of W. S. O'Brien, deceased, to foreclose a mortgage on certain specific lands of the Santa Clara Association, and to foreclose a pledge of certain bonds secured by another and second mortgage or deed in trust. Afterwards, when the beneficiaries under the deed in trust, who were made parties to the action originally, intervened and filed a cross-complaint seeking to foreclose their second mortgage or deed in trust, he was appointed receiver of all the property contained in both instruments, to carry on the quicksilver mines, borrow money, etc. There were other unsecured creditors, among whom was the plaintiff, Mary E. Staples, who could not get any satisfaction for their debts out of their debtor, the Santa Clara Mining Association, by reason of its insolvency, and the existence of the instruments above mentioned. But she brought suit against the association, obtained her judgment, and, by proceedings supplementary to the execution issued on her judgment under section 720, Code Civil Proc., sought the aid of the superior court to force May, the receiver, to pay her what she claimed was due her debtor, the mining association, from May, as a trespasser, in realizing money from a mine of the Santa Clara Mining Association which was not included in either of the mortgages for

which foreclosure had been prayed, and in which action May was, as before stated, appointed receiver. The court below held that May, as receiver, had gone upon the property of the Santa Clara Mining Association which was not included in either mortgage; that he was not authorized to do so as receiver under the appointment of the superior court; that he did so as a trespasser; and that the net profits which he had realized out of the working of the quicksilver mine upon which he had trespassed amounted to the sum of \$38,212, for which and interest he became liable to pay to the Santa Clara Mining Association of Baltimore, the mortgagor in the two mortgages, amounting in the aggregate to the sum of \$46,414.84; and, being liable to that corporation, the plaintiff "is entitled to judgment against defendant for such proportion of the sum of \$46,414.84, as the amount of her said judgment and interest thereon to date, to-wit, \$6,593.19, bears to the said sum of \$55,470.70, to-wit, for the sum of \$5,515, and costs of suit."

The theory of the case on which the court seems to have made its findings and decision, and upon which it refused the motion for a new trial, is that the court never had any jurisdiction over the particular part of the Guadeloupe mine, the mining property of the Santa Clara Mining Association, from whence the quicksilver sold by the defendant was taken; that the receiver never had any authority to enter upon it; and that whatever sum of money resulted over and above the expenses of mining the quicksilver was an indebtedness of May, as a trespasser, to the Santa Clara Mining Association, for which he was individually responsible to them, and which, being an indebtedness accruing to them, was the subject of such proceedings as are here initiated, and he must pay her share over to the plaintiff. This conclusion, it is contended by the appellant, is wrong, if the defendant is not justly indebted to the Santa Clara Mining Association, or if any such state of facts exists, as in equity and good conscience that association should not hold the defendant liable as trespasser; and it is urged that he should be held as one who, in the proper care of the other property of the association legally in his custody, was compelled to preserve that part of which he did have charge by the use of that of which he did not have control; thus benefiting the property of the Santa Clara Mining Association, increasing its value, and rendering it the more capable of paying the mortgage debts, and thus making it the more probable that the unsecured debts should be paid.

We think that the facts shown by the record are that, at the time of the first appointment of the receiver, all the mining property of the Santa Clara Mining Association was a part of the same system of operations; that it was all held as the mining ground, for the one common purpose of extracting quicksilver ore; that whatever quicksilver was extracted from one portion of the ground was

used, indiscriminately, when sold and converted into money, for the common benefit of the whole property; that the association, being a party to these foreclosure proceedings, knew when the receiver was appointed that he would take charge of the whole property; that it was in such a condition as that everything which could be gotten out of it, and every part of it, would be needed to preserve the property, and aid in paying its secured indebtedness; and that the receiver would use the whole of this property for that purpose. And, knowing all this, the mining corporation permitted him to take possession of all the property, to use it indiscriminately, to borrow money under the orders of the court, to carry on the whole mining industry, to work every part of it for the common benefit of the whole, never once protesting or objecting, but, apparently, willingly allowing all the benefit which accrued by virtue of the acts of the receiver to go to the enhancing of the value of its property, and standing by, not only without objection to, but, to all intents and purposes, approving his acts; and, so far as this record shows, the corporation is still satisfied with and acquiesces in the acts of the receiver with reference to its whole property. Those who complain are persons to whom the mining association is indebted, and who cannot get their money unless they can show that, as a trespasser, the defendant did acts which the corporation considered a trespass, and not a benefit. The defendant, as receiver, has yet to repay many thousands of dollars of borrowed money used to develop and care for the property of the mining corporation, and borrowed under the authority of the court; yet the plaintiff claims that the proceeds of the quicksilver which the defendant extracted from one portion of the mine should go to her as the representative of the corporation whose property had been trespassed upon, and that the debts which he contracted under orders of the court, unobjected to by the mining corporation, and used to render more valuable its whole property, shall go unpaid from the proceeds of the corporation's property which this borrowed money assisted to bring into existence. The defendant has benefited the mining corporation by all his acts. That corporation was a party to the proceedings, stood by and allowed him, without any sort of check or sign of disapproval, to develop its property, make it more valuable, more capable of paying its creditors, and yet seems to affirm his acts, and makes no claim against him; but its creditors who are not secured claim that May is a willful trespasser, and should be made to hand over to them money, which they claim he wrongfully has, belonging to the mining corporation. That corporation was interested to have the property included in the McCalmont or first mortgage increased in value so as to go further towards the payment of the mortgage debt, by the preservation of such property by May; and, if he used the ore taken out of station 8 to do this, and bor-

rowed money, and applied it to the working of the whole property, thus benefiting the mining corporation, and it sat by, and did not object to receive such benefit, but took it in silence, we cannot see that it can now hold the acts of May in the premises those of a trespasser. *Wise v. Walker*, 81 Cal. 11-13, 20 Pac. Rep. 81, 22 Pac. Rep. 293, and cases cited.

But, while this is true, there is another reason why May should not be held a trespasser, and responsible to the mining corporation. The second mortgage, or deed in trust, the one given to the Farmers' Loan & Trust Company of New York, which was a party defendant to the suit of foreclosure, and then, by intervention and a cross-complaint, became a voluntary party thereto, was, as we think, a mortgage on all the interest in the disputed mine which the Santa Clara Mining Association had. The specific description of property set out in that conveyance did not carry any interest in the ground called "Station No. 8," from whence the quicksilver in controversy was taken, but that which follows did. It is in this language. After conveying the property described in the first or McCalmont mortgage, it reads: "Together with all and singular the property thereunto attached or belonging, situated in Santa Clara county, in the state of California, or wherever the same may be, and all the lands, tenements, mines, minerals, real and personal property, rights, privileges, and appurtenances, of every kind whatsoever, of or belonging to the said party hereto of the first part, in Santa Clara county aforesaid." "A deed is evidentiary and may be helped out by other evidence." *De Sepulveda v. Baugh*, 74 Cal. 468-472, 16 Pac. Rep. 223. As this deed conveyed all the lands, etc., that belonged in any way to the mining corporation in Santa Clara county, all that would be necessary to make the description certain would be to show *dehors* the deed, by proper evidence, that the mining ground in controversy belonged at that time to the corporation. *Pettigrew v. Dobbelaar*, 63 Cal. 397. This was sufficiently shown; and the court had jurisdiction of the property by reason of the second mortgage or deed in trust, and the mortgagor being a party, as well as the mining corporation, to the action of foreclosure wherein the receiver was appointed. The Santa Clara Mining Association was a party to the whole proceedings. It was competent, therefore, for the court, sitting as an equitable tribunal, to settle all matters of accounting in the foreclosure suit; to adjust the whole matter, even if it involves items accruing after the commencement of the action. Station 8, from which the ore in controversy was taken, belonged to the association at the time the trust-deed was executed and delivered,—as much so as it ever did after that time. If the association had no title at the time the trust-deed was given, it had none at the time the ore was taken out. But

it did have possession and control of the land, under a claim of ownership recognized in the neighborhood; and in whatever way the land belonged to it, or by what right, that right was carried by the deed in trust.

Upon the whole case, we do not think the court warranted in finding that May was a trespasser upon the property of the Santa Clara Mining Association, or that he is indebted to it in any sum whatever. Wherefore, we advise that the order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is reversed.

BEATTY, C. J. Justice THORNTON is assigned to department 1 for the purpose of considering this case.

83 Cal. 588

NUNAN v. VALENTINE *et al.* (No. 12,663.)
(Supreme Court of California. April 28, 1890.)

APPEAL—DISMISSAL—SATISFACTION.

A motion by appellants to dismiss their appeal on the ground that the judgment has been satisfied will be granted, though opposed by persons who claim to succeed to the rights of the respondent, and ask to be substituted on the ground that the alleged satisfaction was in fraud of their rights; leaving the question to be settled in the superior court, which is the proper forum.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Wm. & Geo. Leviston, for appellants. Carl T. Graef and George D. Collins, for respondent.

BEATTY, C. J. In this case the appellants move to dismiss their own appeal upon the ground that the judgment appealed from has been satisfied. The motion is opposed by parties who claim to have succeeded to the rights of the original plaintiff, and who ask to be substituted as respondents, upon the ground that the alleged satisfaction of the judgment was entered in fraud of their rights. A number of affidavits have been filed relating to this controversy, but we do not think this the proper forum for its determination. A dismissal of the appeal will simply have the effect of affirming the judgment and remitting the questions as to the persons entitled to enjoy the fruits of it, and as to whether or not it has been satisfied, to the superior court, where they ought to be tried. We do not decide these questions, but we see no reason to deny the motion. Appeal dismissed, with costs to respondent.

We concur: THORNTON, J.; SHARPSTEIN, J.; McFARLAND, J.; FOX, J.

83 Cal. 583

In re MOORE'S ESTATE. (No. 13,139.)
(Supreme Court of California. April 26, 1890.)

ADMINISTRATOR—REMOVAL—BURDEN OF PROOF.

1. Code Civil Proc. Cal. §§ 1436-1440, provides that whenever a judge of a superior court has reason to believe, from knowledge or information, that any administrator has long neglected to perform any act as administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such administrator until the matter is investigated, and if, after notice given, he fails to appear, or, if appearing, "the court is satisfied that there exists cause for his removal, his letters must be revoked." *Held*, that an administrator cannot be removed simply because his administration has been continued for 16 years. Such fact, alone, does not overcome the legal presumption of faithful performance of official duty.

2. In such case, it is error to refuse to allow the administrator to show that for 10 years preceding the trial the estate was involved in litigation which was not commenced by him, and which resulted in no injury to the estate.

In bank. Appeal from superior court, Santa Cruz county; PHIL W. KEYSER, Judge.

Petition for the removal of Thomas W. Moore, administrator of William H. Moore. For former reports see 9 Pac. Rep. 164, 315, and 20 Pac. Rep. 558. Code Civil Proc. Cal. §§ 1436-1440, provide that "whenever a judge of a superior court has reason to believe, from his own knowledge or from credible information, that any executor or administrator * * * has long neglected to perform any act as such executor or administrator, he must by an order entered upon the minutes of the court, suspend the powers of such executor or administrator until the matter is investigated;" and if, after notice given, he fails to appear, or, if appearing "the court is satisfied that there exists cause for his removal, his letters must be revoked."

Hall & Rodgers, (Warren Olney, of counsel,) for appellant. *C. B. Younger*, for respondent.

PATERSON, J. The appellant, Thomas W. Moore, was appointed administrator of the estate of William H. Moore, deceased, March 4, 1872. On February 7, 1882, a petition was filed by the widow of deceased, asking the court to remove the administrator from his office on the grounds that he was incompetent to act as administrator of the estate, and that he had neglected to have his accounts settled by the court, and had failed to turn over certain property which had been set apart as exempt from administration. On September 19, 1883, the court denied the petition. The widow thereupon appealed; and on January 27, 1886, this court dismissed the appeal on the ground that an order refusing to remove an administrator was not appealable. 68

Cal. 394, 9 Pac. Rep. 315. On March 15, 1883, the widow asked the court below to appoint her administratrix of the estate, on the ground that Thomas W. had been committed to the insane asylum on April 28, 1881, and that since that time no order had been made appointing any person administrator of the estate. The court denied the request, and the widow again appealed. This court, on appeal, held that the fact that the administrator had been sent to an insane asylum did not create an absolute vacancy in the administration of the estate; and, the application having been made after his incapacity had been removed and he had again entered upon the discharge of his duties as administrator, the court properly refused to appoint another in his place. 68 Cal. 281, 9 Pac. Rep. 164. On July 14, 1887, the petition before us herein was filed in the court below, asking for the removal of the administrator on the following grounds: (1) That he had failed to pay all the family allowance, and refused to deliver to the widow the possession of property set aside for her; (2) that he had failed to file his final account within a reasonable time; (3) that he had wrongfully prolonged the administration of the estate for the purpose of withdrawing from the estate the sum of \$6,000 to pay the widow; (4) that he had used \$6,000 of the fund of the estate to pay off a personal obligation; (5) that he had become mentally and physically incompetent to act as administrator; (6) that, although he knew one of his bondsmen had removed from the state, no additional bond had been given; (7) that he improperly paid out certain sums of money. The appellant filed an answer denying all the charges. The evidence introduced related to only two of the charges, namely, the first and the fifth. The matter having been submitted for decision, the court, on September 7, 1888, filed the following findings and order: "The said Thomas W. Moore has wrongfully and willfully neglected said estate, and has unnecessarily, willfully, and wrongfully prolonged the administration of said estate, to the great detriment thereof. As conclusion of law, I find that the administrator should be removed from the administration of said estate, and his letters of administration revoked. Let an order be entered accordingly." These findings were filed on September 7, 1889; and upon the same day a judgment was entered revoking the letters of administration, and removing the appellant from his office as administrator of the estate.

The judgment is clearly erroneous. If it be conceded that there is an allegation in the petition upon which the finding of the court could be based, there is not a word of evidence in the record to support the finding. The only evidence offered by either party on the question of delay in the settlement of the estate was offered by appellant, and tended to show that the administration of the estate had been prolonged by reason of litigation, for which the administrator was not respon-

sible; but the court, on the objection of respondent, excluded it. If it be assumed that the fact that the administration of the estate was continued for 16 years without a final account, is sufficient, *prima facie*, to justify the finding, it was clearly error to reject evidence offered by appellant tending to excuse the delay in closing the estate. To show unavoidable delay and good faith, the appellant was entitled to introduce in evidence, if he desired to do so, every paper in the case which tended to show the history of the various proceedings had therein, from their commencement to the time of trial. But, as a matter of fact, it is apparent that the issue referred to was abandoned by the petitioner at the trial. He made no attempt to prove his allegation. The burden of proof rested on him, and not upon the administrator; but he offered no evidence of negligence, or of injury by reason of delay. Appellant had the right to rely upon the presumption of fair conduct and faithful performance of official duty until something was offered by the petitioner tending to overcome it, and the mere fact that the proceeding had been pending for 16 years did not throw upon him the duty of disproving the charge of negligence.

The court could not, of its own motion, remove the administrator without giving him an opportunity to be heard. Sections 1436-1440, Code Civil Proc. Nevertheless, this is practically what was done in this case; for not only was there no evidence offered by the petitioner to show unnecessary delay in the settlement of the estate, but, as stated before, the administrator was not allowed to introduce evidence in his own behalf which, if admitted, would have tended to show that for about 10 years the widow had been prosecuting a claim for certain sums of money alleged to be due her as family allowance, and that the litigation had terminated, only a few days before the trial of this action, in a judgment denying her petition. It is true this court had on a former appeal (60 Cal. 528) decided that the administrator was not entitled to have the \$6,000 paid in satisfaction of the bond referred to allowed as a payment on account of family allowance, and to that extent his defense was not supported; but there is nothing to show bad faith on his part. The litigation was not commenced by him, and it resulted in no injury to the estate. In *Deck's Estate v. Gherke*, 6 Cal. 667, it is stated, in the statement of facts, that the order removing the appellant from the administration was made on an order to show cause. That case is authority only for the proposition that the appellate court will interfere with the exercise of the power conferred upon the probate judge in such matters only where there has been gross abuse of discretion. All the cases agree upon that matter. Here, there was no evidence at all introduced in support of the charge of wrongfully prolonging the administration. The only theory upon which the finding can be

supported is that all the papers filed, being matters of record in the proceedings, might be considered by the court as evidence in the case. But, when the appellant applied here for an order for the insertion in the bill of exceptions of some of the papers filed in the proceedings, the application was denied on the ground that they had not been offered in evidence. The fact that they had been commented on at the argument was held not to be sufficient to entitle the party to have them considered as evidence. 78 Cal. 244, 20 Pac. Rep. 558. Respondent again objects to the right of appellant to be heard, and moves to strike out the bill of exceptions and to dismiss the appeal. On August 21, 1889, the motion to dismiss was, after argument, denied in department 2. On September 5th the court in bank granted respondent leave to renew the motion, which was done, and, after argument, was again denied. 20 Pac. Rep. 558. Upon consideration of the points made, we are satisfied that the ruling in this regard was correct. The judgment is reversed, and the cause is remanded for further proceedings.

We concur: BEATTY, C. J.; FOX, J.; THORNTON, J.

(83 Cal. 515)

McDANIEL v. CUMMINGS. (No. 13,173.)

(Supreme Court of California. March 13, 1890.)

EASEMENTS—DISCHARGE OF FLOOD WATER.

1. Civil Code Cal. § 801, providing that the right of receiving water from or discharging it upon land, and the right of having water flow without diminution or disturbance of any kind, may be attached to other lands as easements, merely defines the easements, without prescribing or regulating the mode of acquiring them. Overruling *McDaniel v. Cummings*, 22 Pac. Rep. 216.

2. Plaintiff owns land lying between the Sacramento river and certain lowlands belonging to defendant. The land next to the river is the highest, there being a gradual descent from the river bank to and beyond defendant's land. Held, that plaintiff has no easement at common law to have the flood waters of the river flow over defendant's land. Distinguishing *Ogburn v. Connor*, 46 Cal. 346.

In bank. On rehearing. For former opinion, see 22 Pac. Rep. 216.

H. M. Albery, for appellant. *Edwin Swinford* and *John T. Harrington*, for respondent.

BEATTY, C. J. Defendant owns the west half of a certain section, No. 26, in Colusa county. Plaintiff owns land adjoining on the west. Still further to the west, at a distance of about two miles from plaintiff's land, the Sacramento river flows from north to south. The land next the river is the highest, there being a gradual descent from the river bank to and beyond the land of defendant. When the river rises above the level of its banks, as it generally does several times during every rainy season, the water flows off to the east or south-east, across the land of plaintiff and other lands similarly situated, to and across the land of defendant

and other lands in the same relative situation. It does not flow in any narrow or defined channel or channels, but in a broad sheet, covering a wide surface. When the river falls below the level of the banks the overflow cannot, of course, find its way directly back into the stream, and consequently the lands near the river are drained by the spread and flow of water towards the east and south-east, across the lower lands, such as those of defendant. Left unobstructed in their natural and accustomed flow, these waters soon pass beyond the plaintiff's lands, leaving them fit for cultivation. But recently the defendant, without intending to injure the plaintiff, and acting upon the *bona fide* belief that he had the right so to do, commenced, and was proceeding to complete, a levee or embankment along his west line, the necessary effect of which will be to prevent the flood water from passing over his land, and to set it back upon the plaintiff's land, causing it to cover a larger area thereof, and to remain thereon for a longer period, than it otherwise would. The plaintiff thereupon commenced this action to enjoin the defendant from erecting or maintaining said levee. A temporary injunction was issued upon the filing of the complaint. Afterwards, on motion of the defendant, and upon affidavits showing the state of facts above set forth, the superior court dissolved the injunction on the ground that the defendant, in erecting and maintaining his levee, was acting within and according to his rights. From this order dissolving the injunctory plaintiff appealed, and on September 12 1889, an opinion was filed by this court reversing the order, upon the authority of *Ogburn v. Connor*, 46 Cal. 346. See 22 Pac. Rep. 216. A rehearing was subsequently granted upon petition filed on the part of the defendant, in which the correctness of the decision in *Ogburn v. Connor* is assailed, as is also the construction which we gave to section 801 of the Civil Code.

I think there can be no doubt that we were in error in holding that section 801 of the Civil Code gives to the owner of higher land an easement for the discharge of surface water upon lower land adjoining. That section merely enumerates the different kinds of burdens or servitudes upon lands that may be attached as incident or appurtenant to the other lands; or, in other words, it is a mere definition of easements appurtenant, and makes no pretense of prescribing or regulating the manner of acquiring them. Among the other easements defined are: "(9) The right of receiving water from or discharging the same upon the land. * * * (11) The right of having water flow without diminution or disturbance of any kind." Undoubtedly these are easements which may exist as appurtenant or incident to the lands of one, and as servitudes or burdens upon the land of another, but the question here is not as to what an easement or a servitude is, but as to how it is created, and when it attaches. In

the solution of this question we derive no assistance from section 801 of the Civil Code. That section is no more authority for saying that the plaintiff has an easement for the discharge of surface water according to its natural flow from his land to that of defendant than it is for saying that he has any other of the 17 kinds of easements enumerated; as, for instance: "(1) The right of pasture. (2) The right of fishing. (3) The right of taking game. * * * (17) The right of burial." How, then, is the existence of an easement in any particular case to be determined? Ordinarily, an easement is created by contract between the owners of different parcels of land,—that is to say, by grant, either express or implied; but with respect to rights such as that in controversy here, the question of easement or no easement depends upon the law defining the mutual rights and obligations of the owners of land in the relative situations of the tracts belonging to the plaintiff and defendant. What, then, was the law applicable to these lands at the date of their acquisition? It does not appear when either of the parties acquired his land, but it is to be presumed it was subsequent to the 13th of April, 1850, at which date it was enacted that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state." St. 1850, p. 219. This rule continues in force. Pol. Code, § 4468. As there is nothing in the constitution of the United States, or in the constitution or statute law of this state, to which the common-law rule on this subject—whatever it may be—can be repugnant, it is manifest that the whole question is solved whenever it is determined what the common-law rule is. In the case of *Ogburn v. Connor* this precise question was presented, and it was then determined that "when two parcels of land, belonging to different owners, are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of the lower tract cannot obstruct this flow. The owner of the upper tract has an easement to have the water flow over the land below, and the land below is charged with a corresponding servitude." This, of course, was intended as a statement of the common-law rule, for otherwise it could not have been the law of this state. But counsel for respondent contends, and counsel for appellant seems to admit, that it is really a statement of the rule of the Roman civil law, and that it is the exact opposition of the common-law rule. It must be confessed that this proposition seems to be sustained by many of the cases cited in the briefs, and if the question were now to be decided for the first time I should certainly find great difficulty in arriving at the conclusion reached by the court in the case referred to. But that decision was rendered

17 years ago, following a previous case, not reported, entitled *Castro v. Bailey*, and has stood unchallenged ever since. Necessarily, it has become a rule of property and of right respecting interests which have vested during that long interval, and it cannot now be disturbed without manifest injustice to all who have acted upon the faith of it. If it be erroneous, it must nevertheless be upheld upon the principle of *stare decisis*, and, so far as our action is concerned, the rule must continue to obtain as it is there laid down.

But counsel for respondent, although originally conceding that the order appealed from must be reversed unless the decision in *Ogburn v. Connor* was repudiated, now contend that the cases may be distinguished, and that this order should be affirmed on the principle applied in *Lamb v. Reclamation Dist.*, 73 Cal. 125, 14 Pac. Rep. 625. In that case this court adopted and applied to the flood waters of our large rivers the principle laid down in the English case of *Rex v. Commissioners, etc.*, 8 Barn. & C. 355, with respect to the waters of the sea, viz., that they are a common enemy, against which every man has a right to defend himself, regardless of the fact that the barriers he erects for the protection of his land may cause the flood to rise higher, or flow with greater force upon his neighbor. We think this is the true principle to apply to the case of parties in the relative situation of the plaintiff and defendant here, especially in view of the policy of all our state legislation respecting our overflowed lands. If the owner of the land next to the river will not, either by himself or in combination with those behind him, erect a levee on the bank, he ought not to be allowed to prevent them from protecting themselves merely because by so doing they prevent his higher land from being drained of the flood waters as rapidly as it otherwise would be. Because his land may be cultivated without artificial protection, he ought not to be allowed to prevent others from using proper means to make their lands productive; and what is true of the owner of the river bank is true in the same sense of each successive owner back of him. It is the interest of all to combine and share the expense of placing a levee on the bank, by which all will be protected; but if those in front will not co-operate with those behind, and will do nothing for themselves, they must not be allowed to stand in the way of those whose necessities compel them to act. There is no necessary conflict between these views, or the principles they sustain, and the decision in *Ogburn v. Connor*. That decision refers to surface water having its sources in springs, or descending from the clouds in the form of rain or snow waters; waters, that is to say, which the owner of the higher land cannot keep out by any practicable means. It does not apply to flood waters which the owner of the higher land can restrain by the same means employed by his neighbor. In this case it does not appear that defendant's dam will cause

the plaintiff any injury by holding back the rain-water falling on his land, or any water except the overflow of the Sacramento river. As against that, we think the defendant is entitled to protect himself, and that the plaintiff, if he finds it necessary, may do the like.

Order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.

83 Cal. 561

STEPHENS *et al.* v. PARRISH *et al.* (No. 13,505.)

(Supreme Court of California. April 16, 1890.)

PLEADING—VERIFICATION—ATTORNEY.

The verification of a complaint by plaintiffs' attorney, which states that plaintiffs are absent from the county where the attorney resides, is sufficient, under Code Civil Proc. Cal. § 446, which provides that a pleading may be verified by the attorney when "the parties are absent from the county where the attorney resides," but requires him to "set forth in the affidavit the reasons why it is not made by one of the parties."

In bank. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Collier & Haines, Shaw & Holland, and Parrish, Mossholder & Lewis, for appellants. *J. B. Mannix and Brunson, Wilson & Lamme*, for respondents.

FOX, J. The only point made on this appeal is as to the sufficiency of the verification of the complaint. It reads as follows: "State of California, county of San Diego—ss.: J. B. Mannix, being duly sworn, says that he is the attorney for the plaintiffs in the above-entitled action; that he resides in the said county of San Diego; that the plaintiffs are absent from the said county; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters he believes it to be true. J. B. MANNIX. Subscribed and sworn to before me this 4th day of April, 1889. THOMAS HIGGINS, Notary Public. [Seal.]" Section 446 of the Code of Civil Procedure provides that, "where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties." The verification in this case is made by the attorney, and distinctly sets forth the first of the conditions which authorize the making of it by some person other than a party,—that the plaintiffs are absent from the county in which the attorney resides. This is the only one of the conditions under which the law excuses the making of the verification by a party that is given in the affidavit, and

is alone sufficient for the purpose. No additional force could be given to it by adding that it is for that reason that the verification is made by the attorney. The best of the statutory reasons is given. We see no occasion to say more on the subject than is said.

Judgment affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

83 Cal. 579

MOYLE *et al.* v. LANDERS *et al.* (No. 11,906.)

(Supreme Court of California. April 26, 1890.)
CORPORATION—STOCKHOLDER'S ACTION—PARTIES.

1. Where an action is brought against the directors of a corporation by some of its stockholders in behalf of themselves and all other stockholders who see fit to join them, to recover moneys alleged to have been fraudulently misappropriated, an objection that one of them has been made a plaintiff since the filing of the original complaint cannot be sustained when the complaint shows that he is a stockholder, and the record does not show when he was made a party. The presumption is that he was made a party by leave of court.

2. A demurrer to a complaint will be overruled where the complaint is not ambiguous nor unintelligible in the particulars specified in the demurrer, though obscure and multifarious.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

L. E. Bulkeley, for appellants. H. G. Sieberst, for respondents.

FOX, J. This is a bill in equity brought by two stockholders of the defendant, the Andes Silver Mining Company, against the directors of said company and certain others, for an accounting, and the recovery, for the benefit of the company, of moneys of the corporation alleged to have been fraudulently misappropriated by the other defendants. The judgment is on demurrer to the fourth amended complaint, from which the plaintiffs appeal. The complaint is a model of obscurity. If it were again amended, and carefully pruned of much of its verbiage in the way of recital and repetition, and reduced to about one-third its present volume, it would be much more intelligible and probably would not then invite demurrer; at least, it would not be as likely to induce a sustaining of the demurrer. A careful analysis of the complaint, however, shows that each of the two counts thereof contains allegations of fact sufficient to constitute a cause of action in favor of the company against the other defendants; that the plaintiffs are, and have been during all the times mentioned in the complaint, stockholders in the corporation; that the facts and circumstances are such as would make it useless to apply to the directors to have the action brought in the name of the corporation, and such as to authorize the plaintiffs to bring and maintain the action in their own names for the benefit of the corporation; that all persons who are not plaintiffs are made defendants, who are

necessary parties to the action, and that none are made defendants who are not proper parties; that, if the facts stated are true, the action is not barred by the statute of limitations; and that the complaint, though multifarious and obscure, is not ambiguous and unintelligible in the particulars specified in that branch of the demurrer. The demurrer, therefore, should have been overruled, with leave to the defendants to answer. A point is made by appellants that the plaintiff Holling has been made such since the filing of the original complaint. The record does not disclose such to be the fact; but, if it is, the presumption is that he was made so by leave of the court, and there is no legal objection to his being joined as plaintiff, as the complaint shows that he was from the beginning, and still is, a stockholder, and the action was brought on behalf of all stockholders who might see fit to join as plaintiffs therein. Judgment reversed, with directions to the court below to overrule the demurrer and allow the defendants to answer.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

83 Cal. 571

MCCALLION *et al.* v. HIBERNIA S. & L. SOC. *et al.* (No. 12,423.)

(Supreme Court of California. April 24, 1890.)

APPEAL—BOND—JUDGMENT AGAINST SURETIES.

1. Defendants appealed from a judgment and an order denying a motion for a new trial, and gave an undertaking, with sureties, "that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay to the plaintiffs the amount directed to be paid by the said judgment, * * * and that, if the appellants do not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondents, in their favor, against the sureties." *Held*, that the undertaking related only to the appeal from the judgment itself, and not to the appeal from the order denying a new trial, and did not authorize judgment, on motion, against the sureties, on receiving a *remittitur* that "the order of the superior court" was affirmed.

2. In such case, it is incumbent on plaintiffs, on making the motion, to show that 30 days had elapsed since the filing of a *remittitur* on appeal from the judgment; and a certificate of the clerk of the supreme court filed after notice of the motion was given, and only four days before the hearing, cannot help plaintiffs, even though the certificate should be deemed to be a *remittitur*.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

D. L. Smoot, for appellants. M. C. Hassett and Theodore Bradley, for respondents.

HAYNE, C. This was a motion by plaintiffs for judgment against the sureties on an undertaking on appeal. The motion was denied, and the plaintiffs appeal. The action related to the right to a deposit in the Hibernia Bank. The bank paid the money into

court, and other parties were substituted as defendants. The plaintiffs recovered a judgment; and the substituted defendants appealed from such judgment, and from an order denying their motion for a new trial. In order to effect a stay of execution, the substituted defendants gave, in addition to the \$300 undertaking, an undertaking in double the amount of the judgment, which undertakings were in the same instrument. The promise of the sureties set forth in the stay undertaking was as follows: "That if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay to the plaintiffs the amount directed to be paid by the said judgment, or the part of said amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants upon the appeal, and that, if the appellants do not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondents, in their favor, against the undersigned sureties," etc.

Under this agreement, we think it clear, in the first place, that the stay undertaking related to the appeal from the judgment, and not to the appeal from the order on motion for new trial. It is not doubted that a stay undertaking can be so drawn as to effect a stay on appeal from an order denying a new trial. See *Fulton v. Hanna*, 40 Cal. 278. But the undertaking here was not so drawn. Its condition was that "if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay," etc.; and it is, therefore, clear that, before the liability of the sureties upon the stay undertaking became fixed, the appeal from the judgment must have been disposed of, either by affirmance or dismissal. A disposition of the appeal from the order alone was not sufficient.

In the next place, the sureties, by the express provision of their contract, were to become liable to a proceeding of this kind upon the stay undertaking only in case of non-payment by the principals "within thirty days after the filing of the *remittitur* from the supreme court;" and this, evidently, refers to the *remittitur* upon the appeal from the judgment, which, as we have seen, is the appeal to which the stay undertaking relates. Consequently the sureties were not in default until 30 days after the filing of the *remittitur* upon the appeal from the judgment; and, this being so, it was necessary for the moving parties to show that 30 days had elapsed since the filing of the *remittitur* on that appeal. The *remittitur* which they introduced in evidence was on appeal from the order only. Its language is that "the order of the superior court * * * be, and the same is hereby, affirmed." It says nothing about the appeal from the judgment; and, if the

certificate of the clerk of the supreme court, introduced in evidence in rebuttal, be deemed to be a *remittitur*, it does not help the plaintiffs, because it was filed after the notice of motion was given, and only four days before the hearing and the order denying the motion. The way this condition of affairs came about was, probably, that the appeal from the judgment was dismissed nearly a year before the appeal from the order denying the motion for new trial was disposed of; and, from inadvertence, the clerk of the court omitted either to send down a separate *remittitur* on the dismissal, or to include it in the *remittitur* on affirmance of the order. But the omission of the clerk cannot take away the right of the sureties to stand upon their contract. They were not in default until 30 days after the filing of the *remittitur* on the appeal from the judgment, and consequently the motion for judgment against them was properly denied.

This disposes of the appeal before us, and, as the order appealed from must be affirmed, no other questions can arise on the return of the case to the court below; and hence it is not necessary or desirable to express an opinion upon the other questions discussed, although they may, possibly, arise in some other proceeding. See *State v. McGlynn*, 20 Cal. 276. We therefore advise that the order appealed from be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

83 Cal. 246

FARNUM *et al.* v. PHENIX INS. CO. (No.
13,365.)

(Supreme Court of California. Feb. 27, 1890.)

INSURANCE—CONDITIONS OF POLICY—WAIVER.

1. An express provision in an insurance policy that the company shall not be liable thereon until the premium is actually paid, is waived by the unconditional delivery of the policy to the insured under an agreement that a credit shall be given for the premium.

2. An agent who has power to countersign and deliver policies, and who is responsible to the company for collection of all premiums on policies issued by him, binds the company by an agreement to give credit on the premium for a certain time, though he is expressly authorized to give such credit only for a shorter time.

3. An insurance company cannot cancel a policy for failure of insured to fulfill certain conditions, without giving notice to the insured, and a notice sent by mail is ineffectual unless received.

4. A tender of the full amount of the premium within the term of the credit allowed is a sufficient compliance with the condition of payment to sustain an action on the policy.

5. A provision in the policy that "the use of general terms, or anything else less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver" of any condition, did not have the effect to render the waiver invalid, as not indorsed on the policy, since the agent had ostensible authority to waive the indorsement.

6. A provision in the policy that the damage "may be determined by mutual agreement, * * * or, failing to agree, the same shall be submitted to * * * arbitration," does not require arbitration unless the parties fail to agree; and the fact that the company, when proofs of loss to a certain amount were furnished, made no objections to the amount, but denied its liability on other grounds, and denied the existence of the policy, is sufficient proof that the company acquiesced in the amount of the loss, and waived submission to arbitration.

Appeal from superior court, San Joaquin county; J. W. SWINNERTON, Judge.

Action by N. C. Farnum et al. against the Phenix Insurance Company. Plaintiffs appeal from a judgment of nonsuit.

Louttit, Woods & Levinsky, for appellants. *J. C. Campbell* and *P. W. Bennett*, for respondent.

VANCLIEF, C. The action is upon a policy of insurance, and the appeal is from a judgment of nonsuit. The grounds of defendant's motion for nonsuit, and upon which the motion was granted, are presented by a bill of exceptions, and the record discloses the following facts. The defendant is a foreign fire insurance corporation doing business as such in this state, having general agents for the state, located in San Francisco, and a duly-appointed local agent for the county of San Joaquin, located at Stockton. On May 2, 1887, plaintiffs verbally applied to the Stockton agent for a policy of insurance upon their frame barn, windmill, tank, and tankhouse, situated about two miles south-east of Banta, in San Joaquin county. The land upon which these buildings stood was the property of G. W. Trahern, the father of one of the plaintiffs, who had permitted plaintiffs to erect the buildings thereon, but the buildings were the property of plaintiffs, who resided upon the land, and used and occupied the buildings. At the time the insurance was applied for the local agent was informed that the land belonged to Trahern. The policy, as applied for, was issued insuring the buildings for the term of five years from May 1, 1887; the insurance on the barn being for \$1,000, and upon the other structures for \$200. The policy does not refer to the ownership of the land on which the buildings stood. On September 5, 1887, the barn was totally destroyed by fire, and it was admitted that when destroyed it was of the value of \$1,000. Notice and proof of the loss were duly given and made by plaintiffs, upon receipt of which the defendant, without questioning the amount of the loss, denied all liability on the policy. No offer or request was made by either party to submit the question, as to amount of the loss, to arbitration. At the time of the fire and loss no part of the premium had been actually paid, but it was in evidence that the local agent of the defendant, at the time the policy was issued and delivered, verbally agreed and promised to give the plaintiffs a credit on the premium until October 1, 1887, and that the policy was taken by plaintiffs with that understanding, and upon that condition, though the agreement for such credit was not indorsed in writing upon the policy. The policy was countersigned by the local agent, and delivered to plaintiffs, on May 24, 1887. It was admitted that it was the custom of defendant to allow its agents to give credit for premiums for the term 60 days; and it was proved that the local agent was, by virtue of his appointment, made responsible for the collection of all premiums on policies issued by him. On June 25, 1887, the local agent mailed to plaintiffs, at Banta, a writ-

ten notice stating that "the premium on policy No. 73,143, on barn, tank, etc., \$1,200, amounting to \$73.50 on five-years policy, falls due on the 1st of July, and our instructions from the home office are imperative to collect in sixty days;" and inclosed in the same envelope was a notice that, "unless the premium thereon shall be paid on or before 12 o'clock noon of July 1, 1887, we shall cancel the insurance under said policy on our books, for non-payment of premium, without further notice, and terminate our liability thereunder from that date." It was proved that there was a regular daily communication by mail between Stockton and Banta; but neither of the plaintiffs actually received said notice. At the expiration of the time named in the notice, the premium being still unpaid, the general agents of defendant at San Francisco made an entry in the books in their office to the effect that the policy was canceled, but no notice of the cancellation was given to either of the plaintiffs. On September 30, 1887, plaintiffs tendered to the local agent of defendant the full amount of the premium, which he refused to receive. The pleadings admit that the amount of the premium was thereupon immediately deposited by plaintiffs, subject to the order of defendant, and that defendant was notified in writing of such deposit, and payment of the amount to defendant is offered in the complaint. The policy recites a consideration of \$73.50, but does not expressly acknowledge receipt of payment. It contains the usual conditions of fire policies as to the use and occupancy of the premises. The following clauses are the only ones relevant to the points to be considered: "The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." "The use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." "The insurance may be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." "The amount of solid value and of damage to the property * * * may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall be submitted to competent and impartial arbitrators. * * * It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable by any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided. In witness whereof the Phenix Insurance Company has caused these presents to be signed by its president, and attested by its secretary, in the city of Brooklyn, county of Kings, N. Y.; but the same shall not be binding until countersigned by

Henry C. Keyes, agent for the company at Stockton. STEPHEN CROWELL, President. PHILANDER SHAW, Secretary. Countersigned at Stockton this 24th day of May, 1887. HENRY C. KEYES, Agent."

1. The defendant contends that there is no liability upon the policy, because the premium was not actually paid before the loss, and because the agreement for credit was not indorsed in writing upon the policy. It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid, is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium; and that in such case the company is liable for a loss which may occur during the period of the credit. *Boehen v. Insurance Co.*, 35 N. Y. 131; *Wood v. Insurance Co.*, 32 N. Y. 619; *Goit v. Insurance Co.*, 25 Barb. 190; *Trustees v. Insurance Co.*, 18 Barb. 69; *Sheldon v. Insurance Co.*, 26 N. Y. 460; *Bodine v. Insurance Co.*, 51 N. Y. 117; *Bowman v. Insurance Co.*, 59 N. Y. 521; *Church v. Insurance Co.*, 66 N. Y. 222; *Manufacturing Co. v. Insurance Co.*, Id. 613; *Latoix v. Insurance Co.*, 27 La. Ann. 113; *Pino v. Insurance Co.*, 19 La. Ann. 233; *Insurance Co. v. Neyland*, 9 Bush, 430; *Heaton v. Insurance Co.*, 7 R. I. 506; *Eagan v. Insurance Co.*, 10 W. Va. 583; *Hodge v. Insurance Co.*, 33 Hun, 584; *O'Brien v. Insurance Co.*, 22 Fed. Rep. 586; *Tennant v. Insurance Co.*, 31 Fed. Rep. 322; *Insurance Co. v. Norton*, 96 U. S. 234; *Young v. Insurance Co.*, 45 Iowa, 378; *Wagon Co. v. Insurance Co.*, 20 Fed. Rep. 232; *Post v. Insurance Co.*, 43 Barb. 351; *Van Schoick v. Insurance Co.*, 68 N. Y. 440. The reason for this rule is well expressed in the case last above cited, as follows: "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium, as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer, or supposed by either party, that it was intended to make that condition a potent part of the contract. * * * It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe." In *Insurance Co. v. McCrea*, 8 Lea, 520, it is said: "It seems to be well settled that, when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition or its breach will be considered as waived, because otherwise it would

be an unmeaning form, the only effect of which would be to deceive and defraud."

In *Tennant v. Insurance Co.*, supra, Ross, J., holds that an extension of credit for an insurance premium pursuant to custom, by an agent having power to countersign a renewal receipt upon a life-policy, made the renewal of the policy binding in favor of the assured, notwithstanding the terms of the policy making the actual payment of the premium a condition precedent to the binding force of the renewal, and notwithstanding the death of the insured before the payment of the premium, and assigns as the reason for so holding that "it would manifestly operate as a fraud upon him to hold that the insurance did not become operative until the premium was actually paid." It should also be remarked that it would be manifestly unjust for an insurance company, which extends the time for the payment of the premium upon an executed and delivered policy, to charge the full amount of premium upon the risk for the entire period covered by the policy, and to accept such full amount at the expiration of that period if no loss occurred meanwhile, and yet to deny the validity of the policy, and its liability upon it during the period of credit, in case a loss should occur during that period.

In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least 60 days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. "An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured." *Rivara v. Insurance Co.*, 62 Miss. 728. In *Insurance Co. v. Block*, 109 Pa. St. 538,¹ it was held that the counter-signature of an authorized agent upon a policy which is unconditionally delivered by him to the insured, and which, by its terms, requires such countersigning to make it valid, is a virtual acknowledgment of the receipt of premium, and estops the company to deny the validity of the policy, upon the ground that the premium was not actually received by the officers of the company. The policy in this case does not formally express receipt of premium, but it recites a consideration of \$73.50 for the contract of insurance, and declares that the policy shall not be binding until countersigned by the agent at Stockton, and thus impliedly authorizes him to consummate a binding contract of insurance for the consid-

¹ 1 Atl. Rep. 523.

eration expressed. If the policy had contained a formal receipt of premium, its unconditional delivery would have been conclusive evidence of payment, so as to have estopped the defendant from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid, (Civil Code, § 2598; *Basch v. Insurance Co.*, 35 N. J. Law, 429; *Insurance Co. v. Fennell*, 49 Ill. 180;) and upon principle the same result should follow where the policy is delivered as a valid and completed contract, upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed upon as an equivalent and substitute for cash payment. The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay at a future day was binding on the plaintiffs, and could have been enforced by the defendant.

It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case,—from May 2 to October 1, 1887,—but was limited to a credit of 60 days; for it is sufficient that he had authority to give a credit of 60 days. The credit given was a valid credit for 60 days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. The only remedy of the company thereafter was to rescind or to cancel the policy for non-payment of the premium within the 60 days, upon personal notice to the plaintiffs, which the bill of exceptions shows was not received by either of the plaintiffs. When credit is given by an insurance company it has no right to cancel the policy for non-payment of premium, except after putting the insured in default, (*Latiox v. Insurance Co.*, 27 La. Ann. 113,) and personal notice of intended cancellation must be given to the insured, (*Insurance Co. v. Turnbull*, 86 Ky. 230, 5 S. W. Rep. 542.)

If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective. *Mullen v. Insurance Co.*, 121 Mass. 171. Notice of cancellation to the agent who negotiated the policy will not bind the assured, (*Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Assurance Society v. Insurance Co.*, 84 Va. 116, 4 S. E. Rep. 178; *Insurance Co. v. Turnbull*, 5 S. W. Rep. 542,) nor to any other person than the one obligated to pay the premium, (*Chadbourne v. Insurance Co.*, 31 Fed. Rep. 533.)

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance and to countersign and deliver policies in San Joaquin county, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit. *Wagon Co. v. Insurance*

Co., 20 Fed. Rep. 232; *Post v. Insurance Co.*, 43 Barb. 351. Whether an agent has general or only particular powers is not determined by simply calling him a local agent. *Murphy v. Insurance Co.*, 3 Baxt. 448. An agent who, under general instructions from the home office, has authority, within a certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payment. *Insurance Co. v. Booker*, 9 Heisk. 606. A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. *Baubie v. Insurance Co.*, 2 Dill. 156. Where, by the terms of a policy, a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of limitation of his power, though he may have exceeded his authority, and violated his duty to his principal. *Insurance Co. v. Earle*, 33 Mich. 151, 153; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Whited v. Insurance Co.*, 76 N. Y. 415.

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. *Insurance Co. v. Wilkinson*, 13 Wall. 234; *Insurance Co. v. Neyland*, 9 Bush, 436; *Rivara v. Insurance Co.*, 62 Miss. 721; *Insurance Co. v. McLanathan*, 11 Kan. 533; *Insurance Co. v. Kasey*, 25 Grat. 271; *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. Rep. 758; *Insurance Co. v. Barnes*, (Kan.) 21 Pac. Rep. 165; *Insurance Co. v. Hogue*, Id. 641. By the authorities above cited it appears that the plaintiffs were entitled to the whole term of the credit for which they contracted, through the defendant's local agent, and could not thereafter be put in default for a failure to pay or tender the premium before the expiration of the period of credit actually given. That credit from May 2 until October 1, 1887, was actually given, must be assumed as a fact for the purposes of the motion for a nonsuit, it appearing from the bill of exceptions that evidence to that effect was given on behalf of the plaintiffs without any counter-evidence whatever, unless the contents of the letter addressed to the plaintiffs by the defendant's agent at Stockton may be so construed. That letter only purports to notify them that "instructions from the home office are imperative to collect in sixty days," and that the premium "falls due on the 1st of July,"—two months after the policy was delivered,—thus clearly indicating that a credit of 60 days had been given with the sanction of the company; but, as the letter was not

received by the plaintiffs, it can have no effect as evidence against them for any purpose. It also appears by the terms of the written appointment of the local agent that he was made responsible to the company for the collection of all premiums on policies issued by him, and that it was the custom of the company to allow its agents to give a credit of 60 days on premiums. From these facts it may fairly be inferred that the company was content to substitute the personal liability of the agent for the condition of prepayment of the premium. *Elkins v. Insurance Co.*, 113 Pa. St. 386-394, 6 Atl. Rep. 224; *Insurance Co. v. Hoover*, 113 Pa. St. 591, 8 Atl. Rep. 163; *Insurance Co. v. Elkins*, 124 Pa. St. 484, 17 Atl. Rep. 24.

It is urged by respondent's counsel that actual payment of the premium is a condition precedent to a recovery upon the policy, notwithstanding an agreement for credit, and that it was so decided in *Bergson v. Insurance Co.*, 38 Cal. 546. But it appeared in that case that issue was taken on the fact of payment, and that there never was any actual payment or tender of the whole premium, and that the policy was canceled for non-payment of a part of the premium, within the period of the credit given by the company, and after due notice. The case also holds that an acknowledgment of the receipt of the premium in a delivered policy may be contradicted so as to defeat a recovery upon the policy; but this rule has been changed by section 2598 of the Civil Code. The decision in that case is no authority against the position that a tender of payment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy. The company cannot refuse such a tender, and then successfully insist upon a nonsuit, because the premium was not actually paid. *Eagan v. Insurance Co.*, 10 W. Va. 588; *Boehen v. Insurance Co.*, 35 N. Y. 132; *Bodine v. Insurance Co.*, 51 N. Y. 119; Civil Code, § 1485.

2. The next important question relates to the effect of the provision in the policy that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." So far as such provision has been held to constitute a limitation upon the power of agents, it has been applied to cases of waiver of conditions made after the signing and delivery of the policy as a consummated contract, such as the waiver of conditions relating to assignment of the policy, to increase of risk, or to occupancy of the insured premises. *Shugart v. Insurance Co.*, 55 Cal. 408; *Gladding v. Association*, 66 Cal. 6, 4 Pac. Rep. 764; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. Rep. 379; *Walsh v. Insurance Co.*, 73 N. Y. 5. In the last case cited, it is expressly held that the conclusion that such a provision limits the power of agents after the policy has been

delivered, and the restriction upon their power to waive conditions as to the use or vacancy of the premises, known to the insured, "does not interfere with that class of cases which have established that conditions for pre-payment of premiums and the like, which enter into the validity of the contract of insurance at its inception, may be waived by agents, and are waived, if so intended."

It has been expressly adjudged by the supreme court of Iowa, in a well-considered case, that the insured is not bound to take notice of the conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed in writing on the policy when the policy is executed and delivered to him as a valid and completed contract, by an agent having authority to countersign it, and who before or at the time of the delivery of it has given the insured a credit upon the premium by parol; and that, if a loss occurs in such case before the credit expires, the company is bound, notwithstanding that the agreement for credit was not indorsed upon the policy. *Young v. Insurance Co.*, 45 Iowa, 378. And it has been repeatedly held that where any fact, which would constitute a breach of a condition precedent to any liability of the company on the policy, is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy, as a valid and completed contract, is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers or conditions expressed in the policy shall be in writing indorsed on the policy. *Van Schoick v. Insurance Co.*, 68 N. Y. 434; *Whited v. Insurance Co.*, 76 N. Y. 418-421; *Insurance Co. v. McCrear*, 8 Lea, 513-520; *Insurance Co. v. Jones*, 62 Ill. 458; *Insurance Co. v. Earle*, 33 Mich. 151-153; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Geib v. Insurance Co.*, 1 Dill. 449; *Devine v. Insurance Co.*, 32 Wis. 471; *Pelkington v. Insurance Co.*, 55 Mo. 172; *Insurance Co. v. Lyons*, 38 Tex. 253; *Insurance Co. v. Hall*, 12 Mich. 202; *Carroll v. Insurance Co.*, 38 Barb. 402; *Manufacturing Co. v. Insurance Co.*, 2 Paine, 501; *Insurance Co. v. Schettler*, 38 Ill. 166. It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver not forbidden by the statute of frauds. *Trustees v. Insurance Co.*, 19 N. Y. 305; *Insurance Co. v. Norton*, 96 U. S. 234; *Carrugi v. Insurance Co.*, 40 Ga. 141; *Lamberton v. Insurance Co.*, 39 Minn. 129, 39 N. W. Rep. 76; *Insurance Co. v. Earle*, 33 Mich. 153; *Reiner v. Insurance Co.*, 42 N.

W. Rep. 208; *Steen v. Insurance Co.*, 89 N. Y. 326. Whether or not any particular agent has the general power of the company to make an oral contract, or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. *Insurance Co. v. Norton*, 96 U. S. 234; *Steen v. Insurance Co.*, 89 N. Y. 326.

The authorities before cited show that a local agent, who is clothed with general power to solicit and consummate contracts of insurance within a certain territory, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the "home office," in the state of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it. *Geib v. Insurance Co.*, 1 Dill. 449; *Insurance Co. v. Earle*, 33 Mich. 151-153; *Whited v. Insurance Co.*, 76 N. Y. 418; *Viele v. Insurance Co.*, 26 Iowa, 58; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Insurance Co. v. McCrea*, 8 Lea, 513-520.

3. It is contended by counsel for respondent that the judgment of nonsuit should be sustained because the plaintiffs did not demand nor obtain an award of arbitrators as to the amount of loss. This, it is said, was a condition precedent to a right to maintain this action. No arbitration is contemplated or required by the terms of the policy, except in case of a failure of the parties to agree upon the amount of the loss. After the fire, and within the time prescribed by the policy, the plaintiffs furnished to defendant the requisite proofs of loss to the extent of \$1,000,—the amount alleged in the complaint,—and thereupon, without questioning or making any objection to the amount of the loss claimed or to the proofs thereof, the company, for other reasons, not only denied its liability, but denied the existence of the policy, claiming that it had been canceled two months before the loss. This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed, and thereby waived its right to have it determined by arbitration. *Lasher v. Insurance Co.*, 18 Hun, 98, 55 How.

Pr. 318; *Insurance Co. v. Putnam*, 20 Neb. 331, 30 N. W. Rep. 246; *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Insurance Co. v. Badger*, 53 Wis. 284, 10 N. W. Rep. 504; *Wallace v. Insurance Co.*, 4 McCrary, 123, 41 Fed. Rep. 742; *Nurney v. Insurance Co.*, 30 N. W. Rep. 350. Then, it is well settled by a long line of authorities that the denial of all liability upon other grounds is a waiver even of the condition requiring proofs of loss. *Insurance Co. v. Ruckman*, 127 Ill. 364, 20 N. E. Rep. 77; *Insurance Co. v. Spiers*, 8 S. W. Rep. 453; *Transportation Co. v. Insurance Co.*, 34 Conn. 561; *McBride v. Insurance Co.*, 30 Wis. 562; *Donahue v. Insurance Co.*, 56 Vt. 382; *Insurance Co. v. Erb*, 112 Pa. St. 149, 4 Atl. Rep. 8; *Zielke v. Assurance Corp.*, 64 Wis. 442, 25 N. W. Rep. 436; *O'Brien v. Insurance Co.*, 52 Mich. 131, 17 N. W. Rep. 726; *Wagon Co. v. Insurance Co.*, 20 Fed. Rep. 232; *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. Rep. 863. Under the circumstances, an offer by the plaintiffs to arbitrate would have been an idle act, which "the law neither does nor requires." Civil Code, § 3532.

None of the California cases cited to this point by respondent's counsel are opposed to the position here assumed. In *Old Saucelito L. & D. Co. v. Commercial Co.*, 66 Cal. 253, there was an actual dispute as to the amount of the loss, and plaintiff alleged that it had offered to submit to arbitration; but the court found to the contrary. 5 Pac. Rep. 232. So, in the case of *Adams v. Insurance Co.*, 70 Cal. 198, 11 Pac. Rep. 627, it appears that the only dispute between the parties was an express dispute as to the amount of the loss. In *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. Rep. 863, the difference as to the amount of loss had been submitted to arbitration, and an award had been made. The defendant pleaded this award as a limitation upon the amount to be recovered, and the plea was held good. As it appears from the bill of exceptions that the evidence on the part of the plaintiffs, substantially, and even strongly, tended to prove all the facts necessary to entitle the plaintiffs to recover, I think the judgment of nonsuit was erroneous, and should be reversed, and that the cause should be remanded for a new trial.

WE CONCUR: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit is reversed, and the cause remanded for a new trial.

(87 Cal. 104)

DUFF v. DUFF. (No. 13,078.)

(Supreme Court of California. March 31, 1890.)

ACTION TO SET ASIDE CONVEYANCE—FRAUD.

1. A complaint for relief on the ground of fraud stated that plaintiff's ancestor had executed a power of attorney to defendants' ancestor, empowering him to sell for him certain realty; that soon thereafter he left the state, and never returned, and during the next 10 years defendants'

ancestor secretly, without consideration, and without notice to plaintiff's ancestor, conveyed to defendants (who were conversant with the fraud) the property in question; and that shortly after the death of plaintiff's ancestor, who devised all his property to plaintiff, she was first informed of the fraudulent conveyances. *Held*, that the complaint showed a good cause of action for concealed fraud, not barred by laches or lapse of time.

2. In an action for relief on the ground of fraud in relation to real estate, where the complaint avers that the conveyances alleged to be fraudulent were without consideration, but the allegations in the complaint show that there has been a great lapse of time, the court, taking into consideration the probability of the statute of limitations being invoked, will not refuse relief in equity on the ground that, the conveyances being alleged to be without consideration, plaintiff's complaint shows a complete and adequate remedy at law by ejectment.

3. In a suit in equity for relief on the ground that defendants' ancestor, who was, by power of attorney, authorized to sell for plaintiff's ancestor certain realty, had fraudulently exercised this power by a conveyance to defendants, a special finding of the jury that property referred to in a letter, being a power of attorney, is held in trust for plaintiff, as stated in it, should find that the property referred to in the letter is held in trust "in the manner and proportions mentioned" in the letter.

In bank. For opinion on former appeal, see 12 Pac. Rep. 570.

S. M. Buck, Horace L. Smith, and John A. McQuaid, for appellants. *S. M. Wilson, Wilson & Wilson, J. D. H. Chamberlain, G. W. Hunter, and W. L. Duff*, for respondents.

WORKS, J. A statement of this case will be found in *Duff v. Duff*, 71 Cal. 513, 12 Pac. Rep. 570. It was there held that the complaint stated a cause of action; the law relating to the question of the statute of limitations, as applicable to an action of this kind, was stated; and the cause was reversed for certain errors of law occurring at the trial. The cause was again tried by the court below without a jury, and findings and judgment rendered in favor of the plaintiff as to the greater portion of the property in controversy, and in favor of the defendants as to the balance. A new trial as to the issue found in favor of the plaintiff was denied, and as to that portion of the finding in favor of the defendants a new trial was granted. The defendants appeal from both of these orders, and from the judgment.

It is earnestly contended by the appellants that the findings of the court, and especially those relating to the fraud charged, and the statute of limitations, were not sustained by the evidence. We have gone over the evidence, and find it to be such that we cannot disturb the judgment on this ground.

Numerous assignments of errors of law occurring at the trial are assigned and extensively argued in the briefs. We cannot undertake to discuss these alleged errors in detail. They relate mainly to rulings made in the admission and exclusion of evidence. A careful reading of the briefs of counsel and the record has convinced us that no error was committed, in any of these rulings, that should reverse the judgment. The cause has

been twice tried, once by the jury and once by the court, and decided each time in favor of the plaintiffs. The last trial appears, from the record before us, to have been a very full and fair investigation of the complicated affairs of this family, so far as it affects the title to this land, and we are satisfied that a correct result was reached. Judgment and orders affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; FOX, J.; THORNTON, J.

82 Cal. 576

TILLMAN v. AVERETT *et al.* (No. 12,263.)

(Supreme Court of California. Jan. 27, 1890.)

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Wm. H. Webb, for appellant. *Geil & Morehouse*, for respondents.

THORNTON, J. Appeal from a judgment by plaintiff. The complaint states his cause of action, in which the pleader sets it forth by using the common counts for goods sold and delivered, for services performed and money paid, etc. The defendants denied the allegations of the complaint, and set up a counter-claim by proper averments. The action seems to involve a settlement of the respective accounts of the parties. The court found that the plaintiff was not entitled to a judgment, and entered judgment for defendants for their costs. We find no error in the record. The evidence is not before us in any shape in which we can consider it. There is no bill of exceptions and no statement, and, if there was, the appeal was not taken within 60 days after the rendition of the judgment, so as to entitle the appellant to have it considered by the court. Judgment affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

83 Cal. 84

PAIGE v. ROCKY FORD CANAL & IRRIGATION CO. (No. 12,645.)

(Supreme Court of California. Feb. 1, 1890.)

RIGHTS IN WATER-COURSES.

1. A stream which had been a natural water-course was obstructed by a flood, and from that time water flowed to plaintiff's lands, situated on the stream, only in time of freshets. Plaintiff purchased the right to turn other streams into the old channel for purposes of irrigation. Defendant corporation had obtained from plaintiff's grantors the right to turn water into the stream, with the privilege of turning it out again, and of clearing the obstructions from the stream. *Held* that, this being a natural water-course, defendants were not entitled to take out more water than they turned in, and would be restrained from building a dam across the stream, whereby all the water would be diverted, and none would flow by plaintiff's land.

2. Though the natural flow of water after the stream was obstructed only reached plaintiff's land on occasions of freshets, yet, when the flow of water was increased by the removal of the obstructions by defendants, the increase of flow accrued to the benefit of plaintiff, and not to that of defendants, who had no right to the natural flow.

On rehearing. For former opinion, see 21 Pac. Rep. 1102.

Brown & Daggett, for appellant. *Atwell & Bradley*, for respondent.

PER CURIAM. We granted a rehearing in this case, after affirmance of the judgment of the superior court, because we were in doubt whether there was not a fatal conflict in the findings as to appellant's claim of prescriptive right to maintain the dam in the South fork of Packwood creek, and to divert the waters of the creek through its canal. After the reargument, and a careful re-examination of the findings, we are satisfied that they are entirely consistent. They are not so clearly expressed as they might have been upon one or two points, but, reading them and construing them all together, their evident meaning is that, although the appellant maintained a dam in the South fork of Packwood creek for more than five years continuously prior to the commencement of this action, and also maintained its ditch during the same period, it did not maintain such dam or ditch under any claim of right adverse to the respondent's right, and consequently that its continuous maintenance of the dam and ditch was no bar to the action. We are in all respects satisfied with our former opinion. Judgment and order affirmed.

HOGUE v. OWEN. (No. 13,537.)

(*Supreme Court of California*. Feb. 3, 1890.)

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Grady & Welsh, for appellant. *Geo. A. Nourse*, for respondent.

FOX, J. On motion of counsel for respondent, and on reading the certificate of the clerk of the court below, and the affidavits filed on behalf of the respective parties herein, filed on said motion, it is by the court now ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed.

We concur: WORKS, J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

MIX v. SAN DIEGO & C. RY. Co. *et al.*
(No. 13,629.)

(*Supreme Court of California.* March 15, 1890.)

In bank. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

S. C. McCormick, Cassius Carter, and Leovy & Humes, for appellant. *Hunsaker & Britt*, for respondents.

PER CURIAM. Motion to dismiss appeal because the transcript was not filed in time. The transcript was not filed in time, and no sufficient excuse for the failure to file it in time is given. Appeal dismissed, but without prejudice to the right of appellant to take a new appeal from the judgment, if he shall be so advised.

83 Cal. 563

MILLER v. RICHARDS. (No. 13,771.)

(Supreme Court of California. April 17, 1890.)

APPEAL—NOTICE.

Plaintiff purchased land under a decree of foreclosure, and assigned the certificate of sale to L. Before expiration of the time for redemption, the court, on motion of plaintiff, vacated the decree and sale, and allowed an amendment of the complaint, to bring in another party. L. filed his complaint in intervention, and afterwards defendant appealed from the order vacating the decree and sale without serving notice of the appeal on L. Held, that the appellate court acquired no jurisdiction, since L. was an adverse party, within the meaning of Code Civil Proc. Cal. § 940, requiring notice of appeal to be served on the adverse party.

In bank. Motion to dismiss appeal.

Scarborough & Waterman and *C. C. Stephens*, for appellant. *Miller, Richards, Dooner & Burdell*, for respondent.

BEATTY, C. J. This is a motion by intervenor to dismiss the defendant's appeal upon the ground that the notice of appeal was not served upon him. The facts are that plaintiff obtained a decree of foreclosure upon a mortgage made by defendant, and the mortgaged premises were sold under the decree, plaintiff being the purchaser. The certificate of sale was assigned by plaintiff to the intervenor. Before expiration of the time for redemption, it was discovered that the decree of foreclosure was ineffectual by reason of the fact that a grantee of the mortgagor had not been made party to the suit. Thereupon the court, on motion of plaintiff, vacated the decree and sale for the purpose of allowing an amendment to the complaint, making the grantee of the mortgagor a party defendant. After this order was made the intervenor was allowed to file his complaint in intervention. After notice of the intervention, defendant attempted to appeal from the order vacating the decree and sale, but he served his notice on the plaintiff only, omitting to serve the intervenor.

We think the motion to dismiss should be granted. From the time of filing his complaint the intervenor became a party to the action, and his interests would be directly and adversely affected by a reversal of the order appealed from. It was, therefore, necessary to serve the notice of appeal on him in order to give this court jurisdiction. Code Civil Proc. §§ 938, 940,¹ and notes to Deering's Edition. Appeal dismissed.

We concur: FOX, J.; SHARPSTEIN, J.; McFARLAND, J.

¹Section 940 requires notice of an appeal to be served on the adverse party.

3 Cal. Unrep. 256

HARMON v. SAN FRANCISCO & S. R. R. CO.
(No. 12,017.)

(*Supreme Court of California.* May 3, 1890.)

MECHANIC'S LIEN—FILING CLAIM—SUFFICIENCY.

1. A claim of lien filed by a material-man against a railway company for materials furnished a contractor and his assignee, who assumed all liabilities, although it omits to show the proportion of materials furnished to each, is sufficient, under Code Civil Proc. Cal. § 1187, requiring that the claim state the name of the person to whom the materials were furnished. *Distinguishing Hardware Co. v. Railroad Co.*, 22 Pac. Rep. 406.

2. The fact that a claim of lien filed by a material-man includes more than is due him, if the error is without fraud, will not defeat his right to recover.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

On rehearing. For former report, see 22 Pac. Rep. 407.

J. H. Boalt, H. A. Powell, and Hepburn Wilkins, for appellant. *Hanton & Lippitt*,

O. P. Evans, and Lloyd & Wood, for respondent.

PATERSON, J. This cause was heard in department 1, and the judgment and order were affirmed October 4, 1889, on the authority of *Hardware Co. v. Railroad Co.*, 22 Pac. Rep. 406, (filed on that day.) By consent of counsel for the respective parties the court below, before the trial of either cause, made an order that the two actions be consolidated. When the cases were considered by this court it was assumed that the record in this case was substantially the same as the record in No. 12,030; but our attention was called to the fact in the petition for a hearing before the court in bank, and at the argument, that this assumption was not correct. The record in this case differs from the other in two material respects: In this case the evidence shows that "the work on the contract was completed on June 2, 1884." There is nothing in this record to the contrary, and we cannot, as claimed by respondent, look at any evidence in the other record to explain or contradict this testimony. *Second.* The description of the materials furnished in the other case was "nails, spikes, iron, steel, picks, shovels, and other like material." In this case the materials furnished are described as "lumber, timber, and logging, and other like material." The first description given above was held not good because too indefinite and uncertain, part of the materials described being property for which no lien could be maintained. The case of *Malone v. Big Flat Min. Co.*, 76 Cal. 578, 18 Pac. Rep. 772, was relied on as authority for the contention that, although the claim of lien was in part for articles not the subject of lien, the court should permit the party by proof to make the necessary segregation, throw out the value of such articles, and declare a lien for the balance. In that case there were as many claims as there are letters in the alphabet, (Exhibits A to Z, Vol. XLV. 1888, Supreme Court Records, pp. 38-120,) all of which were assigned to the plaintiff; and, of course, the fact that one of them was for materials not the subject of lien did not prevent a recovery of the others, which were good.

Respondent claims that the claim filed by plaintiff, and upon which this action is based, must have included material for which no lien could be maintained, because the plaintiff testified that of the lumber he furnished "there was used \$1,159.13 worth in the building of temporary houses," and \$577 paid on the lumber for freight and cartage. It does not clearly appear whether there was extra material included in the claim of lien, or an erroneous statement as to the value; and, as the claim filed contained no articles except such as are the subject of lien, we cannot say that a lien for so much lumber, etc., as was actually used in the construction of the road, should be defeated by reason of this testimony. As was said in the former opin-

ion, the bare fact that he had filed his lien for too much lumber, or set too high a price on it, would not, in the absence of fraud, defeat his right to recover.

In *Hardware Co. v. Railroad Co.*, the department held that the failure to designate what portion of the materials were furnished to each of the contractors was fatal to the lien. Whatever may be the rule in ordinary cases where the material-man furnishes materials to several independent contractors, we do not think it was necessary for the plaintiff to segregate the amounts in the claim which he filed. Hawley was the only person with whom the company had to settle. The latter was liable only for the balance of the contract price held by it. It was in no way interested in the question how much had been furnished McDonald before the assignment. Hawley had simply stepped into McDonald's shoes, with the knowledge and consent of the company, and had assumed all liabilities. There was but one contract on the part of the defendant. On final settlement, McDonald was entitled to nothing, and we are unable to see how the company could be prejudiced by the failure to designate the amount furnished to each. No question of priority is involved herein. Where a statute required a claimant to state from whom the debt was due, it was held that a mistake in the name of the contractor would not defeat the lien if it appeared that the owner was not harmed by the error. *Putnam v. Ross*, 46 Mo. 337. In the case at bar the proof does segregate the amounts furnished to Hawley from that which was furnished to McDonald, so that no injury could possibly occur. In the *Gordon Case* this was not done. In view of the facts stated, we think that the court ought not to have rejected the notice of lien. We have examined other points made by respondent, but we do not think the objections raised are well taken. If the facts shown by the evidence of the plaintiff are true, he is entitled to have his lien declared good, at least, to an amount not exceeding the amount of the contract price in the hands of the company at the time the notice of lien was filed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.; THORNTON, J.

GORDON HARDWARE CO. v. SAN FRANCISCO & S. R. R. CO. (No. 12,030.)

(Supreme Court of California. May 3, 1890.)

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

On rehearing. For former report, see 22 Pac. Rep. 406.

Hepburn Wilkins, for appellant. E. S. Lip-pitt, O. P. Evans, and Lloyd & Wood, for respondents.

PATERSON, J. The judgment and order were affirmed in Department 1, and the reasons therefor given in an opinion filed on October 4, 1889. We

are satisfied that the conclusion there reached was correct, but have taken occasion in *Harmon v. Railroad Co.*, ante, 1024, (this day filed,) to explain and limit one or two of the points therein decided. The judgment and order are affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; FOX, J.; THORNTON, J.

84 Cal. 27

LYONS v. ROACH *et al.* (No. 12,021.)

(Supreme Court of California. May 3, 1890.)

JUDGMENT—SETTING ASIDE DEFAULT—APPEARANCE.

A default judgment against an administrator will not be set aside because the summons and default name him as executor, where the judgment recites that defendant appeared by attorney, as such appearance, under Code Civil Proc. Cal. § 416, is equivalent to personal service, and such recital will be presumed correct, in the absence of a showing to the contrary in the record.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Matt I. Sullivan and R. Percy Wright, for appellant. *J. C. Bates*, for respondent.

McFARLAND, J. After argument in bank, we are satisfied that the judgment should be affirmed. The action is for the enforcement of a street assessment. Patrick Cunningham in his individual capacity, and also Patrick Cunningham as a representative of the estate of May Cunningham, deceased, were made parties defendant. The complaint charges Cunningham as "administrator" of the estate, and the summons is directed to him as "executor." The affidavit of service of summons shows that he was served as administrator. A default was entered against him as "executor." Afterwards, Roach succeeded Cunningham as administrator, and was substituted as defendant; and he appeals from the judgment in favor of plaintiff. His main point is that the judgment against Cunningham as representative of the estate is void, because the summons and default name him as executor, while the complaint and judgment are against him as administrator. If we were compelled to decide this extremely technical point, we would be inclined to hold that the estate was substantially and fairly brought into court through its legal representative, and that the mistake or inadvertence by which he was called in some of the papers "executor," and in others "administrator," was not fatal to the default. But it is not necessary to determine this point, because the judgment recites that the defendants, "after service of summons, regularly appeared in said action by Robert Ash, Esq., an attorney of the court, who also was present on the trial thereof." This appearance was equivalent to personal service of summons and complaint. Code Civil Proc. § 416; *Ghiradelli v. Greene*, 56 Cal. 629. The Code does not require such appearance to be made part of the judgment roll; and, as appellant appeals upon the judgment roll alone, which shows nothing contradictory of, or inconsistent with, said recital, it must be taken as at

least *prima facie* true. All presumptions not contradicted by or inconsistent with the record are in favor of the correctness of the judgment. *Parker v. Altschul*, 60 Cal. 330. The doctrine of *Lick v. Stockdale*, 18 Cal. 219, *Alderson v. Bell*, 9 Cal. 315, and kindred cases, have been modified only with respect to those matters which are required to be shown in some part of the record other than the judgment itself. The cases cited by appellant are mostly cases where the recitals were of matters required to appear elsewhere in the roll, or which were inconsistent with matters which did thus elsewhere appear; and the main difference between collateral and direct attacks is that in the former the record alone can be inspected, and is conclusively presumed to be correct, while on direct attack the true facts may be shown, and thus the judgment itself, on appeal, may be reversed or modified. See *Freem. Judgm.* §§ 124-134, and cases there cited. But in the case at bar the appellant showed nothing, and offered to show nothing. He comes here on the judgment roll alone, and merely contends that the judgment roll, apart from the judgment itself, does not affirmatively show that appellant appeared by attorney. He does not attempt to show that the recital of appearance is not true. But, as before stated, the Code does not require the fact of appearance to be shown by the roll.

Respondent offered to amend the record by attaching to it a certified copy of a formal written appearance for Cunningham as administrator of the estate, filed in the court below. But, in the *first* place, such document, not being part of the judgment roll, could not be part of the record here; and, in the *second* place, under the views above expressed, it would not be necessary.

The printed record contains a statement, in parenthesis, made by some one, that the complaint was amended by changing "executor" to "administrator;" but this statement is no part of the judgment roll or of the record in this case, and cannot be considered. It would make no difference, however, as the appearance by attorney was afterwards. And this answers appellant's second point, as to the service of amended complaint.

We think that the averments of the complaint were sufficient, particularly in the absence of a demurrer. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.

84 Cal. 21

DAVIDSON v. ELLMAKER. (No. 12,068.)

(Supreme Court of California. May 3, 1890.)

UNLAWFUL DETAINER—ESTOPPEL TO DENY LANDLORD'S TITLE.

1. In unlawful detainer, defendant claimed the premises as legatee of her husband, though she admitted having signed a lease from plaintiff's grantor, but denied that she ever took or hired the property under it. The court found that she signed the lease, but failed to find whether it was executed and delivered. *Held*, that such finding was error, as not covering the material issues.

2. Defendant, who at the time of the execution of the lease was in possession of the premises under claim of title, is not estopped from disputing plaintiff's title derived from the lessor.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

W. T. Baggett, for appellant. *E. J. & J. H. Moore*, for respondent.

PATERSON, J. This is an action of unlawful detainer. The plaintiff alleged that the defendant, on August 11, 1880, took and hired from plaintiff's grantor the premises described in the complaint at the monthly rental of one dollar per month, payable in advance. Defendant admitted that she had signed the lease set out in the complaint, but denied that she took or hired the property thereunder, or at all, from plaintiff, and alleged that while in possession, on said August 11, 1880, she was induced by plaintiff's grantor to sign the alleged lease by false and fraudulent representations. She also alleged that neither the plaintiff nor the savings and loan society, under which he claimed, was the owner, or entitled to the possession, of the property, and averred that she, as sole legatee of her deceased husband, was the owner thereof. The appeal is from the judgment, and on the judgment roll only. The findings do not cover the material issues.

1. There is no finding on the issue as to whether the savings and loan society, plaintiff's grantor, leased the premises to the defendant. The court found that the defendant signed the agreement set forth in the complaint, but did not find whether the agreement was ever delivered. The relation of landlord and tenant cannot be predicated on the production of the lease signed without evidence of a delivery. *Caldwell v. Center*, 30 Cal. 544. The court found that "defendant Ellmaker never in any manner acknowledged the delivery, force, or effect of said tenant's agreement, except to execute the same." It is apparent from other findings that the court here used the word "execute" in the sense that it had before used the word "sign."

2. The court found that, at the time the agreement was signed, defendant was in possession of the premises, claiming title thereto. She was not estopped, therefore, even if the lease was executed and delivered, from disputing the title of the plaintiff. *Peralta v. Ginochio*, 47 Cal. 460. We are not advised by the findings whether she offered any evidence in support of her allegation of ownership. There is no finding on that issue.

Judgment reversed and cause remanded, with directions to the court below to find on all the issues upon the evidence taken at the trial, and such other evidence as may be adduced, and thereupon render judgment.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; FOX, J.

MYERS v. DAUBENBISS *et al.* (No. 12,252.)

(Supreme Court of California. May 3, 1890.)

HIGHWAYS—LIMITATIONS—PARTIES.

1. Under Pol. Code Cal. § 2320, providing "a road not worked or used as a highway for five years ceases to be a highway for any purpose whatever," a public road cannot be opened over a man's land 14 years after judgment rendered in the district court, establishing it as a highway over his property.

2. In a suit to enjoin the opening of a public road through plaintiff's land, the county supervisors may be properly joined as co-defendants with the road overseer, under Code Civil Proc. Cal. § 379, providing that any person may be made a defendant who has or claims an interest adverse to plaintiff.

Commissioners' decision. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Wm. T. Jeter and *Charles B. Younger*, for appellants. *Julius Lee*, for respondent.

BELCHER, C. C. The plaintiff brought this action to obtain an injunction restraining the defendants from laying out, opening, or constructing a public road or any road over, across, or upon a certain described tract of land, situate in Santa Cruz county, or from opening, breaking, or tearing down the inclosure about the said tract of land, or in any manner entering thereon for the purpose of making such road. The court below granted the relief prayed for, and the defendants appeal from the judgment, and from an order denying them a new trial.

It is alleged in the complaint that, on the 18th day of August, 1873, an action for the partition of the rancho San Andreas was pending in the district court in and for the county of Santa Cruz, wherein Titus Hale was plaintiff, and Edward Briody, Francis Larkin, and others were defendants; that on the day named a judgment was duly given, made, and entered in the action, by which the tract of land described in the complaint in this action was allotted and set apart to the said Larkin in severalty; that under and by virtue of this judgment Larkin entered upon the premises so set apart to him, claiming and having the title thereto, and thereafter, continuously, up to October 21, 1882, had and held the actual, open, notorious, exclusive, and adverse possession of the whole of said premises, and paid all taxes levied or assessed thereon; that on the day last named Larkin sold and conveyed the whole of said premises to this plaintiff, who thereupon, under and by virtue of his deed of conveyance, entered upon the same, and has ever since had, held, and claimed the actual, exclusive, open, notorious, and adverse possession thereof, and has paid all taxes levied or assessed thereon; and that there is not and never was any road or highway across the said premises or any part thereof, but that the same at all times named have been inclosed by a substantial fence. It is further alleged that in December, 1883, and again in January, 1887, the defendant Freshour, who was the road

overseer of the district in which the plaintiff's land was situate, was insolvent, and was "instigated thereto and aided and abetted" by the other defendants, who were the supervisors of the county, broke and tore down plaintiff's inclosure, and entered upon his land, dug up and removed the soil, trampled down and destroyed the grass and other crops growing thereon, and cut down and removed trees standing thereon, with the avowed intention and purpose of laying out, opening, and constructing a public road over and across said land; that the acts of defendants are trespasses which, if continued, will do great and irreparable injury to the plaintiff, and that they will be repeated and continued, unless restrained by the court. The defendants demurred to the complaint on the grounds: (1) That there was a misjoinder of parties defendant; and (2) that the facts stated were not sufficient to constitute a cause of action. The demurrer was overruled, and an answer filed. The answer denies plaintiff's ownership of the land, and most of the other allegations of the complaint. It then sets up that, by the judgment in the partition suit of *Briody v. Hale et al.*, entered on the 18th of August, 1873, it was, among other things, ordered, adjudged, and decreed that there be, and thereby was, laid out and established over and across the lands allotted to Larkin a public road, which was known and called the "Larkin Valley Road," and was particularly described, and that it was this road which defendants were trying, and had a right, to open. At the trial the plaintiff offered and read in evidence the judgment roll in the case of *Briody v. Hale et al.*, and thereupon the parties stipulated as follows: "This action is hereby submitted to this court for its decision and judgment upon the following question of law, viz.: Does the said judgment in said action of *Briody v. Hale et al.* of itself establish or declare a public road or highway over or across the lands described in the complaint herein, called in said judgment the "Larkin Valley Road," (it being conceded that the said Larkin Valley road named in said judgment passes over the lands described in said complaint herein, so far as said judgment can establish a road,) so as to justify the defendants herein, acting in their official capacity of supervisors, or road overseer, or otherwise, in now entering upon said lands, and opening, laying out, working, or using a public road over or across the same, along the route set out and described in said judgment, defendants not having entered upon any other portion of said lands? If the court shall decide that said defendants are not justified in so doing, then plaintiff is entitled to a judgment as prayed for in his complaint, but without damages; if defendants are so justified, then they are entitled to a judgment that plaintiff take nothing by said action, but that they recover their costs herein, and that said road be adjudged a public road in accordance with the prayer

of defendants' answer." The case was then submitted for decision.

1. We think the court acted rightly in overruling the demurrer. The complaint stated a cause of action, and, if its averments were true, the supervisors were joint trespassers with the road overseer, and were properly joined with him as defendants. Code Civil Proc. § 379; *Grigsby v. Burnett*, 31 Cal. 406.

2. The stipulation leaves for consideration only one other question, and that is, did the partition judgment, rendered in 1873, "of itself," and unaided by any other fact, authorize the defendants in December, 1886, and January, 1887, nearly 14 years afterwards, to break the plaintiff's close, and enter upon his land to construct the road? In the pleadings in the case referred to there was no reference to roads, and no prayer that any portion of the property be set apart for road purposes; and at that time the statutes gave the district courts no power to set apart or establish roads by their judgments in actions for partition. On March 24, 1874, this power was conferred, for the first time, by an amendment to section 764 of the Code of Civil Procedure. In support of the proposition that the judgment of the court, setting apart and declaring the Larkin Valley road to be a public highway, was binding and conclusive, and not subject to collateral attack, counsel for appellants cite *Carey v. Rae*, 58 Cal. 159. But that case does not sustain their contention. This is made evident by an examination of the record of the case, which shows that the judgment of partition then under review was entered in December, 1876, more than two years after the amendment above referred to was made. Counsel also cite section 2618 of the Political Code, which declares that "in all counties of this state public highways are roads * * * laid out or erected as such by the public, * * * or made such in actions for the partition of real property." This section, however, cannot aid the appellants, for the reason that the last clause of it, on which they rely, was first made a part of the section by an amendment adopted in 1883. The other cases cited hold only, in effect, that, when a court has jurisdiction of the parties and of the subject-matter, its judgment, though erroneous, cannot be attacked collaterally. This is undoubtedly true; but did the court, in *Briody v. Hale et al.*, have jurisdiction of the subject-matter, of laying out and establishing highways? The power to lay out roads was at that time given by the statutes exclusively to the boards of supervisors, and if the court had such jurisdiction how did it obtain it? Suppose the court had undertaken by its judgment to set apart for the use of the public a portion of the land as a public park, would it have had jurisdiction of that subject-matter, and would its judgment in that respect have been final and conclusive as against any collateral attack? It is unnecessary to answer these

questions, for if it be conceded that the court had the jurisdiction which it attempted to exercise, still we think the judgment in this case must be upheld. When the judgment was entered in 1873, and continuously thereafter until 1883, section 2620 of the Political Code—as applicable to Santa Cruz county—provided as follows: "A road not worked or used for the period of five years ceases to be a highway for any purpose whatever." Hitt. Codes, 331; St. and Amend. Codes 1883, p. 5. Now if the judgment had the effect "of itself" to establish the Larkin Valley road, and to give the right to open and use it as a public highway, it had all the effect which of itself it could have, at the time it was rendered. But as the road so established was not opened, worked, or used for nearly 14 years afterwards, and, under section 2620, *supra*, had ceased to be a highway "for any purpose whatever," it is clear that the judgment of itself did not justify the defendants in entering upon the plaintiff's land, and doing the acts complained of. We therefore advise that the judgment and order be affirmed.

We concur: GIBSON, C.; VANCLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

I concur in the judgment: BEATTY, C. J.

84 Cal. 50

In re ACOCK. (No. 20,620.)

(*Supreme Court of California.* May 3, 1890.)

CONTEMPT—ABUSE OF PROCESS—AFFIDAVITS.

1. Plaintiff in replevin executed the proper undertaking, and had the sheriff take the property. Defendants then executed an undertaking, duly approved by the court, for the redelivery of the property. Plaintiff dismissed his action, and, by false representations to sheriff's watchman, got possession of the property, and disposed of it. *Held*, plaintiff was guilty of contempt, under Code Civil Proc. Cal. § 1209, providing that deceit or abuse of process by a party to an action is contempt.

2. Where, in a contempt proceeding, defendant is convicted after full hearing, the judgment is not void because some of the material allegations in the affidavits upon which the proceeding is based are stated on information and belief.

In bank. *Habeas corpus.*

Grove L. & Albert M. Johnson, for petitioner. *A. L. Hart*, for respondent.

PATERSON, J. The petitioner was adjudged guilty of contempt by the superior court of Sacramento county, and seeks to be discharged from custody, by this proceeding, on the ground that the commitment and judgment are void. The commitment is a certified copy of the judgment. The recitals in the judgment show that on the 22d day of August, 1889, an action of claim and delivery was commenced by the petitioner, against Salome E. Acock and Nellie T. Halsey, for the recovery of some wheat and barley then in the possession of one W. K. Lindsay as

the agent of the defendants in said action; that a proper affidavit and undertaking on claim and delivery were made by the plaintiff in said action, and an order was indorsed upon said affidavit, directed to the sheriff, requiring him to take said property from the possession of the defendants; that, in pursuance of said order, said property was taken by the sheriff into his possession, and held by him until the 4th day of September, 1889; that, on August 30th, seven days after the service of the summons and other papers in said action upon defendant Halsey, the defendants therein executed and delivered to the sheriff an undertaking, which was afterwards approved by the judge of said superior court, for the delivery of said property to him; that this undertaking was approved, after a regular justification of the sureties, on the 3d day of September, 1889, and was caused to be filed by the judge on that day; that "thereupon said Acock, wrongfully, and for the purpose of preventing the return of said property to said defendants, did procure said Ed Treganza, the keeper of said property, to remove the same from the land of one W. K. Lindsay, where the same had been seized by the sheriff, and was being kept, onto the land of said Acock, which removal was without the knowledge or consent of said sheriff; that immediately after the removal of said property, to-wit, on the 4th day of September, 1889, the attorneys of said Acock, at his instance and in his presence, and with the intent and purpose on the part of said Acock of preventing said return of said property, did dismiss said action, while the said property was in the hands of said sheriff as aforesaid, and thereupon the said Acock did, immediately after said dismissal, and on the same day, go to the place where said property was situated, and, while the same was still in the possession and under the control of the sheriff of said county of Sacramento, and was by him held as an officer of this court, and under the process of this court, did then and there falsely represent to said keeper that said case had been settled, and thereupon, in disrespect of this court and its process, the said Acock did unlawfully and forcibly take the said property into his possession, without the previous consent or knowledge of the sheriff of said county of Sacramento, did provide himself with wagons, and did load the said property so held by the said sheriff upon said wagons, and did haul away, sell, and convert the same to his own use, all of which was done without the knowledge or consent of the defendants in the said action, and with the intent to evade the process of said court, and to prevent the said defendants from getting possession of said property from said sheriff, in pursuance of their said bond for a redelivery thereof; that it appears to the court, from the evidence in said cause, and the court finds, that the said action was not commenced or prosecuted in good faith, but was commenced and prosecuted with the intent and purpose on the part of said Acock

of using said court and its process in an improper effort to obtain the possession of said property in an unlawful manner, without having previously tried the title of said property, or obtained a judgment in said action." The petitioner claims that the facts stated in the judgment are not supported by the testimony taken at the hearing, but admits that, under the decisions of this court, they are conclusive in this proceeding. He contends that the judgment is void for the following reasons: (1) Material allegations of the affidavits are made upon information and belief; (2) the facts alleged do not show any abuse of the process of the court, or any offense for which the court could adjudge him guilty of contempt.

1. Whatever the rule may be with respect to the rights of persons held for examination under an attachment which has been issued upon an affidavit made on information and belief alone, we do not think that, after a full and fair hearing, in which the prisoner has been given full opportunity to present his defense to the charge made against him, a judgment of conviction can be held to be void because some of the charges are made on information and belief. It would be impossible, in many cases of contempt committed out of the presence of the court, to secure the apprehension or conviction of the guilty parties if every fact essential to sustain the judgment were required to be stated in positive terms. In the case at bar, if the moving parties had been required to state positively, upon oath, that the petitioner was the person who removed the grain, the proceedings, probably, could not have been instituted. We think, at least, that after judgment the point made is not well taken. *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. Rep. 380; *Ex parte Kearney*, 55 Cal. 228.

2. A great many reasons are assigned for the contention that the facts stated constitute no offense. It is said that the action had been dismissed, and no contempt could be committed unless the litigation was pending; that if any offense was committed the remedy was by criminal action; that there was an adequate remedy by action at law on the undertaking; that no process or order was abused or violated, and no deceit was practiced; that there was no rescue of property in the hands of an officer, and no such charge was made against him in the affidavits, yet the court found him guilty of that offense, thus going beyond the issues; that petitioner was entitled to the possession of the property, under section 514 of the Code of Civil Procedure, because the time within which the defendants could give a counter-bond, and claim the property, had expired before he took the property from the keeper. We have carefully considered all of these points, and are unable to agree with counsel for petitioner. If the facts stated are true—and they cannot be assailed here as contrary to the evidence—the acts of petitioner were contempts, within the meaning of section 1209 of the Code of

Civil Procedure. That section provides that "the following acts * * * in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * (4) Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding; * * * (7) rescuing any person or property in the custody of an officer by virtue of an order or process of such court." See, also, *Biggs v. Garrard*, 6 B. Mon. 484; *King v. Barnes*, 113 N. Y. 476, 21 N. E. Rep. 182. And, if the facts stated are true, it is clear that the petitioner could not, by a dismissal of the action, shield himself from the legal consequences of his acts. The fact that the petitioner may be prosecuted in criminal and civil actions does not prevent a prosecution for contempt. A party may be liable civilly and criminally for an assault upon an officer in open court, and at the same time may be punished for the indignity laid upon the court.

We think the findings of fact are within the issues. It was alleged that the petitioner deceived the officer of the court, and thereby unlawfully converted the property to his own use; that he abused the process of the court, and used the same for a purpose wholly at variance with the purpose for which it was issued, and to deprive the owners of it, and appropriate it to his own use; that the grain was removed from the farm of Lindsay, with the consent and connivance of petitioner, and for the purpose of placing the property in a position which would enable him, by a dismissal of the action, to unlawfully take the same, and deprive the defendant thereof. The summons was not served on the defendant S. E. Acock until August 26th, and she made a demand, and gave an undertaking, for the return of the property on August 30th. Each one of the defendants was entitled to claim the redelivery of the property at any time within five days after service of notice upon her. Upon the giving of the undertaking within the five days after service upon defendant Acock, it was the duty of the sheriff to hold the property until the sureties justified, and upon such justification to turn it over to her. Sections 514, 515, Code Civil Proc. It is found that, after the giving of said undertaking, and justification by the sureties, the petitioner, knowingly, and for the purpose of preventing the return of the property to the defendants in the action, removed the property from Lindsay's ranch, and dismissed the action.

We have examined the cases cited by counsel for petitioner, and find nothing in them which, taken in connection with the provisions of our Code, cited above, support the contentions made herein against the validity of the judgment. The prayer of petitioner is denied, and the petitioner is remanded into the custody of the sheriff of Sacramento county.

We concur: McFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

83 Cal. 645

KNEEBONE v. KNEEBONE. (No. 13,439.)

(Supreme Court of California. May 3, 1890.)

CONTINUANCE—DISCRETION—REPLEVIN—JUDGMENT.

1. The refusal of a continuance on plaintiff's application, supported by affidavit that he was unable, from sickness, to attend, and that another material witness could not attend the trial, will not be disturbed where defendant opposed the motion, and filed affidavits controverting plaintiff's statements, as such action is in the discretion of the court, and will not be reviewed unless its abuse is affirmatively shown.

2. In an action of replevin dismissed for want of prosecution, judgment that the property described in plaintiff's writ be returned to defendant is not error, under Code Civil Proc. Cal. § 667, providing that in replevin the judgment shall be in the alternative, as that section only applies to judgment after trial.

Commissioners' decision. Department 2. Appeal from superior court, Yuba county; PHIL W. KEYSER, Judge.

A. J. Ridge, for appellant. C. A. Webb, for respondent.

BELCHER, C. C. This action was brought to recover the possession or value of certain personal property. The answer denied all the allegations of the complaint, and demanded judgment for a return of the property. The case was set for trial on the 29th day of June, 1889, and on that day the plaintiff appeared by attorney, and moved the court to continue the case for two weeks. In support of the motion the attorney read two affidavits made by plaintiff on the 26th of June. In one of the affidavits the affiant stated that he would be unable to attend the trial at the time set for it, or for two weeks thereafter, on account of sickness caused by his fall from a tree on the 18th of June, and that he would be a material and necessary witness in his own behalf. In the other affidavit, it is stated that one William Kneebone was an important witness for plaintiff, and if present would testify to certain material facts which are set out; that plaintiff was not informed that the case was set for trial till the 18th of June; and that at that time the witness was absent in another county, more than 30 miles from the place of trial, and had continued so absent, and plaintiff could not, by the use of any diligence in his power, secure his attendance at the trial, nor procure his deposition. In opposition to the motion, defendant read counter-affidavits which tended to contradict the plaintiff's affidavits, and to show that both the plaintiff and his witness might have been present at the time set for the trial. The court denied the motion, and thereupon, counsel for plaintiff declining to proceed with the trial, judgment was entered dismissing the action for want of prosecution, "and that plaintiff return the property described in plaintiff's complaint to defendant, that the undertaking in said action be delivered to the defendant, and that defendant have and recover of and from the plaintiff her costs," etc. From the judgment so entered the plaintiff appeals.

In support of the appeal, it is first claimed

that the court erred in denying plaintiff's motion, and that for this error the judgment should be reversed. It is settled law in this state that applications for continuance are addressed to the sound discretion of the trial court, and its action will not be disturbed on appeal unless the record affirmatively shows that it abused its discretion. In *Musgrove v. Perkins*, 9 Cal. 212, the court, per FIELD, J., said: "The granting or refusing a continuance rests in the sound discretion of the court below, and its ruling will not be revised except for the most cogent reasons. The court below is apprised of all the circumstances of the case, and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary, discretion, its action will not be disturbed." And similar language has been used in many subsequent decisions. After carefully reading all the affidavits found in the record, we are unable to see that the court in any way abused its discretion in refusing to grant the continuance.

It is next claimed that the court erred in adjudging that "plaintiff return the property described in plaintiff's complaint to defendant." It is said the judgment should have been for a return of the property, (describing it,) or the value thereof in case a return could not be had; in other words, in the alternative form, as prescribed by section 667 of the Code of Civil Procedure. The section referred to applies to cases where judgment is entered after trial, and not to cases like this, where the action is dismissed without trial. It would seem from the record that the property in controversy here must have been taken from the possession of the defendant, when the action was commenced, under the provisions of section 512, Code Civil Proc., and, if so, the defendant was clearly entitled to its return when the action was dismissed; and it was a matter of no concern to the plaintiff whether the judgment was in the alternative form or not, as he had no option as to whether he should pay for or return the property. In *Waldman v. Broder*, 10 Cal. 380, the court said: "The legal effect of a finding for the defendants on the question of the plaintiff's right to the property is to entitle the defendants, from whom it was taken, to its restoration. Nor is there anything in the failure to give an alternative judgment for the value of the property. This omission might be complained of by defendants if they had shown the value, but it is no ground of complaint on the part of the plaintiff." In our opinion the judgment was in proper form, and we advise that it be affirmed.

We concur: GIBSON, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

5 Cal. Unrep. 745

HEILBRON *et al.* v. CAMPBELL, Judge.
(No. 13,478.)(Supreme Court of California. March 15,
1890.)

PROHIBITION—PROCEDURE—DEMURRER AND ANSWER.

Where respondent to petition for writ of prohibition filed a demurrer and answer, and the demurrer was overruled, and judgment absolute given against respondent on the insufficiency of his answer, when, in the absence of a motion for judgment on the pleadings, he expected that only the demurrer would be passed on, a motion to vacate the decision on the ground of surprise, and to allow an amended answer, will be granted. PATERSON, J., dissenting.

S. C. Denson and A. L. Hart, for petitioners.

FOX, J. This was an application for a writ of prohibition. Upon the return of the alternative writ, the respondent demurred to the petition, and at the same time filed an answer. Argument was had upon the demurrer, but in the decision thereon, which was filed December 28, 1889, reference was made to the fact that a certain allegation in the petition and writ was not denied, and the decision is open to the construction that it was made upon the pleadings generally, and not simply upon the petition or writ, and the demurrer thereto. Although not so stated in terms, the legal effect of that decision was to overrule the demurrer, and give final judgment in favor of the petitioner. That judgment, in our opinion, was entirely correct upon the petition or writ and demurrer, as the legal effect of the latter was to admit the truth of allegations of the former. But an answer was in, the sufficiency of which was unchallenged; and there was no motion for judgment on the pleadings, putting the respondent upon notice that his answer was insufficient to constitute a defense. In the briefs filed after the argument, petitioner expressly claims that the hearing is upon respondent's demurrer only, and not upon the pleadings generally. It may well be that under these circumstances a final decision of the whole case was, in law, a surprise to the respondent. He has now, and in due time, moved the court to vacate the decision then rendered, pass upon the demurrer directly, and, if overruled, to allow him to file an amended answer in the cause, a draft of which, duly verified, he has deposited with the clerk of this court. This motion is made on affidavit, and on the ground of surprise. We think he is entitled to this relief, and to be heard upon the merits of the cause. It is therefore ordered: (1) That the judgment rendered in this cause on the 28th day of December, 1889, be, and the same is hereby, vacated and set aside; (2) that the demurrer of the respondent to the petition heretofore filed in this cause be, and the same is hereby, overruled; (3) that the amended answer of respondent, now deposited with the clerk of this court, be filed as and for his answer in the cause, and that, if not already done, a copy thereof be served upon attorneys for pe-

tioner within 10 days from the filing of this order; (4) that this cause be placed upon the bank calendar of this court for the May term, 1890, at Sacramento, for such further proceedings as the parties may then desire to take therein; (5) that, until the further order of this court in this cause, the respondent, J. B. Campbell, judge of the superior court of the state of California in and for the county of Fresno, do absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of Charlotte F. Clarke *et al.* v. August Heilbron *et al.*, now pending in said superior court, or from making any further or other order in the cause except such as may pertain to the arrangement of the calendar of his court, or such as may be agreed to by the counsel on both sides.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

PATERSON, J., (*dissenting.*) I do not see how it can serve any useful purpose to hear this matter any further. The learned judge, respondent herein, naturally feels like having nothing more to do with the case, his interests and motives being questioned, and, exercising his good taste, states to this court, in his answer, "that now that his attention is called to the fact that one of the parties to said action claims, or pretends to claim, that the land of the respondent is included within the land therein in controversy, the defendant does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever, therein." What is the use of issuing a restraining order when the judge thus positively states his determination not to act in the case? What good can arise from the trial of the other issues of fact? If the petitioners should fail to prove that respondent has any interest in the subject-matter of the litigation, or in the success of either party thereto, the result would be the same. The judge would still refuse to act in the case. No doubt it would be gratifying to Judge Campbell to be given an opportunity to show that the allegations as to his interest in the case are groundless, and I wish it could be done. But he has already denied them under oath. There is no presumption against him; and it would only result in expense, annoyance, and delay to investigate the question as to whether the petitioner or respondent is correct, and consume unnecessarily the time of this court.

84 Cal. 71

SAN LUIS OBISPO v. GRAVES, Tax Collector.
(No. 13,554.)

(Supreme Court of California. May 5, 1890.)

CONSTITUTIONAL LAW—UNIFORM AND GENERAL LAWS—LICENSE TAXES.

A license tax collected, under an ordinance of the board of supervisors of a county, for a business carried on within a municipality in that county, must, under Pol. Code Cal. § 3163, be paid into the county treasury for the use of the county; and the county government act, § 189, subd. 15, as amended, (St. 1839, p. 283,) which requires that all

license taxes collected in counties of a certain class, within the limits of an incorporated city or town, shall be paid over to the town authorities for street improvements, is unconstitutional and void as violating Const. Cal. art. 11, § 4, providing that the legislature shall establish a uniform system of county governments; also article 1, § 11, which provides that all laws of a general nature shall have a uniform operation; and also article 4, § 25, subds. 9, 33, forbidding local legislation in relation to county business.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge. *Graves, Turner & Graves*, for appellant. *Wm. Shipsey*, for respondent.

FOX, J. The plaintiff is a county of the twenty-seventh class. The respondent is license tax collector of the county. The city of San Luis Obispo is a municipality of the sixth class, situate within the county. The county is divided into five supervisor districts, numbered from 1 to 5. District No. 3 consists of the city, and one election precinct outside the city, known as "Orcutt Election Precinct." The city itself comprises three of the county election precincts, numbered 1, 2, and 3. The county, exclusive of the territory, lying within the corporate limits of the city, is divided into 17 road-districts, numbered from 1 to 17. Road-district No. 5 is composed of the territory embraced in Orcutt election precinct. No part of the territory within the municipality belongs to any road-district in the county. On the 8th of March, 1889, the board of supervisors passed an ordinance "concerning licenses, and to provide for the collection thereof." By section 1 of this ordinance, a license tax was imposed "upon every kind of business carried on in the county of San Luis Obispo, and all shows, exhibitions, and lawful games carried on therein." Section 20 provided that the licenses must be procured from the license tax collector, and that no license issued under the order should authorize any person to carry on any business within the limits of any incorporated city or town empowered by its charter to levy city or town licenses, unless such person also procure the license required by the ordinances or orders of any such city or town. Section 24 of the ordinance reads as follows: "On the first Monday of each month, the license tax collector must return to the auditor all the unsold licenses, and be credited therewith, and the auditor must apportion all license money collected to the road funds of the several supervisorial districts of the county from which the said license money was collected; and the license tax collector must appear at the county treasurer's office, and pay into the road funds of the several supervisorial districts the license money so appropriated, less his compensation or percentage, for licenses sold during the preceding month, take the treasurer's receipt therefor, and file duplicates with the auditor. The auditor must credit the license tax collector, and charge the treasurer therewith." The county licenses collectible within the city of San Luis Obispo under this ordinance

amounted to \$1,000 per quarter, but in road-district No. 5, Orcutt election precinct, no business was carried on which was subject to license tax under the ordinance.

In August, 1889, the defendant collected \$22 for license to carry on a business within the corporate limits of the city. On the 5th of September, 1889, the county auditor made a written demand upon him to pay over this \$22 to the county treasurer in accordance with the terms of the said ordinance, which the defendant failed to do; and thereupon the alternative writ of mandate was sued out of the superior court, commanding the defendant to pay said money into the county treasury as demanded, or show cause why he did not do so. On the return of the writ the defendant admitted the collection and possession of the money, and alleged that he held the same to pay it over to the city treasurer of the city of San Luis Obispo "under the provisions of subdivision 15 of section 189, as amended in 1889, of an act of the legislature of the state of California entitled 'An act to establish a uniform system of county and township governments,' approved March 14, 1883." St. 1889, p. 283.

The proceeding is evidently one to determine the conflict between section 24 of the ordinance and subdivision 15 of section 189 of the county government act. That section is in relation to counties of the twenty-seventh class, and subdivision 15 thereof contains this provision: "All moneys collected in counties of this class for licenses within the limits of any incorporated city or town shall be paid over by the officer collecting the same to the officer authorized to receive the same of the incorporated city or town in which such licenses are collected, to be expended by the authorities thereof in the improvement of the streets of such incorporated city or town wherein such license money was collected." There can be no question, and we understand it to be conceded, that, if this provision of the county government act is constitutional, so much of the ordinance as provides for the payment of the moneys collected for license tax upon business carried on within the municipality into the county treasury is in conflict with the general law, and void. It is claimed by appellant that this provision of the state statute is special and local, in direct conflict with certain provisions of the constitution, and void; and we have no doubt that it is so. It is found, it is true, in an amendment to a general law. But it is upon a subject which is not germane to the section or subdivision of the general law to which it is attached, and undertakes to establish for and in a single class of counties a rule which is in conflict, upon the subject of which it treats, with the law prescribed for all other counties, and classes of counties, in the state.

In the first place, the most general of all the laws of the state, the Code, (Pol. Code, pt. 3, tit. 7, c. 15,) treats of the subject of licenses. It prescribes all the different

classes of business upon which a license tax may be imposed, and also prescribes a rate of license which shall be collected upon the several classes of business in all the counties of the state, and the mode and manner of collecting the same, and, by section 3363, provides that the moneys so collected shall be paid into the general fund of the county. In the absence of other legislation upon the subject, the county authorities would undoubtedly be required to collect the rate of license prescribed in this chapter. But, as the question of rate is largely a matter of local interest, the legislature has, by other and appropriate legislation, authorized the boards of supervisors, by ordinance, to fix the rates, in the several counties, to be imposed upon all business authorized by law to be so taxed, and to provide for the collection thereof; but it has in no instance that has come under our observation, authorized any board of supervisors to permit any business which the general law requires to be licensed to be carried on in any county without a license. The rule prescribing what business shall be charged with a license is uniform throughout the state. The rate to be charged may be prescribed by the local authorities. Whether the rate which may be fixed by the board of supervisors can be less than that prescribed by the general law, we are not now called upon to say. Whether it be the one fixed by the board of supervisors or by the general law, the only exception made by statute to the rule that it must be paid into the general fund of the county treasury is that fund in the provision above quoted from the proviso attached to subdivision 15 of section 189 of the county government act, as amended in 1889. The subject of the proviso has no relation whatever to the subject of the section, or of the subdivision thereof to which it is attached. The subject of the disposition of the license tax fund is not germane to any part of the entire act of which the section is a part. That act provides for the organization, classification, and powers of counties, and the powers, duties, and compensation of county officers. The organization, powers, and duties of counties and their officers is provided for in a portion of the act which is common to all the counties. Then follows a provision classifying the counties,—a duty which the constitution imposed upon the legislature. The sole purpose of that classification is declared by the constitution to be that of regulating the compensation of the officers in proportion to their duties. Const. art. 11, § 5. All the law relative to the powers and duties of counties and their officers is found in the sections of the act preceding the one making the classification, (section 162,) which expressly declares the purpose of the classification to be the same as that prescribed in the constitution. The sections following this, to and including section 210, are devoted exclusively to fixing the compensation of the officers in the several classes; sec-

tion 189 being the one which fixes the compensation of officers in counties of the twenty-seventh class. Subdivision 15 of that section fixes the compensation of supervisors; and to this is tacked on the provision which we have above quoted, and which is wholly foreign to the section, and to the purpose for which, and for which alone, the legislature is authorized to classify counties. It is an attempt to classify counties upon a subject and for a purpose for and in relation to which the legislature is not authorized to make any classification. Except for the sole purpose of fixing the compensation of county officers in proportion to their duties, the duty of the legislature was and is to "establish a system of county governments which shall be uniform throughout the state." Article 11, § 4. The attempt to make any such discrimination as that sought to be made in this case is not only in violation of the section of the constitution last cited, but also of article 1, § 11, and article 4, § 25, subds. 9, 33. License taxes collected under provisions of the Code, or of an ordinance of the board of supervisors are moneys collected for the use of the county; and it is the duty of the collector to deposit them with the county treasurer. Const. art. 11, § 16. Under another and different law, municipalities are authorized to impose and collect license taxes for municipal purposes. These, and these only, of the license tax collected in the county, are to be paid into the municipal treasury.

Counsel for respondent has cited several authorities in support of the proposition that the disposition made by the legislative provision above quoted is not unconstitutional; for that it requires that the money, though paid into the municipal treasury, shall be devoted to a purpose which is a county purpose, namely, the improvement of the streets in the municipality, such streets being public highways within the county. It is unnecessary for us here to decide whether a county could appropriate moneys from its treasury for the improvement of streets of a municipality within its borders, or not. The authorities cited would seem to indicate, by a parity of reasoning, that it could. But that question is not now before us. What we are here considering is whether or not the legislature of the state can make such a disposition of county funds, and require that they be deposited, not in the county treasury, but into a municipal treasury, to be disbursed by a government other and different from that for which, and by whose authority, they were collected. That it cannot do so, we are satisfied.

The judgment of the court below was in favor of defendant. From the conclusion which we have reached, it follows that the judgment must be reversed, and it is so ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

84 Cal. 219

ROSEWARN v. WASHINGTON G. M. Co.
(No. 12,281.)

(Supreme Court of California. May 31, 1890.)

INJURY TO SERVANT—DEFECTIVE APPLIANCES.

In an action by a servant against a mine-owner for personal injuries, plaintiff alleged that a defective bell-wire, fastened at intervals of 100 feet in the shaft, coiled around his leg as he was ascending in the bucket, and inflicted the injury. The court found that the wire was of suitable size and strength, and that it was properly fastened at irregular intervals from 15 to 50 feet apart. *Held*, that judgment for defendant will be affirmed, as the findings must be accepted as true, the evidence not having been brought up.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

A. Waitz and R. H. Taylor, for appellant.
Pillsbury & Blanding, for respondent.

HAYNE, C. This was an action against the owner of a mine for damages for injuries received from a broken bell-wire while being hoisted up the shaft of the mine. Judgment was given for the defendant, and the plaintiff appeals. The evidence is not brought up, and therefore the findings must be accepted as true. The negligence set forth in the complaint consists in the use of defective machinery. The allegation is as follows: "That one of said wires was composed of such poor material that the same broke on the 2d of October, 1881, at or near the 300-foot level of said mine, and by the negligence and carelessness of said defendants, its agents and servants, in the selection of said wire, and in fastening the same to the timbers of said mine, at such long distances apart, to-wit, about one hundred feet apart, that said broken wire became coiled in the middle of said shaft, and while plaintiff was being hauled to the surface of the earth, through said shaft, on said 2d of October, 1881, at the close of his day's work, on said bucket, said wire coiled around the right leg of plaintiff just below the knee," whereby he was injured. It will be seen from this that the complaint set forth two circumstances of negligence, viz.: *First*, that there was negligence in the selection of the wire; and, *second*, that there was negligence in having the fastenings of this wire so far apart as 100 feet. Both these charges are negatived by the findings. In relation to the first, the court finds that "there were two bell-ropes, one to each division of the shaft, each composed of three galvanized wires twisted together, making a wire of suitable size and strength for the purpose, but with a tendency to twist." If the wire was of suitable size and strength, the defendant could not have been guilty of negligence in its selection. In the second place the findings negative the allegation that fastenings were 100 feet apart. The court finds that "the fastenings to the timber were at irregular intervals from fifteen to thirty, and even fifty, feet apart." And in its conclusions of law it states that the wires were "properly adjusted

and fastened to the mine." It is not alleged that from 15 to 30 and even 50 feet apart was an improper distance for the fastenings, and there is nothing in the record to lead us to suppose that it was. Thus it appears that the circumstances of negligence charged in the complaint are negatived by the findings; and this being so, and the truth of the findings not being questioned, the judgment must be affirmed, and the objections made to the findings as to contributory negligence become immaterial. We therefore advise that the judgment be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

83 Cal. 574

LUCK v. LUCK. (No. 13,567.)

(Supreme Court of California. April 24, 1890.)

SERVICE OF NOTICE BY MAIL—FINAL ORDER—
DIVORCE.

1. Notice of appeal served by mail from any place, whether it be the residence or office of the person serving it or not, which has regular mail communication with the place where the notice is to be sent, is sufficient under Code Civil Proc. Cal. §§ 1012, 1013, providing that service by mail may be made where the person making it and the person on whom it is to be made reside or have their offices in different places, between which there is regular mail communication, and that the paper must be deposited in the post-office, postage paid, addressed to the person on whom it is to be served at his residence or place of business. *Reed v. Allison*, 61 Cal. 461, and *Murdock v. Clarke*, 73 Cal. 25, 14 Pac. Rep. 385, overruled.

2. In divorce, a judgment denying plaintiff's prayer, and awarding the custody of the children to defendant, is final, and appeal lies from any part of the decree.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

F. J. Kierce, for appellant. Chase & Chase, for respondent.

PATERSON, J. This is an action for divorce. The prayer of the plaintiff was denied, and the custody of the children was awarded to the defendant. Plaintiff appealed from that portion of the judgment giving the care, custody, and control of the children to the defendant. Respondent moves to dismiss the appeal on the following grounds: That the portion of the judgment appealed from is not appealable; that the notice of appeal was not served as required by sections 1012, 1013, Code Civil Proc.; that the notice of appeal was served by an attorney (Kierce) who had no authority to sign or serve it.

1. The right to the care, custody, and control of the children was an issue in the case. Judging from the nature of the appeal, it was the issue upon which the parties made their chief efforts. Plaintiff alleged that defendant was not a fit person to have the care of the children. Defendant denied the allegation, and countered with a similar accusation against the plaintiff. The portion of the judgment appealed from is a part of the

final decree, and an appeal may be taken from any final decree, whatever its nature, and from any part thereof. The fact that the court below may modify the decree so far as the children are concerned does not deprive the defeated party of her right to have this court say whether the judgment of the court below is correct. Such party is not bound to wait for the court below to change its judgment. The cases cited upon the proposition that the appellate court will not disturb the action of the court below in exercising its discretion in such matters have no bearing on the question as to whether the order is appealable.

2. The attorney who served the notice of appeal resided and has his office in the city of San Francisco, and the attorneys for respondent reside in Martinez, Contra Costa county. The notice was served by depositing it in the post-office at Oakland, with postage prepaid, and addressed to the attorneys for respondent at Martinez. It is claimed that the service was ineffectual, because the notice was not mailed at San Francisco, and the case of *Reed v. Allison*, 61 Cal. 461, is relied on in support of the contention. That case had been tried in the city of San José, and the attorney for appellant, being in that place on business, served the notice of appeal personally on the respondents residing there, and mailed notices to the other respondents. The attorney for appellant resided at San Rafael, Marin county. The court held that the attempted service upon the respondents residing at Redwood City, San Francisco, and other places, except at San José, was void; and, it being an action of partition, and necessary to have all the parties before the court, the appeal was dismissed. We think that case and *Murdock v. Clarke*, 73 Cal. 25, 14 Pac. Rep. 385, which followed it in department, should be overruled. The decision in *Reed v. Allison* was based upon a construction of sections 1012 and 1013, Code Civil Proc., which in our opinion is not warranted by the language of those sections, and upon cases which do not support the conclusion reached. As was said in that case, "the conditions involved in the fact of service by mail are: (1) That the person making the service and the person on whom it is to be made reside or have their offices in different places; and (2) that there shall be a regular mail communication between the 'places.'" Those conditions existed in that case. The attorney for appellant and the respondents and their attorneys resided in different places, and there was regular mail communication between all of the places. The statute does not in terms require the notice to be deposited in the post-office at any particular place, the essential things being simply residence in different places, (if the parties reside in the same place the service should and must be personal,) and the fact of regular mail communication between the place where it is mailed and the place to which it is sent. "In case of service by mail, the notice or other

paper must be deposited in the post-office, addressed to the person on whom it is to be served," is the language of the section (1013) which directs how service by mail is to be made. There is nothing in the language of this or any other statute indicating an intention on the part of the legislature to require the party making the service to deposit the paper in any particular one of the post-offices of this state having regular mail communication with the place to which the paper is to be sent. There can be no good reason assigned for such a construction, or for such a provision. The fact that under the construction which we give to the section the paper may be sent from a place in the central part of the state to one end of the state, and there mailed to the party to be served living in the other end of the state, is a thing not at all likely to occur, and could not prejudice the rights of the respondent if service should be made in that way. It is provided that "the service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised or an act be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address." The rights of respondent are thus carefully preserved against any abuse by the moving party of the privilege given him. On the other hand, it may often happen, as it did in *Reed v. Allison*, that the attorney for appellant is engaged in preparing his appeal at a place other than his residence or office. What good reason can be given for requiring him to mail the notice from the place in which he resides, especially where such place is further from the place to which the notice is to be sent than the place where he is engaged at the time? This case was tried in Oakland, and the notice was deposited in the post-office at that place, which is nearer Martinez than San Francisco is. It would be an absurd requirement which would compel the person making the service to perform the act in San Francisco, which could be done as effectually, and with more convenience and expedition and less risk, in Oakland. But it is sufficient to say that the statute does not require that the deposit should be made in the place where the party making the service resides. The cases of *Corning v. Gillman*, 1 Barb. Ch. 649, and *Moore v. Besse*, 35 Cal. 184, do not sustain the reasoning in *Reed v. Allison*, supra, so far as the question before us was involved. In *Corning v. Gillman* the decision was upon the ground that the fourteenth rule of the court required the notice to be deposited in the post-office where the moving party resided. The rule is not reported. In *Moore v. Besse* the court decided that a party relying upon substitute service by mail must show that he and the person upon whom service is made reside in different places. They may have resided in the same place, in which event personal service was necessary;

and no presumption arises from the fact that a case is tried in a particular place that the attorney of the moving party resides there. That is all the court decided in that case which bears on the question before us.

There is no merit in the contention that Kierce was not substituted as an attorney for appellant in the place of her former attorney, Smith, and that the notice and service are without authority and void. The substitution was duly made, and notice thereof given to the attorneys for respondent. Motion denied.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 221

THOMAS v. BLACK. (No. 12,635.)

(Supreme Court of California. May 31, 1890.)

REPLEVIN—EVIDENCE—CONTINUANCE.

1. In an action against a sheriff to recover personal property levied on in plaintiff's hands as having been fraudulently conveyed to him by a defendant in divorce proceedings to evade the payment of a judgment therein, evidence of ill treatment and abuse of his wife, which was the ground of the divorce, is inadmissible, as irrelevant and as having a tendency to prejudice plaintiff's case.

2. On the granting of a continuance, the testimony of witnesses in attendance, taken by the judge in the form of a deposition, under Code Civil Proc. § 596, and reduced to writing by a stenographer, but not read over to, corrected, or signed by the witnesses, nor certified by the judge, does not constitute a deposition, within the requirements of section 2032.

Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Hudner & Dooling and Montgomery & Scott, (T. H. Campbell, of counsel,) for appellant. *N. C. Briggs*, for respondent.

MCFARLAND, J. This is an action to recover certain personal property, or its value, alleged to have been purchased by plaintiff from one Joaquin S. Serpa. Maria L. Serpa, former wife of said Joaquin, had obtained a divorce from the latter, and a judgment for \$290, as costs, attorney's fees, etc. On this judgment an execution had issued, and the original defendant, Ross, (now deceased,) as sheriff, had, under said execution, levied on said personal property as the property of said Joaquin, when this action was commenced by plaintiff, and the property replevied from the sheriff. Defendant averred that the property was the property of said Joaquin, and that the attempted sale from Joaquin to plaintiff was fraudulent, and for the purpose of hindering and defrauding said Maria, etc. The verdict and judgment were for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial. In the mean time, Ross died, and his administrator was substituted as defendant.

The respondent was allowed, over the objection of appellant, to prove by three different witnesses that, when Joaquin Serpa was married to his wife, Maria, he had a loathsome private disease; that he married her for

the purpose of curing himself, by transmitting the disease to her; that such was the result of the marriage; and also that during the marriage he cursed, kicked, and struck his wife. It is quite evident that the allowance of this testimony was error. It had no bearing on the question whether the alleged sale from Joaquin to plaintiff was valid, and it clearly prejudiced plaintiff's case by inflaming the minds of the jury against his asserted grantor. For this reason a new trial must be granted.

There are one or two other questions to be noticed. Appellant contends that the answer does not contain a sufficient statement of the facts which constitute the fraud, and the hindering the creditor, and, particularly, that it does not state that the property in question was the only property of Joaquin out of which the execution might have been satisfied. But no question of that kind was raised in the court below; and both parties introduced evidence, without objection, on the issue of fraud, and as to the point whether Joaquin had other property. Under these circumstances, we would not reverse the judgment for this objection to the answer, raised here for the first time.

Some declarations of Joaquin made after the sale were improperly admitted.

The testimony of the witnesses M. V. Silva and Frank Martin was improperly admitted. The case had been set for trial for March 23d; but on March 21st the court, at plaintiff's instance, made another order, setting it for April 6th. On March 23d the defendant came into court with the witnesses Silva and Martin, and insisted that the trial should proceed, and that if it should be continued the testimony of the said witnesses should be taken in the form of depositions, because the real defendant was poor, and could not get the witnesses there again. Thereupon the court set aside the order resetting the trial for April 6th, and ordered that the case be continued until April 6th, and that, as a condition of the continuance, the testimony of said two witnesses "be taken at this time, by and before the court, in the form of a deposition, by questions and answers, and that the evidence be taken by the short-hand reporter." To all of this, plaintiff objected. The testimony of the two witnesses was then taken by the short-hand reporter, but was not read over to the witnesses, or corrected or signed by them. On the trial of the case, which was before a jury, a transcript of this testimony, or what purported to be such a transcript, but not certified by the reporter, or by any other person, was offered in evidence and admitted over plaintiff's objections that it had not been read to the witnesses, nor subscribed by them, nor certified by the officer taking the depositions as required by the Code, nor certified by the report as a correct transcript of his notes. There no doubt can be a valid condition to a continuance that the testimony of witnesses in attendance shall be taken, but this must be done in the

manner prescribed by the Code; and the Code (section 596, Code Civil Proc.) provides that the testimony must be taken "by deposition, before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate." In the case at bar the transcript admitted in evidence lacked the essential elements of a "deposition," as defined by the Code. It was not certified or authenticated in any way whatever, and the witnesses had no opportunity to correct it. The jury before whom the case was afterwards tried did not see the witnesses, and could have no assurance that the document presented contained a true statement of their testimony; and we can see no tenable ground upon which the document could have been admitted. The testimony of these witnesses was not taken as part of the trial, which was not commenced until April 6th, and was had before a jury which was not impaneled until the latter date. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; FOX, J

84 Cal. 201

GRANGERS' BUSINESS ASS'N OF CALIFORNIA
v. CLARK. (No. 12,677.)

(Supreme Court of California. May 31, 1890.)

PLEADING—REPLY—EVIDENCE—ATTORNEY'S FEE.

1. Defendant secured an indebtedness to plaintiff by a mortgage on real estate and a chattel mortgage on growing wheat. Thereafter plaintiff loaned other money to defendant. The wheat when harvested was placed in a warehouse, and receipts therefor obtained in plaintiff's name, and delivered to him. He sold the wheat, and applied the proceeds to the unsecured debt. In an action to foreclose the real estate mortgage, defendant answered that the crop mortgage was given at the same time to secure the same debt, and that, in accordance with its terms, the wheat was harvested and delivered to plaintiff, to be applied on the debt secured thereby. *Held* that, under Code Civil Proc. Cal. § 462, providing that "the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party," plaintiff could introduce evidence of a verbal agreement with defendant that the wheat, when harvested and delivered to plaintiff, should be held as security for the new indebtedness, and the proceeds thereof applied, first, to such indebtedness, and then to the mortgage debt, though this was not pleaded.

2. As the verbal agreement related to the wheat "when it should be harvested and delivered," and Civil Code Cal. § 2955, specifying what personal property may be mortgaged, does not mention grain except as "growing crops," the agreement was not the creation of a verbal mortgage, in violation of section 2922.

3. It was competent for the parties to agree that the wheat should be diverted from the satisfaction of the mortgage debt, and converted into a pledge to secure the subsequent indebtedness.

4. A mortgage provided for an attorney's fee, in case of foreclosure, not exceeding \$500, and 10 per cent. on the amount found due. The mortgage was originally for \$5,135, but about \$1,300 had been paid on it. The court allowed \$1,000. *Held* that, under act Cal. March 27, 1874, § 1, (St. 1873-74, p. 707,) providing that the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in the mortgage to the contrary notwithstanding, \$600 being a reasonable amount, the sum allowed would be reduced \$400.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Mich. Mullany and *Wm. Grant*, for appellant. *Estee, Wilson & McCutchen*, for the State.

GIBSON, C. Defendant appeals from a judgment and order denying a new trial in an action to foreclose a mortgage on real estate. The defendant, on the 19th of March, 1880, being indebted to the plaintiff corporation in the sum of \$5,135, for money loaned to and expended for him, gave to plaintiff

his note for that amount, payable one day after date, bearing interest at the rate of 1 per cent. per month from date, payable quarterly, and, if not so paid, to be compounded quarterly. To secure this note he executed and delivered to plaintiff, on the same date with that of the note, two mortgages,—one upon 160 acres of land in Alameda county, and the other a chattel mortgage upon a certain crop of wheat then growing upon about 480 acres of land, also in the same county. At divers times from the same day this transaction was had until July 1, 1881, the plaintiff loaned to and advanced for defendant other amounts of money, aggregating the sum of \$3,407.06. Previous to the execution of the note and mortgages, the defendant had delivered a lot of hay, worth \$703, to the plaintiff that it had not accounted for to him, and it was agreed that the amount should be credited upon the note. Plaintiff, however, first deducted \$30 that had been advanced to the defendant, and credited the remainder upon the note. The crop of wheat described in the chattel mortgage was by the defendant harvested prior to October, 1880, and placed in a warehouse at Livermore, and receipts therefor obtained in the name of the plaintiff, which were delivered to it. On a sale of this wheat by the plaintiff, on July 1, 1881, it realized the sum of \$4,061.99. This amount the plaintiff applied to the payment of defendant's indebtedness of \$3,407.06, which had, as above shown, accrued after the making of the note and mortgages, and the overplus was applied upon the said note. Defendant contends that the whole amount realized from the wheat should have been applied upon the note. This raises the principal question, upon the solution of which the case depends. Plaintiff, in its complaint, seeks to foreclose the mortgage upon the real estate, and admits therein that a certain amount has been paid upon the note, which is secured by the mortgage. The answer of defendant admits the making of the note and mortgage sued upon, and avers that the crop mortgage, above mentioned, was also made at the same time to secure the same note; and that in accordance with its terms the crop of wheat covered by it was duly harvested and delivered to plaintiff, to be applied to the payment of the note; and that the load of hay above mentioned was delivered to plaintiff for the same purpose.

Thus we perceive that the main issue tendered is whether the note was paid. To meet the affirmative matter set up in defendant's answer the plaintiff interposed a replication, which traverses such new matter, and, among other things, avers that the proceeds of the sale of the hay and wheat were applied to the payment of the loans and advances other than those included in the note, according to the agreement of the parties. This reply was unnecessary, and has no place in our system of pleading, because the Code of Civil Procedure provides, in section 462, that "the statement of any new matter in the answer, in avoid-

ance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party." Thus in *Cur-tiss v. Sprague*, 49 Cal. 301, this court, with respect to the same provision in the practice act said: "The counter-claim was barred by the statute of limitations, and, under the provisions of the practice act, the plaintiff must be considered to have pleaded the statute by way of replication to the counter-claim." So, in the present case, the plaintiff must be deemed to have pleaded the verbal agreement between itself and defendant, whereby the grain covered by the chattel mortgage, when the same was harvested and delivered to it, should be held as security for the advances made, and to be made, to and for the defendant, and the proceeds of the sale of the grain should be applied, first, to the payment of such advances, and the remainder, if any, to the payment of the note; and it was proper for the court to receive evidence in support of such agreement. Although the two mortgages are separate and distinct from each other, they were given for the sole purpose of securing the same note, a copy of which is set forth in each of them. This is found as a fact by the court, and is not disputed; and it is also found that at or about the time the note and mortgages were made, and at different times until July 1, 1881, "the defendant orally, but not in writing, promised and agreed, in consideration of said advances and loans being made, and to be made, from time to time by plaintiff to defendant, that the plaintiff should have and hold, as fast as the same could be delivered, all produce raised by the defendant, including the wheat mentioned in defendant's answer, as security for the payment of all moneys so loaned, paid out, and advanced by plaintiff to defendant in excess of the note described in the complaint;" and that all the proceeds of the sale of such produce should be applied by plaintiff to the payment of moneys advanced, and the remainder, if any, to the payment of the note.

The evidence in support of the finding as to the verbal agreement is not as satisfactory as it might be, but the testimony of the defendant to the contrary presents such a conflict as to preclude us, under the settled rule in this regard, from disturbing it. But it is earnestly urged by counsel for appellant that, even if the evidence relevant to the issue involving the verbal agreement was properly received, and is sufficient to support the finding respecting it, such an agreement in effect created a chattel mortgage contrary to section 2922 of the Civil Code, which provides that "a mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." A complete answer to this is, the finding shows the verbal agreement related to the grain, when it should be harvested and delivered, and such grain could

not be made the subject of a chattel mortgage, under section 2955 of the Civil Code, in which the only personal property capable of being mortgaged is specified. But we think it was perfectly competent for them by agreement to divert the grain from the satisfaction of the debt for which it was first agreed, in the chattel mortgage, it should be security for, and convert it into a pledge to secure the payment of defendant's other and subsequent indebtedness. This, it is true, affected the written mortgage, but, instead of it being modified or changed by such verbal agreement, it was extinguished when such agreement was executed.

The mortgage on the real estate provides that, in the event of a suit being brought to foreclose the mortgage, an attorney's fee, not exceeding \$500, and 10 per cent. upon the amount found due to plaintiff on the note and mortgage, shall be allowed. At the trial the counsel for the respective parties agreed to leave the amount of such fee to the court, and the court thereupon found and allowed \$1,000 as a reasonable attorney's fee. Defendant's counsel now claim—*First*, that no attorney's fee should be allowed in view of an offer they made to permit judgment to pass against the defendant for the amount due upon the note after deducting the payments claimed to have been made thereon; and, *second*, that the amount allowed is unreasonable and excessive. The offer referred to was made upon the theory that plaintiff could not prove and recover upon the verbal agreement above mentioned, which, as we have seen, it was properly permitted to do.

In view of the record here, we are constrained to say that the amount fixed by the court appears to be too great, and that \$600 would, in our opinion, be a fair and reasonable compensation for plaintiff's counsel. The stipulation in the mortgage is not controlling, as the law provides: "In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had; any stipulation in said mortgage to the contrary notwithstanding." Act March 27, 1874, § 1, St. 1873-74, p. 707. And when on appeal the sum fixed by the trial court exceeds a reasonable amount, it will be corrected by this court. *Mascarel v. Raffour*, 51 Cal. 242. We therefore advise that the judgment be modified by deducting \$400 from the sum allowed therein as an attorney's fee, and, as thus modified, it and the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by deducting \$400 from the sum allowed therein as an attorney's fee, and, as thus modified, it and the order denying a new trial are affirmed.

(83 Cal. 633)

KIRSCH v. KIRSCH. (No. 12,668.)

(Supreme Court of California. May 2, 1890.)

APPEAL—OBJECTIONS NOT RAISED BELOW.

Where, with plaintiff's consent, defendant in divorce files an amended cross-complaint setting up adultery committed by plaintiff since the beginning of the action, plaintiff, after going to trial on the issues raised thereby, cannot object for the first time on appeal that the amended cross-complaint contained no prayer for affirmative relief.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Fisher Ames and *George D. Collins*, for appellant. *William C. Flint* and *F. Wm. Reade*, for respondent.

McFARLAND, J. Action for divorce. Judgment for defendant, and plaintiff appeals from the judgment upon the judgment roll alone. The ground of divorce set up in the complaint was extreme cruelty. Defendant filed an "answer and cross-complaint" in which he denied the alleged acts of cruelty, and set up affirmatively extreme cruelty by plaintiff and prayed for a divorce on the latter ground. Plaintiff answered the cross-complaint, denying its averments as to cruelty. The amended complaint was filed September 26, 1886. Afterward, on January 10, 1887, defendant, "by consent of plaintiff, and by leave of court," filed "amendment to answer and supplemental cross-complaint," in which he averred that, "on divers days and times between the 3d day of September, 1886, and the 1st day of January, 1887, and particularly on the 30th day of November, 1886, the plaintiff herein committed adultery with" a certain person named at a certain named place. The plaintiff made no objection whatever to this last-named pleading, but answered it, calling it in her answer "Defendant's Supplemental Cross-Complaint," and denied the averments of adultery. Afterwards plaintiff herself filed a supplemental complaint, averring additional acts of cruelty committed since the commencement of the action, viz., on January 13, 1887. Defendant answered, denying its averments. The parties went to trial on the issues raised by these last-named pleadings, as well as upon other issues; and the court found against all the averments of cruelty, but found, also, "that, on divers days and times between the 3d day of September, 1886, and the 1st day January, 1887, and particularly on the 30th day of November, 1886, the plaintiff committed adultery with" the person and at the place stated in said so-called "supplemental cross-complaint." No motion for a new trial was made, no evidence is brought here by bill of exceptions, and the record does not show any objection or exception whatever.

Appellant now asks a reversal of the judgment on the sole ground that the so-called "supplemental cross-complaint" of defendant was insufficient; that it must be regarded as only a defense; that it sets up a new cause of action accruing after the commencement of

the action; that there is no prayer for relief, etc. But the case comes clearly within the rule that, where a case is tried upon the theory that the issues are properly joined in the trial court, and no objection or exception is taken there, it is too late to raise such objections here. *Hiatt v. Board*, 65 Cal. 481, 4 Pac. Rep. 464; *Spiers v. Duane*, 54 Cal. 176; *Cave v. Crafts*, 53 Cal. 141; *Van Maren v. Johnson*, 15 Cal. 313. The judgment is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(83 Cal. 501)

PEOPLE v. RAISCHKE. (No. 20,518.)

(Supreme Court of California. March 31, 1890.)

LARCENY—WEIGHT OF EVIDENCE.

On a prosecution for larceny the evidence was that defendant, by previous arrangement with two persons alleged to be his partners, tried to buy the goods; that the owner was willing to sell, provided the title should remain in him until they were paid for, and that, with this understanding, they were delivered to the alleged partners, defendant having at the commencement of the negotiations proposed to purchase the goods, to be used in a legitimate business to be carried on by the three jointly; that the goods were first taken to the premises where the three were represented to, and supposed by, the owner to have gone into business; that the owner took a note for the price from the other two; that thereafter some of the goods were found buried on defendant's land, and secreted in various places on his premises, after he had denied having any of the goods there; that defendant did not deny that the goods were to remain the property of the owner until they were paid for; that an expressman was hired by said pretended partners to, and did, take certain goods, similar, at least, to those in question, from the place where they were first delivered to defendant's place at 5 o'clock in the morning. *Held*, that a verdict of guilty would not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

R. Percy Wright, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of grand larceny. From the judgment rendered against him, and an order denying a new trial, he appeals. The case has been here before. 73 Cal. 378, 15 Pac. Rep. 13. The defendant was then awarded a new trial because of an erroneous instruction granted by the court below. It was contended on that appeal that there was no evidence of any larceny of the goods charged to have been stolen by the defendant, and the same point is made now. Upon that contention the appellate court determined adversely to the defendant.

We have carefully examined and compared the evidence as set out in the transcript of both appeals, and find no material difference, so far as the main points of the evidence are affected. That which was testified to by Bernard, the owner of the goods alleged to have been taken and stolen, as it appears in the present record, is not so full in some particulars as on the former trial. Bernard was alive at the time, but died before the second

trial was had; and his evidence was introduced at the later period in the form of a long-hand transcription of the reporter's notes of his evidence taken before the police court on the preliminary examination of the defendant, properly certified and filed. This evidence indicates that the defendant, by preconcerted arrangement with two other persons claimed to be his partners, endeavored to buy the goods in question in the first instance; that Bernard, the owner, was willing to sell them, provided the title to the articles should remain, as it then was, vested in him, until they were paid for, and with this understanding he delivered the goods to the two other persons, Lewandowsky and Furlong, the alleged partners of the defendant, the latter having in the beginning of the negotiation proposed to purchase the goods to be used, as he represented, in a legitimate business to be carried on by the three jointly; that the goods were first taken to the premises whereon these three persons were together represented to, and supposed by, Bernard, to have set themselves up in business; and that Bernard took a note for the price of the goods from Lewandowsky and Furlong. A short time after this delivery of the goods, having his suspicions aroused to the effect that a swindle had been perpetrated upon him, Bernard sought the aid of the police with a search-warrant; and, after Raischke, the defendant, had denied having any of the goods on his premises, some of them were found thereon, secreted in various places,—a portion of them in a potato-patch, buried 9 or 10 inches in the earth. This witness was corroborated by his daughter in his statement that he told the defendant the title to the property remained in him until it should be paid for, and by Mr. Rogers, a police officer; the last witness further stating that, when he and Bernard went to Raischke's to hunt for the goods, Bernard said: "Raischke, I told you the goods were mine until you paid for them; and I haven't got my goods, and you say you haven't got them. You took them away." "He told him a dozen times that he continued to own the goods. Raischke never denied anything of the kind, except that he hadn't the goods, or any of them, about the premises." O'Brien, an expressman, testified to having been employed by Furlong, one of the alleged partners of the defendant, to haul away from the place of business of the defendants Furlong and Lewandowsky certain articles of glassware, etc., which were similar to those obtained from Bernard; that he took these things, "boxed up," to Raischke's place, about 5 o'clock in the morning.

The appellate court on the former appeal (73 Cal. 382, 15 Pac. Rep. 14,) laid down the rule of law as applicable to cases of larceny of the kind of which this is contended by the people to be in this language: "That where, notwithstanding a delivery by the owner in

fact, the legal possession remains exclusively in him, larceny may be committed exactly the same as if no delivery had been made. (2) That where, by the delivery, a special property, and consequently a legal possession, apart from any felonious intent, would be transferred, if it be found that such delivery were fraudulently procured, with a felonious intent to convert the property so acquired, then, also, the taking amounts to larceny." The evidence quoted, as well as some circumstances in the record, as we think, tend to show that the defendant and his two alleged partners bought these goods under pretense that they intended to use them in a legitimate business; that they did not intend so to use, or in good faith to pay for, them, but, after taking them to the place where they were claiming to carry on business, they had them removed to the premises of Raischke, who converted them to his use with the intent, feloniously, to deprive the owner of them. Under these circumstances, no reason is apparent for disturbing the verdict of the jury. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 618)

LANGAN v. LANGAN. (No. 13,620.)

(Supreme Court of California. April 30, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Wickliffe Matthews, for appellant. John E. Lundstrom and Manuel Eyre, for respondent.

McFARLAND, J. The record in this case shows that an action for divorce between the parties herein is pending and undetermined in the superior court; that the court made an order that defendant pay to plaintiff \$25 per month alimony; and that afterwards, the court made another order that defendant pay to plaintiff \$150 counsel fees. Defendant takes a separate appeal from each of said orders, and respondent moves to dismiss the appeal from the order allowing the counsel fees. (As respondent does not move to dismiss the appeal from the order allowing alimony, that question is not before us.) The appeal from the order allowing \$150 counsel fees must be dismissed, because the amount in dispute is too small to give the court jurisdiction. The appeal from the order allowing counsel fees is dismissed.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

83 Cal. 623

CITY OF EUREKA v. ARMSTRONG. (No. 12,565.)(Supreme Court of California. May 1, 1890.)
DEDICATION.

The sale of land described as bounded on a certain street is at least an offer of dedication of the street, which is sufficiently accepted by a resolution of the city council accepting as public streets all streets which have been dedicated by the owners thereof. Affirming 22 Pac. Rep. 923.

In bank. On rehearing. For former report, see 22 Pac. Rep. 928.

McQuaid & Wheeler, for appellant. *J. H. G. Weaver*, for respondent.

McFARLAND, J. In this case there was a decision in department affirming the judgment. A hearing in bank was ordered mainly because a number of cases, involving the doctrine of the dedication of streets to the public, were either then under advisement, or had recently been decided, and it was thought best to again carefully compare the case at bar with the others. After further consideration, we are satisfied with the opinion delivered in department. There is nothing in that opinion inconsistent with *People v. Reed*, (No. 11,769,) 81 Cal. 70, 22 Pac. Rep. 474, or *City of Eureka v. Croghan*, (No. 11,695,) 81 Cal. 524, 22 Pac. Rep. 693. The sale of land described as bounding on a certain street is at least an offer of dedication of the street; and we think, as stated in the opinion of department 2, that the resolution of the city council was an acceptance before any attempt at revocation. Judgment and order affirmed.

We concur: THORNTON, J.; FOX, J.; SHARPSTEIN, J.

I dissent: BEATTY, C. J.

84 Cal. 159

TOGNAZZINI v. MORGANTI et al. (No. 13,363.)(Supreme Court of California. May 16, 1890.)
BOUNDARIES—COURSES AND DISTANCES—MONUMENTS.

Where a patent of land is issued with boundaries as described in a survey and map made by a government surveyor, who has also made field-notes giving not only courses and distances, but also monuments and the various topographical features of the country, the calls for monuments will control the courses and distances in relocating the boundaries of the patent. THORNTON, J., dissenting.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Geo. A. Rankin, for appellant. *Cross & Simonds* and *P. F. Denson*, for respondents.

BEATTY, C. J. This is an action to recover a tract of land in Santa Barbara county. Defendants had judgment in the superior court, from which, and from an order denying a new trial, plaintiff appeals, assigning errors in the rulings of the court, and con-

tending that the findings are contrary to the evidence.

Plaintiff is owner of a Mexican grant, known as the "Casmalia Rancho." This rancho was patented to his grantors in 1861, with boundaries as described and delineated in a survey and map made in 1860 by a deputy United States surveyor named Terrell. Terrell's survey commenced at the north-west corner of the rancho, and ran a certain distance easterly to the north-east corner, designated as "C. No. 2," the location of which is known and undisputed. His next course was S., 50 deg. E., 395.55 chains, to corner No. 3, which was also corner No. 5 of an adjoining rancho, called "Todos Santos;" and the stake set at this corner at that time was marked "T. S. No. 5, and C. No. 3." After some years this stake disappeared, and the government, desiring to connect the surveys of public lands with the north-east boundary of the Casmalia rancho, the line between "C. 2" and "C. 3 T. S. 5," caused several surveys to be made for the purpose of re-establishing the lost corner. In 1868 Thompson, who had accompanied Terrell in the capacity of chainman, in the original survey of the Casmalia rancho, re-established the common corner ("C. 3 T. S. 5") of that and the Todos Santos. This, however, was done in a survey of Todos Santos, and it is not clear that it was done by direction of the government. But, in 1880, Von Schmidt, starting from C. 2, and running the course and distance called for by the patent and Terrell's field-notes, (S., 50 deg. E., 395.55 chains,) established C. 3 at a point 20.30 chains easterly from the stake, (C. 3 T. S. 5,) established by Thompson. This survey of Von Schmidt was rejected by the government, and another surveyor (Minto) was directed to run a correct line, and to obliterate Von Schmidt's work. Minto, after a careful survey, established a straight line running from C. 2 to Thompson's stake (C. 3 T. S. 5) as the correct boundary. The result was to exclude from the Casmalia rancho, as surveyed by Von Schmidt, a triangle having its apex at C. 2, and for its base a line 20.20 chains in length extending from Von Schmidt's C. 3 to Thompson's and Minto's C. 3 T. S. 5, and for its sides the Von Schmidt line on the east, and the Minto line on the west. This triangle is the tract in dispute. After the Minto survey, it was sectionized and subdivided according to the government system of surveys, and occupied by the defendants as pre-emptioners or homestead claimants. But plaintiff, claiming that the Minto survey was wrong, and that the Von Schmidt survey correctly re-established the line as run by Terrell, and as called for by the patent, sues to recover the triangle above described.

The rights of the respective parties, of course, depend upon a correct relocation of the Terrell line; and the claim of the plaintiff is that, since the stake set by Terrell is lost, and no living witness can testify to the

place where it stood, the only means of re-establishing the line is to start from the admitted location of C. 2, and run according to the calls of Terrell's survey, S. 50 deg. E. 895.55 chains, and fix the corner at the end of the line so run. If this proposition is correct, there is no doubt that the superior court erred in rejecting the Von Schmidt line, which was run in conformity to it. But we think there were other and more important considerations to be attended to in relocating the line. Terrell not only made a map of his survey, but field-notes showing the various topographical features of the country over which his lines extended. The material part of these field-notes reads as follows: "Two hundred and six chains to a post marked 'C., No. 2' station; thence descending ridge south, fifty degrees east, eighty-eight chains and fifty links, enter Canada; thence down through same one hundred and fifty-five chains, leaving Canada bearing south-east; thence over low rolling hills three hundred and ninety-four chains and fifty links, leaving hills and crosses road course south-west and north-east, three hundred and ninety-five chains and fifty-five links to old post in the entrance of Canada Verde, marked 'T. S. No. 5 and C. No. 3;' thence down through the Canada Verde Chamisal Hills, being to the left of line, south, fifty-three degrees west, fifty-six chains, old adobe house, bears west two chains distant at one hundred and eleven chains, new house in Canada de 'Casmalia.'" The Von Schmidt line has the sole merit of conforming in course and distance to these calls of the Terrell survey. It does not in any other particular tally with the field-notes. It enters and departs from the Canada at too short a distance from C. 2. It does not terminate at the entrance of the Canada Verde. It does cross a road near its southern extremity, but not the road delineated on Terrell's map. The road it crosses is a road running north and south, while the road called for in Terrell's field-notes, and delineated on his map, runs nearly east and west.

But the strongest argument against the correctness of the Von Schmidt line is furnished by the fact that his C. 3 is a full quarter of a mile further east from the adobe houses than Terrell's C. 3 T. S. 5 was. (The adobe houses are located by the field-notes of Terrell's line running west from C. 3 T. S. 5.) The Minto survey conforms to the field-notes in every respect except as to the course of the disputed lines. His line, instead of running S., 50 deg. E., runs S., 46 deg. E. We think this call for the course surveyed is much less certain and trustworthy than the calls for the entrance to and exit from the Canada, the crossing of the road running east and west, the entrance to the Canada Verde, all of which sustain the Minto survey. In short, we think that the findings of the superior court, so far from being unsupported by any testimony, are in conformity to the decided preponderance of the testimony. We

cannot, indeed, see how the decision could have been in favor of the Von Schmidt survey.

If there was any error in the refusal of the court to strike out the answers of the witness Minto to the questions asked him by defendants on his redirect examination, the error was trivial and unimportant. What he stated was that the Cooper (Von Schmidt) line was wrong because, among other things, it produced a conflict—over-lapping—between the Casmalia rancho and the Laguna and Todos Santos ranchos. It is by no means clear that Minto was not entirely competent to testify as to the location of these ranchos; but, whether he was or not, their location was shown in some of the exhibits put in evidence by plaintiff, and all that Minto stated with reference to this point was merely in elucidation of matters called out on his cross-examination by the plaintiff. We find no error in the record. Judgment and order affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; FOX, J.; McFARLAND, J.; PATERSON, J.

THORNTON, J., dissents, and may file an opinion hereafter.

84 Cal. 154

BARBIERI v. RAMELLI *et al.* (No. 12,816.)

(Supreme Court of California. May 15, 1890.)

MORTGAGES—MONEY LENT—ACTIONS.

1. Code Civil Proc. Cal. § 726, which provides that "there can be but one action for the recovery of any debt * * * secured by mortgage upon real estate or personal property," and that it shall be by foreclosure, is imperative, and a creditor holding a mortgage given as security must bring his action of foreclosure; and, though the security proves valueless, he cannot waive it, and bring an action on the debt.

2. Code Civil Proc. Cal. § 537, which allows an attachment to issue where the security for a debt has become valueless without any act of the plaintiff or the person to whom the security was given, applies only to cases where the security has so depreciated, since it was taken, as to become valueless. It does not permit one who has taken a mortgage on land to evade the provisions of section 726 without showing that the land has in fact depreciated in value.

Department 2. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Geo. C. Ross, for appellants. Jos. F. Cavnaro, for respondent.

THORNTON, J. This is an action to recover \$700, money lent, and interest thereon, and comes before this court on an appeal from the judgment. The question to be considered arises on the judgment-roll.

It appears from the findings that on the 13th of November, 1885, the plaintiff lent to defendants, at their request, the sum of \$700, who on the same day executed a mortgage on a tract of land to secure its payment. On this tract of land there were, at the time that the money was lent and the mortgage to plaintiff executed, two mortgages, one executed by defendants' grantor, Gottardo Turri, to the

Savings & Loan Society of the City of San Francisco to secure the payment of the mortgagor's promissory note for \$11,334, and another by the defendants to Turri to secure the payment of three promissory notes of defendants, aggregating in amount the sum of \$14,500. Both of these mortgages were recorded in the proper county, but when so recorded does not appear in the findings. The court finds that there was due, of principal and interest on the mortgage executed by Turri, the sum of \$13,297.12, and on the mortgage by defendants to Turri the sum of \$14,525.83. It is further found that at the time of the commencement of this action the mortgage was valueless as a security to the plaintiff; that is to say, that the market value of the land, and the improvements put on it by defendants since their purchase, was not equal in amount to the sums due on the indebtedness secured by the prior mortgages. The court gave judgment in favor of plaintiff against defendants for the sum of \$700, with interest at the legal rate from the date of the loan.

It is contended here on the part of the defendants (appellants) that the action cannot be maintained, for the reason that it is prohibited by section 726 of the Code of Civil Procedure. That section, so far as it bears on this case, reads as follows: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property."¹ We are of opinion that the point is well taken. The statute is imperative. The word "secured" in the section does not mean that the security shall be adequate, or that, in case prior liens upon it would exhaust the money derived from the land conveyed as security on a sale of it, that then the plaintiff is relieved from bringing the action to foreclose. The proper construction of the language of the statute is that, if the mortgage on its face purports to be a security to the plaintiff, then he must bring his action for foreclosure. This word has reference only to the purport of the mortgage, as it appears on its face. The interpretation of it is not proper when its meaning is sought in something outside of the mortgage instrument. The plaintiff is not authorized to waive the security, and bring an action on the indebtedness, and the court erred in so holding, as it did in effect, and rendering judgment for plaintiff. The cases cited by counsel for plaintiff, to-wit: *Ladd v. Rugles*, 23 Cal. 233; *Mascarel v. Raffour*, 51 Cal. 242; *Ould v. Stoddard*, 54 Cal. 613; and *Bartlett v. Cottle*, 63 Cal. 366,—have no application to the case before the court, as will be seen by reading them.

The head-note in *Bartlett v. Cottle* is incorrect and misleading. It represents this

court as holding that, where a mortgage is given to secure the payment of a promissory note, an action cannot be maintained on the note alone, unless the security is valueless. The court did not decide, nor did it intend to decide, any such point. In fact, the point was not involved in the case. The court below had found that the security was of no value, and rendered judgment for the plaintiff. This court merely said that the court erred, in that the value of the houses on the property had been omitted in the calculation. It only decided that the security was not valueless, and did not hold that in such a case an action could be brought on the indebtedness alone.

Nor does section 537, Code Civil Proc., affect this case, as contended by plaintiff. That section allows an attachment to issue where the debt is secured by a mortgage upon real or personal property, and, if originally so secured, such security, without any act of the plaintiff or the person to whom the security was given, has become valueless. It does not appear what the value of the land was when the security was given, or that it has depreciated in value at all since that time. *Non constat* that the land was any more valuable when it was accepted as security than it was when the case was tried in the court below. The plaintiff was satisfied with it when he received his mortgage; that must be presumed. Should he be allowed to say at a subsequent day, to get rid of a mandate of the statute, (section 726, Code Civil Proc.,) that it had become valueless? Section 537 refers to a case where the security has changed in the value it had when originally taken, and has so depreciated as to become of no value. It has no reference to a case where there has been no change in value. Having elected to take the security at the value it possessed when the mortgage was originally executed, no change in value having since occurred, he cannot be allowed to urge, to evade a compliance with the provisions of section 726, that it has become valueless. We are of opinion that the plaintiff is bound by the law to pursue the remedy pointed out by the statute. The land may sell under execution on a decree of foreclosure for enough to pay all the indebtedness secured by the various mortgages. But, whether this be so or not, we are of opinion that the court erred in rendering judgment for the plaintiff, and that the judgment must be reversed and the cause remanded, with directions to the court below to dismiss the action. Ordered accordingly.

I concur: SHARPSTEIN, J.

McFARLAND, J., (*concurring*.) I concur in the judgment, upon the ground that the rule that an independent action cannot be maintained on a debt secured by mortgage, without foreclosing the mortgage, has been settled by several decisions of this court, and that there is no sufficient reason for over-

¹Section 726 further provides that this "action must be in accordance with the provisions of this chapter," which prescribes the procedure for the foreclosure of mortgages.

turning the line of decisions on the subject. If the question were an open one I would come to a different conclusion.

84 Cal. 41

SACRY v. LOBREE. (No. 12,066.)

(Supreme Court of California. May 3, 1890.)

FRAUDULENT CONVEYANCE—INSOLVENCY.

In an action by an assignee for the benefit of creditors to set aside an alleged fraudulent transfer of property made by the debtor about two weeks before the filing of the petition in insolvency, the debtor testified that when he made the transfer he did not know that he was owing more than he could pay, but that he did know that more money was due than he could have paid if his creditors had demanded immediate payment, and that he did not have money enough in his hands to pay his debts as they became due, but that he had merchandise. *Held* that, under Civil Code Cal. § 3450, defining an "insolvent" as one who is unable to pay his debts from his own "means" as they become due, this was not such a distinct confession of insolvency as would warrant the supreme court in setting aside a finding that the debtor was solvent when the transfer was made. *BEATTY, C. J.*, and *THORNTON, J.*, dissenting.

Commissioners' decision. In bank. Appeal from superior court, Lake county; *RODNEY J. HUDSON*, Judge.

Crawford & Tabor and J. H. Shankland, for appellant. *E. W. Britt and F. E. Johnston*, for respondent.

BELCHER, C. C. Action to recover certain real and personal property alleged to have been transferred by an insolvent debtor to defendant in violation of the provisions of the insolvent act. The complaint states, in substance, that on the 30th day of April, 1886, certain creditors of one Leon Lobe filed a petition in the superior court of Lake county wherein they averred that he had permitted his property to remain under attachment for four days, and was insolvent; that, on the 18th of May, 1886, Lobe was by an order of the court adjudged an insolvent debtor, and thereafter the plaintiff was duly appointed assignee of his estate; that, on the 12th of April, 1886, and for some years prior thereto, Lobe had been carrying on business as a merchant at the town of Middletown, in Lake county, and was then insolvent, and unable to pay his debts; that, on the said 12th of April, Lobe conveyed to defendant certain real property, and assigned to him certain books, notes, papers, and accounts; that the conveyance and assignment were made, received, and accepted with a view to pay defendant before and in preference to all other creditors, and to prevent the assets of Lobe from coming to the possession of his assignee, and being ratably distributed among his creditors, and that defendant had at that time reasonable cause to believe that Lobe was insolvent; that the value of the real property was \$500 or thereabouts, and the value of the personal property \$2,000 or thereabouts; and that defendant had collected upon the accounts a sum exceeding \$300. The answer denies that, at the time the conveyance and assignment were made, Lobe was

insolvent, or unable to pay his debts; denies that defendant, when he received and accepted the conveyance and assignment, had reasonable cause, or any cause, to believe, or did believe, that Lobe was insolvent, or unable to pay his debts; denies that the conveyance and assignment were made, received, or accepted with a view to pay defendant in preference to all or any other creditors of Lobe, or with any view or design to prevent the assets of Lobe from coming to the possession of his assignee, or being ratably distributed among his creditors, or with any intent to hinder, impede, delay, or defeat the object or due operation of the insolvent act.

The court below found the facts to be as follows: "(1) That on the 12th day of April, 1886, the said Leon Lobe was justly and legally indebted to said defendant in the sum of \$2,500, as evidenced by his promissory note then held by said defendant for that amount; that said note included as part of the sum due thereon, and not otherwise secured, the purchase price of the lot of land described in plaintiff's complaint, and which was conveyed by defendant to said Leon Lobe, January 28, 1882, for the agreed consideration of \$600; that, on said 12th day of April, 1886, said Lobe conveyed the said lot of land, and also transferred all his outstanding mercantile book-accounts, to the said defendant, in satisfaction of the said promissory note, which defendant thereupon surrendered to him, (said Lobe;) that such conveyance of the said land, and the transfer of said book-accounts, constitute the whole of the transactions complained of by plaintiff in this action. (2) That at the time of such conveyance and transfer the said Leon Lobe was not insolvent, or unable to pay his just debts; that said defendant did not then have reasonable cause to believe, and did not in fact believe, that said Lobe was insolvent, or unable to pay his debts; that such conveyance and transfer were not made by said Lobe in contemplation of insolvency, nor with a view to pay defendant in preference to his other creditors, nor with any design to prevent his assets from coming to the possession of the assignee, or of being ratably distributed among his creditors, nor with any intent to impede or delay or defeat the object of the act of the legislature of this state, entitled, 'An act for the relief of insolvent debtors,' or any other statute or law. (3) That defendant did not take, receive, or agree to said conveyance and transfer with any view to obtaining payment of his demand against said Lobe in preference to other creditors of the latter, nor with any view to prevent the assets of said Lobe from coming to the possession of the assignee, or being distributed ratably among his creditors, or with any intent to defeat or impede, or at all interfere with, the object or due operation of the insolvent act aforesaid, or any other law. (4) That said conveyance and transfer were made by said Lobe, and received by defendant, in good faith, to discharge the said promissory

note, and not with any intent to give or receive any fraudulent preference, or to defraud any other creditor of said Lobe. (5) That said defendant has collected upon said book-accounts the sum of \$350, and no more, but that neither the estate of said insolvent, nor the plaintiff as assignee thereof, has any interest in the amount so collected or received by defendant." Upon the findings, judgment was entered that the plaintiff take nothing. A motion for a new trial was then made, and denied, and thereupon plaintiff appealed from the order.

It is contended for appellant that the findings were not justified by the evidence, and that a new trial should therefore be granted. The first question to be determined is, was Lobe shown to be insolvent, or in contemplation of insolvency, when he made the transfers complained of? At the trial, no evidence was introduced by the plaintiff showing, or tending to show, that Lobe was insolvent, or in contemplation of insolvency, when the transfers were made; but, to establish the fact, he appears to have relied then, and his counsel rely now, entirely upon the testimony given by Lobe himself when called as a witness for defendant. The material parts of that testimony are as follows: "I am the person who made the conveyance and assignment to the defendant on April 12, 1886. I was in the mercantile business at the time, and had no intention of going into insolvency. Within a month before this, I had paid on account of my debts \$1,109.70, to different creditors, in varying amounts. * * * On the 12th of April, I was doing business in the usual way, buying and selling. I did not intend to go into insolvency. I did not want to. I considered I was solvent. I was carrying about \$6,000 or \$7,000 stock, beside the book-accounts. No creditors had at that time intimated to me the intention of petitioning the court to declare me an insolvent. I had not the least intimation or suspicion of such a thing. I was indebted to Lobree on the 12th of April to the amount of \$2,500 on a note, with interest from 1883. * * * Only a portion of my property was attached. The attachments were for \$140, I think,—one for \$80 and one for \$60. I had no intention of preventing my property from going into the hands of an assignee. Lobree came to me, and told me I was attached, and he wanted security for his debt; and I secured him with whatever I had. I had no more money. The last I had I sent to Crawford & Tabor, \$80, on same day said attachments were levied. I might have had \$15 or \$20. I think the account of Murphy, Grant & Co. held by Crawford & Tabor was \$160. I was owing them at the time. Their debt was then due. I could have paid them in a few days. I was not able then to pay it. I can't say whether I owed any other creditors whom I was unable to pay as their accounts became due or not. * * * I did not pay my bills as they became due, because I did not have the money. I had no bank account. I was

attached at 9:30 o'clock Saturday night, and I made the assignment and conveyance to Lobree about 8 o'clock Monday morning. The keeper was in charge then of those goods that had been attached. At the time I made the assignment and conveyance, I did not know that I was owing more money than I could pay, but I knew that I could not pay all at once what I owed then. There was more money due my creditors then than I could have paid if they had demanded immediate payment. I did not have money enough in my hands to pay my debts as they became due. I had merchandise. Only one side of the store was attached. * * * I had property enough to pay everybody, and I wanted to pay everybody. I did not have money enough at the time to pay them. I had made no proposition to my creditors for a settlement." It is claimed that this testimony shows "a clear and distinct confession of insolvency," but we do not think that this claim can be maintained. It has been held, under the United States bankrupt act, that a trader is insolvent when he is unable to pay his debts as they become due in the ordinary course of business. *Toof v. Martin*, 13 Wall. 40; *Wager v. Hall*, 16 Wall. 599. In the case first cited the district judge had ruled that, "if the bankrupts could not pay their debts in the ordinary course of business,—that is, in money as they fell due,—they were insolvent." Speaking of this, the supreme court, by Mr. Justice FIELD, said: "The rule thus laid down may not be strictly correct as applied to all bankrupts. The term 'insolvency' is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used, in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent; and, as applied to them, it is the sense intended by the act of congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel. With reference to other persons not engaged in trade or commerce, the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case." It was further said: "In the present case, the bankrupts were insolvent, in both senses of the term, at the time the conveyances in controversy were made."

In *Bump's Law and Practice of Bankruptcy* (5th Ed.) p. 469, it is said: "Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual

and ordinary course of business, as persons carrying on trade usually do, is insolvent, within the meaning of the bankrupt law; and there is no better general rule to govern courts when they are considering the facts of a case. It is neither too broad nor too narrow, while it would be quite too narrow and restricted to hold that failure to pay someone debt when due is evidence of insolvency in all cases, under the act. Whether a single instance of non-payment of a debt at maturity would be evidence, in a given case of insolvency, depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency. * * * The question is whether the debtor or trader is able to pay his debts, in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is, true that insolvency in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent, whereas in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence of insolvency in London or Paris or New York is not evidence of insolvency everywhere." Citing cases.

The insolvent act of this state provides that a debtor may be put into involuntary insolvency, if he, "being insolvent, has suffered his property to remain under attachment or legal process for four days," (section 8;) but it nowhere defines what shall constitute insolvency. The Civil Code, however, in the title in regard to assignments for the benefit of creditors, (section 3450,) says: "A debtor is insolvent within the meaning of this title, when he is unable to pay his debts from his own means as they become due." And it has been held that this is the correct definition of insolvency under the insolvent act of 1880. *Washburn v. Huntington*, 78 Cal. 573, 21 Pac. Rep. 305. What is meant by the words "from his own means?" The definition of the word "means," as given by Webster, is "resources of income." But "resources" does not necessarily mean money in hand. A debtor may have ample resources to pay all his debts as they become due, and yet have no money in his pocket or in bank. Is such a debtor insolvent? Suppose a wheat buyer should have 1,000 tons of wheat in a warehouse, worth \$25,000, which he is holding for better prices, and is indebted in the sum of \$1,000. Is he insolvent unless he sells the wheat at whatever price he can get, and pays the debt as it becomes due? We do not think he is, under the insolvent law of this state. In *Bell v. Ellis*, 33 Cal. 320, it was held that a trader is insolvent when he is not in a condition to meet his engagements, or to pay his debts in the usual and ordinary course of business; but he is not so merely

because his assets at a given date may not satisfy all the demands against him due, and to become due. The court said: "The test question is not, will his effects realize enough to pay his debts due and to become due? but, are his affairs in such a condition as to enable him, in the usual and ordinary course of his business, to make his payments as they fall due? and the question is to be answered by the jury in view of all the circumstances affecting the business of the trader, including the value of his effects, the extent and character of his business, the manner in which it was being conducted,—whether upon a speculative or legitimate and safe basis; the amount of his profits; the extent of his liabilities,—whether kept within a safe limit; and, generally, his credit, accompanied by the benefit or advantage which he has, outside of the mere value of his property and the debts due him, arising from the good-will of the business."

In the light of the authorities, we cannot say, therefore, that the finding "that, at the time of such conveyance and transfer, the said Leon Lobe was not insolvent, or unable to pay his just debts," was contrary to, and not justified by, the evidence. This being so, it is unnecessary to consider the other findings complained of. We advise that the order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

BEATTY, C. J., and THORNTON, J., dissenting.

PEOPLE v. BACHMAN. (No. 20,523.)
(Supreme Court of California. March 31, 1890.)

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TWOHY, Judge.

Carrol Cook, for appellant. George A. Johnson, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of arson in the first degree, and this appeal is from the judgment entered against him. The transcript was filed in this court on the 6th of March, 1889, and, by stipulation with the attorney general filed August 21st, appellant was to have until and including September 1st to serve and file his brief. The case was submitted for decision on the 21st of February without any oral argument. No brief has been filed for or on behalf of appellant, and under these circumstances the judgment should be affirmed.

We concur: FOOTE, C; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

84 Cal. 61

ASTON v. DASHAWAY ASS'N *et al.* (No. 12,069.)

(*Supreme Court of California.* May 3, 1890.)

CORPORATIONS—MISAPPROPRIATION OF PROPERTY—ACTIONS BY MEMBERS.

1. A temperance society, owning improved land, was incorporated, without capital stock, "for the purpose of promoting the cause of temperance," under Hitt. Gen. Laws Cal. § 1024 *et seq.*, providing for the incorporation of "religious, social, benevolent, and learned associations." Some years afterwards, the membership having greatly decreased, a resolution was passed that the trustees sell the property, pay off some outstanding indebtedness, and "purchase other cheaper property suitable for the uses and purposes of the association." A petition asking for leave to sell, and stating, among other things, that the corporation was "purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit," was accordingly filed in the superior court, which granted the prayer of the petition, reciting the resolution in its order of sale. The property was sold, and a portion of the proceeds divided among a part of the members, including the trustees, pursuant to a motion "that the association donate to each member in good standing the sum of \$1,500 for past services, on signing a receipt for the same;" but it was admitted on the trial that no services had been rendered other than being good and efficient members of the organization. *Held*, a misappropriation of corporate funds, and that any member not a party thereto could maintain a suit to compel a restoration.

2. Where trustees misappropriate corporate funds, claiming the right so to do, a member may institute proceedings for their restoration without demand on the trustees to take action in the matter.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

S. Heydenfeldt, Jr., and Joseph P. Kelly, for appellants. *Tilden & Tilden*, for respondent.

SHARPSTEIN, J. This appeal was heard in department 2, which reversed the judgment and order of the court below. An opinion was filed November 22, 1889. 22 Pac. Rep. 660. Afterwards a petition that the cause be heard in bank was filed and granted, and the case has been argued in bank, but the argument has failed to convince us that the decision of the department was erroneous; and, for the reasons stated in the opinion of the department, the judgment and order appealed from are reversed.

We concur: WORKS, J.; THORNTON, J.; PATERSON, J.

84 Cal. 12

SPANGLER v. CITY AND COUNTY OF SAN FRANCISCO. (No. 11,958.)

(*Supreme Court of California.* March 3, 1890.)

MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS—NEGLIGENCE.

1. In an action against a city for injuries to adjacent property caused by the overflow of a sewer which it has knowingly permitted to become obstructed and out of repair, it is no defense that the flow was unusual where it appears that the sewer would have carried off all the water if it had been kept in repair.

2. Where the overflow of a sewer is caused by a dam which the superintendent of streets know-

ingly permits to be placed therein, the city will be liable for injuries caused by the flooding of adjacent property. Nor is it material that the property injured is below the grade of the street.

3. It is not necessary to present a claim for damages resulting from defective sewers to the board of supervisors of the city and county before instituting suit upon it.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

George Flournoy, Jr., City and Co. Atty., for appellant. *Wm. H. Bodfish and W. C. § I. G. Burnett*, for respondent.

THORNTON, J. This is an action to recover of the city and county of San Francisco damages for neglect in keeping a sewer in repair, whereby the plaintiff was injured. At the time that the injury occurred, and for some years before, the plaintiff was the owner of a lot of land situate at the south-westerly corner of Eighteenth and Fair Oaks streets,—27 feet on Eighteenth street, and 101 feet on Fair Oaks street; the lot lying east of Fair Oaks, and constituting a parallelogram of 27x101 feet, on which he had, in 1877, built a house.

The material facts are found by the court as follows: "That prior to October 19, 1883, defendant had authorized and caused a public street in said city and county of San Francisco, called 'Eighteenth Street,' along and near the line of which a natural stream of water had been accustomed to flow and run, and many other streets crossing Eighteenth street, to be graded greatly above the natural level of the ground there, from Folsom street westerly as far as Douglass street; and thereby the waters of said natural stream were prevented from flowing in the bed of said stream, and said bed filled with earth in many places, and the waters flowing from a large water-shed to the westerly of Church street intercepted and prevented from reaching said bed as they had been accustomed to do; and had authorized and caused a sewer to be constructed and laid down along Eighteenth street, from Folsom to Douglass streets, and other sewers along the streets crossing Eighteenth street, and that by means thereof the waters that formerly flowed in said natural stream and from said water-shed were, until the time of the acts of negligence hereinafter referred to, received into and conducted in said sewer in Eighteenth street, and conveyed therein to a point at Folsom street, and from thence said waters found their way into Mission bay and the bay of San Francisco, and that said waters would have continued to be so conveyed and to find their way until after the injuries herein mentioned but for the acts of the defendant, and of her servants and agents, as hereinafter mentioned. That plaintiff, after October 19, 1883, and before the time of the injuries hereinafter mentioned, erected upon said lot of land a dwelling-house and carpenter shop, and had improved said lot by grading it, and at the time of such injuries had

on said premises, and was the owner of, the lumber, tools, paints, oils, finishing lumber, mouldings, doors, windows, material, rails, and property hereinafter mentioned, which tools constituted a chest of carpenters' tools, and said material included casings, among other things; and, at the time of said injuries, plaintiff was conducting business at his trade as a carpenter in said shop, and was residing on said premises with his family. That the foundation and shop floor mentioned in the fourth paragraph of the first count of the complaint constituted part of the dwelling-house and shop aforesaid. That there were no outhouses on said land. That within two years before the commencement of this cause, and up to the time of the injuries hereinafter mentioned, said sewer in Eighteenth street to the westerly of Guerrero street, through the negligence of the defendant, and carelessness of the defendant, in omitting to clear or repair the same, became, and, until and including the times when such injuries occurred, continued to be obstructed, insecure, broken, and, with said sewers in said streets crossing Eighteenth street to the westerly of Guerrero street, incapable of conveying away the waters, drainage, and sewage received into the same; and thereby large volumes of water and sewage collected in said sewers westerly from Guerrero street were conducted to, and discharged with great and increased violence upon, the said land and premises of the plaintiff, between March 1, 1884, and at divers times between said dates,—that is to say, on the 7th, 8th, and 9th days of March, 1884, and on the 11th and 12th days of April, 1884. Whereby said water and sewage greatly devastated and injured the said land, dwelling-house, and shop during the period last aforesaid, and injured said building and shop, and caused said building to settle and become out of plumb, and saturated the soil of said lot, and partially filled the basement of said house and shop with water, and broke said house, and the other property hereinafter mentioned was wetted and injured and damaged. By means whereof the said dwelling-house and carpenter shop, and the foundations thereof, and said land, were damaged in the sum of \$500, and other property then on said premises damaged,—that is to say, 5,000 feet of lumber to the amount of \$120; paints and oils to the amount of \$50, finishing lumber, cases, and mouldings to the amount of \$100; doors, windows, and blinds to the amount of \$70; one ton of nails to the amount of \$100; carpenter tools in carpenter shop to the amount of \$150. That said injuries were in part caused by the washing of sewage and earth into and upon said lot, and into said house and shop, by and with said water. That the amounts above mentioned include the values of all the injuries to the plaintiff's said property by means of the facts herein stated. That defendant at all times, and during the whole period herein referred to, had notice of the then condition of said Eighteenth street, and the sew-

er therein, and of the streets crossing said street, and of the sewers therein, as hereinbefore shown, and that such notice was also given to, and possessed by, and the knowledge of such condition had by, the defendant's board of supervisors and mayor, and her superintendent of public streets, highways, and squares, at all said times and during said period. That there was no necessity for causing said discharge of waters or of said sewage or of said earth upon the land of plaintiff; but, by a proper repair and claiming [cleaning] of said sewers, the whole thereof could easily have been conducted past the land of the plaintiff, and discharged into Mission bay and the bay of San Francisco, without doing any damage to plaintiff's said property. That the damage, loss, and injury hereinbefore mentioned was not, nor any part thereof, caused by the negligence of the plaintiff, and that plaintiff was not negligent in any particular in the premises."

It is urged that there was no proof that there was such a water-course as is alleged and found. The evidence is ample to bring it within the definition as given by all the cases. It is not necessary that the water shall run in the bed or channel of the stream all the year. There is evidence of bad breaks, and water flowing in the bed. But, whether the water that did the damage came from a water-course or from the surface, the liability would be the same. The liability here rests in the duty of the city to keep the sewers in repair, which duty, after ample knowledge of it, was grossly neglected. It is the duty of the city, when it does provide water-ways, to provide such as are sufficient to carry off the water that might reasonably be expected to accumulate. The rule is so laid down in *Damour v. Lyons City*, 44 Iowa, 282, approved and followed in *Powers v. City of Council Bluffs*, 50 Iowa, 201, 202. See *Mayor, etc., v. Bailey*, 2 Denio, 433. We think the rule above stated correct, and approve it.

But it is said that the precipitation which caused the injury herein was extraordinary and unusual,—could not reasonably have been expected,—and therefore the defendant is not liable. This might be true if the sewers had not been of sufficient size to carry off all the water which was so extraordinarily and unusually precipitated, but the evidence is clear and direct that the sewers, if they had been kept in order, were of a capacity to carry off all the water which did fall. This shows that the agents and servants by whom the city acted in constructing the sewer anticipated that large sewers would be required to carry off the rain-falls which might be looked for, and it could not be allowed the defendant to invoke this defense when it had in advance made provision for the very event that did occur. It could not harmonize with reason and justice to allow such defense for negligence. The contention would amount to this: Though the sewers were made large enough to carry off all the water, though the extraordinary rain-falls were anticipated,

yet, inasmuch as the fall of water was unusual and extraordinary, the defendant is not liable. Sufficient provision having been made in advance for anticipated events, it would be inconsistent with all just and sound reason, and the settled principles of law, to hold one excused when the provision has become insufficient by reason of indifference to monitions and inexcusable neglect. The plaintiff had a right to assume that the agents of the city would attend to duty, and repair the broken and dilapidated sewer. He had a right to act on this assumption. Certainly there was no duty on him to remove the obstructions from the sewer, and repair it himself, or be chargeable with negligence if he did not do so. It would have cost a considerable sum of money to have put the sewer in a proper condition,—may be more than his property was worth.

The evidence shows that the foundation of the house was below the grade of Eighteenth street. The floor of the basement was four feet six inches below the level of the sidewalk on Eighteenth street, on which the house fronted. The plaintiff moved into the house in January, 1884, though it was not completed until the month of March following. The lot was graded in October, 1883, about three feet higher than the former level. The front of the house was set back about five feet from the edge of the sidewalk on Eighteenth street, and was reached by steps going up from the sidewalk to the front door. Though the lot was below grade, still the sewer, when in proper condition and unbroken, would have carried off the water which did the injury. Plaintiff was guilty of no negligence in building where he did, and his right to recover would not be impaired. When the plaintiff built his house, in 1883 and 1884, he had, as said above, a right to act on the assumption that the city authorities would keep the sewer in good repair. The sewer being sufficient in capacity to carry all the water, the plaintiff might well consider that he could remain securely on the land where he had built his house, and would not be guilty of negligence which would bar a recovery. On this subject see *White Lead Co. v. Rochester*, 3 N. Y. 463; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54; *Ashley v. Port Huron*, 35 Mich. 299, and cases there cited. Dillon states that "there is a municipal liability where the property of private persons is flooded, either directly or by water or sewage being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction; and this whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity." 2 Dill. Mun. Corp. 1335. Counsel for defendant urges that, if the damages to plaintiff had resulted from the natural flow from the adjoining high ground, he cannot recover. He further says: "It does not

appear that this was not so." The evidence on the point urged was before the court below, and it held that the damage was caused by the water which flowed from the broken sewer, and not from the adjoining higher ground. There is evidence to sustain the finding, and we do not feel at liberty to disturb it.

It is urged that the injury was caused by certain parties, who had been constructing a sewer, who built a dam which diverted the water, and caused it to flood plaintiff's land. Sewers are built under the direction of the city authorities; and, if the parties building it are so negligently conducting their work as to cause loss and injury to a third person, the city is liable. It is no excuse to the city that a dam thus built caused the damage. If there was such a dam, there is evidence which shows that the superintendent of streets had knowledge of it. There was a contractor building a sewer on Eighteenth street in February, 1884, and, if he constructed any dam there, the city authorities had an opportunity of seeing and knowing it; for the uncontradicted evidence shows that the superintendent or his deputy was there, when the sewer was being constructed, every morning. The only person building a sewer was a contractor, McDonald, who was a witness in the case, and, if any such dam was built, he or his employes built it; and he testifies that the superintendent of streets or his deputy was there every morning to inspect the work. The superintendent, thus knowing of the dam, must have known it would have diverted the water in the rainy season. Knowing it, he should have caused it to be removed. His failure to remove it was negligence of duty; and the city, under the circumstances, should not be relieved, in consequence of this dam, of its responsibility in this case. Further, the dam being on the east side of Eighteenth street, it does not appear with sufficient clearness that it caused the damage to authorize this court to regard its existence as impairing plaintiff's right to recover herein.

It was not requisite to present the claim sued on herein to the board of supervisors of the city and county before instituting suit upon it. *Bloom v. City and County of San Francisco*, 64 Cal. 503, 3 Pac. Rep. 129; *Lehn v. City and County of San Francisco*, 66 Cal. 76, 4 Pac. Rep. 965.

A stipulation appears in the record in this case to the effect that all the evidence and findings appearing in the statement of the case in the action of *A. O. Cook v. the City and County of San Francisco*, now here on appeal, that may be pertinent herein, shall be considered in this cause upon the appeal from the order denying defendant's new trial as though the same were embodied in the statement on motion for a new trial in this case. Under this mode of bringing a case here on appeal, the work of counsel is imposed on this court. This court is called on to read two transcripts in different cases,

to decide and determine what evidence is pertinent in one case, but not in the other, and what is not. This labor should be performed by counsel, and not by the court. Counsel should not turn over their work to be performed by the court. The transcript, in every case, should contain in it all the matter on which it is to be determined; and the court ought not to be called on to read two transcripts to determine one case, and find out and cull from one transcript what would be pertinent in the case under consideration. Certainly counsel should recollect the amount of labor imposed on this court, and do everything incumbent upon them to lighten it. This court might well have refused to consider this cause, and have affirmed the judgment and order without consideration, by reason of the facts just set forth. In its consideration, more time has been consumed on account of the unusual mode of presenting the case in the record. Though this case has been determined, another may not be treated in the same way.

The evidence is sufficient to justify the findings. We find no error in the record. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

I concur in the judgment: MCFARLAND, J.

COOK v. CITY AND COUNTY OF SAN FRANCISCO.
(No. 11,950.)

(*Supreme Court of California.* May 3, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge. *George Flournoy, Jr.*, City and Co. Atty., for appellant. *Wm. H. Bodfish* and *W. C. & I. G. Burnett*, for respondent.

PER CURIAM. This case turns on the same questions presented in *Spangler v. the same defendant*, ante, 1091, just determined. It must be decided in the same way. Judgment and order affirmed.

84 Cal. 197

GRANT v. SHEERIN. (No. 12,749.)

(*Supreme Court of California.* May 31, 1890.)

PLEADING—BREACH OF CONTRACT—GENERAL AND SPECIAL DEMURRER.

The complaint alleged that plaintiff's testator intrusted a certain monument to defendant to sell, and that "since the sale of said monument, and the receipt by defendant of the purchase price thereof, plaintiff, as such executrix, has demanded an accounting of said sale, and the payment to her of the purchase price of said monument, and defendant has refused, and still refuses, to account for or pay the same, or any part thereof." Held, that there was not an entire failure to state the fact of non-payment, but that the averment was simply uncertain and defective, and that this defect could be reached, not by general demurrer, but by special demurrer only.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

M. C. Hassett and *Jas. F. Tevlin*, for appellant. *Mich. Mullany*, for respondent.

BELCHER, C. C. This is an action for an accounting, and to recover money alleged to be due the plaintiff. The complaint alleges that one John Grant, the plaintiff's testator, was the owner of a certain marble monument of great value, and that, for the purpose of effecting a sale thereof, he placed the monument in the possession of the defendant, with authority to sell it; that defendant accepted the monument for and on account of said Grant, and took and held the same until some time in May, 1885, when, under the authority so given, he sold it, as plaintiff is informed and believes, for the sum of \$1,000 or thereabout, and received the purchase price thereof; and that "since the sale of said monument, and the receipt by defendant of the purchase price thereof, plaintiff, as such executrix, has demanded from defendant an accounting of said sale, and the payment to her of the purchase price of said monument, and defendant has refused, and still refuses, to account for or pay the same, or any part thereof." The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and his demurrer was "overruled for want of prosecution, and five days allowed to answer." Within the time allowed, an answer was filed, which admitted "that the said John Grant placed the said monument in the possession of defendant, with authority to sell the same," and that "the said monument was sold in the year 1885," but denied that it "was sold for any other or greater sum than the sum of about \$550," or "that defendant ever refused or failed to account to plaintiff for any moneys which she is or might be entitled to receive from the defendant." The answer then set up that between the years 1870 and 1878 the said Grant requested defendant to take certain marble monuments, among which was the one mentioned in the complaint, and to do work and labor thereon, and add thereto such other marble work as would make them more valuable and easy of sale; that defendant received the monuments, and did work and labor upon the same, and added a large amount of material thereto, and made the same of greater value and easy of sale; that the defendant from time to time sold all of the said monuments except one; that the net amount of all money received from such sales, "exclusive of defendant's material furnished as aforesaid, expenses of sale, and work and labor done thereon by defendant, was the sum of \$1,041.80;" that, while the monuments were in the possession of defendant, he advanced to Grant the sum of \$1,235 upon the agreement and understanding between them that, whenever defendant could dispose of the monuments, he should pay himself, out of the proceeds of the sale, all moneys so advanced; that the defendant had not received from the sales the full amount advanced; and that there was still due him a balance, which, with interest, amounted to more than \$1,000. Upon the issues framed the case was tried

by the court, and judgment given for plaintiff "for the sum of \$441.92, and legal interest thereon from the 1st day of June, 1885, viz., for the sum of \$524.34 and costs." From this judgment the defendant appealed, and has brought the case here on the judgment roll.

1. The first point made is that the complaint failed to state facts sufficient to constitute a cause of action, because there was no sufficient averment of non-payment; and, in support of this position, *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. Rep. 882, is cited. In that case the action was upon a promissory note, and the complaint averred that the defendant "has refused, and still refuses, to pay" the principal or interest of the note, or any part thereof, and "that there is now due" the sum, etc. The complaint was demurred to on the ground that there was no allegation of non-payment, and the demurrer was overruled. It was held in this court that the demurrer should have been sustained, the court saying: "The averments of the complaint are not equivalent to an averment of non-payment. 'The failure to pay constitutes the breach, and must be alleged.'" It has been held in numerous cases that a party suing upon a contract to pay money must show a breach of the contract,—that is, must allege the non-payment of the money which he seeks to recover,—or his complaint states no cause of action, and may be assailed by a general demurrer. In *Richards v. Insurance Co.*, 80 Cal. 506, 22 Pac. Rep. 939, the last case in which this rule is declared, it is said: "The complaint was fatally defective in this respect. It contained no allegation of non-payment, nor is there any allegation from which such non-payment can be implied." But there is a plain distinction between an entire failure to state essential facts, and a statement of such facts imperfectly or defectively. In the one case the defect can be reached by a general demurrer, while in the other it can only be reached by a special demurrer. The rule upon this subject is thus stated in *Harnish v. Bramer*, 71 Cal. 158, 11 Pac. Rep. 888: "If a complaint fails to state any fact or facts essential to a recovery, the defect may be reached by a general demurrer. If, however, it states all the essential facts, but states them improperly or defectively, the defect can only be reached by a special demurrer particularly designating the specific point at which it is aimed;" and see *Tehama Co. v. Bryan*, 68 Cal. 59, 8 Pac. Rep. 673. In *Scroufe v. Clay*, supra, there was not an entire failure to state in the complaint the fact of non-payment, but the averment was simply uncertain and defective; and the same is true of this case. But in the former case the demurrer was special, while here it was general. In our opinion, the complaint in this case stated a cause of action, and was sufficient when tested only by a general demurrer. Besides, the court found that no part of the money for which judgment was entered had been paid; and the Code provides

that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Code Civil Proc. § 475.

2. It is next claimed that the findings do not meet all the issues raised by the answer, and for that reason that the judgment should be reversed. But, in answer to this objection, we think it enough to say that, while the findings may be open to some criticism, still they were, in our opinion, intended to, and in effect do, cover all the issues tendered, and should be held sufficient.

No other points are discussed by counsel, and we therefore advise that the judgment be affirmed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

84 Cal. 193

MENDENHALL v. PARIS *et al.* (No. 12,767)

(Supreme Court of California. May 31, 1890.)

BOUNDARIES—SURVEY—MONUMENTS AND COURSES.

In an action to quiet title to a strip of land 4.62 chains wide at the eastern end, and running to a point at the west end at the distance of $3\frac{1}{2}$ miles, it appeared that it lay immediately south of a certain survey, P.; and the question was whether the strip was included in a subsequent survey, J., south of P., or lay between the two. This depended upon the location of the north-east corner of J. The description in the survey of J., commencing at a point in the eastern line, was thence due north 453.50 chains to a certain post, V, "station at intersection of line" with the survey of P.; "thence along said line" N., 51 deg. 45 min. W., a certain distance to the "old corner" of P. The course of the southern boundary of P. was N., 51 deg. 45 min. W. The post, V, was destroyed, but a line drawn due north from the starting point in the east line of J., 453.50 chains, would not reach the southern boundary of P. by 4.62 chains. The post, V, was also described in the survey of J. as 2.25 chains north of a certain creek, while the southern line of P. was at this point nearly 7 chains north of the creek. Held, that the evident purpose was to make the two grants join, and that these facts make out a *prima facie* case, at least, that the strip was included in the survey, J.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Jas. C. Martin and R. A. Redman, for appellant. J. W. Harding, for respondents.

BELCHER, C. C. This is an appeal from a judgment of nonsuit in an action to quiet title to 51.20 acres of land in Alameda county. The land in controversy is described as a strip three and one-half miles long, 4.62 chains wide at one end, and running to a point at the other end. The plaintiff alleged in his complaint that the strip was a part of a Mexican grant called the "Rancho El Valle de San José," which was patented by the United States to Antonio Sunol and others on the 15th of March, 1865. The defendants

denied that the strip constituted any part of the rancho named, or that plaintiff had any title thereto. It is admitted that plaintiff proved at the trial, by mesne conveyances from the patentees, that he had sufficient interest in the strip to entitle him to have judgment entered in his favor, provided it was shown to be included within the patented lines of the grant; and whether it was so shown or not—that is to say, sufficiently to make a *prima facie* case—is the only question discussed by counsel, and presented for decision.

The strip lies along the south-westerly side of a Mexican grant called "Rancho Las Pocitas," the preliminary survey of which was made in 1854 by one Lewis. The survey of the patented land which is involved in this case was made some 10 years later by one La Croze. At the time of the trial, Lewis and La Croze were both dead. The dispute is as to whether or not the north-easterly line surveyed by La Croze is the same as the south-westerly line surveyed by Lewis, and the question depends upon the true location of what is called station 25. To determine this question, it is only necessary to look at two lines described in the patent,—the easterly and north-easterly. The first begins at station 24, and runs due north 458 chains and 75 links "to a post marked 'V S J 25,' station at intersection of line with the preliminary survey of the rancho Las Pocitas." It is described as crossing the Arroyo Mocho at 456 chains and 50 links, or 2 chains and 25 links south of the station. The second line begins at station 25, and runs "thence along said line" N., 51 deg. 45 min. W., 279 chains "to an oak tree 3 feet in diameter, marked 'V S J 26,' station, and old corner of the rancho Las Pocitas." Stations 24 and 26 are still found, clearly marked on the ground, and there is no controversy as to their true location. The Lewis line was retraced in 1874 by one Carlton, a United States deputy surveyor, under an appointment by the surveyor general, "to examine and verify the line and establish the boundary of the El Valle de San José rancho, running from station 24 to station 25;" and it is admitted that the line was correctly retraced and located. It was found to run from station 26 south, 51 deg. and 49 min. east, thus varying 4 minutes from the corresponding line described in the patent; and it met the line running north from station 24 about 7 chains north of the Arroyo Mocho. There was nothing on the ground to indicate, and no evidence was offered to show, where station 25 was actually located by La Croze. It was relocated by Carlton at the point where the two lines last mentioned met. The Lewis line was again retraced by one Nusbaumer, the county surveyor of Alameda county, in 1882. He testified: "The course of the line of the preliminary survey of the Las Pocitas, as called for in the pat-

ent, is 51 deg. 45 min., while the course of this line, as called for by the survey made by Lewis, is 51 deg. and 50 min., which is 5 min. more." And again: "If you run due north from station 24 till you get 2 chains and 25 links north of the Arroyo Mocho, and then run to station 26, the course would be 51 deg. 4 min. east, which would make a difference of about three-quarters of a degree from the call of the course in the patent." He further testified: "If I run from station 24, the distance called for by the patent will place that corner [25] 2 chains and 30 links beyond the creek. The patent fixes that corner 2 chains and 25 links north of the creek, according to distance; * * * but the line of the preliminary survey of the rancho Las Pocitas is at this point, as I measured it, 7 chains north of the Arroyo Mocho."

In view of the above, and some other slight discrepancies, it is argued for respondents that the Arroyo Mocho was a controlling monument, and that station 25, as fixed by La Croze, could not have been placed at a greater distance therefrom than 2 chains and 30 links, and that the preliminary survey of the Las Pocitas was an artificial or imaginary line only, and should be disregarded. It is undoubtedly true that courses and distances are controlled by monuments. But, while the arroyo was a fixed and visible monument, still it was at an intermediate point, and not at the end of the line. It cannot, therefore, be said to be entirely controlling.

In our opinion, the Lewis line, its true location being settled and undisputed, was a natural boundary or monument; and the fact that it met the line from station 24 at a point seven chains north of arroyo was not sufficient to cause it to be disregarded. Besides, in making the survey for the patent, the evident purpose was to make the two grants adjoin, and not to leave a narrow gore three and a half miles long between them. This is clearly shown by the calls "to station at intersection of line with the preliminary survey with the rancho Las Pocitas: thence along said line," etc. The discrepancies in the courses may be accounted for by the fact that the different surveys were made at different times, and by different instruments. We think the evidence tended to show that the strip in controversy was within the patented lines of the grant, and that it was sufficient to make at least a *prima facie* case for the plaintiff. This being so, the case should have been fully tried, and not terminated by a nonsuit. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: VANCLIFF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

84 Cal. 181

GRAHAM v. HARMON *et al.* (No. 12,693.)

(Supreme Court of California. May 31, 1890.)

ACCOUNT—EVIDENCE—BILL OF PARTICULARS.

1. Code Civil Proc. Cal. § 454, providing that a party need not set forth in a pleading the items of an account sued on, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof, does not prevent a party who has furnished a copy of the account from explaining it, and showing that some of the items in the account, from which the copy furnished was taken, were carried into it by mistake.

2. Where the evidence is conflicting, and is not wholly documentary, the findings of fact of the trial court will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

McQuaid & Wheeler, for appellants. *J. H. G. Weaver*, for respondent.

GIBSON, C. Judgment passed for the respondent in this action for \$219.77, without costs, which sum consists of \$12.10 for services rendered by him to defendants between the 17th and 28th days of December, 1886, and the remainder for a balance due upon an account between them. The main question presented for consideration here is whether the findings of fact are supported by the evidence.

The defendants, who were engaged in the business of conducting a theater and skating rink in Eureka during November and December, 1886, employed the plaintiff as their manager, whose duty it was to sell tickets of admission to the entertainments and performances given by the defendants, and to pay all the expenses thereof. Before the trial, defendants, under section 454 of the Code of Civil Procedure,¹ demanded of and obtained from plaintiff a copy of the account sued upon, which showed that he had received \$1,250.78, and paid out \$1,797.63, being \$546.35 more than he received. Among the items charged to the defendants is one for \$32, for eight days' services, at \$4 per day, rendered by plaintiff to defendants. These services were declared upon as a separate cause of action in the complaint, to which defendants replied in their answer by denying that such services were worth any greater sum than \$1.50 per day, and averred that plaintiff agreed with them that, in consideration of the exclusive privilege of maintaining a stand in their theater for the sale of cigars, etc., he would render the services for which he seeks compensation in money. On the trial, plaintiff testified that he made no such agreement with the defendants; that he did not have a stand in the theater while he was manager, but only for a few nights, long prior to his engagement as manager; that there was no understanding or agreement re-

specting the amount he should receive for his services as manager, but that from four dollars to five dollars per day therefor would be reasonable. That portion of plaintiff's testimony in which he denies the agreement respecting the privilege of selling cigars, etc., in the theater was contradicted by defendant Harmon and one of his actresses, who testified that the only compensation he was to receive for his services was the privilege referred to. On this point the court found against the defendants, and in favor of plaintiff, to the extent of \$1.50 per day for eight days, as stated in the answer. The finding of the court, based on conflicting testimony, that the agreement contended for by defendants did not exist, must be regarded as conclusive here; and, as the value of the services testified to by plaintiff was uncontradicted, the court might well, and perhaps should, have found in his favor to the extent of four dollars per day for eight days' services. There is, therefore, not only evidence enough to support this finding, but one much more favorable to the plaintiff.

Upon the other cause of action, involving the account, the court found that between October 1, 1886, and the commencement of the suit, plaintiff paid defendants \$207.77 in excess of what he had received upon their account. It was developed by the testimony of the plaintiff in explanation of the account involved, which he kept himself, that he had but little knowledge of such matters and attempted to keep several accounts in one. "This account," says the learned judge who tried the case, "is made up in such a manner that it is very difficult to understand it, and it would seem that the plaintiff has blended therein his own personal account as treasurer with the accounts of the defendants with different members of the theatrical company, which plaintiff kept as a sort of manager and treasurer of the company; and in this way he charges himself with money and board accounts never received by him, nor properly charged to him, and to offset which he claims credit for board bills never paid by him, and money never paid out by him in person. Thus he claims credit for money which the account on its face, in some instances, shows was paid by defendants, and for other sums, paid to different persons, which he testifies were in fact paid by one or other of the defendants; his explanation being that, while such payments, for which he credits himself, were made by Harmon or McKay, he charged himself, as manager or treasurer, with having received this same money from them, and which, if true, would make the erroneous credit just offset the erroneous charge. That the bill of particulars was made up in this manner was not seriously disputed in the evidence." The defendants, one of whom was sworn and examined as a witness, made no attempt to disprove the explanation given by plaintiff as to the manner in which he had confused the several accounts; but they endeavored to show by two members of their

¹ Code Civil Proc. § 454, provides that "it is not necessary for a party to set forth in a pleading the items of an account therein alleged; but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof."

troupe, who were interested in knowing what the receipts of the several entertainments were, that he, (plaintiff) had reported to them larger receipts than his account showed he had charged himself with, and that he had not charged himself with the receipts of the performances given upon November 15th, December 1st, 3d, 10th, and 22d. Respecting the items on the credit side of the account, they testified that many of them were not paid out by plaintiff, but by other persons, except certain of them which he paid out in part. The court, it seems, charged the plaintiff with \$168.50, the aggregate receipts of the first three of the five performances, which the last-mentioned witnesses said were not on the debit side of plaintiff's account; and, after this was deducted from the amount, it still appeared he had paid out \$207.77 in excess of what he had received, as found by the court. This finding, too, like the one first considered, it is clear, rests upon evidence sufficient to sustain it, and, as the evidence is conflicting as to most of the items of the account, the finding cannot be disturbed; for, where a review of the evidence, when it is not wholly documentary, shows it to be conflicting, we cannot, under the settled doctrine of this court, proceed further.

It was not error to permit the plaintiff to explain the items in the bill of particulars, or the copy of the account he furnished to defendants prior to the trial, pursuant to section 454, *supra*. The book or books from which it was taken were brought into court, and it is not disputed that the copy furnished was a correct one. That is all the plaintiff was required to do. The truth of the items of the account was the very point in issue, and his testimony in explanation of the items which he carried into his account by mistake was properly received as tending to show the true state of the account. The penalty of being precluded from giving evidence of the account provided for in said section only applies where the party of whom a copy of the account in controversy is demanded, in writing, refuses to furnish the same. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in foregoing opinion the judgment and order appealed from are affirmed.

84 Cal. 104

HIMMELMAN v. HENRY *et al.* (No. 11,659.)
(Supreme Court of California. May 7, 1890.)

TRIAL—FAILURE TO FIND.

A judgment will not be reversed for the want of a finding on an issue with respect to which there was no evidence, where the effect of such a finding would simply be to invalidate the judgment.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

For former hearing, see 21 Pac. Rep. 731. J. H. Gove and Langhorne & Miller, for appellants. J. B. Reinstein and J. M. Seawell, for respondents.

BEATTY, C. J. The judgment appealed from in this case was affirmed by department 2 upon the grounds stated in the following opinion: "This is an action of ejectment. The answers, in addition to general denials, set up certain alleged special defenses. The court, trying the case without a jury, found that the plaintiff was the owner, and seised in fee, and entitled to the possession, of the premises in suit, and that defendants ousted plaintiff therefrom, and wrongfully and unlawfully withheld possession thereof; but there is no finding as to the alleged special defenses. Judgment went for plaintiff, and defendants appeal from the judgment upon the judgment roll alone. Appellants' main contention is that the judgment should be reversed because there is no finding on all the issues raised, or alleged to have been raised, by the pleadings. But a judgment will not be reversed for want of a finding on an issue with respect to which there is no evidence. In *Wise v. Burton*, 73 Cal. 175, 14 Pac. Rep. 683, this court say: 'This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue.' In the case at bar, which is brought here upon the judgment roll alone, we will not presume, against the correctness of the judgment, that there was evidence upon a point with respect to which there is no finding. This view of the case makes it unnecessary to consider the question whether or not the alleged special issues were material. We think the findings support the judgment. Judgment affirmed." 21 Pac. Rep. 731. Afterwards a rehearing in bank was ordered, because there appeared to be some conflict between the decision in *Wise v. Burton*, cited in the opinion of the department, and the later case of *Leviston v. Ryan*, 75 Cal. 293, 17 Pac. Rep. 239, and some earlier cases cited in the petition for rehearing.

A careful re-examination of all the decisions on this point has convinced us that there is no real conflict between the decision in *Wise v. Burton* and any of the earlier or later decisions. The proposition stated in *Wise v. Burton* is that this court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue. This was a sufficiently accurate statement of the rule for the purpose of that case, in which the facts found fully supported the judgment, and the only issue undetermined arose upon an affirmative allegation of the answer. In the case of *Leviston v. Ryan* the plaintiff in ejectment relied upon a patent for the demanded premises, and the defense was that the patent was void. The facts found showed a valid patent, and there was no finding as to the fact alleged against its validity. But the court nevertheless held the patent invalid, and gave judgment for the defendant. The

judgment, being inconsistent with, and not supported by, the findings, was clearly erroneous, and was necessarily reversed. The author of the opinion, in response to a suggestion that it was impossible to make a finding on the point referred to, went on to remark that there is no question of fact material to the decision of a cause which cannot be settled by proof, or, in the absence of evidence, by presumption. This is perfectly true, but it is not in the slightest degree inconsistent with the point decided in *Wise v. Burton*. Undoubtedly the finding omitted in that case could have been made upon proof or presumption, and the want of it was not excused upon the ground that there was no evidence upon which the court could base a finding. The judgment was affirmed because every fact necessary to uphold it was found; and the complaint of the defendant and appellant that the court had failed to find upon the affirmative allegation in his answer setting up a fact inconsistent with the judgment was met by the proposition above stated,—that this court will not reverse for want of a finding upon an issue when there is no evidence in relation to that issue,—meaning, of course, an issue upon a point not necessary to sustain the judgment, but only sufficient, if proved, to invalidate the judgment. It will be found, we think, upon examination, that no decision in this court is inconsistent with this proposition.

The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it; but a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue. Judgment affirmed.

We concur: THORNTON, J.; FOX, J.; PATERSON, J.; MCFARLAND, J.

84 Cal. 101

WALSH v. WALSH. (No. 12,757.)

(*Supreme Court of California*. May 8, 1890.)

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE.

Where, at the time of the marriage, the wife contributed to the business from her separate property all the stock and capital except a few goods put in by the husband, and the stock on hand at his death is less than the amount of her original investment, it is her separate property.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Geo. D. Collins, for appellant. *Mr. Sullivan*, for respondent.

MCFARLAND, J. The only question in this case is whether certain personal property was the separate property of the respondent, or community property of her deceased husband, James Walsh, and herself. The court found that it was respondent's separate prop-

erty, and appellant appeals from the judgment upon the judgment roll.

Respondent and James Walsh, deceased, intermarried in January, 1882. James Walsh had been carrying on a grocery business; but, at the time of the marriage, James was impecunious, and there was only \$20 worth of goods in the store. Respondent had, also, been conducting a store at another place; and she abandoned her own store, and put her stock of goods, amounting in value to \$500, in the store in which James had been doing business. She also put \$400 in money into the business. Upon this capital the two did business for three or four years, when James died. At the time of his death the stock of goods on hand, together with a little money and effects, the proceeds of the business, amounted to less than \$900, the amount originally invested in the business by respondent. James never put any money or goods into the business except the \$20 worth of goods above-mentioned. As the capital upon which the business was conducted was the separate property of respondent, we think that, although, of course, the particular goods were from time to time changed in the course of the business, still there is, under the circumstances, a sufficient tracing of the original capital to keep it impressed with the character of separate property. *Lewis v. Johns*, 24 Cal. 98. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

84 Cal. 297

McMENOMY v. TALBOT *et al.* (No. 12,755.)

(*Supreme Court of California*. June 3, 1890.)

STATUTE OF FRAUDS—PLEADING—WEIGHT OF EVIDENCE.

1. In an action for the price of goods sold and delivered, it is not necessary that the complaint should show that the contract was not within the statute of frauds.

2. In an action for the price of beef sold and delivered, four persons to whom defendants had resold the beef testified that part of it was bad, and that defendants had had to make good the loss to them. Plaintiff and one of his employees testified that the beef was first-class, and in good condition, when sold, and was cured and packed under their supervision. *Held*, that a verdict for plaintiff would not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Henry McCrea, for appellants. *John H. Dickinson*, for respondent.

HAYNE, C. This was an action for \$528.95 for goods sold and delivered. The defense was a breach of warranty of quality. The plaintiff had a verdict and judgment for the amount claimed, and the defendants appeal.

1. It is objected that the complaint does not allege that the contract was in writing, and that the contract was required to be in writing because the price was more than \$200. Even if the contract was required to be in writing, it was not necessary for the complaint to allege that it was written.

Wakefield v. Greenhood, 29 Cal. 599. But the contract was not required to be in writing, for the buyer accepted and received the goods; and, if it were otherwise, there is no specification of the insufficiency of the evidence in this regard.

2. It is claimed that the verdict is not supported by the evidence. The defendants admitted at the trial that the goods were sold and delivered as alleged, and that they had not been paid for; and the plaintiff agreed that, if they were of bad quality, he was not to recover for them. Thus the sole question submitted to the jury was as to the quality of the goods. In relation to this question the defendants introduced the depositions of four witnesses, to whom defendants had resold the beef, that part of it was bad and unfit for use, and proved by three witnesses that defendants had had to make good the loss. In opposition to this, the plaintiff testified as follows: "All the beef included in the bill of items, Exhibit A, was A No. 1, and in good condition at the time when I sold it to defendants; it was cured and packed, under my supervision, by my assistant, George B. Francisco, and myself." And it was admitted "that said George A. (?) Francisco, if present in court, would testify the same as plaintiff regarding the condition, quality, and packing of said beef." The jury evidently believed the plaintiff, and we think the case fairly within the rule as to conflict of evidence. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

84 Cal. 424

SHARON v. SHARON. (No. 12,775.)

(Supreme Court of California. June 10, 1890.)

INJUNCTION—CONTEMPT—JURISDICTION.

Upon the hearing of a motion for alimony, it appeared that the decree of divorce was based upon a contract of marriage signed by the parties; that the divorce suit was still pending, an appeal having been taken from the decree entered therein; that before the present proceedings defendant sued plaintiff in the circuit court of the United States, and a decree was entered in such suit declaring said marriage contract fraudulent and void, and an order was entered perpetually enjoining the plaintiff from alleging the validity of the contract, and from making any use of the same in evidence or otherwise to support any claim under it. Upon interposing this decree on the hearing of the motion, the defendant asked the court to compel the plaintiff to obey said injunction. *Held*, that it was error to refuse this request and enter a judgment for alimony.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Wm. F. Herrin, for appellant. *D. S. Terry*, for respondent.

Fox, J. Upon the going down of the *remittitur* upon the appeal from the original

judgment granting a divorce in this cause, and from the order granting alimony and counsel fees, (75 Cal. 1, 16 Pac. Rep. 345.) plaintiff moved the court below for judgment against the present defendant, executor of the original defendant, and who had, pending the appeal, been substituted as sole defendant, for alimony under the said original order, as the same was modified by this court, and for the costs awarded by the original judgment of the court below, affirmed by this court. Defendant opposed this motion, and introduced certain evidence in support of his opposition, which need not here be repeated, but which presented the facts upon which his opposition was grounded. The court overruled all the objections made by defendant, and ordered judgment against him, and in favor of plaintiff, for \$6,614, as alimony, and \$825.25 as costs, from which judgment this appeal is taken.

1. The defendant made the point in the court below, and insists upon it here, that plaintiff was not entitled to such judgment, for that she had not presented or exhibited any claim for alimony or costs to the executor of William Sharon or to the judge of the probate court. While it is a general rule of statute law in this state that claims against the estates of deceased persons, upon money demands, whether in suit or in judgment, must be presented to the executor or administrator for approval or rejection before any action can be maintained thereon, the question of whether or not it would apply to this peculiar case is not free from doubt, and it is one entirely unnecessary to be determined on this appeal. There is another point in the case, now coming up for the first time squarely on the record, which determines the rights of the parties, not only upon this appeal, but which must govern the courts of this state in all future proceedings which may be attempted in the action out of which the judgment or order here appealed from has come. To that point we address ourselves as conclusive of the case.

2. From the record in this case, and upon this appeal, it appears that the original judgment, which was the basis of the judgment now appealed from, was based upon certain findings, which are given in the transcript; that among them was one to the effect that on the 25th day of August, 1880, the plaintiff and defendant, William Sharon, each signed a certain declaration of marriage, a copy of which is set out in the finding, and that this was the only written declaration, contract, or agreement of marriage ever entered into between the parties; and, as a conclusion of law, the court held that since the 25th of August, 1880, the parties have been and are husband and wife. The question of marriage or no marriage was the real subject of contest in this case,—the one bitterly contested question. Without a finding of marriage, the judgment must have been for the defendant, and there would have been no judgment for either costs or alimony.

A marriage being found, and it being further found that defendant had violated the obligations imposed upon him by the marriage relation, judgment for divorce, alimony, and costs followed. From that judgment two appeals were taken by the defendant,—one direct, on the judgment roll alone; the other from an order refusing to vacate the decision and grant a new trial. A reversal of the court below on either of these appeals was fatal to that judgment. Until both were disposed of the case was still pending. When Sharon died, and when this application for final judgment for alimony and costs was made, only one of those appeals had been disposed of; so that the case was then still pending.

Under these circumstances, and on the application for the judgment now appealed from, this defendant proved that nearly a month before the commencement of this action the original defendant, William Sharon, commenced an action against this plaintiff, by the name of Sarah Althea Hill, for the purpose of obtaining a decree canceling the identical contract which, by the court in this case, was found to be the only contract or agreement of marriage ever made by or subsisting between the parties, on the ground that the same was fabricated, false, and forged, and introduced the judgment roll in that case, showing the proceedings had therein, culminating in a final judgment, filed and entered January 15, 1886, as of September 29, 1885, adjudging and decreeing "that said instrument is false, counterfeited, fabricated, forged, and fraudulent, and is therefore utterly null and void," and "that the same be and is hereby canceled and utterly annulled." And it was "further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, [the plaintiff in this cause,] her heirs, executors, administrators, and all persons claiming any interest thereunder by or through said respondent, and her and their agents and attorneys, be, and they and each and all of them are hereby, perpetually enjoined from alleging the genuineness or validity of said instrument, and from making any use of the same, in evidence or otherwise, to support any right or claim under it, or making any claim, or setting up any right, interest, or claim of any kind, under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit."

The record shows that the circuit court of the United States (the court in which such action was brought) acquired jurisdiction of the persons and subject-matter before the commencement of this action. Consequently, no matter when its judgment was rendered, whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons

and subject-matter, the final judgment in that case became binding and conclusive as to that subject-matter, upon all persons and upon all other courts and tribunals whatsoever. *Taylor v. Taintor*, 16 Wall. 370; *Shoemaker v. French*, Chase, 267; *Gaylord v. Railroad Co.*, 6 Biss. 286; *Union Mut. Life Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. Rep. 443; *Mason v. Piggott*, 11 Ill. 88; *Bellows Falls Bank v. Rutland & B. R. Co.*, 28 Vt. 470; *Stearns v. Stearns*, 16 Mass. 170; *Insurance Co. v. Howell*, 24 N. J. Eq. 239; *Brooks v. Delaplaine*, 1 Md. Ch. 354; *Withers v. Denmead*, 22 Md. 146; *New Orleans v. Steam-Ship Co.*, 20 Wall. 393. The judgment of the court below for alimony and costs was essentially based upon this identical contract or instrument, for the court expressly finds that it was the only contract or agreement of marriage between the parties. There could be no marriage without a contract or agreement of the parties. Without marriage there could be no divorce, and without this judgment for divorce there would have been no judgment for alimony or costs. This judgment in the circuit court was and is the only final judgment on the question of the validity of the contract upon which this alleged marriage depends. Upon the application to have the judgment for alimony and costs entered up against this executor, he interposed this judgment of the circuit court, showing an adjudication, the legal effect of which was to determine that under this contract there had been no marriage, and consequently that there could be no divorce, and forever enjoining the plaintiff from asserting any marital or property rights under it, and asked that the court compel her in this action to obey said injunction. It was error in the court to deny this request. In *Engles v. Lubeck*, 4 Cal. 32, this question was fully considered and passed upon by this court. The action was ejectment, and the defendant moved for a stay of proceedings on the ground that he had commenced a suit in the fourth district court, (a court of co-ordinate jurisdiction,) and obtained an injunction against the plaintiffs, restraining them from disturbing his possession of the land in question. This court, in discussing the question, says: "It is said, however, that the injunction operates upon the party, and not upon the court, and that, therefore, the court of the seventh district was right not to regard it, and the defendant's remedy is by attachment for contempt in the fourth district. We prefer to lay down a different rule. The remedy suggested, for aught that we can see, may be fraught with difficulty, and involve the parties in needless expense. When a party obtains an injunction to restrain the prosecution of a suit, he acts upon the presumption that the process of the court will be respected, and it may reasonably be supposed that he declines to make the necessary preparation for the trial of his case. This ought certainly to be considered a good reason even for granting a continuance. But we think that

the propriety of the observance of the injunction, by the court to whose notice it is brought, may be properly placed upon higher grounds. The comity which one court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other. The one should regard the party attempting to proceed in defiance of the authority of the other as laboring under the same disability to ask for the action of the court as if he was an alien enemy, or under the ban of a decree of outlawry at common law. Such being the opinion we entertain upon this point, we cannot permit the judgment to stand." Page 33. To claim alimony and costs under a judgment based upon that alleged marriage contract was to make a claim under and by virtue of that writing, in violation of the injunction.

Several other points are made by the appellant on the record, but we do not deem it necessary to consider them. Attention is also called to the fact that, since the entry of the judgment appealed from, the appeal from the order refusing to vacate the original decision, and denying the motion for new trial, has been reversed by this court. This fact is not presented by the record, and it is claimed by the respondent that we cannot consider it on this appeal. We do not base our decision upon this appeal on that fact, or pass upon the question of whether or not it can be considered for that purpose; but this court is certainly bound to take judicial notice of its own decisions, and when, for any cause, it reverses any proceeding had in a court below, it may with propriety look into its own records for the purpose of ascertaining what instruction, if any, it is proper to give the court below. The legal effect of the reversal on said former appeal (79 Cal. 633, 22 Pac. Rep. 26, 131) was to vacate and set aside the judgment for divorce upon which this judgment for alimony and costs was based, and there is now no judgment whatever in favor of plaintiff, upon which to base the motion upon which this judgment was entered.

The judgment appealed from, being the judgment entered in this cause June 23, 1888, on the motion of plaintiff made May 5, 1888, is reversed, and the court below is directed to enter an order denying said motion.

We concur: WORKS, J.; PATERSON, J.

84 Cal. 433

SHARON v. SHARON. (No. 12,776.)

(Supreme Court of California. June 10, 1890.)

Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Wm. F. Herrin, for appellant. D. S. Terry, for respondent.

Fox, J. Tevis and Baldwin were the sureties on the undertaking given on the appeal from the judgment originally entered in this cause, (75 Cal. 1, 16 Pac. Rep. 345,) and when, on the 5th day of May, 1888, the plaintiff moved the court below for judgment against the present defendant, executor of

the will of the original defendant, for alimony and costs, she also moved that the judgment be entered up as a judgment against the sureties, as well as against said defendant, and in entering the judgment it was so done. From the judgment so entered against them the sureties appeal. So long as the plaintiff was not entitled to recover against the defendant, she could not recover against the sureties. Parnell v. Hancock, 48 Cal. 452. On the authority of that case, and of Sharon v. Sharon, ante, 1100, (No. 12,775, this day decided,) the judgment appealed from in this case, being the judgment entered in this cause against Lloyd Tevis and E. J. Baldwin, June 23, 1888, upon the motion of the plaintiff, made May 5, 1888, is reversed, and the court below is directed to enter an order denying plaintiff's said motion.

We concur: WORKS, J.; PATERSON, J.

83 Cal. 589

BULWER CON. MIN. CO. v. STANDARD CON. MIN. CO. (No. 13,192.)

(Supreme Court of California. April 30, 1890.)

QUIETING MINING TITLE—PLEADING—IMMATERIAL ISSUES.

1. Rev. St. U. S. § 2322, provides that the owner of a mining claim shall have the exclusive right to the possession of all veins, throughout their entire depth, the tops or apexes of which lie inside of the surface lines of his claim extended downward vertically, though such veins may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines of the surface location. Held that, in action between two adjoining mine-owners to quiet title to a mining claim, where there is no dispute as to the surface boundaries, and each admits that the other is entitled to all veins, throughout their entire depth, having apexes within the vertical side lines of his claim, an allegation in the complaint that a vein known as the "Ralston No. 1" has its apex within the side lines of plaintiff's claim, and an allegation in the answer that a vein known as the "West Bullion" has its apex within defendant's claim, do not raise any material issues, in the absence of an averment that these two veins are identical.

2. When no material issues arise directly from the pleadings, the findings of fact in the case are also immaterial, though both parties go to trial without objection.

3. Under Code Civil Proc. Cal. § 739, which provides that, if defendant in an action to quiet title disclaims in his answer any interest or estate in the property, plaintiff cannot recover costs, it is immaterial whether or not a defendant who in his answer makes such a disclaimer has ever before claimed an interest in the property, as in either event plaintiff would be entitled to judgment without costs.

4. The object of an action to quiet title is to enable plaintiff to dispel whatever may be regarded, not only by defendant, but also by third persons, as a cloud on his title, depreciating its value; and therefore, though a formal allegation of adverse claim may be necessary in the complaint, under Code Civil Proc. Cal. § 738, providing that the action will lie to determine "adverse claims," it is immaterial whether or not defendant actually asserted such adverse claim before the commencement of the action.

Commissioners' decision. Department 1. Appeal from superior court, Mono county; O. F. HAKES, Judge.

Action to quiet title by the Bulwer Consolidated Mining Company against the Standard Consolidated Mining Company. There was a judgment in plaintiff's favor, and defendant appeals. Rev. St. U. S. § 2322, provides that the locators of mining locations "shall have the exclusive right of possession and enjoyment of all the surface included

within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location." Code Civil Proc. Cal. § 738, provides: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." Section 739 provides: "If the defendant in such action disclaims in his answer any interest or estate in the property, * * * the plaintiff cannot recover costs."

P. Reddy and C. A. Schuman, for appellant. *Lloyd & Wood and Richard S. Miner*, for respondent.

VANCLIEF, C. Action to quiet title to a mining claim in Mono county, brought under section 738 of the Code of Civil Procedure. Each party is a California corporation. The complaint is in the usual form of complaints under said section, and describes a strip of land 1,188 feet in length, containing two acres, "known as the 'Ralston No. 1 North Mine or Vein,' * * * being mineral entry No. 48 in the series of the land-office at Bodie in said state, designated by the surveyor general as 'Lot No. 44,' " of which the plaintiff alleges that it is the owner and in possession, "with exclusive right of possession and enjoyment of all land included within the exterior lines of said survey, and of 1,188 linear feet of said Ralston No. 1 North mine or vein, lode or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward, vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey. That the defendant makes and asserts a claim adverse to the plaintiff for an estate and interest in said real property, mine, mining claim, and location. That the claim of the said defendant is without any right whatever, and that the said defendant has not any right, title, or interest whatever in said lands and premises, or any part thereof."

In its answer the defendant "admits that plaintiff is the owner and in possession, and entitled to the possession, of that certain mining claim and location described in said complaint, as the 'Ralston No. 1 North Mine or Vein,' but denies that plaintiff is or ever was the owner, or that it has or ever had the exclusive right of possession or enjoyment, of all or any of the land described in the complaint, except the surface included within the lines of said location, and all veins,

lodes, ledges, if any such there be, throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically." The answer then avers that the defendant owns and possesses a piece of land, being mineral entry No. 46 in the land-office at Bodie, and designated by the surveyor general as "Lot No. 46," being 1,500 feet in length, and containing 15.44 acres, "commonly known as 'West Bullion Lode,'" and describes the exterior boundaries thereof. The answer then further alleges that this last-mentioned claim "adjoins the mining claim of the plaintiff described in the complaint, and lies on the easterly side thereof," and that defendant has the exclusive right of possession and enjoyment of all the surface included within the lines of this last-described location, "and of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular line in their course downward as to extend outside the vertical side lines of such surface location; * * * that within said West Bullion lode mining claim there is a vein commonly known and designated as the 'West Vein' of the West Bullion lode location, which vein lies near the western boundary line of said West Bullion lode mining claim, said boundary line being the west side line of said West Bullion lode location, and the east side line of said Ralston No. 1 North mining claim; that the top or apex of said west vein of the said West Bullion lode location lies inside the surface lines of said West Bullion lode location extended downward vertically. That said west vein of said West Bullion lode location, at some points thereon, so far departs from a perpendicular in its course downward as to extend outside the vertical side lines of defendant's said surface location, and to and within the vertical side lines of plaintiff's said surface location; that defendant claims the right to follow, work, possess, and enjoy the said west vein of said West Bullion lode location throughout its entire depth, and the right to follow, work, possess, and enjoy all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside the surface lines of defendant's said location extended downward vertically, although such veins, lodes, or ledges may in their courses downward extend outside of the vertical side lines of defendant's said mining claim, and into the land and mining location described in plaintiff's complaint herein; that defendant does not make or assert, and has never made or asserted, any claim adverse to plaintiff for any estate or interest in the mine, mining claim, or location described in the complaint, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof, except the right, hereinbefore alleged and claimed, to follow, work, possess, and enjoy the veins, lodes, and ledges so belonging to

defendant as aforesaid. And defendant denies that its said claim is without right, and denies that the defendant has not any right, title, or interest in the lands described in said complaint."

At the time of filing its answer the defendant also filed what it denominates a "cross-complaint," which is substantially the same as its answer in all respects, except the addition thereto of the following two paragraphs and the prayer, viz.: "That plaintiff makes and asserts a claim adverse to defendant for some estate or interest in said West Bullion lode location, and particularly in said west vein thereof, and claims and asserts that the same, or some part thereof, is part of the said mine or mining claim of plaintiff; that the claim of said plaintiff is without any right whatever, and the said plaintiff has no right, title, or interest whatever in said West Bullion lode mining claim, or in said West Vein lode of said West Bullion lode location, or any part thereof." Then follows the usual prayer in complaints to quiet title. In plaintiff's answer to the cross-complaint, it is admitted "that defendant is the owner and in possession of that certain mining claim and location described in said cross-complaint as the 'West Bullion Lode,' but denies that said defendant is or ever was the owner, or that it has or ever had the exclusive right of possession or enjoyment, of all or any of the land included within the exterior lines of the survey described in said cross-complaint, except the surface included within the lines of said location, and all veins, lodes, and ledges, if any such there be, throughout their entire depth, the tops or apexes of which lie inside of such surface lines extending downward vertically. Plaintiff denies that within said West Bullion lode mining claim there is a vein commonly known and designated as the 'West Vein' of the West Bullion lode location, or otherwise designated, which vein, or any vein, lies near the western boundary line of the said West Bullion lode mining claim. Plaintiff denies that the top or apex of said west vein of the said West Bullion lode location lies inside of the surface lines of said West Bullion lode location extending downward vertically." The answer to the cross-complaint then repeats the substance of the complaint as to plaintiff's right and title to the Ralston No. 1 North mine, and adds thereto the following: "That said Ralston No. 1 North mine or vein adjoins the mining claim of the defendant, described in said cross-complaint, and lies on the westerly side thereof. That, within the said Ralston No. 1 North mine or mining claim, there is a vein commonly known and designated as the 'East Vein' of the Ralston No. 1 North mine location, which vein lies near the eastern boundary line of said Ralston No. 1 North mine or mining claim, said boundary line being the east side line of said Ralston No. 1 North mining claim, and the west side of the said West Bullion lode location; that the top or apex of the said east vein of

the said Ralston No. 1 North mining claim lies inside of the surface lines of said Ralston No. 1 North mining claim location, extending downward vertically; that said east vein of said Ralston No. 1 North mining claim location, at some points thereon, so far departs from a perpendicular in its course downward as to extend outside of the vertical side lines of plaintiff's said surface location, and to and within the vertical side lines of defendant's said surface location; that plaintiff claims the right to follow, to work, to possess and enjoy the said east vein of said Ralston No. 1 North mining location throughout its entire depth, and the right to follow, work, possess, and enjoy all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of plaintiff's said location, extending downward vertically, although such veins or ledges may in their courses downward extend outside of the vertical side lines of plaintiff's said mining claim, and into the land and mining location described in defendant's cross-complaint herein; that plaintiff does not make or assert, and has never made or asserted, any claim adverse to defendant for any estate or interest in the mine, mining claim, or location described in the cross-complaint, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof, except the right, hereinbefore alleged and claimed, to follow, work, or possess and enjoy the veins, lodes, and ledges so belonging to the plaintiff as aforesaid. And plaintiff denies that its said claim is without right, and denies that plaintiff has not any right, title, or interest in the lands described in said cross-complaint."

It is apparent from these pleadings that all the lands described therein are mineral lands containing veins and lodes of rock in place, and that such right and title as either party has thereto was acquired under and depend upon the provisions of chapter 6, tit. 32, of the Revised Statutes of the United States. Upon this assumption, it is clear that defendant's answer to the complaint neither raised nor tendered any material issue. It expressly admits that plaintiff is the owner, in possession, and entitled to the possession, of the land described in the complaint, and of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of plaintiff's exterior surface lines extended downward vertically; and it expressly disclaims any estate or interest therein adverse to the plaintiff. It is true that it denies that it ever made any such adverse claim; but, in view of section 739 of the Code of Civil Procedure, this issue, in connection with the disclaimer by the defendant, is immaterial, since a decision of it either way would not affect the judgment. That is to say, when, in an action to quiet title to land, the defendant disclaims any interest or estate in the premises, it is immaterial whether or not he had ever before claimed an inter-

est or estate therein adversely to the plaintiff; for in either event the plaintiff would be entitled simply to a judgment quieting his title, without costs.

The new matter alleged in the answer relates solely to a distinctly different piece of land from that described in the complaint, and to a vein (the west vein) having its apex therein, and therefore being a part of it, and being no part of the land described in the complaint, although in its course downward it may pass through the vertical plane extended down from the east side line of plaintiff's land. Rev. St. U. S. § 2322. Conceding the truth of all this new matter, it does not conflict with any alleged right of the plaintiff, or constitute any defense or counter-claim to any matter of the complaint, and therefore might have been stricken from the answer as irrelevant. The cross-complaint of the defendant relates solely to the same land and west vein therein, which is the subject of the new matter in the answer, and is wholly inappropriate, for the following reasons: (1) The affirmative relief sought by it does not affect "the property to which the action [in which it is filed] relates," (Code Civil Proc. § 442,) as the action only relates to the ownership, and right to the possession, use, and enjoyment, of the surface of the land described in the complaint, and of all veins, lodes, ledges, and deposits throughout their entire depth, the tops or apexes of which lie inside the exterior surface lines extended downward vertically, although such veins, lodes, ledges, or deposits, in the downward course, may so far depart from a perpendicular as to extend outside the vertical planes of the side lines, and not to the land described in the cross-complaint, or to the west vein, or any other vein, lode, ledge, or deposit, the top or apex of which lies within vertical planes of the side lines of the land described in the complaint; (2) even if the defendant had claimed ownership of, or any less estate or interest in, the land, veins, lodes, or ledges described in the complaint, there would have been no proper occasion for a cross-complaint, (*Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. Rep. 195; *Association v. Wagner*, 61 Cal. 354;) and the learned counsel for the cross-complainant, in his reply brief, admits that "both the cross-complaint and answer thereto were unnecessary." It does not appear, however, that the plaintiff made any objection to the cross-complaint, or to the new matter pleaded in the answer.

Conceding that, under the circumstances, it was admissible to try the case made by the cross-complaint and answer thereto, it seems difficult to determine what were the material issues to be tried. Each party had expressly admitted the surface boundary lines of the land as claimed by the other. Each party expressly admitted that the other was entitled to all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie within its vertical side lines, although in

their course downward they might pass through the vertical side lines of the land of the other party. Each party admitted that the land of the plaintiff and that of defendant adjoined each other on the surface. Each party expressly disclaimed any interest or estate in the surface of the land claimed by the other, or in any vein, lode, or ledge, the top or apex of which was within the vertical side lines of the land of the other, however far such veins, lodes, or ledges might pass outside of such vertical side lines, and into the space between the vertical side lines of the land of the other party. The cross-complaint alleges that within the land of the defendant, and near the western boundary side line thereof, there is a vein called and known as the "West Vein of the West Bullion Lode Location," the top or apex of which lies inside of the vertical side lines of defendant's land, which at some points below the apex extends outside of defendant's vertical side lines of the plaintiff's land, and that plaintiff claims this west vein, or some part thereof, adversely to the defendant. The answer of plaintiff denies all these allegations of the cross-complaint as to the "west vein of the West Bullion lode," and alleges that, within the plaintiff's land, and near the eastern boundary line thereof, there is a vein commonly known and designated as the "East Vein of the Ralston No. 1 North Mine Location," the top or apex of which lies inside of the surface lines of plaintiff's land, and which, at some points thereon in its course downward, extends outside of the vertical side lines, and within the vertical side lines of defendant's surface location. So far as any information is to be derived from the pleadings, it appears expressly that the "west vein of the West Bullion," and the east vein of the Ralston No. 1, are distinctly different veins; for they are designated by distinctly different names, and are described as being located in different places; there being no dispute as to the true location of the western boundary line of the Bullion location, or as to the eastern boundary line of the Ralston No. 1 on the surface. These lines are distinctly described in the pleadings of the respective parties by courses, distances, and monuments; and it is expressly agreed that they coincide,—that is, that the western boundary line of the West Bullion is the eastern boundary line of the Ralston No. 1. It is nowhere alleged or intimated in the pleadings of either party that these different names and descriptions are intended to designate the same vein. Why not as well contend that, by the different names and descriptions of the surface claims, the parties intended to designate the same land, since the names and descriptions of the veins are quite as distinct as those of the surface claims? The allegation of new affirmative matters in plaintiff's answer to defendant's cross-complaint is subject to the same objections as above stated to the new matter in defendant's answer to plaintiff's complaint.

It relates solely to a different lot of land, and to a different vein, from those described in the cross-complaint, and is not inconsistent with the cross-complaint; nor does it constitute a defense or counter-claim thereto. The express object of the cross-complaint is to quiet defendant's title to the land described therein, and particularly to the west vein, the apex of which is alleged to be within the side lines thereof. While the plaintiff admitted, and even stipulated, that the defendant owned the land described in the cross-complaint, and all veins having their apex within the vertical side lines thereof, of what consequence is it that plaintiff denied the location of the west vein as alleged and described in the cross-complaint, without alleging that its apex was within the side lines of plaintiff's land, or in some way claiming title to it? Suppose the court had rendered judgment for the defendant on the cross-complaint and the answer thereto, without evidence. Would the plaintiff have any just or lawful ground of complaint? If the west vein exists, and its apex is situated as alleged in the cross-complaint, the defendant's title to it is unquestionable on the pleadings, and would properly have been quieted by the supposed judgment; but if, on the other hand, no such vein exists, or, existing, has its apex within plaintiff's side lines, the supposed judgment would have had no effect upon it, or upon the plaintiff's title thereto. Had the plaintiff, in its answer to the cross-complaint, averred that the "east vein of the Ralston No. 1," therein described, was the same vein as that described in the cross-complaint as the "west vein of the West Bullion," in addition to the other averments therein, the answer might have raised the material issues (1) as to whether or not those different names and descriptions indicated the same vein; and, if so, (2) whether the apex of that vein was within the vertical side lines of West Bullion, or within the side lines of the Ralston No. 1,—upon the determination of which depended the decision of the ultimate question of law, as to whether that vein was the property of the plaintiff, or the property of the defendant.

The cases, upon the complaint and answer thereto, and upon the cross-complaint and answer thereto, appear to have been tried together by a jury called to assist the court, and to which the court submitted 17 special issues. Those special issues, and the jury's answers, are as follows: "(1) Is there a vein within the West Bullion mine location, commonly known and designated as the 'West Vein of the West Bullion Mine Location?' Answer. Yes; so designated. (2) If your answer to the last question be 'Yea,' then does the said west vein of the said West Bullion mine location lie near the boundary line of the said West Bullion location; and is the said west boundary line of the said West Bullion location the east side line of the Ralston No. 1 North mining claim? A. Yes: (3) Is the top or apex of the said west

vein of said West Bullion mine location within the surface lines of the said West Bullion mine location extended downward vertically? A. Taking the evidence and the inclination of the ledge, as far as developed, between upraise 3 and 4, yes. (4) Does the said west vein of the said West Bullion mine location, at any point or points thereon, so far depart from perpendicular in its course downward as to extend outside of the vertical side lines of the said West Bullion mine location, and to and within the vertical side lines of the Ralston No. 1 North mining claim? A. Yes. (5) Did the defendant ever before, or at the time of, the commencement of this action, or at any time, make or assert any claim adverse to the plaintiff for any estate or interest in the Ralston No. 1 North mining claim, or any ledge or lode, the apex of which lies within the surface lines of said Ralston No. 1 North mining claim extended downward vertically, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof? A. No. (6) Did the defendant ever before, or at the time of the commencement of this action, make or assert any claim adverse to the plaintiff for any estate or interest in any lode, ledge, vein, or deposit, the apex of which lies inside of the surface lines of the said Ralston No. 1 North mining claim extended downward vertically? A. Yes; near upraises 3 and 4. (7) Did the plaintiff, prior to and at the time of the commencement of this action, assert a claim adverse to the defendant for some estate or interest in said west vein of said West Bullion mine location, if you find that such vein exists; and did the plaintiff before and at the time of the commencement of this action claim and assert that the top or apex of the said west vein of the said West Bullion mine location was within the surface lines of the said Ralston No. 1 North mining claim drawn downward vertically, and that it was the owner of the said west vein of said West Bullion mine location? A. Yes. (8) Is the vein described in the cross-complaint in this action as the 'West Vein of the West Bullion Mine Location' the same vein or lode which is described in the answer of the plaintiff to the cross-complaint in this action as the east vein of the Ralston No. 1 North mining location, and is the so-called west vein of the West Bullion mine location, and the east vein of the Ralston No. 1 North mining claim, the only vein or lode the right to the ownership of which is in dispute in this action; and is it the vein or lode claimed by both the plaintiff and the defendant in this action? A. Yes. (9) Is the top or apex of the vein or lode mentioned in the last question within the surface lines of the said West Bullion mine location drawn downward vertically? A. Taking the evidence and inclination of the ledges as far as developed between upraises 3 and 4, yes. (10) Is the top or apex of the vein last mentioned within the surface lines of Ralston No. 1 North

mining claim extended downward vertically? A. Yes; at upraise No. 6. (11) Is a line drawn from a post designated by the witnesses in this action as 'Post No. 5,' to the post designated by the witnesses in this action as the 'South-West Corner Post of the West Bullion Mine Location,' the west boundary line of said West Bullion mine location? A. Yes. (12) Is the line mentioned in the last question the east boundary line of Ralston No. 1 North Mining claim, so far as said Ralston No. 1 North mining claim extends along said line? A. Yes. (13) Is the boundary line between Ralston No. 1 and the West Bullion claim that part of the straight line from post No. 5 to the post on the ground which is claimed to be at the south-east corner of Ralston No. 2, which lies north of a straight line from the point of commencement of said Ralston No. 1, cutting the said straight line first above named, as surveyed by Mr. Westcott? A. No. (14) Is the boundary line between Ralston No. 1 and the West Bullion claim the straight line from post No. 5 to the post on the ground which is claimed to be at the south-west corner of the West Bullion claim? A. Yes. (15) Is there one continuous ledge on the 200 level of the Bulwer Company running from the south line of Ralston No. 1 to the end of the drift, ending at the point on plaintiff's map marked 'K'? A. According to the testimony and character and course of ledge as far as developed, yes. (16) Is the apex of such one continuous vein mentioned in the last question within the surface boundary lines of Ralston No. 1 extended downward vertically? If so, to what extent? A. Yes, at upraise No. 6. (17) Is the apex of such last-mentioned continuous vein found at any place within the surface boundary line of the West Bullion claim extended downward vertically? If so, at what place, and to what extent. A. Taking the evidence and inclination of the ledge as far as developed between upraises 3 and 4, yes."

The court adopted as its own findings of fact the entire verdict of the jury, except the verdict on the sixth special issue, which was rejected. In addition to the verdict as adopted, the court found the following facts: "That the West Bullion mine location exists and existed many years prior to the commencement of this action, and that the description of said West Bullion mine location set forth in the answer and cross-complaint in this action is correct, and that said West Bullion mine location was made, and the same existed, prior to the location of the Ralston No. 1 North mining claim; that the defendant was at the time of the commencement of this action, and for many years prior thereto, and now is, the owner of, and in the possession, and entitled to the possession, of the said West Bullion mine; that the said West Bullion mine was located upon veins or lodes of quartz or other rock in place bearing gold or silver, and that the defendant was at the time of the commencement of

this action, and for a long time prior thereto, and now is, entitled to the exclusive right of possession and enjoyment of all the surface included within the lines of its said location, and all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of said surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location, and that the said West Bullion mine location adjoins the Ralston No. 1 North mining claim on the easterly side thereof; that the said Ralston No. 1 North mining claim was a location on a lode, ledge, or vein of quartz or other rock in place bearing gold or silver, and that the plaintiff was at the commencement of this action, and for a long time prior thereto, and now is, the owner of, and in the possession of, and entitled to the possession of, the said Ralston No. 1 North mining claim, described in the plaintiff's complaint. (18) In addition to the foregoing findings, the court finds that the one continuous ledge in the drift on the 200-foot level of the Bulwer Consolidated Mining Company's claims, mentioned and described in the foregoing finding No. 15, is the same ledge which is described in the evidence as existing in upraises 3, 4, 5, and 6, designated and shown on plaintiff's map, Exhibit H, and that defendant and cross-complainant make no claim to said ledge in said upraises Nos. 5 and 6; it having disclaimed at the trial all rights of ownership to said ledge in said upraises Nos. 5 and 6. (19) The court further finds that all that portion of the ledge described and referred to in the foregoing findings Nos. 15 and 18, lying north of said upraise No. 4, and the apex thereof, lies within the surface lines of said Ralston No. 1 mining claim extended downward vertically, and that defendant asserted an adverse claim to said ledge between upraises Nos. 4 and 5."

Thereupon the court adjudged and decreed, substantially, that the plaintiff is the owner in possession, and entitled to the exclusive right of possession and enjoyment, of all the surface of the land described in the complaint as the "Ralston No. 1 North Mine," and of all veins, lodes, and ledges, the tops or apexes of which lie inside of the surface boundary lines thereof extended downward vertically, etc., including that portion of the vein described in the answer to the cross-complaint as the "East Ledge of the Ralston No. 1 North Mining Claim," commencing at the north side of the upraise No. 4, lying partly within the surface boundary of Ralston No. 1 North mine, and partly within the surface boundary lines of the West Bullion mine; thence running in a northerly direction to the end of the drift marked "K" on the plaintiff's maps, Exhibits B and H,—being the extreme northerly drift on the 200-foot level in said Ralston No. 1 claim,—and further decreeing that all adverse claims of defendant

to the above described property are invalid, and that plaintiff's title thereto be quieted against all such adverse claims. The court further adjudged and decreed that the defendant is the owner in possession, and entitled to the exclusive right of possession and enjoyment, of all the surface included within the boundary lines of the West Bullion lode location, as described in the cross-complaint and in defendant's answer to plaintiff's complaint, and of all veins, lodes, and ledges, the tops or apexes of which lie inside of the surface boundary lines thereof extended downward vertically, etc., including that portion of the vein described in the cross-complaint as "the west vein" of the West Bullion location, lying between the north side of said upraise No. 4 and the boundary end line of said Ralston No. 1 North mine, being that portion of said vein commencing at the north side of said upraise No. 4, and thence running in a southerly direction to a vertical plane drawn downward through the southern end line of said Ralston No. 1 claim, and further decreeing that defendant's title to said West Bullion surface ground, and all veins, lodes, and ledges last above-mentioned, be quieted against all adverse claims of the plaintiff, and further ordered that each party pay its own costs.

The appeal by the defendant is from the whole and every part of the judgment, upon the judgment roll alone, from which it does not appear that there was any demurrer to any pleading, or any objection to the mode of trial.

1. Counsel for appellant claim that the findings of fact do not support the conclusions of law or the judgment, "in that there is no finding to the effect that the defendant asserted a claim adverse to plaintiff to any part of the property described in the complaint, or to the ledge in dispute, before the commencement of the action," and thence concludes that "the judgment should be against the plaintiff, and in favor of the defendant." But, as above shown, this conclusion does not follow, even if it is true that there is no such finding. Conceding that the averment of an adverse claim is necessary in a complaint to quiet title under section 738 of the Code of Civil Procedure, yet, if the defendant, in his answer, claim an adverse interest or estate in the land described in the complaint, a denial that he had made such adverse claim before the commencement of the action would be immaterial. If, on the other hand, the defendant, as here, expressly disclaim any estate or interest in the land described in the complaint, and at the same time deny that he ever made any such adverse claim, the plaintiff would still be entitled to a decree quieting his title, but without costs. This is implied in section 739 of the Code of Civil Procedure. The object of sections 738 and 739 is to enable the plaintiff in such action to dispel whatever may be regarded by third persons, as well as by the defendant, as a cloud upon his title; for, even though the

defendant makes no adverse claim, third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed, by the decree of the court, so that his record title may appear perfect, not only to the defendant, but to all persons whom it may thereafter concern. The only purpose of the averment of an adverse claim is to notify the defendant of the nature of the action, and that he is required to set forth and litigate any adverse title he may claim to have, or to disclaim any such adverse title either expressly or by default. The case of Pfister v. Dasey, 65 Cal. 403, 4 Pac. Rep. 393, cited by appellant, is not in point. The point under consideration here was not presented in that case. The only material issues tendered by a complaint in this class of cases relate to the title of the real property described in the complaint. Therefore, there was no necessity for a finding upon the formal but immaterial issue as to whether the defendant had asserted an adverse title before the commencement of the action.

2. Counsel for appellant further contend that material findings of facts by the court are inconsistent with each other. If the findings referred to by counsel as being inconsistent are material, I think this point should be sustained; but it seems to me that all the findings of fact are immaterial, for the reason that no material issue arises upon the written pleadings. The answer of defendant admits every material, issuable averment of the complaint, as it only denies the averment that the defendant had made any adverse claim to an interest or estate in the real property described in the complaint. Its new matter, as above shown, relates solely to a different lot of land, and to a different vein, from those described in the complaint, and is not inconsistent with the complaint, and constitutes no defense nor counter-claim. It is admitted by appellant's counsel that there was no necessity for a cross-complaint; and, as above shown, it appears that a cross-complaint was wholly improper. But, conceding that material issues made by such a cross-complaint and answer thereto might have been properly tried by consent of the parties, yet no such material issues were made by the cross-complaint and answer thereto in this case. It is true that collateral issues, as to probative facts, subsidiary to the principal issues arising from the pleadings, often become material, but only in proportion to their evidentiary bearing upon the material issues arising directly from the pleadings, and therefore must be wholly immaterial where, as in this case, no material issue arises directly from the pleadings. To hold otherwise would be to substitute oral pleadings, of which there is no record, for the written pleadings required by law, necessarily resulting in the uncertainty and confusion of which this case furnishes a small example.

The first four special issues, except the last clause of the second, are identical with or subsidiary to only immaterial issues arising directly from the pleadings,—immaterial because the plaintiff claimed no estate or interest in the west vein of the West Bullion, and did not aver that its apex was within the vertical side lines of the Ralston No. 1, but only that it was not within the vertical side lines of the West Bullion. As to the second clause of No. 2, there was no necessity of a finding, because it was settled and agreed by the pleadings that the west line of the West Bullion and the east line of Ralston No. 1 are identical. The fifth and first part of the seventh special issues are immaterial, for reasons already stated, (the verdict on the sixth was not adopted,) and neither of the last two questions in the seventh is founded upon, or possibly subsidiary to, any issue made by the pleadings; for, as before remarked, it is not asserted in any pleading of either party that the "top or apex of the said west vein of the said West Bullion * * * was within the surface lines of the Ralston No. 1," nor that the plaintiff was the owner of said "west vein," or claimed any interest therein. The eighth special issue is neither founded upon nor applicable to any issue made by the pleadings. Both parties named and described the two veins therein mentioned as distinct veins located some distance apart from each other. If this issue resulted from any pleadings, such pleadings must have been oral. If so, which party asserted, and which denied, that these two veins named and described in the written pleadings as distinct are nevertheless identical? The issue itself implies such assertion by one party, and denial by the other. Besides, the jury is required to find what vein is in dispute. The ninth and tenth special issues grow out of and depend upon the eighth, besides being so ambiguous as not to admit of a certain answer, since two distinct veins are "mentioned in the last question." To which of these do the answers of the jury refer? Probably, but not certainly, to neither, as "mentioned in the last question," but to the one identical vein found by the jury to have been designated by the distinctly different names and descriptions thereof in the cross-complaint and the answer thereto. But it is enough to say of these issues that neither of them bears any material relation to the issues made by the written pleadings. The written pleadings fixed and agreed upon the location of the dividing line between the West Bullion and the Ralston No. 1 upon the surface with absolute certainty, as we have seen; therefore the court was not at liberty to find a different location of it, nor does it appear that either the court or the jury did so. This disposes of special issues 11 to 14, inclusive. If the facts involved in special issues numbered 15, 16, and 17 could have contributed in any degree to the solution of any material issue raised by the written pleadings, they would have been properly submitted to the jury;

but, as there was no such material issue upon the written pleadings, they were irrelevant and immaterial. They were the result of purely oral pleadings, framed without regard to the written pleadings. The findings by the court numbered 18 and 19 are subject to the same objection above made to the verdict on special issues 15, 16, and 17. They are not responsive or helpful to any material issue made by the written pleadings. The first four findings by the court, (not numbered,) founded upon the written stipulation of the parties, has no other effect than to adopt the verdict of the jury, except as to issue numbered 6, and to confirm the absence of any material issue upon the pleadings.

Assuming that the two distinct actions—one upon the complaint of the plaintiff, and the other upon the cross-complaint of the defendant—were tried together by consent of the parties, it would seem, though it is not necessary so to decide, that each party was entitled to a decree on the pleadings quieting its title to the real property described in its complaint, regarding the so-called "cross-complaint" as the complaint of the defendant relating to real property totally distinct and different from the property described in the complaint of the plaintiff. I think the judgment should be reversed, and the cause remanded for further proceedings, with leave to the parties to amend their pleadings, as they may be advised, within the limits allowed by law.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for further proceedings, with leave to the parties to amend their pleadings, as they may be advised, within the limits allowed by law; the costs of appeal to be paid one-half by each party.

83 Cal. 613

BULWER CON. MIN. CO. v. STANDARD CON. MIN. CO. (Nos. 13,450, 13,451.)

(*Supreme Court of California.* April 30, 1890.)

QUIETING TITLE—PLEADING—CHANGE OF VENUE.

1. In an action to quiet title, an amendment of the complaint, by enlarging the boundaries of the land as originally described, cannot be prejudicial to a defendant which in its amended answer disclaims title to "any part" of the land described in the amended complaint.

2. Bias or prejudice by the trial judge against defendant and its president is no ground for change of venue, as Code Civil Proc. Cal. § 170, does not include either among the disqualifications preventing a judge from acting in a cause.

Commissioners' decision. Department 1. Appeal from superior court, Mono county; O. F. HAKES, Judge.

P. Reddy and C. A. Schuman, for appellant. Lloyd & Wood, Richards S. Miner, and R. M. Clarke, for respondent.

VANCLIEF, C. There are two appeals in this case—one from the final judgment, and

the other from an order denying defendant's motion to change the place of trial—presented upon bills of exception. The action is brought, under section 738 of the Code of Civil Procedure, for the purpose of determining the adverse title alleged to be claimed by the defendant to the mineral land, veins, lodes, and ledges described in the complaint, of which the plaintiff claims to be the owner. The parties to the action and to this appeal are the same as the parties to the appeal numbered 13,192, ante, 1102, (this day decided.) The original complaint, filed March 17, 1888, is in the usual form of complaints in this class of actions, and in the same form as that in No. 13,192, but describes a different lot of mineral land designated as "Mineral Entry No. 49 in the Bodie Land-Office," and called the "Ralston No. 2 Lode." To this complaint the defendant filed an answer and a cross-complaint, which are identical in form and substance with the answer and cross-complaint in No. 13,192, and claiming the same land, viz., the West Bullion lode and the west vein of the West Bullion lode location, and alleging that it adjoins the Ralston No. 2 lode. The answer of the plaintiff to this cross-complaint is the same in form and substance as its answer to the cross-complaint in No. 13,192, except that it claims the "Ralston No. 2," instead of "Ralston No. 1." On June 17, 1888, by leave of the court, the plaintiff filed an amended complaint. The amendments consist of the additions to the Ralston No. 2 lode of two other claims, called the "Homestake Lode Claim," and the "Stonewall Lode," which are alleged to adjoin the "Ralston No. 2," so that the three pieces of land described in the amended complaint form one consolidated piece of land, constituting a portion of plaintiff's entire mining claim and property known as and called the "Bulwer Mine."

The amendment of the complaint was opposed by the defendant, and it is urged here that the court erred in allowing it. The amendment did not change the nature of the action, nor state an entirely new cause of action, although it enlarged or added to the land described in the original complaint. But whether or not the allowance of such an amendment was within the discretionary power of the court need not be decided, since it appears that the defendant was not injured thereby, having in its answer disclaimed any estate or interest in any part of the land described in the amended complaint, and the judgment for plaintiff being without costs, as it must have been, without the amendments.

The defendant filed an answer, and afterwards an amended answer to the amended complaint. The original answer consisted of admissions and denials, and contained no averment of new matter; but the amended answer to the amended complaint admits that the plaintiff is the owner in possession, and entitled to the possession, of the claim described in the amended complaint as the "Ral-

ston No. 2" mining claim, subject to the right of the defendant to follow and mine, in their course downward, all veins and ledges, the tops or apexes of which lie within the vertical side lines of the West Bullion claim; but, for want of sufficient information or belief to enable it to answer, and upon that ground, it denies that plaintiff is entitled to any of the veins, lodes, or ledges alleged to be in or connected with the Ralston No. 2 claim, as described in the complaint, and in like manner denies all the material allegations of the amended complaint as to the Homestake lode and the Stonewall lode, and in like manner denies that all the mines, mining claims, and veins, lodes, and ledges described in the amended complaint "are held, owned, or possessed by the plaintiff as an entire piece or parcel of mining property, or constitute or are a portion of the mine, mining claim, or property of the plaintiff known as or called the 'Bulwer Mine.'" The amended answer then alleges the defendant's right to the West Bullion lode claim, and to the west vein therein, substantially as the same is alleged in the answer to the original complaint, and also in the cross-complaint, and further alleges as follows: "That defendant does not make or assert, and has never made or asserted, any claim adverse to plaintiff for any estate or interest in the mines, mining claims, or locations described in the amended complaint, or any claim of right to enter upon the surface of the same, or any claim of right to enter upon any portion thereof, except the right hereinbefore alleged and claimed, to-wit, the right to follow, work, possess, and enjoy the veins, lodes, and ledges so belonging to defendant as aforesaid." The "veins, lodes, and ledges" referred to in the last-quoted paragraph are those whose tops or apexes lie within the vertical side lines of the West Bullion claim, the right "to follow, work, possess, and enjoy" which, do not, therefore, conflict with any right claimed by the plaintiff, since the plaintiff claims only the right to follow, work, possess, and enjoy all veins, lodes, and ledges, the tops or apexes of which lie within the vertical side lines of the claims described in the amended complaint as the "Ralston No. 2," the "Homestake," and the "Stonewall," in which the defendant disclaims any interest or estate whatever. There was some controversy as to whether the amended answer was filed by leave of the court, and it was stricken out by the court because no leave had been granted to file it; and after it was stricken out the court denied leave to file it upon the ground that it constituted no defense to the amended complaint. But, for the purposes of this appeal, it will be regarded as if it had been properly on file when the plaintiff moved for judgment on the pleadings. There was no cross-complaint to the amended complaint. On motion of plaintiff's attorneys the court gave judgment for plaintiff on the pleadings without evidence. The judgment recites that the defendant disclaims

any interest or estate in the real property described in the amended complaint, or in any part thereof, and in the usual form adjudges that the plaintiff is the owner thereof, and that the defendant has no estate or interest therein, and closes with the following paragraph: "Nothing in this judgment or decree shall be construed as affecting the rights of this defendant to any mine, mining claim, or location or veins to which it has title or right of possession; nor shall the same affect the right, if any it may have, of said defendant, to follow any vein or lode which it may own, or be entitled to the possession of, on the dip thereof, beneath or into the said mines, mining claims, or locations of the plaintiff." This judgment is without costs, and, according to the principles announced in *Bulwer, etc., Min. Co. v. Standard, etc., Min. Co.*, No. 13,192, ante 1102, (this day decided,) is clearly right. It does not touch or affect any property or right claimed by the defendant, and it gives to the plaintiff only what is disclaimed by defendant.

As to the appeal from the order denying defendant's motion to change the place of trial, it is to be observed that the only ground of the motion alleged or attempted to be proved was that the "judge of said court is disqualified from acting in said case on account of his bias and prejudice against the defendant and A. Pettibone, its president and resident manager," which is not one of the grounds of disqualification enumerated in section 170 of the Code of Civil Procedure, and therefore not a ground of disqualification. *McCauley v. Weller*, 12 Cal. 500; *People v. Williams*, 24 Cal. 31. Besides, the pleadings raised no issue of fact to be tried by any court or jury. I think the judgment and order should be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 626

PHELPS *et al.* v. PRUSCH. (No. 12,738.)

(*Supreme Court of California.* May 2, 1890.)

REAL-ESTATE AGENT—RIGHT TO COMMISSION.

A real-estate broker, employed to find a purchaser of land at a designated price, under an agreement whereby the owner is to furnish a perfect abstract of title on a deposit of 10 per cent. of the price by the purchaser, has earned his commission when he produces a purchaser willing to buy on the prescribed terms; and where the owner afterwards induces his title to be rejected for the purpose of defeating the sale, the broker's return of the deposit, in compliance with the contract of sale, though without the owner's knowledge, does not affect his right to his commission.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; FRs. E. SPENCER, Judge.

T. H. Laine, for appellant. A. S. Kirtledge, for respondents.

HAYNE, C. This was an action to recover \$1,160.75 as broker's commissions for nego-

tiating a sale of real property. The trial court gave judgment for the plaintiffs, and the defendant appeals. The evidence is not brought up, and the findings must therefore be taken to correctly set forth the facts of the case, which are as follows: The defendant authorized one Dunn, the assignor of the plaintiffs, to sell a tract of land then possessed and claimed by defendant at a price not less than \$23,125, and promised in writing that he "should receive from defendant, as commissions for making such sale, the sum of 5 per cent. upon the full amount for which said property should be sold, and that, upon deposit of 10 per cent. of the purchase price by the purchasers, the defendant would furnish to him a complete and perfect abstract of title thereto." Dunn procured purchasers who were willing to take the property at \$23,215, and who deposited with him 10 per cent. of this amount, taking a written receipt containing the following clause: "Title to prove good, or no sale, and this deposit to be returned." The defendant "was immediately informed of said sale and its terms, and expressed himself as satisfied therewith, and acquiesced therein;" and an abstract of title was prepared, at the instance of Dunn, and given to the purchasers, who placed it in the hands of their attorney. A few days after the arrangement "the defendant became dissatisfied with the price at which the property had been sold, and exerted himself to cast suspicion upon, and to impeach and discredit, his title, in order to prevent a consummation of said sale." He first went to the plaintiff Smith, who had assisted Dunn in negotiating the sale, and offered to pay him the amount of the commission if he would break up the sale. Smith declined the proposition. The defendant then went to the attorney for the purchasers, who was examining the abstract of title, and gave him notice of certain matters which induced him to reject the title. The purchasers thereupon refused to complete the purchase, and demanded the return of their deposit, which was thereupon returned to them by Dunn without the knowledge or consent of the defendant.

Upon these facts, we think that the judgment in favor of the plaintiffs was clearly right. The contract of the parties was not that there should be an actual transfer of the title, or a valid contract for such transfer. It was merely that the broker should find a purchaser who was willing to buy upon certain terms. *Duffy v. Hobson*, 40 Cal. 244; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. Rep. 758. This being the contract on the broker's part, it was performed when he produced purchasers who were willing to buy upon such terms. *Phelan v. Gardner*, 43 Cal. 311. It makes no difference whether the defendant had a good title or not. If he had not a good title, and the transaction failed in consequence, that was not the broker's fault, and is no reason why he should lose his commission. *Middleton v. Findia*, 25 Cal. 81. If he had a good title, but took measures to have

it rejected by the purchaser's attorney for the purpose of defeating the sale, it needs no argument or authority to show that the broker's right to a commission is not thereby defeated. It is immaterial that Dunn returned the deposit to the purchasers without the knowledge or consent of the defendant. The condition upon which he held it was that it should be returned if the title should not "prove good." If the title was not in fact good, it was the duty of the depository to make the return. If the title was good, but the defendant, for the purpose of defeating the sale, induced the purchasers to believe that it was bad, and to act upon such belief, he had no more right to have the deposit retained than he had to deprive the broker of his commission. It makes no difference upon whom the demand for a return of the deposit was made, or whether it was returned or not. The complaint was drawn with unusual precision, and the demurrer was properly overruled. We therefore advise that the judgment be affirmed.

We concur: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(84 Cal. 231)

THORNTON *et al.* v. HOGE, Judge. (No. 13,742.)

(Supreme Court of California. May 31, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT—MANDAMUS.

Where, on the hearing of an alternative writ of mandate commanding a judge to show cause why he has not settled a bill of exceptions in a case, it appears that he has settled a bill, the supreme court will not order a reference to ascertain whether the bill as settled is correct, but will discharge the writ.

In bank. Application for mandamus.

Geo. H. Buck and Edward Fitzpatrick, for petitioners. Thos. M. Osmont, for respondent.

SHARPSTEIN, J. To an alternative writ of mandate, issued out of this court, commanding respondent to show cause, if any he may have, why he has failed, neglected, and refused, and still neglects and refuses, to allow, settle, certify, and sign the bill of exceptions, or other proper bill of exceptions, in the petition of the petitioners mentioned, the respondent has filed his answer, in which he denies that he has refused to sign or certify a correct bill of exceptions in the cause mentioned in said petition, and alleges that he has settled, certified, and filed a correct bill of exceptions in said cause. That he has settled, certified, and filed a bill of exceptions is not controverted by petitioners; but they insist that it is not a correct bill of exceptions, and ask this court to order a reference in order that evidence may be taken on that issue. We know of no precedent for such a proceeding. The writ has accomplished the purpose for which it was issued, and is there-

fore *functus officio*. There can be no further proceedings under it. Such being the case, the writ should be discharged. Writ discharged, and proceeding dismissed.

We concur: FOX, J.; McFARLAND, J.

PATERSON, J. I concur. The remedy after a bill has been settled is provided by section 652 of the Code of Civil Procedure. A judge may be compelled to act by mandate, but his discretion cannot be controlled thereby.

(83 Cal. 149)

PEOPLE *ex rel.* KERN COUNTY v. BAKER. (No. 13,542.)

(Supreme Court of California. March 22, 1890.)

In bank. On petition for rehearing. For former report, see ante, 364.

PER CURIAM. We do not think that the opinion heretofore filed in this case ought to be understood as requiring the order of the board of supervisors to state the number and denomination of the bonds to be issued for each particular purpose. All that was intended was that the amount of bonds for each purpose must be stated. Rehearing denied.

(84 Cal. 89; 3 Cal. Unrep. 260)

BERSON v. EWING *et al.* (No. 12,702.)

(Supreme Court of California. May 8, 1890.)

LIMITATIONS—MALICIOUS PROSECUTION—SURVIVING PARTNER.

1. In an action by a surviving partner, the complaint alleged that defendants maliciously prosecuted a claim against plaintiff's firm, knowing that it was fraudulent; that, to maliciously injure said firm, they caused an attachment to be levied on merchandise thereof; that the action resulted in a judgment for plaintiff. *Held*, that the main cause of action set out was the malicious prosecution, and that the determination of the action in plaintiff's favor, and not the levy of the attachment, which was a mere incident, fixed the date from which the statute ran against the present action. Distinguishing *McCusker v. Walker*, 77 Cal. 208, 19 Pac. Rep. 382.

2. Under Civil Code Cal. § 2461, providing that "a partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property," a surviving partner may sue for damages to the partnership estate by reason of a malicious prosecution of a claim; the words "debts" and "claims" being here used synonymously.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Royce & Crinmins, for appellant. Lloyd & Wood and E. F. Preston, for respondents.

GIBSON, C. This is an action brought by plaintiff, as the surviving partner of the firm of A. Berson & Son, against all the defendants except R. E. Corson, as partners under the firm name of Ewing, Plum & O'Brien, and said Corson, to recover damages for maliciously prosecuting another suit on a fraud-

ulent claim, and obtaining a writ of attachment thereon, and causing the same to be levied upon the property of the firm of A. Berson & Son. Two demurrers to plaintiff's complaint were filed,—one by defendants Flood and Coleman, and the other by defendants Plum and Corson. Both were sustained, and judgment thereupon entered for defendants. From this judgment, plaintiff appeals. The complaint is, in substance, as follows: The plaintiff and A. Berson were partners doing business in the city and county of San Francisco under the firm name of A. Berson & Son until December 24, 1883, (?) when the said A. Berson died. On or about the 1st day of June, 1885, the defendants other than Corson, who were then and still are partners under the firm name of Ewing, Plum & O'Brien, maliciously, and for the purpose of injuring A. Berson & Son, pretended to have a claim against the latter for a large amount of money, though they (Ewing, Plum & O'Brien) well knew that such claim was fraudulent, and did not in fact exist; and, in order to carry out their malicious intention to injure and oppress A. Berson & Son, they, (Ewing, Plum & O'Brien,) on the date last mentioned, conspired with defendant Corson, whereby the latter took an assignment of the fraudulent claim, and brought suit thereon in his own name, as assignee, against A. Berson & Son, in the superior court of the city and county of San Francisco. In furtherance of his conspiracy with Ewing, Plum & O'Brien, and further intending to maliciously injure A. Berson & Son, he, (Corson,) on the date last referred to, without cause, sued out a writ of attachment in the action brought by him, and caused the same to be levied upon the merchandise of A. Berson & Son, consisting of carpets, upholstery, and furniture, in their store in said city and county, and placed a sheriff's keeper in charge of the same. Thereafter, and before the trial of said action, the plaintiff caused the court, by its order, to bring in Ewing, Plum & O'Brien as proper and necessary parties to the action. On or about June 14, 1887, the said action was tried by the court without a jury, and resulted in a judgment on the said pretended claim in favor of plaintiff and against Ewing, Plum & O'Brien and Corson, by which judgment the attachment was dissolved. The bringing of said action and levying the writ of attachment issued therein damaged A. Berson & Son in their business and credit, and caused them to sustain loss by the stoppage of goods *in transitu* from New York, and by being compelled to pay attorneys' fees in obtaining a dissolution of the attachment, keepers' fees, and costs of other attachments levied upon their merchandise.

The argument of the respondent in support of the ruling of the court below is: *First*, that the action is barred by the provisions of section 339 of the Code of Civil Procedure, because it appears from the face of the complaint that more than two years have elapsed between the date of the issue

ance of the writ of attachment and the commencement of this action; *second*, that under section 2461 of the Civil Code, the plaintiff has no capacity, as a surviving partner, to maintain this action.

The respondents' counsel, in their first point, have evidently mistaken the scope of the complaint, by confining it to the wrongful issuance and levy of the writ of attachment. The main cause of action is for the malicious prosecution of a civil action; and all the facts necessary to maintain it appear in the complaint, to-wit, that defendants maliciously, and without probable cause, prosecuted an action upon an unfounded claim against plaintiff's firm to their damage, and which action was determined in their favor. *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. Rep. 1106; *Kinsey v. Wallace*, 36 Cal. 462. The writ of attachment was a mere incident of the action complained of, but the use made of it aggravated the damages which resulted from the prosecution of said action; and it is settled in this state, by *Eastin v. Bank of Stockton*, *supra*, that the prosecution without probable cause of an unfounded civil proceeding, in which a writ of attachment is not issued, is actionable on the part of any one injured by such a proceeding. One of the essential facts to the maintenance of an action of the kind before us is, as above stated, that the malicious suit terminated in favor of the party against whom it was prosecuted. Were this not so, the plaintiff might recover for the malicious suit, and still have judgment rendered against him in such suit. Now the malicious prosecution complained of in this case did not terminate in favor of plaintiff's firm until June 14, 1887; and, although the record here does not disclose when the original complaint in this case was filed, it does show that the amended complaint was filed November 8, 1887, from which we must infer that the action was commenced on or prior to that date. It is therefore clear that the period of two years prescribed in section 339, subd. 1, of the Code of Civil Procedure, within which actions of this character may be brought, had not elapsed when the amended complaint was filed. *McCusker v. Walker*, 77 Cal. 208, 19 Pac. Rep. 382, and *Sharp v. Miller*, 57 Cal. 431, relied upon by respondents' counsel to show that the cause of action here is barred by the provision of the Code of Civil Procedure above mentioned, do not apply. In the first case, the levy of the attachment complained of was made in an action which was brought by a purchaser of realty at a foreclosure sale against one of the parties to the foreclosure suit, to recover the value of the use and occupation of the realty during the period of redemption, *i. e.*, from the date of the sale until he received his deed from the sheriff. He was entitled to the value of the use and occupation of the premises, (Code Civil Proc. § 707,) but the writ of attachment which he caused to issue and be levied upon some personal property of *McCusker* was illegal; and it was held that, be-

ing illegal, the right of action for damages sustained thereby accrued when the writ was issued and levied, and that, more than two years having elapsed from that time before the action thereon was commenced, it was barred by section 339, Code Civil Proc. The second case is, in effect, the same as the first, and is commented on in it. It is to be observed that in each of those cases the gist of the action was the wrongful issuance and levy of the writ of attachment, while in the case here the gist of the action is the malicious prosecution of an unfounded action, in which, so far as the record is concerned, a writ of attachment might have properly issued.

Section 2461 of the Civil Code, relied upon by respondents' counsel in their second point, reads as follows: "A partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property." This, they claim, is the measure of the surviving partner's power. Under it, he may collect debts only, but may release or compromise claims against the partnership. Now, while the word "debt," in its legal sense, does not, like the word "claim," include a demand for damages arising from a tort, still we think they were used in the above section synonymously, and probably to avoid repetition, and that the term "debt" was intended to have an application as broad as that of the word "claim." It would indeed be strange if a surviving partner could compromise any claim against the firm, but could neither compromise nor enforce one in favor of it. By section 1585 of the Code of Civil Procedure a "surviving partner has the right to continue in possession of the partnership, and to settle its business * * * without delay." The power to settle gives full authority to the surviving partner to do everything that may be necessary to wind up the affairs of the partnership, but he can do nothing which is not indispensable to this end. T. Pars. Partn. 388. The case of *Lawrence v. Martin*, 22 Cal. 174, cited by respondents, simply goes to the point that the claim, being one arising out of a tort, is unassignable. It by no means sustains the proposition that a surviving partner cannot maintain an action on such a claim for damages sustained by the partnership estate.

It therefore follows that the court erred in sustaining the demurrers to the complaint; and we advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrers, and grant defendants leave to answer within the usual time.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrers, and grant defendants leave to answer within the usual time.

UHLHORN v. GOODMAN. (No. 13,422.)

(Supreme Court of California. May 31, 1890.)

LAND CONTRACT—CONSTRUCTION.

Defendant's testator, G., by writing, made R. his sole agent, for 30 days, to sell certain land on certain terms. Within the 30 days, R. gave a contract by which he agreed to convey the land to B. or order on terms different from those authorized by G. This agreement was signed by R. as "grantee" of G. The next day, G. indorsed on the same paper an agreement to deed to R. or order "the herein-described lands" for a certain sum, and on a certain day. Before that day, G. deeded the lands to a stranger. Plaintiff, claiming that B. and P., to whom B. assigned the contract with R., were his agents, and that the contract inured to his benefit, sued G.'s executor for the breach. Held that, in the absence of proof that plaintiff or his agents obtained an order from R. on G. for a conveyance of the land, a nonsuit was properly granted.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; R. CROUCH, Judge.

King & Saufley and Henry Hogan, for appellant. *F. E. Johnston and A. G. Booth*, for respondent.

GIBSON, C. This is an action for damages for breach of contract. July 9, 1887, and prior thereto, the decedent was the owner of 12,800 acres of land in Fresno county. On the date mentioned, he gave to P. Rothermal a writing, (Exhibit A,) by which he was to have the sole privilege, for a certain time, of selling the land referred to, upon certain terms. The material part of the writing is as follows: "San Francisco, July 9, 1887. I hereby give P. Rothermal the sole privilege, for thirty days from date, to sell my lands in Fresno county for \$3 per acre. Terms, cash, or half cash, balance on mortgage at 7 per cent. interest. * * * JAS. H. GOODMAN." July 30, 1887, Rothermal contracted to sell the same land to H. V. Burner or order for the sum of \$44,800, payable in the following manner: \$2,000 were to be deposited by Burner in the First National Bank of San Francisco, there to remain until September 1, 1887, when Burner was to pay the same to Rothermal, through the bank, together with the further sum of \$13,000, and upon such payment being made the latter was to execute a deed conveying a perfect title to "said Burner or his order," and the latter was in return to execute a mortgage upon the same land, in favor of Rothermal, to secure the remaining \$29,000 of the purchase price, which was to be paid one-half in one year, and the other half in two years, from September 1, 1887, with interest on such deferred payments at 7 per cent. per annum. But, in the event of Burner's failure to make the payment of the \$15,000 as stipulated, then he was to forfeit the \$2,000 on deposit to Rothermal. This agreement to sell was signed: "P. ROTHERMAL, Grantee of James H. Goodman." Burner signified his assent to the terms of the agreement, and compliance with the requirement as to the deposit of the sum of \$2,000, by writing and signing the following on the same paper: "San Francisco, August 1, 1887.

I have this day deposited the above two thousand (\$2,000) dollars in the First National Bank of San Francisco, California, with the foregoing contract and receipt; and I hereby concur in and agree to the terms of said contract and receipt. H. V. BURNER." On the next day, Goodman indorsed the following on the same paper: "San Francisco, August 2, 1887. I will deed to P. Rothermal or order the herein described lands on September 1, 1887, on his paying me the sum of fourteen thousand two hundred (\$14,200) dollars, and execute to me a mortgage for \$20,000 for one and two years, with interest at 7 per cent. per annum. JAS. H. GOODMAN." Thereafter, but at what time does not appear, Burner assigned his interest in the contract to J. W. Pearson, and wrote such assignment upon the contract as follows: "I hereby assign all my right, title, and interest in said contract to Jno. W. Pearson. H. V. BURNER." The instrument made up of the foregoing parts is marked "Exhibit B." After Burner assigned his interest in it, it was by Rothermal and the former delivered to one Coffin for Pearson, who deposited it, together with Exhibit A and a certified check for \$2,000, in the bank last mentioned. Goodman, on August 29, 1887, conveyed all the lands described in Exhibit B to one F. P. Hooper. July 3, 1888, Goodman died, leaving a will, which was subsequently admitted to probate; and the defendant was appointed and qualified as the executor of the same. December 26, 1888, plaintiff presented the claim in suit, for \$61,040 damages against Goodman's estate, to the defendant as executor, who rejected it.

Defendant's counsel, at the trial, upon proof of the fact that Goodman had conveyed to Hooper as above stated, admitted that if J. H. Goodman, by a prior conveyance of the land, had placed it beyond his power to transfer the same to plaintiff or Burner or order, no tender of money, or offer to perform the obligations of the contract signed by Rothermal to be performed upon his part, was necessary. There was testimony introduced tending, in a slight degree, to show that Burner and Pearson, to whom the former assigned his interest in the contract, acted as agents for plaintiff in the matter. At the close of plaintiff's case the court granted a nonsuit upon the grounds: *First*, that no liability on the part of the deceased to plaintiff was shown; *second*, that no order from Rothermal to Goodman to convey the land to any one was shown. From the judgment of nonsuit, and an order denying a new trial, this appeal is taken.

Do the instruments above set forth show any liability on the part of Goodman to plaintiff? Plaintiff claims they do—*First*, because Goodman's indorsement on Exhibit B bound him to convey to Rothermal or his order, and the previous agreement of Rothermal to sell to Burner constituted such an order from Rothermal to Goodman to convey to Burner; and, *second*, because Burner and

Pearson acted for him as his agents in purchasing the lands from Rothermal.

The first contention of plaintiff assumes that Exhibit B is, in effect, but one agreement. In support of it, he cites *Ingoldsby v. Juan*, 12 Cal. 573, as a similar case. That case was not at all similar to this. There the husband, instead of joining in his wife's deed in the usual manner, added at the bottom of the deed, and after the certificate of his wife's acknowledgment: "I have read the foregoing, and fully agree with the conveyance made by my wife. LEWIS DEPEAUX,"—which he acknowledged before the same officer that certified to his wife's acknowledgment, and it was held that "this was contemporaneous with, and a part of, the execution of the original deed." It is a well-established rule that several contracts between the same parties, in relation to the same subject-matter, and made as parts of the same transaction, are to be construed together, and is embodied in section 1642 of the Civil Code. But in Exhibit B we have several contracts, each between different parties, made at different times, and upon different terms. The thing contracted about in each, it is true, is the same; but the object of each contract is, however, to sell the same thing for a different price, upon different conditions. By the terms of Exhibit A, Goodman simply authorized Rothermal to find, within 30 days from the date thereof, a purchaser for his land at the price fixed therein. But the latter, assuming to be the vendee of the land, made a contract to sell it to Burner for \$44,800, upon different terms, and within a period beyond the limit provided for in Exhibit A. To place Rothermal, who had exceeded his authority, in a position to execute his contract with Burner, Goodman made and signed the memorandum of August 2d, whereby he agreed to sell the same land to Rothermal or order, on September 1, 1887, for \$34,200, or \$10,600 less than Rothermal had agreed to sell the same land for to Burner. This last agreement of Goodman's superseded Exhibit A, and apparently changed the attitude of Rothermal from that of an agent to sell under said exhibit to that of a vendee of the land. Rothermal's contract with Burner, and Goodman's contract with Rothermal, although written upon the same paper, were as separate and distinct as if written upon separate pieces of paper, and without any knowledge on the part of Goodman of Rothermal's contract with Burner. Each is separate and complete in itself, and needs no reference to the other, except that of Goodman's refers for a mere description of the land to Rothermal's contract with Burner. Goodman, at the time he wrote his agreement to sell to Rothermal, had the latter's agreement with Burner before him, which disclosed to him that Rothermal was to receive \$10,600 more from Burner than he (Goodman) was to get from Rothermal. Goodman was apparently satisfied with the arrangement, and willing that Rothermal should

make as much as he could over and above the sum the latter had agreed to pay to Goodman. There was no other mode, as far as the record goes, provided for to compensate Rothermal for taking the land, and disposing of it. Suppose Goodman had construed Exhibit B to mean that Burner was the assignee of Rothermal's interest in the latter's contract with him, and upon such assumption had conveyed to Burner, for either, the price the latter was to pay to Rothermal, or that he (Goodman) was to receive from Rothermal, and thereby deprive the latter of \$10,600, can there be any doubt but what Rothermal could sue Goodman for a breach of their contract? If this be correct, of which we have no doubt, it is evident, then, that the two contracts were separate and independent from and of each other. Burner's assignment to Pearson of his interest in his contract with Rothermal related to that contract alone, and cannot be extended to embrace Rothermal's interest in the latter's contract with Goodman, upon which he was to earn a profit of \$10,600 out of Burner or his assignee; for it is obvious that a person cannot assign any interest in a contract greater than his own.

Now, it may well be, as suggested by defendant's counsel, that, for aught that appears to the contrary, Goodman, who conveyed the land to Hooper prior to the 1st of September, 1887, the date on which he agreed to convey the same to Rothermal or his order, may have done so pursuant to an order from the latter directing that the land be conveyed to Hooper. This consideration, we think, points the necessity of requiring the plaintiff to show that he acquired a right to the land from Rothermal by an order, or by an assignment of his interest in his contract with Goodman, before he can recover damages for Goodman's failure to convey the land to him. He did not offer any evidence to meet this requirement, and consequently failed to prove any liability on the part of decedent to him on the contract of the decedent with Rothermal. He endeavored to show, however, by the testimony of Pearson and one Brown as to the contents of a certain letter, written by plaintiff to Pearson about the middle of July, 1887, which had been lost, to the effect that he had authorized Pearson and Burner to buy the "Goodman land" for him at a price not exceeding four dollars per acre. The testimony of Pearson on this point was properly stricken out, because it appeared by his own testimony that he was interested in the contract forming the basis of the suit to the extent of a certain commission that he expected; and it further appeared, in like manner, that, after the time plaintiff presented his claim in suit to the defendant as executor of the will of decedent, he acknowledged in writing that he was jointly interested with plaintiff in the contract, for the breach of which damages are sought in this action. Brown's testimony, given its utmost weight and force, at most but slightly tends to prove that Burner and Pearson acted as the agents

of plaintiff in purchasing the land from Rothermal. But, assuming that it does show that fact conclusively, still it does not in the slightest degree tend to establish that plaintiff or either of his agents obtained an order for a conveyance of the land, or an assignment of Rothermal's interest in his contract with Goodman. Plaintiff did not make any different or additional showing upon his motion for a new trial. We think it manifest that the court was justified in granting defendant's motion for a nonsuit, and denying plaintiff's motion for a new trial, and therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(83 Cal. 564)

LATHAM v. CITY OF LOS ANGELES *et al.*
(No. 13,612.)

(Supreme Court of California. April 17, 1890.)

APPEAL—PRACTICE—NOTICE OF APPEAL.

The court will not, in advance of a hearing of the appeal on its merits, decide a motion to dismiss for want of service of notice of appeal on all the adverse parties, as provided by Code Civil Proc. Cal. §§ 938, 940, where the determination as to who are adverse parties necessitates an investigation of the whole case.

In bank. Appeal from superior court, Los Angeles county.

Rearden & Daly and C. McFarland, for appellant. *Chapman & Hendrick and Johnston & Borden*, for respondent.

BEATTY, C. J. This is a suit to quiet title. The decree is that plaintiff and defendant Bigelow own certain separate interests in the property in controversy, and it quiets their title to their respective interests as between themselves and as against the city of Los Angeles. The city of Los Angeles moved for a new trial, but served notice of the motion upon the plaintiff only, and, that motion being overruled, has appealed from the decree "in favor of the plaintiff and against said defendant," (the city,) serving its notice of appeal on the plaintiff only, and omitting to serve its co-defendant, Bigelow. The respondent now moves to dismiss the appeal on the ground that the notice of appeal, not having been served on Bigelow, was not served on all the adverse parties. Code Civil Proc. §§ 938, 940, and Deering's Notes.

We cannot, without going into the merits of the case, see that Bigelow is necessarily an adverse party to the city of Los Angeles on this appeal, or that his interests will be at all affected by a reversal or modification of so much of the decree as is in favor of the plaintiff, and against the city. Of course, on this appeal, there can be no reversal or modification of that part of the decree which is

in favor of Bigelow, but possibly the interest assigned to plaintiff may be held to belong to the city, and the decree may be modified accordingly without in any manner affecting Bigelow. Such a case is certainly supposable, and that is all that need be determined for the purposes of this motion. If it be true, as suggested by counsel, that the peculiar circumstances of this case make any modification of this decree impossible without injuriously affecting the interests of Bigelow, that fact will render the appeal fruitless, but the question cannot be decided in advance of a hearing on the merits. Motion to dismiss overruled.

We concur: FOX, J.; SHARPSTEIN, J. PATERSON, J.; MCFARLAND, J.

84 Cal. 100

MCGEE v. SWEENEY *et al.* (No. 12,713.)

(*Supreme Court of California*. May 7, 1890.)

EQUITY—JURISDICTION—CANCELLATION OF DEED.

Where a court of equity has acquired jurisdiction of the parties, it may declare void a deed to lands located in another state, and compel a reconveyance.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

J. A. McKenna, for appellant. Smith & Murasky, James F. Smith, and Henly, Swift & Rigby, for respondents.

HAYNE, C. This was an action to have a deed to certain property in Pennsylvania declared void, and for a reconveyance. The trial court gave judgment for the plaintiff, and decreed that the defendant, Rosanna McGee, in whom the title stood, should reconvey the property to the plaintiff, and that in default of such reconveyance a commissioner appointed by the court should execute the conveyance. The defendant, Rosanna McGee, appeals upon the pleadings, findings, and judgment; and the principal point made on her behalf is that the court had no power to make such a decree in reference to property outside of the state. It is well settled, however, that a court of equity has power to compel a reconveyance of property outside of its jurisdiction by reason of its control over the parties before it. The only question that can be raised is whether the court had power to cause the title to property in Pennsylvania to be conveyed by one of its officers. But if the court had no such power the conveyance of such an officer would be void on its face. The title would remain in the appellant, and the deed, being void upon its face, would not constitute a cloud. The appellant would not be injured, and cannot complain. If, therefore, the decree be improper in this regard, the error is immaterial.

The point as to the inconsistency of the findings is without merit. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

84 Cal. 207

MATTINGLY v. ROACH (No. 12,825.)

(*Supreme Court of California*. May 31, 1890.)

BROKER'S COMMISSION—SALE—DELIVERY.

1. Plaintiff alleged that he was employed to sell certain mining stock for \$300,000, clear of costs, he to retain the excess, if any, as his compensation; that he discovered a purchaser for \$425,000, and informed his employer, who thereupon repudiated his agreement. He prayed judgment for \$125,000. The court instructed the jury that their verdict must be for the whole amount claimed, or nothing. There was some evidence tending to show a smaller excess. *Held*, that the jury should have been permitted to find for the plaintiff whatever amount, if anything, they believed due him under all the evidence in the case.

2. Mining stock is personal property, and its delivery is governed by Civil Code, § 1754, providing that personal property shall be deliverable at the place where it is at the time of the sale, or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option for its delivery is provided for.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

D. Wm. Douthitt, (Edward J. Pringle, of counsel,) for appellant. John A. Wright, for respondent.

BELCHER, C. C. Plaintiff brought this action to recover the sum of \$125,000, commissions for the sale of mining stocks. The complaint alleges that on the 15th of October, 1882, Thomas H. Blythe executed to the plaintiff two agreements, in writing, whereby he contracted, promised, and agreed that if plaintiff would, within five months thereafter, procure a purchaser for all the capital stock of the Blue Jacket Mining Company, a corporation, who would be willing and ready within that time to pay Blythe the \$300,000 therefor, he would transfer all said stock to such purchaser, so as to vest the title in him free from all incumbrances; that Blythe further agreed in and by his said contracts that all sums exceeding \$300,000, for which plaintiff might sell the said stock, might be retained by him as commissions for his services and expenses in making the sale and procuring a purchaser; that upon the faith of the agreements, and in consideration thereof, plaintiff proceeded to London and other parts of Europe for the purpose of procuring such purchaser, and that, within the time named in the agreements, he procured a purchaser or purchasers of the stock in England who were ready, willing, and able to pay therefor the sum of \$425,000, and that he then contracted and agreed to sell and convey the stock to such purchaser or purchasers for the said sum; that within the time named in the agreements, and long before the expiration thereof, plaintiff, being then in London, by and through his agent in San Francisco notified

and informed Blythe that he had procured such purchaser or purchasers who were ready, willing, and able to take the said stock and pay therefor the sum of \$425,000; that Blythe, at the time of such notification, absolutely refused to make the sale or convey the stock to the said purchaser, and thereupon the plaintiff was compelled to rescind his agreement with the purchaser for the stock so procured in England; that Blythe died in April, 1883, and the defendant was appointed the administrator of his estate; that plaintiff duly presented his claim to the administrator for allowance, but the same was rejected. The prayer is that plaintiff have judgment for the sum of \$125,000, with interest and costs, to be paid out of the estate of Blythe in due course of administration. The answer admits that Blythe made the written agreements referred to, and died at the time alleged, that defendant was appointed administrator of his estate, and that plaintiff's claim was presented and rejected, but denies all the other averments of the complaint. The case was tried before a jury, and the verdict and judgment were for the defendant. The appeal is from the judgment, and an order denying the plaintiff a new trial.

The two written agreements relied upon by the plaintiff were executed by Blythe in San Francisco on the same day, and are to be construed and read together as one contract. By the first instrument, Blythe agreed to sell to Mattingly all the stock of the Blue Jacket Mining Company "at any time within four months from the date hereof," provided Mattingly "shall see fit and elect to purchase the same for the sum of \$500,000, and pay said sum in gold coin of the United States within the period aforesaid." It is also provided, that, if Mattingly should have an expert on the ground of the company before the expiration of the four months, and the expert should report in writing favorably to Blythe, then Blythe would extend the agreement to sell for the further period of two months. And it is further provided that "time is the essence of this contract, and this contract shall close and be at an end on the expiration of said four months." By the second instrument, after referring to the first, it is agreed that Mattingly "may, within the time limited in said agreement, or within the time of any extension thereof, sell the said stock of said company for a sum not less than \$300,000, which shall be paid to the said Blythe in full payment for all of the stock of said company, free and clear of all commissions and expenses of and pertaining to said sale; and all sums for which said stock shall be sold by the said Mattingly in excess of the sum of \$300,000 shall be retained by the said S. Mattingly as commissions for effecting such sale, or, if excess is paid to me, then I will pay said excess to S. Mattingly or his assigns on demand." There is no pretense that Blythe granted any extension of time; and the authority of Mattingly,

under the agreements, consequently expired on the 15th of February, 1883.

It is urged on behalf of appellant that the court erred in the admission of evidence and in its instructions to the jury, and that the judgment should therefore be reversed. On the other hand, it is earnestly contended for respondent that, looking at the whole case, it is plain that the jury could in no event have found for the plaintiff, and hence that the alleged errors were wholly immaterial. It is said that, taking all the testimony introduced by plaintiff, it cannot be seen therefrom that plaintiff ever effected a sale of the stock, or found a purchaser who was ready, able, and willing to take the stock, and pay therefor the sum of \$425,000, or any other sum, and that "the evidence produced by the defendant sets the whole matter at rest, and stamps the action as wholly unfounded." The testimony is somewhat voluminous, and we do not think it necessary to state it at length. It is enough to say that, in our opinion, plaintiff produced testimony tending to sustain his side of the case, and to show that he did find purchasers who were ready, willing, and able to take the stock, and pay therefor the sum of \$425,000 over and above a commission of \$75,000 to be allowed in England, and that Blythe was so informed about the middle of January, and immediately refused to transfer the stock, saying "that the property was more valuable than what he was getting," and that "if the money was in hand he would not accept it." No motion for nonsuit was made, and the case was properly submitted to the jury for its determination as to the facts. This being so, the only question for consideration is, did the court commit errors which were prejudicial to appellant?

At the request of the plaintiff the court instructed the jury that, if they believed the plaintiff found a purchaser who was able, ready, and willing to purchase and pay for the stock at \$500,000, in gold coin of the United States, before the 15th day of February, 1883, and informed Blythe of that fact in season, so that a sale could have been consummated before the day named, and Blythe refused to make the sale, then the plaintiff was entitled to recover the amount sued for, and that in such case the facts that plaintiff's bargain with the proposed purchaser was merely verbal, and that the purchaser did not actually tender the money, were immaterial, if Blythe refused to make a sale, or expressly repudiated his contract with the plaintiff. The court then gave to the jury the instructions asked by defendant, the last of which reads as follows: "At the request of the defendant, I charge you, further, if you find for the plaintiff, you are limited to the amount sued for by him,—that is, \$125,000 and interest,—as he, (plaintiff,) has brought suit upon a special contract to recover all sums for which the stock of the Blue Jacket Mining Company should be sold in excess of

\$300,000, and the plaintiff claims that he sold the property for \$425,000. You are limited to the amount sued for, and your verdict must be, if for the plaintiff, for the whole amount of \$125,000 and interest, or no sum at all." Under this instruction the jurors were compelled to return a verdict for the defendant, unless they should find that plaintiff was entitled to recover the full amount claimed by him, and though they might be satisfied that he was entitled to recover a less amount. But the defendant, against the objections of plaintiff, and upon the statement of counsel that he offered it for the purpose of impeaching plaintiff's testimony in some respects, had been permitted to introduce in evidence, among other things, the verified claim of plaintiff, which was presented for allowance against the estate of Blythe. This claim was for \$125,000; and, after setting out, in substance, the terms of the contract, it proceeded to state: "That this claimant procured a purchaser who was ready and willing to take said stock in England at the price of \$400,000," etc. Now, if from this, or other evidence in the case, the jurors believed that the plaintiff was entitled to recover the sum of \$100,000, or any less sum than he claimed, they should have been permitted to so find; and the instruction to the contrary was therefore misleading and erroneous.

The other alleged errors do not require extended notice. The Code provides that personal property is deliverable at the place where it is at the time of the sale, or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option as to the place of delivery is provided for. Civil Code, § 1754 et seq. The stock of the Blue Jacket Mining Company was personal property, and was in San Francisco at all the times named in the complaint. Blythe never agreed to send the stock to Mattingly, or gave him any option as to the place of delivery. It was therefore to be delivered and paid for in San Francisco, and the instructions upon that subject were proper. Of course, when Blythe repudiated his contract, if he did repudiate it, it was not necessary for the plaintiff to take any further steps towards sending or tendering the money to him. And, as to the admission of evidence, it is not clear to us that the court erred in this respect; and, if it did, the errors will probably not be repeated on a new trial. It is not necessary, therefore, to consider them further. For the errors above mentioned, we think the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: GIBSON, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

Ex parte MCCONNELL. (No. 20,662.)

(Supreme Court of California. April 11, 1890.)

CRIMINAL LAW—SETTING ASIDE INFORMATION—HABEAS CORPUS.

In a prosecution for burglary, the objection that the information was filed without a previous preliminary examination and commitment can only be made by a motion to set aside before the trial. Pen. Code, § 995. After conviction, it cannot be urged for the first time in a proceeding on *habeas corpus*.

In bank. *Habeas corpus*.

Hugh J. & Wm. Crawford, for petitioner.
Geo. A. Johnson, Atty. Gen., for respondent.

BEATTY, C. J. The petitioner, who has been tried and convicted upon an information charging him with the crime of burglary, seeks to be discharged from imprisonment in the state-prison under said conviction upon the ground that he was not examined or held to answer by a magistrate prior to the filing of the information. It is too late, after conviction, to raise this objection in a proceeding upon *habeas corpus*. It should have been taken by motion to set aside the information before trial. Pen. Code, § 995. The filing of the information gave the court jurisdiction to proceed in the case, and the section of the Code cited provides the exclusive method of trying the question whether the information was founded on the necessary preliminary examination and commitment. No objection to the information having been made at the proper time, the superior court properly proceeded with the trial. Its judgment is regular and valid, and the imprisonment of the petitioner is lawful. Writ discharged, and prisoner remanded.

We concur: FOX, J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

84 Cal. 441

PEOPLE v. WOODS. (No. 20,577.)

(Supreme Court of California. June 10, 1890.)

CRIMINAL LAW—VOID JUDGMENT—FORMER JEOPARDY.

On a conviction of grand larceny, an order granting a new trial, was, upon appeal, reversed. The trial court, however, was deceived into believing that an order denying a new trial had been reversed, and thereupon accepted a plea of guilty of petit larceny, inflicted a fine, and discharged defendant. Afterwards, discovering the deceit, the court set aside the judgment, ordered the money returned, caused defendant to be rearrested, and entered judgment upon the verdict. *Held*, that this judgment was valid, since the plea of guilty of petit larceny was void, and defendant had never been in jeopardy thereon.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Eugene N. Deuprey, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. This appeal is from a judgment of conviction of a felony, and an order denying a new trial. The defendant was in-

dicted for grand larceny, and convicted as charged. The trial judge then granted a motion for a new trial. An appeal was taken from the order made in that behalf, and the appellate court reversed the order. Upon the going down of the *remittitur*, the only duty to be performed by the trial court was to render judgment upon the verdict. Instead of doing this, that tribunal was deceived into the belief that the appellate court, instead of reversing an order granting a new trial, had reversed an order refusing a new trial, and that there was no sufficient evidence which could be obtained to convict the defendant, and permitted the plea of not guilty to be withdrawn, and a plea of guilty of petit larceny to be entered. It also appears that, upon such last plea being entered, the court rendered judgment sentencing the defendant to pay a fine of \$100, which fine was paid, and the defendant discharged from custody. Six days after the entry of this judgment, the court, discovering the deceit which had been practiced upon it, set aside the judgment, and ordered the defendant's money to be returned to her which she had paid as a fine. It also ordered a bench-warrant to issue for her arrest, and fixed a day for sentence. A very considerable period of time elapsed between the date of the order setting aside the judgment for the payment of the fine, and that of the day on which the judgment now appealed from was made and entered.

It is very evident that, when the appellate court reversed the order granting a new trial, the only duty left for the performance of the trial court was to render an appropri-

ate judgment and sentence upon the verdict which the jury had returned of guilty of grand larceny, and which the appellate tribunal, by its action, had upheld. The trial court then had no jurisdiction to entertain any other plea than that which had been passed on by the jury, and it appears from this record that its action would have been in accordance with this view had it known the condition of the cause. But, being deceived into the belief that the case stood for retrial, it permitted a plea to be entered which, in such a *status* of the case, had it existed, it would have possessed the power and jurisdiction to do. As the trial court had no jurisdiction to entertain or allow such a plea to be entered, and no power to render judgment on such a plea, but only power, in obedience to the ruling of the appellate court, to make and enter its judgment and sentence on the verdict of the jury as returned by that body, it follows that the judgment on the plea of guilty of petty larceny was null and void, and was properly set aside as such. That being the case, the defendant was never in jeopardy, so far as the proceedings based upon that plea were concerned, and judgment was properly rendered on the verdict of guilty returned by the jury on the trial for grand larceny. For these reasons, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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T. H. Laine, for appellant. *Atty. Gen. Geo. A. Johnson*, *D. W. Burchard*, and *C. L. Witten*, for the People.

HAYNE, C. The defendant was convicted of arson in the second degree, and appeals from the judgment and from an order denying a new trial.

1. It is contended that there was not sufficient evidence to support the verdict. There was, however, the direct evidence of a person who says that he set fire to the house by the direction of the defendant, and in his presence. It is urged, however, that this was the testimony of an accomplice, and that there was no sufficient corroboration. See Pen. Code, § 1111. There is no doubt that the cabin was destroyed by fire, and no probable natural cause of the fire was shown by the evidence. The question is whether the defendant had a guilty connection with it. The circumstances to corroborate the accomplice upon this question are as follows: In the first place, there was a difficulty between the defendant and the owner of the cabin, concerning the land upon which it stood. This land was public land, and each party claimed to have taken such proceedings as entitled him to it. Some angry interviews took place between them, and on one occasion the defendant was quite roughly handled by one of the workmen of the owner of the cabin. In the next place, the defendant made contradictory statements concerning his whereabouts on the night of the fire. And, finally, there is evidence tending to show that he took measures to get the accomplice to leave that part of the country, and wrote to his mother to "keep Bill out of the way for a while, till the trouble blows over," although the letter did not state what the trouble was. These circumstances constitute, in our opinion, evidence tending to show the defendant's guilty connection with the burning of the cabin, which is the material point requiring corroboration. The evidence is not strong. But, although more is required by way of corroboration than to raise a mere suspicion, (see *People v. Thompson*, 50 Cal. 480,) yet the corroborating evidence is sufficient if it of itself tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration, (*People v. Melvane*, 39 Cal. 616; *People v. Clough*, 73 Cal. 351, 15 Pac. Rep. 5.) Judge **SPENCER**, in his opinion on the motion for new trial, gave a careful analysis of the evidence, and declared that he was "entirely satisfied with the verdict;" and we do not think that it can be disturbed upon the ground mentioned.

2. During the trial the defendant moved to strike out certain evidence. The court denied the motion upon the statement of the district attorney that he would show its relevancy by other evidence, but gave the defendant leave to renew his motion at a subsequent stage of the trial. The district attorney failed to introduce the other evidence, and the defendant renewed his motion, which was granted. It is argued that the court ought to have grant-

84 Cal. 480

PEOPLE v. McLEAN. (No. 20,629.)

(*Supreme Court of California.* June 11, 1890.)

ARSON—CORROBORATING EVIDENCE—INSTRUCTIONS.

1. A witness testified that he set fire to a house by defendant's direction, and in his presence. No probable natural cause was shown for the fire. The house stood on public land claimed by both defendant and the owner of the house, and there had been several quarrels about it, in one of which defendant was severely handled. Defendant made contradictory statements as to his whereabouts the night of the fire, and there was evidence tending to show that he tried to get his accomplice to leave the country. *Held*, the corroborating evidence was sufficient, under Pen. Code Cal. § 1111, to sustain the verdict of guilty of arson in the second degree.

2. Where a motion to strike out irrelevant evidence was temporarily denied upon the district attorney's assurance that he would produce connecting evidence, and was granted upon his failure to do so, there was no error.

3. Defendant cannot complain of an omission to caution the jury as to this proceeding, when he did not ask for such caution.

4. By Pen. Code Cal. § 1093, subd. 6, it is made illegal to charge the jury concerning matters of fact; but where the court, during the charge, addressed itself to the attorneys, and, as justifying the charge, stated that in its opinion the evidence tended to prove certain facts, there was no error.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; **F. E. SPENCER**, Judge.

ed the motion in the first instance, and that, when the evidence was finally stricken out, a caution concerning it should have been given to the jury. But it is usual, and quite proper, for a court to accept the statement of a reputable counsel as to what he will show, and upon the faith of such statement to temporarily refuse to strike out evidence that has been introduced, or to admit evidence offered; and, if the defendant had desired any caution to be given to the jury, he should have asked for it. The failure of a court to charge on any point usually proceeds from inadvertence, and the law casts upon the parties the duty of calling the judge's attention to the matter by a formal request for an instruction in relation to it. *People v. Haun*, 44 Cal. 96; *People v. Rodondo*, Id. 541; *People v. Ah Wee*, 48 Cal. 237; *People v. Collins*, Id. 277; *Chamberlain v. Vance*, 51 Cal. 84; *Williams v. Insurance Co.*, 54 Cal. 449.

3. At the close of the case for the prosecution the defendant moved for a discharge upon the ground that the evidence was not sufficient to go to the jury. In ruling upon this motion the court stated certain facts which, in its opinion, the evidence tended to prove; and it is objected that this was a violation of the provision that the court shall not charge a jury with respect to matters of fact. But the language complained of was not addressed to the jury, or intended for their guidance. It was merely a statement to counsel of the reasons or grounds of the ruling. And it contained no reflection upon the defendant, or anything which was not called for by the motion made by him. Under these circumstances, we think that there was no error. *Reed v. Clark*, 47 Cal. 200. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

84 Cal. 31

PEOPLE v. FERRY. (No. 20,611.)

(Supreme Court of California. May 3, 1890.)

CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS.

1. An instruction to the jury, after defining "reasonable doubt," and declaring that their opinion of guilt of the accused must "approach absolute conviction," concluded as follows: "They [certain crimes] ought to be punished when they are proved, gentlemen, to your satisfaction; and, if not so proved, whatever suspicion there may be, he is entitled to an acquittal, unless you seriously believe him guilty." *Held*, that the language is doubtful and uncertain, and authorized the inference that the jury might convict if they believed him guilty, regardless of the proof, and that it is not in accord with Pen. Code, § 1096 and Code Civil Proc. § 2061, subd. 5, providing that the evidence shall satisfy the jury of the guilt of the defendant beyond a reasonable doubt.

2. Where the assignment of error in charging the jury differs from the charge itself, as particularly set forth in the bill of exceptions, the latter will ordinarily control.

In bank. Appeal from superior court, city and county of San Francisco; *J. McSHAFFER*, Judge.

v.24r. no.1—3

John Flournoy, for appellant. *J. D. Page*, Dist. Atty., for the People.

THORNTON, J. The defendant was accused by information of the crime of robbery, was convicted, and prosecutes this appeal to this court from the judgment and from an order denying his motion for a new trial. Several questions are made on the charge, among others this portion: "You must be satisfied beyond a reasonable doubt. What a reasonable doubt is depends upon definition. It must be such a doubt as nearly approaches conviction, —I mean, the opinion of his guilt must nearly approach what is called 'absolute conviction.' It must approach it nearly; but, if it satisfies you to that extent so that you can settle back upon the consideration of the man's guilt, and believe the guilt, and, under a rational examination of the testimony, your mind recurs back to that conclusion that he is guilty, and abides there, that is sufficient to satisfy you. It is not necessary for me to comment about the value of this testimony or that testimony, nor upon the fact that your town is infested by villains; it may be so, it may not be so, so far as we know here; nor to instruct you that this class of offenses ought to be punished. They ought to be punished when they are proven, gentlemen, to your entire satisfaction; and, if not so proved, whatever suspicion there may be, he is entitled to an acquittal, unless you seriously believe he is guilty." It is provided by section 1096 of the Penal Code that "a defendant in a criminal action is presumed to be innocent until the contrary is proved; and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." By section 2061, Code Civil Proc., subd. 5, it is provided "that in civil cases the affirmative of the issue must be proved; and, when the evidence is contradictory, the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt."

We premise what we have to say on this assignment with the remark that we consider the sentence, "It [referring to reasonable doubt] must be such doubt as nearly approaches conviction," as withdrawn from the charge by the next sentence, which is, "I mean the opinion of his guilt must nearly approach what is called 'absolute conviction.'" The law does not justify a jury in convicting a defendant of a felony without being convinced of his guilt. There must be a conviction of guilt before there can be a conviction of defendant. It is not sufficient that it should approach conviction. There must be a conviction of guilt in the minds of the jury to justify a verdict affirming guilt. It is said in the charge it must approach "absolute conviction." Is there any difference between "conviction" and "absolute conviction?" Do they mean the same thing? The word "absolute" came originally from the Latin, and means to "loose from." Webster gives many meanings to the word, as, *inter alia*, "completed, or regarded as complete; finished; perfect; total; as absolute perfection; absolute beauty. (2)

Freed or loosed from any limitation or condition; uncontrolled; unconditional. (3) Positive; clear; certain." (6) "Unconditioned; unrelated." We think there is a difference, and that absolute conviction means conviction beyond a possibility of doubt, which the law does not require a jury to attain to render a verdict against a defendant. It is said in *People v. Padilla*, 42 Cal. 540: "The truth of any fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth." Certainly, if it can or cannot be established beyond the possibility of a doubt, it need not be so established in order to justify a verdict of guilty against a defendant. In this connection may be noted the remarks on the import of the word "absolute" in *People v. Davis*, 64 Cal. 440, 1 Pac. Rep. 889, in which case it was held "that absolute moral certainty was a greater degree of certainty than moral certainty." In *People v. Strong*, 30 Cal. 154, an instruction asked by defendant on the point of reasonable doubt, or one cognate, containing the words "absolute moral certainty," was said to be substantially and almost literally in the language of the books which treat of the subject, referring to *Burrill on Circumstantial Evidence*, 181, 182, and to 1 *Starkie*, Ev. 482, 483, 510. In this the court probably went too far; but, as the instruction was given at defendant's request, it furnished no ground for reversal. In *Davis' Case* it was asked by defendant, and the court held the refusal proper on the ground above stated.

There was no error, then, in the direction to the jury that their opinion must approach absolute certainty; that is, a conviction so perfect, complete, and unconditioned as to exclude the possibility of a doubt. Now we cannot say but that the remainder of the charge on this point, taken together, down to and including the words "entire satisfaction," presented the law fairly to the jury. Adverting, now, to the last clause of the charge on this point, that is in these words, "and if not so proved, whatever suspicion there may be, he is entitled to an acquittal, unless you seriously believe he is guilty,"—this must be connected with what precedes it. The jury had just been told, "They [referring to the class of offenses for one of which the defendant was on trial] ought to be punished when they are proved, gentlemen, to your entire satisfaction." Then follows the last clause. The jury was told, in effect, that the guilt of the accused must be proved to your entire satisfaction, unless you seriously believe he is guilty. If this means that the jury was authorized to convict the prisoner on evidence which did not prove his guilt to their entire satisfaction, then the direction is an error. If it required more than such evidence, it is also an error. Can it be affirmed of these words that the latter portion did not require more or less than was legally requisite? The word "seriously" in its connection is at least of doubtful import. It may mean more or less evidence than that indicated by the words "proved to your entire satisfaction." Take the word "seriously" in any of the meanings attributed to it by

lexicographers, it leaves its signification in its connection here ambiguous and doubtful. See Webster's, Stormouth's, and Imperial Dictionaries. How would a jury construe these words? Could they not justly say: "If we gravely or earnestly or solemnly believe the accused guilty, we can so adjudge him, although he is not proved guilty,—although the testimony does not establish his guilt to our entire satisfaction?" The words used, in our opinion, may be justly so construed. We are therefore of opinion that the qualifying clause above cited sets forth to the jury a criterion too doubtful and uncertain for them to act on in passing on the liberty of the citizen, and not clearly conveying a meaning in accord with the rule laid down in our law, that the evidence shall satisfy the jury of the guilt of the defendant to a moral certainty, and beyond a reasonable doubt. We are satisfied that the instruction in the record thus pointed out is erroneous.

The last assignment of error relates to a portion of the charge which, though in our judgment just on the verge of error, yet should not be held erroneous. The other assignments of error are not well taken. Two sentences appear in the assignment of this error at the end of what is set forth in it, as a portion of this charge of the court, which are not a portion of the charge. The charge is given *verbatim* in an antecedent portion of the bill of exceptions. No such sentences appear in the charge as it is thus inserted. In considering the last assignment of error we do not consider these two sentences. We are not certified that the jury was directed, as stated in the sentences referred to. In fact, the proper construction of the bill of exceptions compels this course. Although assignments of error constitute a part of the bill, and the whole bill is authenticated by the signature of the judge, yet it would be unfair to hold that these words in the assignment were seen by him, when in that portion of the bill where the charge appears no such words are found. It might be expected that the judge would examine the bill to see that the charge was correctly given, and, finding it so, would conclude that the assignments of error were in accord therewith. A judge would rarely, under such circumstances, examine the assignments of error to see if they accorded with his charge. As a general rule, when the assignments of error differ from the charge as particularly set forth in a bill of exceptions, the charge as set forth should control.

For the error above pointed out the judgment is reversed, and the cause remanded, that a new trial may be had. So ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; FOX, J.

I concur in the judgment: PATERSON, J.

84 Cal. 304

In re KEENBY. (No. 20,660.)

(Supreme Court of California. June 7, 1890.)

BURIAL PERMITS—VALIDITY OF ORDINANCE.

Order No. 2,162 of the board of supervisors of the city and county of San Francisco which de-

clares it a misdemeanor for the health officer to issue burial permits on certificates of death signed by midwives, or any others than legally qualified physicians, except in certain cases, when they may be signed by the coroner, or a physician authorized by him, is void as in conflict with the general law, (Pol. Code Cal. § 3025,) providing that the health officer may issue such permits on certificates signed by a physician, midwife, or coroner.

In bank. On application for *habeas corpus*.

Curtis H. Lindley and *Henry Eickhoff*, for petitioner. *Spencer & McEnerney*, for respondent.

Fox, J. Petitioner, who is health officer of the city and county of San Francisco, is arrested and held under a warrant issued out of the police court of said city and county, upon a complaint charging him with misdemeanor, for that he, "as such health officer, did grant and issue a permit to deposit the body of said Ah Tin in the city cemetery, in said city and county of San Francisco, and to inter said body in said city and county without requiring, receiving, or obtaining or filing, and without the issuance of, the certificate of the death of said Ah Tin, signed or issued by an attending physician or by the coroner of said city and county of San Francisco, or by a physician authorized by the coroner to grant a certificate of death, thereby violating the provisions of order No. 2,162 of the board of supervisors of the city and county of San Francisco." Order No. 2,162, referred to, is entitled as an order "regulating the granting of certificates of death, and the issuance of permits for interments." It provides that no person shall deposit in any cemetery, or inter in said city and county, any human body without first having obtained and filed with the health officer a certificate of death, signed by a legally qualified attending physician, * * * nor without having obtained from said health officer a permit to deposit or inter said human body; that if there be no attending physician, or he be absent, such certificate may be issued by the coroner, or by a physician authorized by the coroner to grant such certificates; that in case of death in maternity homes, lying-in hospitals, or other similar institutions, the certificate shall be issued only by the coroner, or a physician authorized by him to grant certificates of death; that no permit to deposit or inter shall be granted or issued by the health officer until he shall have received the certificate of death required by the order; and that any violation of the provisions of the order shall constitute a misdemeanor, punishable by fine of not more than \$500, or by imprisonment not more than six months, or by both such fine and imprisonment.

On the part of the people it is claimed that the passage and enforcement of such an order is fully authorized by article 11, § 11, of the constitution, which reads: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Although "cities and counties" are not mentioned in this section, this and all other provisions of the consti-

tution, not inconsistent or prohibited to cities, are made applicable to consolidated cities and counties by section 7 of the same article.

On the part of the petitioner it is claimed that the provisions of this order are in conflict with the provisions of sections 3012, 3025, and 3084 of the Political Code, and of section 377 of the Penal Code, all of which are general laws, and that, in so far as the provisions of the order do conflict with these general laws, they are unauthorized and void. That they are unauthorized and void, if such conflict exists, cannot be doubted. All these sections of the Political Code are found in title 7 of part 3. That title is in relation to the "general police of the state." Chapter 2 of the title relates to "preservation of the public health," and article 3 of that chapter relates to "health and quarantine regulations for the city and harbor of San Francisco." This article consists of sections 3004 to and including 3035. Section 3005 provides for a board of health for the city and county of San Francisco, to consist of the mayor and of four physicians, to be appointed by the governor, to hold office for five years. Section 3007 provides for the appointment, by the board, of a health officer; and section 3008 makes him the executive officer of the health department. Section 3012 reads as follows: "The board of health have general supervision of all matters appertaining to the sanitary condition of the city and county, including the city and county hospital, the county jail, almshouse, industrial school, and all public health institutions provided by the city and county of San Francisco; and may adopt such orders and regulations, and appoint or discharge such medical attendants and employees, as to them seems best to promote the public welfare; and may appoint as many health inspectors as they deem necessary in time of epidemics." So much of section 3025 as needs to be considered here reads as follows: "No person shall deposit in any cemetery, or inter in the city and county of San Francisco, any human body, without first having obtained and filed with the health officer a certificate, signed by a physician or midwife or a coroner, setting forth, as near as possible, the name, age, color, sex, place of birth, occupation, date, locality, and the cause of death of the deceased, and obtain from such health officer a permit; nor shall any human body be removed or disinterred without the permit of the health officer or by order of the coroner." It is very clear that by this article the legislature has undertaken, as a part of the provisions of the general law "relating to the public health," and through a local department of the state government, to wit, a board of health for the city and county of San Francisco, all of the members of which, except the mayor of the city and county, are appointed by the governor, to manage and control certain—we do not say all, but certain—of the sanitary regulations of the city and county, and contiguous harbor of San Francisco; and by section 3025 has particularly undertaken to manage and control the condition and terms upon which permits

for the interment of human bodies within said city and county may be issued, and by whom. So much of section 3005 as prescribes the term of five years for the officers of the board appointed by the governor has been declared to be unconstitutional, (*People v. Perry*, 79 Cal. 105, 21 Pac. Rep. 423;) but it was expressly held that this did not affect the validity of the balance of the act.

It follows that any order or ordinance, or provision of any order or ordinance, of the municipality, which conflicts with the provisions of this general law, is prohibited and forbidden to the municipality, and is unauthorized, and void. Is there a conflict between the provisions of this order and of the general law? We think so. The order punishes the health officer as for misdemeanor if he issues a burial permit upon the certificate of any person other than a legally qualified attending physician, except that if there was no legally qualified attending physician, or if there was such, and he be absent, thus making it the duty of the health officer at his peril to ascertain and determine these facts before he can accept any other certificate, he may accept the certificate of the coroner, or of a physician authorized by the coroner in writing to grant such certificates: and with the one further exception, that if the death occur in a maternity home, lying-in hospital, or other similar institution, and no matter whether the death be of a patient or of a servant, a stranger who has happened to call, a male or a female, he must ignore even the "legally qualified attending physician," and all other persons licensed by the state to issue certificates of death, and issue his permit only on the certificate of the coroner, or of a physician authorized by that officer to issue such certificates. Section 3025 in express terms authorizes, and by necessary implication makes it his duty, to issue such permit upon the certificate of a physician, a midwife, or a coroner. He has no right, under the general law, to force a party seeking a permit to hunt up some favorite of the coroner to get such a certificate, or to refuse the certificate of a physician or a midwife, whether such physician holds the license of the coroner or not. The order, therefore, punishes him for doing what the general law not only authorizes, but requires him to do. It is no answer to this to say that the object of the order is to shut out the certificates of impostors and dishonest persons practicing as physicians and midwives. To be eligible to the place, the health officer must himself be a graduate of a medical college in good standing, residing within the limits of the city. He is the executive officer of an important department of the state government, bound to know, and in his department to execute, the law. Under the law no person is entitled to practice medicine, or to be recognized by the officers of the law as a physician, unless licensed as such by the state. It is the duty of the health officer to know, and the law presumes that he does know, and that he acts upon that knowledge, whether a person who issues a death certificate presented to him is a physician or not.

The law also recognizes the fact that there is a profession called "midwife," and imposes upon midwives certain duties, both as to deaths and to births. Pol. Code, §§ 3024, 3075. It has not only granted to them the right to issue death certificates, (section 3025,) but it compels them to report deaths to the health officer in San Francisco, (section 3024,) to keep a registry of births and deaths occurring in their practice, (section 3075,) and to report the same to the county recorder, (section 3077.) The last requirement possibly does not apply in San Francisco, where they are required to make such report to the health officer, and he to file their reports in the office of the county recorder. If ample provision is not already made to protect the public against imposters in that profession, no doubt it may be done in that as in the other. But so long as the general law recognizes it as a legitimate profession or calling, and authorizes the health officer to grant burial permits on midwives' certificates of death, he cannot be punished as for a crime for so granting them. Section 3084 of the Political Code is a part of chapter 3 of title 7, above referred to,—a different chapter from that to which the article belongs which we have been considering. That chapter relates to the "registry of births, marriages, and deaths," and generally, as to its provisions, has no application to the city and county of San Francisco. It is claimed on the part of the people that the section referred to, like the balance of the chapter, has no application to this municipality. Without finally deciding that question, for we do not deem it necessary to decide it in this case, it is sufficient to say that, if it does apply to this city and county, the order is in conflict with its provisions, equally with those of section 3025. But it is also claimed that if section 3084 does not apply to San Francisco, then there is no law for punishing the health officer for issuing a burial permit without the proper certificate; and an ordinance prescribing a punishment for that act is not unauthorized. This contention is based upon the fact that section 377 of the Penal Code, as amended in 1889, provides a punishment only for violations of the provisions of chapter 3, tit. 7, of the Political Code, and that section 3084 is the only one of the sections with which it is claimed that the order conflicts which belongs to that chapter. It is true that in amending the section, in 1889, the legislature has so changed the form of section 377 of the Penal Code as to make it apply only to violations of the provisions of chapter 3 of the title of the Political Code referred to. But we cannot concede that his change has left the state without a law for the punishment of this officer for misfeasance or malfeasance in office. Under any reasonable construction of the general law, it is his duty, before he issues his permit, to demand, receive, and file the proper certificate of death prescribed by the statute. Upon its receipt it is equally his duty to issue the permit. For a violation of his duty in either of these respects, he is liable to be proceeded against for removal from office under the proper statutes, and is punishable for misdemeanor under section

378 of the Penal Code; or, in the absence of that section, he would be equally punishable under section 176 of the same Code.

Holding, as we do, that the order, in so far as it attempts to punish the health officer for granting permits upon certificates authorized by general law, is in conflict with the general law, and void, it follows that the complaint, which is based on the order alone, fails to state facts constituting a public offense, and the prisoner must be discharged. So ordered.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; WORKS, J.

84 Cal. 142

NORRIS v. MOODY *et al.* (No. 12,400.)

(Supreme Court of California. May 12, 1890.)

EJECTMENT—GRANTS—CONDITIONS—LIMITATIONS.

1. Plaintiff in ejectment claimed under a grant from the alcalde of a pueblo, dated in 1847, and expressed to be on condition that grantee make certain improvements within a year, which were never made, nor did he ever take possession. *Held*, that under the civil law in force prior to April 13, 1850, the grant was absolutely forfeited by the non-performance of the conditions.

2. Where the land in suit was confirmed to the pueblo, by final decree, in 1866, and was then conveyed to defendant, and the action was not brought till 1885, one year after patent issued by the United States government, it is barred, under Code Civil Proc. Cal. 1873, § 318, granting five years in which to sue, whether plaintiff claims under Spanish grant or not.

In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

A. L. Rhodes and John Reynolds, for appellants. T. H. Laine, for respondent.

Fox, J. Action in ejectment. Judgment for plaintiff, from which defendants appeal. There are two controlling points in this case, upon each of which, we think, the court below erred in its conclusion of law. The material facts, as found by the court and conceded by counsel, are these: The land in controversy is a lot in the city of San José, found and conceded to be within the exterior boundaries of the lands finally confirmed, and subsequently patented, to said city, as the successor of the pueblo of San José de Guadalupe. The lot is 50 *varas* square, known as lot 3, in block 1, range 8, and was granted by the alcalde of the pueblo, July 12, 1847, to Leo Norris, upon the express condition subsequent, stated in the grant, "that said Leo Norris will fence said lots with a redwood fence, or erect a dwelling-house thereon, on or before the expiration of twelve months from date." On the 24th of May, 1882, Leo Norris made a deed, purporting to convey the lot to William H. Norris, the present plaintiff. Neither the said Leo Norris, nor any one in his behalf, or claiming under him, ever had the actual possession of said lot, or made any improvement thereon. On the 27th of October, 1857, one Warren, claiming to be the owner of the lot, conveyed the same to Ransom G. Moody, who immediately went into possession, and thereafter continued in the open, notorious, actual, exclusive, and adverse possession of the same, claiming title thereto in fee against all the world, and on the 2d day of October, 1866, the mayor

and common council of the city of San José, being then duly authorized by law to make conveyances of lands belonging to the city, executed and delivered to said Moody a deed of "remise, release, and quit-claim," purporting to convey said lot to him in fee. Said Moody and his successors in interest have ever since continued in the actual, open, notorious, exclusive possession of the said lot as before, and of the whole thereof, claiming title thereto in fee against the whole world, and paying the taxes thereon. The present defendants are the successors in interest to the title and possession of said Moody.

There is no dispute that there was an entire failure to perform the condition subsequent, upon which the grant to Leo Norris was made. The first question is whether the breach of that condition subsequent, of itself, revested the title in the pueblo, or its successor, so as to enable it to pass title by a subsequent grant, without denoucement under the civil law, or office found under the common law. Under the common law it may be conceded, without argument, that the mere breach of the condition would not revest the title so as to authorize a subsequent grant, without office found. But this grant to Norris was made under the civil law, July 12, 1847. That civil law continued to be "the law of the case," that is, the law governing this grant and its condition, until April 13, 1850,—the date of the adoption of the common law,—almost two years and nine months after the date of the grant, and one year and nine months after the breach of the condition was complete. In the early history of this state this court had occasion several times to consider this question of the necessity of denoucement, in order to revest title and authorize a reconveyance. One of the cases in which that question was discussed was *Vanderslice v. Hanks*, 3 Cal. 27. That was a case of the grant of a rancho direct from the Mexican government to the grantee,—a natural person. There was no limitation of time within which the condition subsequent was to be performed. The court held, and very properly, that a reasonable time must be allowed; that a reasonable time would depend upon the character of the grant and of the condition, and upon all the circumstances of the case; and, applying the rule laid down by Blackstone, (2 Bl. Comm. 157,) that if the conditions after the grant became impossible by the act of God, or the act of the feoffor himself, or were contrary to the law, or repugnant to the nature of the estate, the condition was void, and the estate vested. It was further held that as in that case there had been no denoucement by the Mexican government, that before a reasonable time had elapsed within which to perform the condition, the Mexican government (the feoffor) had become embroiled in a war with the United States, resulting in the conquest of the country by the latter, rendering it no longer possible to perform the condition, the estate had vested, notwithstanding the non-performance. In the subsequent case of *Touchard v. Touchard*, 5 Cal. 307, the court, in referring to the case of *Vanderslice v. Hanks*, gave as a

further reason for the ruling in that case that by express decree of the Mexican government, denouncement was the mode of taking advantage of the non-performance of subsequent conditions in cases of grants made by the government itself. But it further held that as to grants made by municipal corporations they must be construed in the same manner as those of natural persons, and that as a private natural person can grant lands upon conditions subsequent, and upon their non-performance resume the ownership, a municipal corporation can do the same. But it is claimed by respondent, and was so held by the court below, in an opinion filed in the case, that *Touchard v. Touchard* has been overruled, and is no longer authority for any purpose. This contention is founded upon the decision in the case of *Holliday v. West*, 6 Cal. 525. That case discusses, but does not in terms, nor do we think it does in legal effect, overrule, *Touchard v. Touchard*. Referring to the last-named case the court said: "In that case a subsequent grant of a lot by a municipal corporation was held valid against an older grant on the ground of the non-performance of the conditions by the elder grantee. The only question made there in favor of the first grant was that the Mexican law, which then prevailed, required the proceeding of denouncement before there could be a legal forfeiture of the grant. But we held that that proceeding only applied to grants made by the government, and was totally inapplicable to the contracts of private individuals. A denouncement was never made by the grantor, but always by some person who desired to obtain the land for himself." The fact affirmed and emphasized in the quotation just made is important to be borne in mind in our consideration of this contention of respondent, viz., that the question now under consideration in this case was the direct and only one involved in *Touchard v. Touchard*. The court then proceeds to discuss further and anew the question considered in the former case. It says: "The respondents insist, and so it was held by the district court, that in order to invalidate the first grant there must have been a re-entry by the grantor, or some other notorious act, in order to show the intention by the grantor to forfeit the grant and resume the estate upon the ground of the non-performance of the conditions, and that the subsequent grant is no proof of such intention. This position would be unassailable if we were at liberty to apply the principles of the common law to this case, but the facts all arose before the adoption of the common law, and must be governed by the rules of the civil law." And after some discussion of the civil law it says: "We discover no rule whatever at the civil law answering to the common-law doctrine of re-entry to produce a forfeiture. It does not follow, however, that that system was destitute of principles which to an equal extent were potent to secure and enforce the rights of litigants in like cases. And so we find that instead of an unbending rule, which disregards material clashing circumstances, each case was determined according

to its own facts by those principles which every system would admit to be the immutable laws of right and wrong." Acting upon that principle of the civil law, the court proceeded to examine the case before it, and found that the lot in question had been granted in 1843 to one Bee; that he commenced in good faith to comply with the condition, a condition usual to such grants,—that of building a house within one year; (the breaking out of a revolution checked the progress of his building before it was completed;) that all during the war, and even after the conquest, the lot was recognized as Bee's lot; that in January, 1847, one Pell applied to the new alcalde for a grant of the lot, representing it as vacant, and secured a grant, but he never went into possession, and his grant was subsequently lost without having ever been recorded; that in 1849 the holders of the Bee title went into possession, when Pell undertook the recovery by suit, but was unable to do so; that in 1847 the alcalde found that he had been making mistakes in granting lots of which there were already outstanding grants, and he notified the parties in interest to appear and have their grants adjusted. Pell failed to appear, but Bee appeared, and had possession redelivered to him. Under these circumstances the court held that Bee's title had never been forfeited.

Under the course of procedure and rulings of the court in this case we fail to see how it can be held that this decision, either in terms or legal effect, overruled the case of *Touchard v. Touchard*. And yet the court did say, in *Hart v. Burnett*, 15 Cal. 599, that *Touchard v. Touchard* had been overruled in *Holliday v. West*, as to the only point really involved or decided in the case, and we are now asked to apply to that statement the doctrine of *stare decisis*. But *Hart v. Burnett* furnishes us the very best of reasons why we should not make such an application of the rule. In that case (page 598) the court says: "A decision is not even authority, except upon the point actually passed upon by the court and directly involved in the case. But even then the mere reasoning of the court is not authority. The point decided by the court, and which the reasoning illustrates and explains, constitutes a judicial precedent. The books are full of cases in which learned judges have earnestly deprecated the attempt to urge the mere *dicta*, or the arguments of judges, as authoritative expositions of the law. Chief Justice MARSHALL, in the case of *Cohens v. State*, 6 Wheat. 399, thus defines the rule: 'It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decid-

ed, but their possible bearing on all other cases is seldom completely investigated.' Chief Justice BEST, in *Richardson v. Melish*, 2 Bing. 248, says: 'The expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look to in all cases. The manner in which he is arguing is not the thing,—it is the principle he is deciding.'

Applying the principle thus plainly stated to what is said immediately following in the same case, as to what was decided, and the effect of the decisions rendered in *Touchard v. Touchard* and *Holliday v. West*, and we find that it is "not even authority," upon the point actually passed upon by the court in either of the former cases, or directly involved therein. There were three questions involved, and necessary to be decided, in *Hart v. Burnett*: *First*. Was the city of San Francisco a pueblo, or the successor to a pueblo? *Second*. If yea, then was she possessed of a certain right or title in lands as such, within certain prescribed limits? *Third*. If both the other questions were answered in the affirmative, then were the lands in which she had such right or title by virtue of her character as a pueblo, or the successor to a pueblo, subject to seizure and sale under execution against the city? In the unsettled condition of the law at that time it was both natural and proper that the court should enter very fully into its reasons for the affirmative conclusion which it reached upon each of the first two of these questions, and the negative conclusion reached upon the last of them. The temptation was also naturally strong to enter into a general discussion of all the powers of a pueblo, or its successor, and it will be found upon examination that the court has occupied more than 50 pages in the discussion of general powers and rights of a pueblo, which were entirely unnecessary to the determination of the question of the character of its right in lands, or of whether or not they were subject to seizure and sale under execution. This was especially so of its discussion of the question of denouncement and forfeiture. It was a discussion wholly foreign to the determination of the fact that the lands held by the pueblo were held in trust, and were not, therefore, subject to seizure and sale under execution,—so foreign to it that anything which was said upon the subject is not entitled according to the rule laid down by the same court in the same case to be cited as an authority. But even according to *Hart v. Burnett* the case of *Holliday v. West*, is authority for the proposition that formal denouncement was not necessary in case of forfeiture for non-performance of condition subsequent in an alcalde grant, and also for the proposition that according to their civil law the court was to view the acts of each particular case, and from those facts determine the right, "by those principles which every system would admit to be the immutable laws of right and wrong."

In this case it is conceded that there was no attempt to perform the condition subsequent; that there was neither civil war,

insurrection, nor anything else to prevent or excuse performance; that for nearly 40 years the holder of this alcalde grant has remained silent, asserting no claim to the lot, and for 30 years of that time has seen others actually occupying the premises, improving them, building tenements upon them, (for the place has long been occupied by tenants, which implies the existence of tenements,) and he only now asserts a right after the property has been made and become of great value, and upon the assumption that the recent issue of a patent for the pueblo lands has given him a right of action to recover what in fact he had forfeited by the terms of his own title deed 40 years before. Under these circumstances, we have no hesitation in holding that under the civil law, interpreted as the courts of the country under the civil law were accustomed to interpret it, he had forfeited all right to this lot before the adoption of the common law, and neither that adoption, nor any event that has occurred since, has restored to him any right in the premises. This is decisive of this case. But there is one other ground upon which we are equally confident that the plaintiff ought not to recover. One of the defenses to the action is the statute of limitations. The patent for these pueblo lands was issued June 4, 1834. This complaint was filed May 4, 1885. The contention is that the statute of limitations did not commence to run until the patent was issued. This court has several times so held, and one of the cases in which it announced that rule was that of *Beach v. Gabriel*, 29 Cal. 580, a case involving a lot in this same pueblo. But a careful examination of the several statutes of limitation, passed at different times in this state, show that the rule should always have been subject to a certain qualification or exception. No such rule prevailed, or was authorized, under the statute of 1850. The first statute placing any such limitation upon the time when the limitation should commence to run, was that of 1855, (page 109,) which provided that action could be maintained where the title was derived from the Spanish or Mexican government, if commenced within five years from the time of final confirmation of the title by the government of the United States, or its legally constituted authorities. In 1863 this statute was again amended, (St. 1863, p. 327,) so that where the title has not been finally confirmed more than five years before the passage of the act, action might be maintained if brought within five years from that date, providing, however, that nothing therein contained should operate to enlarge or extend the time allowed by the act of which this was amendatory, where confirmation had been had before the passage of this act. "Final confirmation" was defined by the next section of this act to be the issue of the patent by the government of the United States, or the final determination of the official survey under the provisions of the act of congress to regulate the jurisdiction of the district courts of the United States in California, in regard to the survey and location of private land claims, approved June 14, 1860. This alternative clause seems to

have been generally overlooked, and not unnaturally so, since the patent would, of course, be the very highest evidence of final confirmation. The court had occasion to discuss and consider this act of 1863, in the case of the City of San José v. Trimble, 41 Cal. 536, a case brought by the city itself for the recovery by virtue of its right as a pueblo of a portion of the pueblo land within its limits. In that case the court held that under the provisions of this act, as the defendant had been five years in adverse possession, the plaintiff could not recover, and this notwithstanding the patent had not yet issued. The final decree of confirmation of the lands of this pueblo was entered June 13, 1866, and in that decree the boundaries of the lands are fixed and established, definite and certain, by monuments and courses. Not even monuments were required to be established, or any course authorized to be varied, by any subsequent survey. From this fact (and there is nothing in the record to militate against this view) it would seem that this was a final confirmation and determination of the survey of those lands. And this conclusion would account for the ruling in City of San José v. Trimble. Whether that be the reason for the ruling or not, if the decision in City of San José v. Trimble was correct, then this plaintiff's right of action was barred by the statute of limitations, even as it stood before the adoption of the Codes.

Under the Codes plaintiff's right of action is clearly barred. The Codes went into effect January 1, 1873. They do not contain, and never have contained, any provision such as that found in the former statute of limitations, giving to claimants under Spanish or Mexican grants five years after confirmation of either grant or survey, or after patent, in which to bring or maintain an action. If the statute of limitations never commenced to run against this plaintiff before, it did so commence to run when the Codes went into effect, and had run more than twice over before the commencement of this action. Judgment reversed, with directions to the court below to enter judgment on the findings in favor of defendants.

I concur: SHARPSTEIN, J.

THORNTON, J. I concur in the judgment on the ground that the cause of action is barred under the Code of Civil Procedure, which went into effect on the 1st of January, 1873.

We concur in the judgment on the ground first discussed by Mr. Justice Fox. PATERSON, J.; MCFARLAND, J.

84 Cal. 256

WORN v. FRY *et al.* (No. 12,703.)

(Supreme Court of California. June 2, 1890.)
FACTORS AND BROKERS—ACCOUNTING—EVIDENCE.

Defendants bought and sold stocks for plaintiff's testator, as brokers. It was charged that their books failed to show that they had accounted for all the shares they had purchased for and charged to him. The evidence showed that testator, though doing business in his own name, and with his individual money, had a partner who, in consideration of the "pointers" which he gave, re-

ceived half of the profits. For the purpose of closing out this partnership, testator instructed defendants to charge him and credit his partner with half of the net profits shown by testator's account. At the same time, and for the purpose of closing up the partnership account and opening an individual account, testator instructed defendants to sell certain stock; and, at the same time, he and his partner gave instructions to defendants to buy for them, respectively, one-half of said stock. Instead of executing the orders according to the terms, defendants made a certain division of the stock between testator and his partner, so as to accomplish the object intended. The stocks given to testator's partner were those which appear by the books to have been charged to testator and not accounted for. Testator thereafter continued to do business with defendants until his death, about a month later; and there was nothing to show that he was dissatisfied with the transaction. *Held*, that the stocks were properly accounted for to testator.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Henry Thompson, (Ben Morgan, of counsel,) for appellant. Gunnison & Booth, (W. H. L. Barnes, of counsel,) for respondent.

GIBSON, C. This appeal comes from a judgment in favor of defendants, and an order denying a new trial, entered and made in an action to recover the value of certain shares of the capital stocks of certain mining companies, alleged to have been wrongfully converted by defendant Fry's testator and defendant Neal, while doing a partnership business as stock-brokers under the firm name of Fry, Neal & Co.

It appears from the record that, on October 1, 1878, plaintiff's testator, Bullock, who for some time prior thereto had been engaged in the business of buying and selling shares of mining stocks, began to deal with Fry, Neal & Co., stock-brokers in San Francisco. This firm, acting as his brokers, bought and sold a number of shares of mining stocks for Bullock between the above date and November 2, 1877. On the last-mentioned date Mrs. Wheeler, Bullock's mother, was, upon her own application, appointed the guardian of his person and estate, on account of his mental incapacity, Bullock having, on October 22, 1877, the date of her application, been adjudged insane, and committed to the asylum at Napa. November 9, 1877, upon an order of sale made in the guardianship proceedings, some of the shares of stock then in Fry, Neal & Co.'s hands were sold, and, on the 26th of the same month, Mrs. Wheeler was removed from the position of guardian, and on January 2, 1878, William Doolan was appointed in her stead. January 17, 1878, Bullock, on his petition to the probate court, was adjudged to be sane, and was on the same day discharged from the asylum. Two days afterwards Doolan, as his guardian, delivered to Bullock \$6,778.95, and certain mining stocks belonging to Bullock, and subsequently filed his account as guardian, and was discharged from his trust. In the latter part of January, 1878, Bullock renewed his dealings with the firm of Fry, Neal & Co., and continued to employ them as his brok-

ers until his death, in October of the same year. In April of the same year the firm, which consisted first of J. D. Fry and Charles S. Neal, was changed by the withdrawal of J. D. Fry and the substitution in his place of E. M. Fry, who, with Neal, constituted the new firm. They retained and continued the same business under the name of the old firm. October 9, 1878, Bullock died suddenly, and left a will by which he gave all his property to his mother, and nominated her as his sole executrix. She, however, renounced her right to act as such, and, on the 17th of the same month, W. W. Crane was appointed administrator with the will annexed. By the inventory and appraisement filed by him it appeared that the only shares of mining stocks belonging to Bullock's estate were 1,300 Endowment, 300 Senator, and 50 Union shares. November 5, 1878, Crane, as such administrator, obtained from Fry, Neal & Co., upon an accounting with them, a balance of about \$20,000. The only persons Crane obtained information from, concerning the mining stocks Bullock died possessed of, were the members of the firm of Fry, Neal & Co., but they were not the only persons possessed of such knowledge. Crane brought the administration of the estate to a close on June 6, 1883, when he was discharged from his trust as such administrator. Some time after the death of Bullock, and before September 1, 1879, the firm of Fry, Neal & Co., composed, as above shown, of E. M. Fry and Charles S. Neal, was dissolved, and the assets thereof divided. Thereafter, on December 29, 1882, Neal, on his own petition, was adjudged insolvent, and, on April 2d of the following year, was discharged from all his debts, except such debts as were excluded by the insolvency act of April 16, 1880. Fry died on October 20, 1884, leaving a will, whereby the defendant J. D. Fry was nominated as the executor thereof, and, as such, letters testamentary were issued to him November 24, 1884. The plaintiff, with the consent and upon the request of Bullock's mother, on the 21st of August, 1885, obtained letters *de bonis non* in the matter of Bullock's estate, upon the ground that property belonging to the estate had been discovered since the decree of final distribution had been made. On the 22d of September, 1885, the plaintiff, as such administrator, presented to J. D. Fry, the executor of the will of E. M. Fry, a claim against Fry's estate, for the value of certain mining stocks that belonged to Bullock at his death, alleged to have been wrongfully converted by the firm of Fry, Neal & Co., which claim was by J. D. Fry, as such executor, rejected, and returned to plaintiff. This claim was based upon the supposed discovery of property next referred to. Prior to November 13, 1885, Neal and Fry, upon a citation issued therefor, appeared in the matter of Bullock's estate, and were examined concerning the wrongful conversion of certain shares of mining stocks. Upon this examination it appeared that, from the time Bullock renewed his dealings with Fry, Neal & Co, until his death, this firm had, among other transactions for Bullock, purchased for

and charged to him 1,890 shares of Sierra Nevada, 700 shares of Mexican, 1,750 shares of Gould & Curry, and 130 shares of Bulwer mining stocks; and that, between the shares so purchased and charged, and those of the same shares accounted for by the firm, there were the following apparent differences, viz.: 150 shares of Sierra Nevada, 250 shares of Mexican, 615 shares of Gould & Curry, and 30 shares of Bulwer. These discrepancies form the basis of the present action.

From the evidence adduced at the trial it seems Bullock had, at some time not disclosed, formed a partnership regarding certain mining stocks with one W. J. Collins, by the terms of which the latter furnished information or "pointers," concerning the purchase and sales of certain mining stocks, and the former the capital to make the purchases, and the profits were equally divided between them; but the business was conducted in the name of Bullock alone. September 3, 1878, Bullock notified Fry, Neal & Co. of his partnership with Collins, and at the same time ordered them to sell 600 shares of Gould & Curry, 700 shares of Mexican, and 300 shares of Sierra Nevada. On the 18th of the same month he gave written instructions to the firm to charge to his account and credit to that of Collins one-half of the profits shown by his (Bullock's) account, less the amounts already paid in. And on the same day he gave an order in writing to the firm to sell for him 600 shares of Gould & Curry, 700 shares of Mexican, and 300 shares of Sierra Nevada, for the purpose, expressed in the order, of closing up the partnership account of himself and Collins, and of opening an individual account with each of them. In connection with the order, and to carry out the purpose expressed in it, Bullock and Collins gave to the firm, with the above order, their individual orders in writing to buy for them, respectively, one-half of the shares Bullock had ordered to be sold. The evidence shows that these orders were not executed according to their terms, but, instead, the object of the orders was effectuated, according to the intention of Bullock and Collins, by dividing the stock between them. In making this division Bullock was charged with the portion of each number of the shares referred to upon the stock ledger of Fry, Neal & Co., which shares they delivered to Collins. It is conceded by appellant's counsel that Collins received the shares as shown by the stock ledger, but they contend that if these several stocks had been sold in accordance with the order of Bullock, for the prices they would have respectively brought on September 18, 1878, the date they were ordered to be sold, instead of having been delivered to Collins, Bullock's estate would have received \$22,000 more than it did receive. Respecting the object of the order, Neal, the surviving member of the firm, testified "that the order was given for the purpose of dividing the account. Those papers were taken by Mr. Fry as the simplest way of taking a paper authorizing us to divide the account with Mr. Collins." In this he is corroborated by the testimony of Collins, and there is no evidence to the contrary.

According to the argument of the appellant, if the 300 shares of Sierra Nevada, bought on the 3d and 10th of September, 1878, for \$24,000, had been sold on the 18th of the same month, in accordance with Bullock's order, for \$163.50 per share, the market value of such stock on that date, the amount that could have been realized would have been \$49,050, which, less \$24,000, the cost of the shares, would have left \$25,050 profits, of which Collins would have been entitled to one-half, viz., \$12,525; but, instead of this, he received 150 shares of the stock, worth on that date \$24,525, or \$12,000 more than one-half of the profits would have amounted to, and Bullock just that amount less than he was entitled to. This argument is based on the assumption that Bullock and Collins were only interested together in the stocks specified in Bullock's order of sale. But the evidence shows they were interested in a large number of shares of different mining stocks, and that the business was carried on in the name of Bullock. Now, when they came to settle their partnership affairs, they must have had some agreement or understanding as to the division of the stocks specified in Bullock's order of sale, in order to and which was to completely settle up the affairs of their partnership. Bullock transacted business with Fry, Neal & Co. after the 19th of September, 1878, the date the shares were delivered to Collins, and until he died, on the 9th day of October following, and there is nothing to indicate that he was dissatisfied with the transaction. He was, it seems, a shrewd and successful dealer in mining stocks, and although he was rendered incompetent to transact business for a few months, which time he spent in the asylum, at the time the division of the stocks was made, and from thence until his death, he was possessed of his usual business sagacity. The 30 shares of Bulwer that were delivered on October 3, 1878, were delivered, according to the evidence, in the course of business to either Bullock or his order, and were consequently accounted for. The books of Fry, Neal & Co. it is admitted were kept in a very careful manner, but, because the division of the stocks is not explained in full therein, appellant's counsel would have us infer that a fraud had been perpetrated upon Bullock or his estate; but we do not think that such an inference can be drawn from the books, alone, and certainly not in view of the evidence explanatory of the entries claimed to be suspicious. On the contrary, we think the evidence, taken as a whole, fully supports the findings of fact herein, and shows, as stated in one of the findings, "that all the mining stocks purchased or sold by said firm of Fry, Neal & Co., for or on account of said Frank Dyer Bullock, deceased, were honestly and justly accounted for to him or his representatives, and that the actions of said Fry, Neal & Co., do not show the least suspicion of fraud."

Our conclusion that the findings are sustained by the evidence disposes of the only contention made on this appeal, and we therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 281

LARUE V. GROEZINGER. (No. 12,708.)

(Supreme Court of California. June 6, 1890.)

ASSIGNMENT—CONTRACTS—SALE.

1. Defendant and one H. entered into a contract whereby the latter was to sell to defendant all the sound grapes he might raise, for a period of 10 years, from vines in a certain vineyard, at \$25 per ton, the grapes to contain 22 per cent. of saccharine matter, and to be delivered in boxes. The vineyard was purchased by plaintiff, the contract assigned to him, and a crop of grapes, in boxes, was tendered to defendant; and, upon refusal on the ground that there was no contract with plaintiff, it was resold at a sacrifice. *Held*, in an action for the difference in price and the expenses of resale, that the contract was assignable, and plaintiff was entitled to recover for its breach.

2. It was error for the jury to include in their verdict the expenses of boxing and selling that portion of the grapes which did not contain 22 per cent. of saccharine matter.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; R. CRANCH, Judge.

F. E. Johnston, A. H. Loughborough, and E. W. McKinstry, for appellant. *A. B. Catlin and Dennis Spencer*, for respondent.

HAYNE, C. This was an action for damages for the breach of a contract to buy grapes. The substance of the material portions of the contract was as follows: One Hopper agreed to sell all the grapes which he might raise during a period of 10 years, from the vines which were then growing, or which he might thereafter plant, in a certain vineyard. The grapes were to be "sound," and were to be gathered when they contained 22 per cent. of saccharine matter, and to be delivered in boxes at the wine-cellar of the defendant; the "first crop" to be delivered separately from the "second crop" of the same year. In consideration whereof, the defendant agreed to accept the grapes, and pay for them, after delivery, at the rate of \$25 per ton in specified installments; any advancements which might be made to draw interest at a given rate. The parties performed this contract for five years. At the end of that time, viz., in October, 1885, Hopper conveyed the vineyard and assigned the contract to the plaintiff. At the time of the transfer, the first crop of that year was being delivered by third parties, who had made advances upon it. The plaintiff does not appear to have had anything to do with this crop. He gathered the second crop of the same year, however, and delivered it to the defendant, who accepted and paid for it. This crop, it will be observed, was grown during the ownership of Hopper, and consequently may be supposed to have received the benefit of whatever care and skill he may have been able to give to it. The crop of the following year was grown, gathered, and tendered by the plaintiff. The defendant refused to accept it, saying that he had no contract with the plaintiff, and was not buying grapes. The plaintiff thereupon

sold the crop to the best advantage he could, and brought this action to recover the difference in price, and the expenses of resale. The jury rendered a verdict in his favor for \$2,473.20, and judgment was entered accordingly. Afterwards the court required him to remit \$119.20 as a condition of denying the defendant's motion for new trial. Such remission was made, and the defendant appeals from the judgment and the order denying a new trial.

1. It is contended that the contract was not assignable. The rule of the early common law as to the assignability of choses in action has been much changed in modern times. The Civil Code of this state provides that written contracts "for the payment of money or personal property" may be transferred by indorsement in the same manner as negotiable instruments. Section 1459. And there are other provisions which are more sweeping, viz.: "Sec. 1044. Property of any kind may be transferred, except as otherwise provided by this article." "Sec. 1458. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." These sections seem to do away with whatever restrictions there may formerly have been upon the power of the parties to assign their ordinary contracts. It is clear, however, that the provision cannot be construed to render assignable all contracts whatever, regardless of their nature or effect, but must be taken with some qualification. In the first place, it was not intended to render null any agreement that the parties may have made on the subject. Hence, if the contract itself provides in terms that it is not transferable, it certainly cannot be transferred, although it otherwise might be so. Leases, and the tickets usually issued by railroad companies, are familiar instances of this. Upon the same principle, although a contract may not expressly say that it is not transferable, yet, if there are equivalent expressions, or language which excludes the idea of performance by another, it is not assignable. Of this character is the case of *Shultz v. Johnson*, 5 B. Mon. 497, which is much relied upon for the appellant. There the defendant agreed to buy from one Johnson successive crops of hemp "of his own raising," and it was held that the defendant could not be compelled to accept hemp raised by Johnson's administrator. The court said that "the question * * * in every case must turn at last upon the intention of the parties," and that the phrase "of his own raising" meant that the hemp was to be raised by him, or under his personal superintendence and direction. Upon the same principle, it would probably be held that, if the contract provided that it was not to be assigned to a particular person, it could not be assigned to such person; and it would seem, from one of the cases cited by the appellant, that, if an intention not to deal with a particular person appears from circumstances outside of the contract, it cannot be assigned to such person. In the case referred to the plaintiff had previously been supplying the defendant with ice; but the latter had become dissatisfied, and had transferred his

custom to a company called the Citizens' Ice Company, and had made a contract with it. After this the plaintiff bought out the Citizens' Ice Company, and, without letting the defendant know of the transfer, went on supplying him with ice. When the defendant found out what had been done, he refused to pay for the ice; and the court held that he was not liable, although he had consumed the ice, and had no fault to find with it. *Ice Co. v. Potter*, 123 Mass. 30. We think that this case may be distinguished from the one before us on the ground of the extraneous circumstances showing the defendant's intention not to deal with the plaintiff. If it cannot be so distinguished, we should be inclined to question the soundness of the decision. In the next place, although the language may not show an intention that the contract should not be assigned, yet the nature of the case may be such that performance by another would be an essentially different thing from that contracted for. Thus, a picture by one artist is an essentially different thing from a picture on the same subject by another artist; and so of a book composed by an author, or any other act or thing where the skill, credit, or other personal quality or circumstance of the party is a distinctive characteristic of the thing contracted for, or a material inducement to the contract. Under this general head come several cases relied upon for the appellant. Thus, in *Lansden v. McCarthy*, 45 Mo. 106, it was held that a contract to deliver meat to a hotel, to be paid for at the end of each month, could not be assigned by the hotel-keeper, the court saying: "The defendant's estimate of the solvency and pecuniary credit and standing of the plaintiffs' assignors may have constituted an important inducement to the contract, without which he never would have entered into it." So, in *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 388, 8 Sup. Ct. Rep. 1398, it was held that a contract to sell ore to a smelting company, the price of which was to be adjusted and paid by the mutual acts of the parties after delivery, was not assignable by the smelting company; the court, per GRAY, J., saying: "During the time that must elapse between the delivery of the ore, and the ascertainment and payment of the price, the defendant had no security for its payment except in the character and solvency" of the smelting company. If, therefore, the case before us comes within either of the qualifications above stated, then it must be conceded that the contract was not assignable. But, if it does not,—that is to say, if the language does not exclude the idea of performance by another, and the nature of the thing contracted for, or the circumstances of the case, do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract, then the contract was assignable under the provisions above quoted. It is obvious, therefore, that in this state, at least, the question whether a contract is assignable is a question of construction. As was said in the *Kentucky*

case above referred to, "the question * * * in every case must turn at last upon the intention of the parties." But upon a proper construction there is nothing to show that the contract was not assignable.

(a) There is nothing in the language which excludes the idea of performance by another. The mere fact that the name of the owner of the vineyard was used does not exclude the idea of such performance. The name of the contracting party is almost always inserted as a convenient means of identification. Thus, where John Smith signs a contract which stated that John Smith agrees to pay John Doe a sum of money in consideration of a conveyance of land which the latter agrees to make to the former upon such payment, there can be no doubt that the use of Smith's name does not indicate an intention that his assignee could not perform the contract. To say otherwise would be to say that hardly any contract is assignable unless the word "assigns," or equivalent language is inserted, which would hardly be contended. Nor is the use of personal pronouns of more significance. The counsel for the appellant lay stress upon the circumstance that Hopper agreed to deliver "all the grapes 'he' may raise on the vines 'he' now has growing on 'his' place," etc. But it seems clear that these pronouns were used as equivalents of the proper name, and merely to save repetition of such name. They do not import a desire for the personal services or attention of the owner as contradistinguished from his assignee. This will be readily seen if the same words are applied to different subject-matter. Thus, if it be agreed to buy from another, at a fixed price, a specific quantity of fire-wood which "he" agrees to cut during a certain period from the timber "he" then has growing upon "his" farm, etc., it would surely not be argued that the mere language indicated that the wood was to be cut by the owner himself, or by his agents, and not by his assignee. And so of similar language in contracts to pay money, to convey land, and the like.

(b) There is nothing in the nature or circumstances of the case which shows that the skill or other personal quality of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract. There is no evidence that grapes for wine-making, containing a specified amount of saccharine matter, raised upon a particular vineyard by one man, would necessarily or probably be different from grapes raised from the same vines by another man. Possibly there would be difference between grapes from different vineyards, as the difference between the climate and soil of different places in close proximity is known to be considerable. But here not only is the vineyard the same, but the vines were the same; that is to say, the crop in question was from vines planted by the assignor. It is not impossible that one man might have some peculiar skill or secret by which he could raise better grapes from the same vines than other men could. But there is no evidence that there was any such pe-

culiarity about the original owner of this vineyard, and we do not think that the court will assume that there was. And, while it is to be conceded that men have perfect liberty to contract with whom they choose, and to exclude the idea of performance by another, yet, in the absence of anything indicating such an intention, we do not think that the court should indulge in speculation as to possible prejudice or fancied preference. It should not assume that the parties were influenced by unusual or conjectural motives merely because some men might be so affected under similar circumstances. For example, some men of solvency and credit have preferences as to the persons from whom they borrow money, and would be displeased at having their paper passed around among usurers. Yet at the present day all the courts would hold that, in the absence of indication of a contrary intention, contracts for the payment of money are assignable. So in many cases owners of real property have some choice as to the persons they admit as tenants. Yet it is well settled that an ordinary lease is assignable by the tenant, in the absence of the manifestation of a contrary intention; and the case of a lease is not to be disposed of by saying that it is an interest in property, for, by the express provision of the Code, the right to the performance of an obligation is property. Civil Code, § 1458. These instances, and others which might be mentioned, show that it will not do to indulge in conjecture as to fanciful and unusual motives and prejudices. Now, in the case before us, as has been stated, there is no evidence of anything from which it can be inferred that performance was to be by the original owner of the vineyard, and not by another. Suppose that he had gone to live permanently in Europe, and had given no kind of attention or supervision to the place. Would it have been contended that under such circumstances the defendant would have been justified in refusing to accept grapes of the required standard grown upon the vineyard by an agent? We imagine not. And in the case put there would be no kind of supervision by the owner, who would be entirely and permanently absent; and it seems purely fanciful to say that in such case he would exercise some skill in the selection of an agent, and that the parties must be supposed to have had this in view. Now, if, in the case put, the defendant would be liable, how can it be said that the circumstances show that the personal qualities of the owner were a material inducement to the contract? We cannot see any reason that would make this contract non-assignable which would not equally apply to the ordinary crops of corn, wheat, oats, potatoes, etc. If, in such cases, a party prefers to deal with one person to the exclusion of assignees, it is very easy to indicate such preference in the contract. Courts will not assume that unusual motives exist.

The learned counsel for the appellant have advanced other considerations which may be noticed briefly. The fact that the contract provided in substance that,

if advances should be made by the wine-maker, they should bear interest at a certain rate, does not indicate that the solvency or credit of the owner of the vineyard was an inducement to the contract; for the making of such advances was entirely optional with the wine-maker. Nor is there anything in the circumstance that the owner of the vineyard was not bound to raise grapes. What the contract secured to him was the right to raise grapes of a specified standard, and to compel the defendant to take them at a fixed price. This may have been an unwise contract for the defendant to make. But an optional contract is binding. *Hall v. Center*, 40 Cal. 63. And the mere fact that it is optional cannot be a reason why it should not be assigned. We have not overlooked the distinction pointed out by counsel between executory contracts and contracts which have been executed on one side. What we have said applies where something remains to be done by the party who assigns. And, as a matter of course, since a party cannot release himself from an obligation by his own act without the consent of the other party, it is only the benefit of a contract which can be assigned. Where there is a burden, it cannot be transferred without the consent of the other party. Civil Code, § 1457. It may be added that we have examined the English case of *Robson v. Drummond*, 2 Barn. & Adol. 303, cited by counsel, but consider it to have been disapproved in the subsequent case of *Wagon Co. v. Lea*, 5 Q. B. Div. 149. It is true that the principle of the former case was approved in the latter; but it is only the application of the principle which makes the case in point here, and this is what was disapproved in the latter case, which did not turn upon the use of the word "executors" in the contract.

2. The jury included in their verdict the expenses of boxing and shipping the whole of the first and second crops of the year in question, while the recovery was restricted by the court to that portion of the grapes which contained 22 per cent. of saccharine matter. We think that it was error to include in the verdict the expenses of boxing and shipping that portion of the grapes which did not come up to the required standard. The respondent contends in this regard that he ought to have recovered for all the grapes, regardless of the amount of saccharine matter they contained, and that the error was in favor of the appellant. But we do not take that view of the matter. The contract provides that the grapes were not to be gathered until they contained 22 per cent. of saccharine matter; and, as they could not be delivered at the wine-cellar until they were gathered, we think it is to be inferred that the defendant was not to receive them unless they came up to the standard mentioned. Any other construction would bind the defendant to pay the \$25 per ton for grapes which might not contain any saccharine matter, at all. But the judgment can be modified so as to avoid the consequences of this error. Giving the appellant the benefit of small fractions, the verdict was too large, for the

reason mentioned, by \$337.57. The respondent, under the order of the court, on motion for a new trial, remitted \$119.70 leaving the verdict still too large by \$217.87. We therefore advise that the judgment be modified by deducting therefrom the sum of \$217.87, and that as modified the judgment and order denying a new trial be affirmed; the appellant to recover his costs of appeal.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by deducting therefrom the sum of \$217.87, and that as modified the judgment and order denying a new trial are affirmed; the appellant to recover his costs of appeal.

LARUE V. GROEZINGER. (No. 13,560.)

(Supreme Court of California. June 10, 1890.)

Commissioners' decision. Department 1. Appeal from superior court, Napa county; R. CRANCH, Judge.

F. E. Johnston, A. H. Loughborough, and E. W. McKinstry, for appellant. A. B. Catlin and Dennis Spencer, for respondent.

HAYNE, C. The general features of this case are the same as those of No. 12,708, ante, 42, between the same parties, which has just been disposed of; but there is no complication herein in relation to grapes containing less than 22 per cent. of saccharine matter, for it is found that the grapes for which a recovery was had, contained the required amount of saccharine matter. Upon the authority of said case, we advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

83 Cal. 619

In re WIARD'S ESTATE. (No. 13,093.)

(Supreme Court of California. April 10, 1890.)

APPEAL—ORDER OF FINAL DISTRIBUTION—TIME.

1. An appeal from a decree of final distribution under Code Civil Proc. Cal. § 963, making such a decree appealable, must be taken within 60 days, as provided by section 1715, Id., governing appeals from orders and decrees in probate proceedings when inconsistent with the general provisions.

2. An order refusing to vacate a decree of final distribution is not appealable. Code Civil Proc. § 963, subd. 3.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

C. M. Jennings, for appellant. J. H. Smith, for respondent.

FOX, J. Appeal from a decree of final distribution, and from an order subsequently made denying an application or motion to vacate and set aside said decree, and for a new trial.

The decree was rendered, filed, and entered March 12, 1888. An appeal from such a decree may be taken to the supreme court, (Code Civil Proc. § 963, subd. 3,) and the general provisions of part 2, (of which said section is a part,) relative to appeals, are applicable, except so far as they are in-

consistent with the provisions of title 11, pt. 3, (Code Civil Proc. § 1714.) Appeals from orders and decrees in probate proceedings are governed by chapter 12, tit. 11, pt. 3. Section 1715, found in that chapter, provides that the appeal must be taken within 60 days after the order, decree, or judgment is entered. This appeal was not taken until December 22, 1888. The appeal from the decree must therefore be dismissed. Subdivision 3, § 963, Code Civil Proc., enumerates all the cases in which an appeal may be taken to this court from the superior court in probate proceedings, and an order refusing to vacate a decree of distribution and settlement of final account is not one of them. *Estate of Calahan*, 60 Cal. 232; *Estate of Lutz*, 67 Cal. 457, 8 Pac. Rep. 39. See, also, *Blum v. Brownstone*, 50 Cal. 293; and *Estate of Dean*, 62 Cal. 613. Counsel has not made the point that the order refusing to vacate the decree is not appealable, but we cannot ignore the plain provisions of the statute, particularly after attention has been frequently called to them, because counsel has overlooked the point. The policy of the law is to facilitate, and not to delay, the settlement of the estates of deceased persons. The law gives a direct appeal from the decree, if taken in time, but it gives no appeal from an order of the court below refusing to vacate that decree, which is made only after several months of delay.

Appeal dismissed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

83 Cal. 77

In re STEPHENS. (No. 20,457.)

(*Supreme Court of California.* May 5, 1890.)

ATTORNEY—UNPROFESSIONAL CONDUCT—DISBARMENT.

Respondent was associated with one W. in defending respondent's brother upon a prosecution for criminal libel. Believing that W. had abandoned the case, respondent represented to the prosecuting witness that W. was the real author of the libel, and that he could produce documents purporting to be in the handwriting of W., which he believed to be genuine, and which his brother would testify were so, and that, if genuine, they would show W.'s guilt. Upon these representations, W. was arrested when about to leave the state, but gave bail, continued his journey, and did not return for some time. On his return, respondent learned that he had not, and never intended to, abandon his brother's cause; and thereupon respondent appeared for and defended W. at the preliminary hearing, and afterwards procured his discharge by a writ of prohibition, though still believing the documents to be genuine. *Held*, that his conduct was unprofessional, and he is therefore forbidden to practice in the courts of the state for two months; the punishment being reduced on a petition by numerous members of the bar of the same county with respondent, calling attention to the fact that the proceedings had been pending over a year, and representing that during that time his practice had been entirely suspended, and that he had heretofore borne an excellent reputation.

In bank. Upon proceedings for disbarment.

John S. Chapman and *J. W. Swanwick*, for prosecution. *Houghton, Silent & Campbell*, for respondent.

PATERSON, J. This is a proceeding for

the disbarment of C. C. Stephens, an attorney and counselor at law. The allegations of the accusation are set forth in the opinion of this court rendered at the time of the decision overruling the demurrer. 77 Cal. 357, 19 Pac. Rep. 646. Many immaterial matters are stated in the accusation; but, as there was no motion to strike out, they were not referred to at the time the demurrer was overruled. The result was that, in taking testimony, the commissioners appointed by the court, not knowing what allegations would be deemed material, admitted many hearsay statements, and a great deal of evidence that was not relevant to the material matters charged. Some of the evidence went in without objection, but we have considered only such portions of the evidence as is competent and relevant to the material issues.

The gist of the charge is that, while associated with Col. Wells as an attorney of record for the defendants in the cases against B. A. Stephens and A. M. Thornton for criminal libel, the respondent, C. C. Stephens, represented to Bell, the accuser herein, and prosecuting witness in said case, that Col. Wells was the person really guilty of the libels alleged in those actions, Thornton and B. A. Stephens having acted only at the instigation of said Wells; that he further represented that said Wells "had gone back on" said Thornton and B. A. Stephens, and they proposed to furnish evidence sufficient to convict him of libel if he (said Bell) would dismiss the action against Thornton and B. A. Stephens, the evidence proposed being the original manuscript, portions of which, he said, were in the handwriting of Wells, and a letter written by the latter requesting B. A. Stephens to change certain portions of the article before publication so as to make it more bitter and malevolent against Bell; that the documents referred to were produced; that respondent consulted with said Bell and his attorney concerning the law and facts involved in the proposed prosecution, and repeatedly urged said Bell to file a complaint against Wells; that said Bell, not being satisfied as to the genuineness of the documents exhibited by respondent, refused to dismiss the actions, but during the negotiations said actions were repeatedly continued for trial; that at the urgent request of respondent, and upon repeated representations that he would procure the evidence required to establish the guilt of Wells, a complaint was filed on December 19, 1887, by C. A. Bell, son of the accuser herein, charging said Wells with libel. A warrant was issued. Wells was arrested while on his way to Washington; but he gave bail, and did not return to this state until March 20, 1888. That respondent advised said Bell that in his opinion the absence of said Wells from the state would suspend the running of the statute of limitations, and promised that his brother, B. A., whose address he gave for the purpose of service of subpoena, would appear as a witness at the preliminary examination of Wells, and testify to the genuineness of the letter; that the preliminary examination of Wells was continued from March

20, 1888, to April 17, 1888; that respondent continued to act with said Bell and his attorney in the prosecution of said Wells until the 17th of April, when he appeared and acted as attorney for Wells at the preliminary examination, objected to the examination of Wells on the ground that the prosecution of the action was barred under the provisions of sections 801, 802, of the Penal Code, and, upon said objection being overruled, he procured the discharge of said Wells by virtue of a writ of prohibition, prohibiting the justice of the peace from proceeding with the preliminary examination.

It is conceded that respondent did not act as attorney or counsel for Bell in anything he said or did. There is a conflict in the evidence as to whether the respondent advised Bell to have Wells arrested and prosecuted for libel. Three witnesses testified that he did. The respondent denied it. Bell testified that Stephens did not urge him to file a complaint against Wells, but that he did request him to do so. C. A. Bell, son of Horace, testified that Stephens, respondent, came to his office, and said that Wells was going away that day, and if they wanted to arrest him a complaint should be filed. Williams, counsel for Horace Bell, testified that Stephens told him Wells was the guilty party, had inveigled his brother into the matter, and that he ought to be arrested before he could get away. During the negotiations between the parties, the question arose whether the statute of limitations would continue to run during the absence of Wells from the state. It is alleged in the accusation that respondent advised Bell and his counsel that the statute would not run during such absence. Upon this question, also, the evidence is conflicting; respondent denying that he advised them at all in relation to it, or any other matter of law or of fact. Respondent, in his testimony, denies that he ever said Wells was the guilty party, or represented that he would produce evidence sufficient to prove that fact, but, on the contrary, insists that all he offered to do was to produce the documents which purported to be in the handwriting of Wells,—the manuscript of the original article and the letter,—and that Bell knew all the time that his (Stephens') information as to the genuineness of the documents, and the part which Wells had taken in the production of the libel, was a matter of hearsay.

In view of the nature of this proceeding, and the effect of an adverse decision upon the future of the respondent, we give him the benefit of the doubt which necessarily arises out of the conflict of evidence upon these issues, and find (1) that respondent did not urge or advise Bell to have Wells arrested and prosecuted for libel; (2) that respondent did not advise Bell or his counsel as to whether the statute of limitations would run during the absence of Wells from this state; and (3) that respondent did not represent to Bell that he could or would procure the evidence required to convict Wells of libel. The facts remain, however, that respondent's proposition and conduct resulted in the arrest of Wells on a charge of libel, and that he

(respondent) must have known that such would be the effect of his offer to produce the documents which he had in his possession and exhibited to Bell. He knew that Bell would certainly prosecute Wells if he could be made to believe that the papers, or any part of them, were in the handwriting of Wells. He told Bell that his brother had said they were genuine. He held them out as genuine, himself believing them to be genuine, and at the trial testified that he still believed them to be in the handwriting of Wells. If he believed at the time he offered them that Wells was innocent, or if he had no reasonable cause to believe that they would tend to establish the guilt of Wells, his conduct in thus encouraging the prosecution of Wells was in direct violation of his duties as an attorney and counselor, which require him "to counsel or maintain such actions, proceedings, * * * only as appear to him legal or just." Section 282, subd. 3, Code Civil Proc. And the fact that his brother was in trouble, and that Wells, who had been engaged in the defense of his brother, had abandoned the case, would in that case have afforded no excuse or justification, but would have tended to show that he had violated another provision of the same section, which requires an attorney and counselor at law "not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." Id. subd. 7.

The case in a nutshell, according to the undisputed evidence, is this: Respondent's brother was being prosecuted for criminal libel. Wells was engaged in defending the brother. Believing that Wells had deserted his brother, and refused to act further in his defense, respondent, desiring to punish Wells for his desertion, and to procure the discharge of his brother, proposed to Bell, the prosecutor, that, if he would dismiss the charges against the defendants in the libel suit, he (respondent) would produce documents tending to show that Wells was the person really guilty of the offense charged against his brother. The documents were exhibited. A complaint was filed. Wells was arrested and gave bail while departing from the state. During the pendency of the negotiations between respondent and Bell, and the pendency of the action against Wells, several continuances of the action against respondent's brother were had in pursuance of the proposition referred to. When Wells returned to this state, respondent discovered that Wells had in fact never deserted the cause of his brother, but always intended to return and defend him. Thereupon, and without any further evidence of the guilt or innocence of Wells, but still believing that he had written the documents produced by respondent as tending to show the guilt of Wells, and which had in fact led to his arrest, respondent, without any notice to the prosecution, appeared on behalf of Wells, objected to any evidence against the defendant on the ground that the statute of limitations had run against the prosecution of the offense charged, and, upon his objection being overruled, procured the

discharge of the defendant Wells on a writ of prohibition issued out of the superior court. This state of facts leads to one of two conclusions: Either that the respondent encouraged the commencement and prosecution of a criminal charge against Wells which he did not believe to be just, or had no reason to believe was true, and through motives of "passion or interest," or that, after his production of evidence tending to show the guilt of Wells, and which in fact resulted in the commencement and prosecution of a criminal charge, he undertook the defense, and procured the discharge of the accused, although he entertained the same opinion as to the genuineness of the documents tending to show guilt that he held at the time that the prosecution was commenced. He does not say that he had changed his mind as to the guilt or innocence of Wells, and therefore undertook to defend him. He found that Wells had not in fact abandoned, or intended to abandon, the defense of his brother; therefore he had done Wells an injustice, and desired to right him,—not because he had discovered that the documents were not genuine, or that Wells had not participated in the alleged libel. No such excuse as this is offered. It is admitted by counsel for respondent that "it might have been wiser, and more in accordance with good taste, if he had declined to have any further connection with any of the cases except in the necessary defense of his brother." We cannot thus lightly excuse the respondent's conduct. It was not only a breach of good taste, but was a transgression of those ordinary rules of professional practice which are universally recognized as binding upon attorneys and counselors with or without statutory legislation, if it was not a violation of the express provision of the Code with respect to the duties of such officers of the court. Weeks, Attys. § 80.

While we do not regard the offense as one of so grave a nature as to call for the disbarment of the respondent, we think the practice should be condemned, and that some penalty should be imposed which will deter others from following the same course. In determining the penalty to be inflicted, we consider, in mitigation of the offense, the fact that the respondent was greatly concerned in behalf of his brother, who was in trouble, and that he naturally felt grateful to those who aided him, and unfriendly to those who deserted him. His gratitude to Wells for continuing to defend his brother doubtless led him to assume a position in the case inconsistent with his relations to the parties prosecuting the same. It is ordered that the respondent be deprived of the right to practice as an attorney and counselor in the courts of this state for the term of six months from date hereof.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

ON PETITION FOR MODIFICATION OF SAID ORDER.

(June 13, 1890.)

PATERSON, J. In this matter, we have received a petition, signed by a large num-

ber of members of the judiciary and bar of Los Angeles county, asking on behalf of respondent herein a modification of the order of suspension heretofore entered herein. In support of this request, they represent that the proceedings have been pending for over a year, and that during that time his practice has been almost entirely suspended; that he has heretofore borne an excellent reputation, has never been charged with any infraction of the rules governing professional conduct, and will be careful not to do so in the future; that he is of a sensitive nature, and, in the opinion of the petitioners, has already been sufficiently punished. In determining the matter, we overlooked the fact that the proceedings had been pending for over a year, and of course were not aware of the alleged effect upon the respondent and his practice, and did not consider them in mitigation of punishment. We think that the request of so large a proportion of the members of the bar with whom the respondent is engaged in practice is entitled to consideration. It is therefore ordered that the respondent be permitted to resume the practice of law on July 1, 1890, and the order heretofore entered herein is modified to that extent.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.

84 Cal. 456

HARRIGAN v. MOWRY. (No. 11,815.)

(Supreme Court of California. June 10, 1890.)

QUIETING TITLE.

Where plaintiff conveys land in trust to be reconveyed at the end of five years, an action to quiet title does not lie, on a failure to reconvey, since the effect of such action is simply to declare the title as it is, while the purpose here is to have the title changed.

In bank. On rehearing. For former report, see 22 Pac. Rep. 658.

R. Percy Wright, for appellant. C. H. Parker and Parker & Eels, for respondent.

WORKS, J. The judgment in this case was reversed by department 1, the opinion having been written by Commissioner VANCLIEF. A rehearing was granted. The second argument and further consideration of the case have convinced us that the decision of the department was right, for the reasons stated in the opinion of the learned commissioner.

In addition to what is said in the former opinion, it may be remarked that the evidence clearly proved that the plaintiff was the owner of the equitable title to the property in litigation, and that the defendant was the owner of the legal title thereto as her trustee. Therefore, conceding that an action to quiet title was the proper remedy, the court, under the evidence, should have rendered judgment accordingly. Such a judgment would have availed the plaintiff nothing. It would have left her just as she was in the beginning. Her object was not to declare the title as it really was, which is the effect of a successful action to quiet title; her purpose was to change the title, and vest in herself the legal title that was outstanding in her trustee. This could not be done

by an action to quiet title. The proper action would have been one to close up the trust, or to show that it had been closed, and to compel a conveyance of the legal title. It can make no difference that the reasons of the defendant for withholding a conveyance were insufficient or even unreasonable, as claimed. The court below could not, nor can we, declare that she has no title because she should, in justice, have conveyed it to the plaintiff. Judgment reversed, and cause remanded for further proceedings.

We concur: PATERSON, J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 93

KULLMANN *et al.* v. GREENEBAUM *et al.*
(No. 12,671.)

(Supreme Court of California. May 8, 1890.)

SPECIAL FINDING—JUDGMENT.

Where, under allegations of fraud too indefinite to sustain the charge, the jury found specially that defendants were guilty thereof, the finding was properly disregarded in entering judgment, and the judgment will not be modified to accord therewith.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER LEVY, Judge.

Wal J. Tuska, for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

THORNTON, J. The plaintiffs in this case seek a modification of the judgment. They ask the court to direct a modification of the judgment by the court below by ordering that court to enter judgment in accordance with the facts found by the jury, adjudging the defendants guilty of fraud, and directing process to issue against these persons according to law. This we decline to do, for the reason that the complaint sets up no fraud by defendants of which the plaintiffs can complain. The action is one for the conversion by defendants of shares of stock belonging to plaintiffs. The other matters pleaded to show fraud show no connection with the conversion, and show no relation between the plaintiffs and defendants setting forth fraud on plaintiffs' rights. The allegations in that part of the complaint are too general and indefinite in regard to fraud to make it clear that defendants have defrauded plaintiffs in regard to the stock alleged to have been converted. If there was any fraud alleged, it was disconnected from the subject of the action, viz., the conversion of the stock. Inasmuch as the complaint in respect of fraud is insufficient, the court did not err, though special issues were submitted to the jury, in not entering such judgment as the plaintiffs now ask. The *allegata* and *probata* do not correspond. It may be conceded that the court was bound to enter judgment on the verdict of the jury. But, under the state of facts above pointed out, the court did not err in disregarding the verdict of the jury in respect to fraud. It is unnecessary to determine any other questions made on the argument. The proper judgment was entered. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

84 Cal. 567

PEOPLE v. HARROLD. (No. 20,638.)

(Supreme Court of California. June 14, 1890.)

INDICTMENT—TWO OFFENSES—FORGERY.

1. Pen. Code Cal. § 115, makes it felony to cause to be recorded a false or forged instrument only when the instrument, if genuine, might be recorded under some law of the state or the United States. There is no statute authorizing the recording the assignment of letters patent. *Held*, that an indictment which set forth the recording of a forged assignment of letters patent, and, in addition, a charge of forgery, was not bad as charging two offenses. The part setting forth such recording was mere surplusage.

2. An indictment for forgery which enumerates each one of the series of acts, either one of which constitutes such crime under Pen. Code Cal. § 470, charges but one offense, since under said section they all constitute but a single crime.

Department 1. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Jas. L. Copeland, J. M. Lucas, and W. R. Guy, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

Fox, J. In *People v. Frank*, 28 Cal. 513, it was held that, "where * * * a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." To the same effect is *People v. De la Guerra*, 31 Cal. 459, and *People v. Tyler*, 35 Cal. 553. It follows that the allegation in this indictment of each one of the series of acts named in the statute, either one of which would constitute the crime of forgery, is not the allegation of two offenses, because all constitute but the single crime, under section 470 of the Penal Code. But the court below probably held that the indictment charged two offenses, because in the latter part thereof the pleader charges the defendant with having offered "the said instrument for record at the office of the county recorder of the county and state aforesaid, and then and there causing the same to be recorded as a record in said office." The instrument purports to be an assignment of an interest in certain let-

ters patent for an invention. There is no law authorizing the recording of such an instrument in the office of the county recorder, or making it a public record when so recorded. Section 1160, Civil Code, cited by respondent, has no application. It relates only to the recording of letters patent affecting the title or possession of real property. Section 115 of the Penal Code, which makes it a felony to procure to be recorded a false or forged instrument, makes it so only when the instrument, if genuine, might be filed, registered, or recorded under the law of the state. As this instrument, if genuine, would not be entitled to be recorded under the law of the state, it was not a felony to offer it for record, or to cause or procure it to be recorded, and it leaves but the one offense charged by the indictment,—that of forgery. All the matter about recording is mere surplusage, and may be disregarded. The material portions of this indictment are in the language of the statute, and are sufficient. *People v. Lewis*, 61 Cal. 366; *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830; *People v. Rogers*, 81 Cal. 209, 22 Pac. Rep. 592; *People v. Keeley*, 81 Cal. 212, 22 Pac. Rep. 593. Judgment reversed, and case remanded, with instructions to overrule the demurrer.

We concur: PATERSON, J.; WORKS, J.

(84 Cal. 539)

NAGLE v. McMURRAY. (No. 12,709.)

(Supreme Court of California. June 18, 1890.)

CONFLICT OF EVIDENCE—IMPLIED PROMISE—REPAIRING STREET.

1. In a suit to recover for work done upon a public street, defendant testified that he never authorized the work, and such testimony was in part corroborated by another witness. Both swore that defendant filed in the street superintendent's office a protest against the issuance to plaintiff's assignor of a permit to do the work, and also informed such assignor that he would not be responsible for it. *Held* sufficient to raise a substantial conflict of evidence, and the judgment will not be disturbed.

2. The fact that defendant saw the work going on upon the street without further protest raises no implied promise or liability to pay for it.

3. Nor can a promise be implied from the fact that defendant several times made suggestions to the workmen.

Commissioners' decision. Department

2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Robert Ash, for appellant. Langhorne & Miller, for respondent.

HAYNE, C. This was an action to recover \$547.75 for work done upon a street upon an alleged parol contract with the defendant. The answer denied the contract, and the court found this issue for the defendant, and rendered judgment in his favor. It is contended that this finding is not justified by the evidence. But there is the direct testimony of the defendant in its support, and this was to some extent corroborated by the witness McGreal; and in addition these two witnesses swore that defendant filed in the street superintendent's office a protest against the issuance to the plaintiff's as-

signor of a permit to do the work, which seems to be undisputed, and in addition informed the plaintiff's assignor that defendant would not be responsible for the work. The foregoing is sufficient to raise a substantial conflict in the evidence.

The appellant also relies upon a promise after the work was completed. But, assuming that such a promise would not be without consideration, the finding is against its existence; and there is evidence in support of the finding.

The fact that the defendant saw the work upon the street going on without further protest does not render him liable, or raise an implied promise to pay. Nor can a promise be implied from the fact that on several occasions he made suggestions to the workmen. The street was a public street, and his explanation ("I noticed that his stakes were not right; and, as I liked to see things done right, I called their attention to their mistake") is not improbable. The permit from the street superintendent to do the work is something that is required in case of private work upon the streets, and imposed no liability upon the defendant.

In view of the foregoing, the other matters are immaterial. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 233)

CHURCHILL et al. v. LAUER et al. (No. 13,359.)

(Supreme Court of California. June 2, 1890.)

EQUITY—JOINDER OF PARTIES—INJUNCTION—RIPARIAN OWNERS.

1. The owners in severalty of different tracts of land may join in a bill for injunction to restrain the diversion of the waters of a stream along whose banks their lands are located, and in which they have riparian rights, and rights acquired by appropriation.

2. The complaint alleged that a certain stream, having well-defined beds, banks, and channels, when unobstructed, flowed from its source to, upon, and across the lands of the respective plaintiffs. It then alleged that it flowed upon and across the lands of seven of plaintiffs, "and to some extent, by such natural flow, seepage, and percolation, irrigated and watered portions" of the lands of the others. *Held*, that the language of the last paragraph did not overcome the first, and that all were riparian proprietors.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; M. MARSTELLER, Judge.

Spencer & Raker and C. A. Raker, for appellants. Goodwin & Jenks, J. J. May, Ewing & Clafin and Harrington & Harrington, for respondents.

HAYNE, C. This was a suit by 10 plaintiffs against 18 defendants to enjoin the latter from diverting the water of a stream called "Pine Creek," in Modoc county. The complaint contains two counts. The first count alleges, in substance, that each plaintiff is the owner in severalty of a described lot of land, and that "all the said

lots of land constitute one complete lot and body of land, and are all irrigated by the same stream of water, and from a common source, and cannot be irrigated by any other source." As we construe this count, it alleges that all of the plaintiffs are riparian proprietors. It first alleges that "the said stream has natural and well-defined beds and banks, and a natural and well-defined channel, from its source to and upon the lands of the plaintiffs, and across said lands, respectively, and that said creek, in its own natural channel, when unobstructed, naturally flows to and upon the said lands of plaintiffs." The respondents contend that this allegation is overcome by the following, viz.: "That said Pine creek, in its own natural channel, flows upon and across the lands herein described as the lands owned by plaintiffs Churchill and Adin McDowell and Stephen Burgoyne and Ann R. Wood and J. J. Rodkey and Howard B. Porter and John Wall, and across the said lands owned by each of said plaintiffs, and to some extent, by such natural flow, seepage, and percolation, irrigate and water portions of the said lands of plaintiffs Rachel C. Dorris, Carlos J. Dorris, and Ancil Morse," etc. It is true that the implication from this latter allegation is that the stream flowed across the lands of the seven first-mentioned plaintiffs only, and consequently that they alone were riparian proprietors; but this implication is not enough to overcome the allegation first quoted. It is not the case of a general conclusion overcome by a specific fact, as supposed by counsel; and, in addition to this the court afterwards names the plaintiffs "Rachel C. Dorris, Carlos J. Dorris, and Ancil Morse," and then proceeds as follows: "That each one of said plaintiffs last named is the owner of the whole of the beds and banks of said Pine creek at that point where said creek flows upon and across his said lands; that each one of the plaintiffs last named is a riparian owner on the said creek, and, as such riparian owner, is entitled to the full flow, use, and benefit of all the waters of said creek upon and across his said lands," etc. The most that can possibly be claimed for the respondents, therefore, is that there is an inconsistency. But this can only be objected to by a special demurrer for ambiguity, uncertainty, etc. *Blasingame v. Insurance Co.*, 75 Cal. 633, 17 Pac. Rep. 925; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. Rep. 375. Only one of the four demurrers specified this ground; and, as it has not been argued, it must be held to be waived. *Whitby v. Rowell*, 23 Pac. Rep. 382, (No. 13,398, filed February 28, 1890.) It must be held, therefore, that the first count shows that the plaintiffs were riparian proprietors, and that portions of their lands were irrigated by the direct flow of the stream, and portions by the seepage and percolation. See generally *Heilbron v. Canal Co.*, 75 Cal. 431, 17 Pac. Rep. 535.

This count goes on to allege facts which show that plaintiffs are using the water, and will suffer irreparable injury from being deprived of it, and that the defendants, for several months before the com-

mencement of the suit, have unlawfully and without right diverted the water at a point above the plaintiffs' lands, and have thereby prevented it from reaching their lands, and that they threaten to continue so to divert the water. The second count repeats the allegations of the first, and in addition alleges, in substance, that the plaintiffs have constructed certain dams and ditches whereby the waters of said stream are used for the irrigation of such portions of their said lands as are "not properly or sufficiently irrigated by said natural flow, seepage, and percolation of the waters of said creek," and have "appropriated" large quantities of said waters for the purposes mentioned, and that "the plaintiffs, and each and every one of them, have and hold and own a right to the unobstructed flow of the waters of said Pine creek, in the natural channel thereof, to and upon said lands, and to and through their said ditches, for the uses and purposes hereinbefore stated." These latter rights of the plaintiffs are perhaps not very formally set forth; but the mode of statement is not objected to either in the record or in the briefs, and under the circumstances must be held to be sufficient. Neither count alleges that the plaintiffs, or any of them, have been damaged in any particular sum; and no damages are prayed for, but only an injunction. It therefore appears that the plaintiffs are the owners in severalty of certain tracts along the banks of a stream, and that they resort to a court of equity to prevent the wrongful diversion of the waters of such stream, not only because such diversion will irreparably injure their rights as riparian owners, but because it will irreparably injure their rights acquired by appropriation. The defendants demurred to the complaint upon the grounds, among others, that there was a misjoinder of parties plaintiff, and a misjoinder of causes of action. The trial court sustained the demurrer, and rendered final judgment in favor of the defendants, and the plaintiffs appeal. The respondents do not contend that the complaint does not state a cause of action against the defendants; and inasmuch as it is admitted, for the purposes of the demurrer, that the plaintiffs have some rights to the water, and that the defendants have no right thereto, as against the plaintiffs, but are mere trespassers, no such contention could be made. The positions taken in the argument are that there was a misjoinder of parties plaintiff, and a misjoinder of causes of action. It is to be observed that the demurrer does not take the ground, and the respondents do not contend, that there was a misjoinder of parties defendant; and therefore, for the purposes of the appeal, the case is the same as if the diversion complained of was made and threatened by a single defendant.

We think that the plaintiffs had a right to join in the action. There is an exception, at least in equity cases, to the general rule as to joinder. This is stated by Story as follows: "Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is where the parties, ei-

ther plaintiffs or defendants, have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. The cases respecting rights of common, where all the commoners may join, or one may sue or be sued for all, of parishioners to establish a general *modus*, or of a person to establish a general right of tithes against parishioners, and others of a like nature, already stated under another head, fully exemplify the doctrine; for in all of them there is a common interest centering in the point in issue in the cause." Story, Eq. Pl. § 285. And this exception has been held to cover cases like the present. In *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 328, it was held that the owners of different mills may join in a bill in equity to enjoin a stranger from letting off water from a reservoir which they had erected to collect the waters of a stream for the purpose of supplying their several mills. And SHAW, C. J., delivering the opinion, said: "Although the plaintiffs are several owners of separate and distinct mills injured by the alleged stoppage, diversion, and waste of the water of Mill river, and to recover damages for which each owner must bring his several action at law to obtain a remedy for his particular injury, yet they have a joint and common right in the natural flow of the stream, and in the reservoir by which its power is increased, and a joint interest in the remedy which equity alone can afford, in maintaining a regular flow of the water of the reservoir at suitable and proper times, so as best to subserve the equal rights of them all. The remedy in equity, therefore, would, by one decree in one suit, prevent a multiplicity of actions." In the foregoing case the plaintiffs had increased the flow of the stream by collecting its waters in a reservoir. The decision, however, did not proceed upon this circumstance, but was put upon the ground of the common right "in the natural flow of the stream." The same principle was laid down in *Reid v. Gifford*, Hopk. Ch. 419. There several proprietors of separate and distinct lands and mills, supplied by a natural water-course, were allowed to join in an application for an injunction to prevent the defendants from diverting the water by means of a canal above the plaintiffs' property; and Chancellor SANDFORD said: "The rights of the several complainants to their respective lands are indeed distinct, but the grievance in question is a common injury to all the complainants. The water, in its natural descent from the lake, becomes the property of each of the complainants successively. All the complainants thus have right in the same subject, and the nature of the case forms a community of interests in the complainants." Upon the authority of this case and others, two persons, having separate and distinct tenements which suffered a like injury from a nuisance, were allowed to join in a suit to enjoin the continuance of the nuisance; and Chancellor WALWORTH said of the preceding case that, "as the relief sought was the same as to all the complainants, there certainly was no good reason for compelling them to file several bills

to protect their common right against acts of the defendant which were injurious to all of them." *Murray v. Hay*, 1 Barb. Ch. 59. And in Massachusetts the principle of the case first quoted has been held to sanction the joinder of several complainants in a suit to restrain a private nuisance which was an injury to a passage-way in which they had a right of way as appurtenant to their several estate; and the court, per MORTON, J., said: "Undoubtedly, in a suit at law for the nuisance, they could not properly join. But the rule in equity as to the joinder of parties is more elastic. Generally, when several persons have a common interest in the subject-matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs." *Cadigan v. Brown*, 120 Mass. 494. We find no decision in this state which establishes a contrary doctrine. In the case of *Barham v. Hostetter*, 67 Cal. 274, 7 Pac. Rep. 689, the difficulty in the case seems to have been that an action at law for damages which was "not joint as to all the plaintiffs, but undoubtedly several," was joined with a cause of action for an injunction, "which is common to all the plaintiffs." The decision seems in line with the cases above cited.

In the present case, as above stated, there is no showing of damages sustained in any particular sum, and no prayer for damages; and we consider the proceeding to be in equity to restrain the diversion of the water. In this view, it does not seem to us material how the plaintiffs acquired their rights; i. e., whether they have rights as riparian owners, or as appropriators. It is sufficient, under the decisions cited, that they each have some right to the waters of the stream which will suffer an injury from the diversion complained of. We therefore advise that the judgment be reversed and the cause remanded, with directions to overrule the demurrer to the complaint, with leave of the defendants to answer.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to overrule the demurrer to the complaint, with leave to the defendants to answer.

84 Cal. 476

MARTIN v. PORTER. (No. 13,248.)

(Supreme Court of California. June 11, 1890.)

REPLEVIN—PLEADING—COSTS.

1. An assignee in insolvency proceedings brought replevin against his assignor to recover certain hay which he alleged was not delivered to him under the assignment. The answer denied that defendant was ever owner, or in possession, or entitled to possession, of the hay. *Held*, that the answer made an issue, and the plaintiff was not entitled to a judgment upon the pleadings.

2. The defendant was entitled to appeal from the judgment "that plaintiff recover from the defendant all the property named in the complaint," although no costs were awarded the plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Baker, for appellant. *Jenks & Claffin*, for respondent.

BELCHER, C. C. This is an action of claim and delivery. The complaint alleges that on the 10th day of October, 1888, the defendant, Howard B. Porter, filed in court his petition in insolvency, and thereafter such proceedings were had that plaintiff was duly appointed his assignee, and qualified as such, and thereupon the clerk of the court duly assigned to him all the estate, real and personal, of the insolvent debtor; "that at the time of filing said petition said defendant was, and long prior thereto had been, and still is, the owner and in possession of a certain quantity of hay, to-wit, one hundred and twenty tons, of the value of seven dollars per ton;" that, by virtue of the proceedings and assignment, plaintiff has become and is entitled to the possession of the hay, and has demanded of defendant the possession thereof, but defendant wrongfully and unlawfully withholds possession, and refuses to deliver the hay, or any part thereof, to the plaintiff. The defendant demurred to the complaint, and, his demurrer being overruled, answered. The answer denies that defendant is or ever was, at any of the times named in the complaint, the owner, or in the possession, or entitled to the possession, of the hay sued for, or any part thereof; and it disclaims on the part of defendant "any title to or interest in said hay in any way or to any extent whatsoever, or any right or title to the possession thereof, during any of the time or times alleged in the complaint, or at all." It further denies that plaintiff is entitled to the possession of the hay, or that defendant ever withheld possession, or refused to deliver possession thereof to him. The plaintiff moved for judgment on the pleadings upon the grounds—*First*, that the answer did not state facts sufficient to constitute a defense; *second*, that it did not raise any material issue; *third*, that the defendant disclaimed any right, title, or interest in the property sued for. The court granted the motion, and the appeal is from the judgment thereupon entered.

1. The theory on which the action was brought, evidently, was that the defendant was the owner of the hay in question at the time he commenced his proceedings in insolvency, and wrongfully omitted it from his schedule, and that the title to the hay vested in the plaintiff under the assignment made to him by the clerk, and that he thereby became entitled to demand and recover its possession. The complaint was somewhat crudely drawn. It alleges the assignment, and then that the defendant still is the owner, etc. These averments are conflicting and antagonistic; for, if the defendant was still the owner, the plaintiff evidently was not. *King v. Felton*, 63 Cal. 67. Assuming, however, that the complaint was sufficient when tested by a general and special demurrer, and that the plaintiff had a right to resort to an action of this kind, and was not confined to the remedy provided in section 47 of the insolvent act, (*Goodday v. Superior Court*, 65 Cal. 580, 4 Pac. Rep. 626,) still he

was not entitled to recover unless the material averments of the complaint were either admitted or proved to be true. We think the answer raised material issues. It denied that the defendant was ever the owner or in possession, or entitled to the possession, of the hay, or ever withheld it, or refused to deliver it to the plaintiff; and, if this was so, then clearly the plaintiff had no right to sue for and recover it. Under these circumstances, the plaintiff was not entitled to a judgment on the pleadings; the rule being settled that "it is only where an answer admits or leaves undenied all material facts stated in the complaint that a judgment can be rendered on the pleadings." *Botto v. Vandament*, 67 Cal. 332, 7 Pac. Rep. 753.

2. The judgment was that the "plaintiff do have and recover of and from the defendant the possession of all the personal property described in the complaint, to-wit, one hundred and twenty tons of hay." No costs were awarded the plaintiff and the judgment was not in the alternative form. It is claimed, therefore, for respondent, that the defendant was in no way "aggrieved" by the judgment, and hence had no right to appeal from it. This claim cannot be sustained. If the case had been tried, and the denials of the answer sustained, the proper judgment would have been that the plaintiff take nothing, and that defendant recover his costs. Having been brought into court against his will, and required to contest the case, the defendant should not be turned out without his costs, if the plaintiff failed to show that he was entitled to recover. The judgment should be reversed, and the cause remanded for a new trial.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

84 Cal. 544

FAULK v. STROTHER. (No. 12,061.)

(*Supreme Court of California*. June 13, 1890.)

MANDATE TO COUNTY AUDITOR.

Under the act of the California legislature commonly known as the "Consolidation Act," (article 6, § 92,) providing that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of mandate will issue against the auditor to pay a claim allowed by the county board on appeal from its rejection by him, though the rejection may have been justified on its first presentation. *BEATTY, C. J.*, and *WORKS, J.*, dissenting.

In bank. On rehearing. For opinion on former hearing, see 22 Pac. Rep. 676.

George Flournoy, Jr., (*Philip G. Galpin* and *Wilson & Wilson*, of counsel,) for appellant. *Oliver P. Evans*, for respondents.

McFARLAND, J. After a full consideration of this cause upon hearing in bank, we are satisfied with the decision of department 2, and the opinion rendered by said department. We see no escape from the conclusion there reached. Under section 92 of the consolidation act the action

of the board of supervisors, on an appeal from the auditor, is expressly made final so far as the auditing of a demand is concerned. Upon the appeal, if the board approves and allows the demand, it is made the duty of the auditor to enter it "in the proper book in like manner as other demands allowed by him, and an indorsement must be made of its having been so entered." And this is all that the judgment of the court below requires to be done. Whether or not the payment of the demand could be prevented or enforced at any other stage of its history is a question which does not arise here. Judgment affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: WORKS, J.

I dissent: BEATTY, C. J.

84 Cal. 57

HUMBERT v. DUNN. (No. 13,647.)

(Supreme Court of California. May 3, 1890.)

CONSTITUTIONAL LAW—APPROPRIATIONS.

St. Cal. 1884, p. 421, provided for the appointment of three engineers as examining commissioners of rivers and harbors, and "that each member of said commission shall receive a salary, \$2,400 per annum, payable monthly, and his traveling expenses, while engaged in the performance of official duties. Said salary and expenses to be paid out of any money in the state treasury not otherwise appropriated." In a proceeding for mandate to compel the payment of \$200 claimed to be due petitioner as salary, *held*, that the language of the act designates with sufficient clearness the amount to be paid, and the fund out of which it is to be drawn, to constitute an "appropriation," within the meaning of Const. Cal. art. 4, § 22, which provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

In bank. Mandate.

Robert P. Delvin, for applicant. Geo. A. Johnson, Atty. Gen., for respondent.

PATERSON, J. This is an application for a writ of mandate, commanding the respondent, as comptroller of the state, to draw a warrant in favor of petitioner for the sum of \$200, claimed to be due the latter on account of salary as a member of the examining commission on rivers and harbors. The petition shows, in substance, that the petitioner is a duly appointed, qualified, and acting member of said commission; that, by virtue of his appointment, qualification, and acts as a member of said commission, there is due to him, as salary for the month of November, 1889, the sum of \$200; that his claim was duly presented to the state board of examiners, and by them audited, allowed, approved, and ordered paid out of any money in the state treasury not otherwise appropriated; that the respondent refused to draw on the treasury for the amount allowed. The attorney general, on behalf of respondent, has filed a demurrer to the petition on the ground that it does not state facts sufficient to constitute a cause of action. It is not claimed that the law is against the constitution or good policy. The only point made against the right of

the petitioner to receive the salary due to him under the provisions of the act is that no appropriation has been made out of which it can be paid.

The act in question provides that "each member of the said commission shall receive a salary of \$2,400 per annum, payable monthly, and his traveling expenses while engaged in the performance of official duties; said salary and expenses to be paid out of any money in the state treasury not otherwise appropriated." St. 1889, p. 421. The question is whether these provisions of the act constitute an "appropriation," within the meaning of that term as used in section 22, art. 4, of the constitution, which provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law." It is true, the usual formula, "There is hereby appropriated the sum of * * * dollars out of any money in the state treasury not otherwise appropriated for the payment of salaries," etc., is not found in the act; but the intention of the legislature to provide for the payment of the salaries of the commissioners as they accrued is clearly manifested in the language used. "Each member * * * shall receive a salary of two thousand four hundred dollars per annum, payable monthly," and it is "to be paid out of any money in the state treasury not otherwise appropriated." There is nothing in this language indicating an intention to postpone the payment of the salaries of the commissioners until the next session of the legislature. They are to be paid monthly, and out of any money not otherwise appropriated. "Not otherwise appropriated," when? Clearly, at the time when the services are performed, and the monthly payments become due.

While it is customary to use the words, "there is hereby appropriated the sum," etc., in bills appropriating money for the payment of salary and other expenses of the government, it is not essential to the validity of an appropriation that those words, or any of them, should be used if the legislature has clearly designated the amount and the fund out of which it is to be paid. Has the legislature fixed the amount of the claim, and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation, there being no other constitutional objection to the bill than as to the sufficiency of the act of appropriation. *McCauley v. Brooks*, 16 Cal. 28. The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the constitution of the United States. Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government. 2 Ops. Atty. Gen. 670. It had its origin in parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury ex

cept in accordance with express appropriations therefor made by parliament, (Hall. Hist. 555;) and the system worked so well in correcting the abuses complained of, that our forefathers adopted it, and the restraint imposed by it has become a part of the fundamental law of nearly every state in the Union. To the legislative department of the government is intrusted the power to say to what purpose the public funds shall be devoted in each fiscal year, and, as stated before, when the legislature has clearly indicated its will as to the claim which is to be paid and the fund from which it is to be paid, the constitutional requirement is satisfied, and no particular form of words is essential to make the appropriation valid. *Proll v. Dunn*, 80 Cal. 220, 22 Pac. Rep. 143. In *Ristine v. State*, 20 Ind. 339, the court said: "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant, if he has appropriated money in the treasury. And such an appropriation may be prospective; that is, it may be made in one year, of the revenues to accrue in another or future years,—the law being so framed as to address itself to such future revenues."

It is claimed that the act is unconstitutional because it does not specify the amount to be appropriated; that the amount which may be incurred as expenses is uncertain. So far as the traveling expenses are concerned, this contention may be good, although it has been held that "it is not essential or vital to an appropriation that it should be of an amount certainly ascertained prior to the appropriation." *People v. Miner*, 46 Ill. 390. We are not called upon to decide this question, however, as the only claim here is for salary, which is fixed by the act at \$2,400 per annum, payable monthly. The act provides for the appointment of three engineers as commissioners, and, so far as their salaries are concerned, the amount appropriated is fixed and certain. The demurrer is overruled, with permission to file an answer, if the attorney general should be so advised, within 10 days after notice of this decision.

WE CONCUR: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

84 Cal. 37

PEOPLE V. MAURITZEN. (No. 20,613.)
(Supreme Court of California. May 3, 1890.)

FALSE PRETENSES—EVIDENCE.

1. On a trial for obtaining property by false pretenses, it appeared that defendant, desiring to purchase horses, told the owner that he had \$400 in bank, but that he did not want to use it; that he would take the horses to S., sell them, and get the money to pay for them. Defendant took the horses, and gave his note, with the understanding that he should have one week in which to sell the horses, and pay for them out of the proceeds. Defendant was arrested on this charge before the week had expired, and had the horses in his possession in *S. Held*, that the evidence did not warrant a conviction.

2. The execution, contents, and delivery of the note given by respondent were proven by parol without objection, and the court correctly in-

structed the jury that, if the owner sold the horses upon credit and took a note for them, they should acquit. The foreman asked the court if the note was in evidence, and the court replied, "No." *Held*, that the reply of the court was misleading, and error.

In bank. Appeal from superior court, Napa county; R. CROUCH, Judge.

E. D. Ham, for appellant. Atty. Gen. Geo. A. Johnson, for respondent.

MCFARLAND, J. The defendant was convicted, under section 532 of the Penal Code, of the crime of obtaining three horses from one G. W. Hill by false and fraudulent pretenses. The false pretense alleged was representing to said Hill that the defendant had \$400 on deposit in a certain bank in Napa City, when the horses were purchased by defendant of Hill. The evidence is undisputed that, while defendant stated that he had the \$400 in bank, he also told Hill that he did not want to use that money; that Hill must give him a week's time to pay for the horses; that he would take the horses to San Francisco, and sell them, and wanted to make the turn, and get the money from the sale at the latter place to pay Hill. Thereupon he paid Hill \$20 in cash, and gave him his (defendant's) note for the balance of the purchase money, (\$380,) payable in a week. Defendant then took the horses to San Francisco. As Gardner, one of the witnesses for the prosecution, and one of the owners of the horses, testified: "Defendant was to pay for the horses out of the money derived from the sale of the horses, and was to have one week's time in which to sell the horses and pay for the same." This was on the 17th of June, 1889, but on June 20th—before one-half of the week had expired—defendant was arrested at San Francisco on this present charge. He still had the horses, and when arrested gave them back to Hill, and also gave him his note for Hill's expenses in taking the horses back to Napa City.

This evidence makes a very slender case of the crime charged, at best; and we think that the court misled the jury in answer to their inquiry about the note given by defendant to Hill on the purchase of the horses. The court had correctly instructed the jury that "if said Hill sold horses on credit, and took a note for the same, and relied on the sale of the horses by defendant for his pay, you should find the defendant not guilty, although he may have falsely told the said Hill that he had \$400 in the bank of Seely & Bickford." But after the jury had retired they returned into court, "and through their foreman asked the court if the note given by the defendant to Hill for the purchase of the horses was in evidence before them. The court replied that the note was not in evidence before them." This was clearly error, for the giving of the note and its contents was distinctly proven by the witnesses without objection, and was as much in evidence before the jury as if it had been proven by the production of the written instrument itself. And that the error was material is self-evident, without even considering the fact that the jury specially made inquiry on the subject.

Judgment and order denying a new trial reversed, and cause remanded for new trial.

I concur: BEATTY, C. J.

THORNTON, J., (*concurring*.) I agree in what is said in the opinion of Justice McFARLAND. I am of opinion that the court erred in refusing the first and third instructions asked by defendant. I am further of opinion that the verdict is contrary to the evidence. I cannot perceive how any man of ordinary intelligence could, on the testimony in the record, fail to entertain a reasonable doubt of defendant's guilt. The judgment should be reversed, and cause remanded for a new trial.

PATERSON, J., (*concurring*.) I concur on the ground that the evidence does not support the verdict. Mr. Gardner, one of the owners, testified: "Mr. Hill would not have accepted the note and \$20 for the horses if I had not been satisfied. The money the defendant stated he had in the bank of Seely & Bickford was not to be used in paying for the horses. Defendant was to pay for said horses out of the money derived from the sale of the horses, and was to have one week's time in which to sell the horses and pay for the same. The credit of seven days on said note was to enable him to sell the horses and raise the money and pay for the horses. Defendant was to pay out of the money the horses brought." Mr. Hill, the owner of the horses, and who personally negotiated the sale, testified that the defendant told him he did not have the money to spare then to pay for the horses, but if he would give him a week's time he would pay for them. Defendant was arrested before the expiration of the time given him to sell and pay for them. It is difficult to see how any reliance could have been placed upon a fund which, if it existed at the time, could not be spared to pay for the horses. There was no pretense that defendant would use any of the \$400 in payment of the purchase price. The owners certainly understood that the money defendant claimed to have could not be applied in payment of the purchase price, and that a credit of a week would be necessary. If the money defendant represented he had on hand was to be applied necessarily to other debts, and not in payment of the purchase price, how can reliance be predicated upon any statement in regard to it? There is nothing in the evidence to show that the defendant is insolvent. It is in evidence, and not contradicted, that he owned a store in Napa, where he purchased the horses, though its value is not stated. Mr. Hill now thinks, no doubt, that the statement (as to the money in bank) did induce him to part with the horses, but the testimony of himself and partner and of the defendant, and the circumstances surrounding the transaction, all taken together, show that all parties understood at the time that defendant was to have a week in which to sell the horses and pay the balance of the purchase price out of the proceeds, and that the statement about the \$400 deposit cut little or no figure in the transaction.

BARBIERI v. RAMELLI *et al.* (No. 12,756.)
(Supreme Court of California. May 29, 1890.)
ATTACHMENT—PLEADING—UNCONTRADICTED AFFIDAVIT.

Plaintiff's affidavit for attachment alleged that the mortgage by which the debt of \$700 was secured had become valueless. Defendant's affidavit on motion to dissolve alleged that he was seised and in possession of the mortgaged land; that at the date of the mortgage it was worth \$21,000, and was still worth that amount. *Held* that, plaintiff having failed to avail himself of the right, under Code Civil Proc. Cal. § 557, to contradict defendant's statement of facts, or to state other facts, defendant's affidavit was conclusive that plaintiff had no right of attachment, on the ground that the "security had become valueless," under section 538.

Department 2. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Geo. C. Ross, for appellant. Joseph F. Cavagnaro, for respondents.

McFARLAND, J. This is an appeal by defendants from an order of the court below denying their motion to discharge and dissolve an attachment. The action is to recover upon an alleged indebtedness of \$700, and the part of the affidavit of attachment involved in this appeal is as follows: "That the same was secured by a mortgage on real property only, which was recorded in the recorder's office of San Mateo county, state of California, on the 16th day of November, 1885, in Record 16 of Mortgages, page 589, and said mortgage, without any act of plaintiff, or the person to whom the security was given, became valueless." The affidavit of the defendant Carlo Ramelli, on the hearing of the motion, states specifically, among other things, that the mortgage referred to in plaintiff's affidavit for attachment was of a certain described tract of land in San Mateo county, containing over 1,000 acres; that it was given to secure the identical indebtedness sued on, and none other; that it has never been satisfied, but remains in full force and effect; that the said land was at the date of the mortgage of the value of about \$21,000; that it has not depreciated in value since said date, but, on the contrary, defendants, since then, have put additional improvements thereon to the extent of \$2,000; that said land is still in existence, and is still security for said indebtedness, and is worth fully as much as it was at the date of said mortgage; that defendants have not parted with their interests in said land, except that defendant Beffa has sold and conveyed his interest to the other defendants, who are seised and in possession of the whole of said tract of land; and that the sheriff, under the writ of attachment, has taken and withholds from defendants a large amount of personal property, consisting of cows, calves, horses, etc. Appellants contend that the affidavit for attachment is defective because it merely states that "said mortgage" became valueless, while the Code provides for a statement that the "security" has become valueless; and, furthermore, that there can be no attachment in any case where there is a mortgage, because, under section 726 of the Code of Civil Procedure and the de-

cisions of this court, no action in such a case can be maintained without a foreclosure of the mortgage. But, waiving these questions, we think that the evidence before the court on the motion to discharge showed that the security had not become valueless. The words "has become valueless," as used in section 538 of the Code of Civil Procedure, are, no doubt, of somewhat uncertain meaning, and cases can be readily imagined where it would be difficult to properly apply them; but in the case at bar it very clearly appears that no change had taken place in the security from the time the mortgage was executed until the time of the issuance of the writ of attachment. It cannot be fairly said that there is a conflict of evidence on this point. It is true that the affidavit of plaintiff states the general conclusion that the mortgage has become valueless, which was sufficient, no doubt, to justify the clerk in issuing the writ; but the affidavit of defendant contained a statement of specific facts which, if true, shows that the mortgage had not become valueless. Plaintiff had the opportunity, under section 537 of the Code, to contradict these specific statements of fact made by defendant, or to state any other facts; and, not having done so, we think that defendant's affidavit must be taken as establishing the truth of what it contains. And, if the security had not become valueless, then defendants were entitled to have the attachment dissolved. Of course, if there had been any substantial conflict in the evidence as to the facts involved, we would not disturb the ruling of the court below. The order appealed from is reversed, and the court below is directed to discharge and dissolve the attachment.

We concur: SHARPSTEIN, J.; PATERSON, J.

84 Cal. 177

FROLICH v. MCKIERNAN. (No. 12,670.)

(Supreme Court of California. May 29, 1890.)

SLANDER—WORDS ACTIONABLE PER SE.

The words alleged in the complaint to have been slanderously spoken by defendant of plaintiff were: "You thief!" "You swindler!" "You scoundrel! You want to swindle me out of my money." Defendant claimed that this amounted only to saying that plaintiff wanted to swindle, which was not charging a crime. But the complaint minutely alleged what defendant meant by the language, how he meant it to be understood by those present, and how it was understood by them, and, moreover, that it was spoken of plaintiff as secretary of a corporation, for the purpose of injuring him in his office. *Held*, that the complaint showed the words actionable *per se*, within Civil Code Cal. § 46.

Department 2. Appeal from superior court, Santa Clara county; FRIS. F. SPENCER, Judge.

S. A. Barker, for appellant. Moore & Burchard, for respondent.

McFARLAND, J. Action for slander. Verdict and judgment for plaintiff for \$450. Defendant appeals from the judgment upon the judgment roll alone. The only points made by the appellant relate to the sufficiency of the complaint, to which he demurred upon the grounds that it does

not state facts sufficient to constitute a cause of action, and is ambiguous, uncertain, and unintelligible.

There is supposed to be still some relic of the exaggerated nicety with which pleadings in actions of libel and slander had formerly to be constructed, and it is invoked in this case. The words alleged in the complaint to have been slanderously spoken by defendant of plaintiff are these: "You thief!" "You swindler!" "You scoundrel! You want to swindle me out of my money." Of this language the ordinary man would say, with the hostess in Henry IV.: "These are very bitter words." But it is contended that, for the purposes of the law of slander, the sting of the first part of the language is removed by the qualification of the latter part. That is to say, the contention is that defendant only said that plaintiff was a thief because he wanted to swindle defendant out of his money, and, as wanting to swindle does not make a man a thief, therefore defendant did not, in law, call plaintiff a thief; and, as wanting to swindle a man out of his money does not constitute a crime, therefore the alleged language is not actionable. There is no doubt some authority for this contention; but the complaint minutely and in detail sets forth what defendant meant by the language used, and how he meant to be understood by those in whose presence it was used, and how the latter understood it; and, moreover, that plaintiff was the secretary of a certain corporation, of which defendant was president, and that the language was spoken of and concerning plaintiff, as such secretary, for the purpose of injuring him in his said office. This was sufficient to make the language actionable, and it was not necessary to allege special damages. Civil Code, § 46; *Butler v. Howes*, 7 Cal. 87.

We see nothing in the points that the complaint was ambiguous, uncertain, or unintelligible. Judgment affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

84 Cal. 239

WILSON v. WHITE. (No. 12,897.)

(Supreme Court of California. June 2, 1890.)

MORTGAGE—FORECLOSURE—PLEADING AND PROOF.

1. A conveyance of land, by the purchaser at a foreclosure sale, to a person who had a contract for the land before the sale, is consideration for a mortgage, whether or not the latter was made a party to the foreclosure suit; for, if his right under his contract was not cut off by the suit, the conveyance at least assigned the mortgage debt.

2. In an action to foreclose a mortgage, evidence of plaintiff's fraud is inadmissible, even though not objected to, where there are no allegations of fraud in the answer.

3. A conveyance to and by a person under an assumed name passes title.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WALTER LEVY, Judge.

Craig & Meredith, for appellant. Fisher Ames, for respondent.

HAYNE, C. This was an action for the foreclosure of a mortgage made to secure the payment of a note for \$250. The answer contained a general denial, and an

affirmative averment that the note was without consideration. The trial court found this averment to be true, and gave judgment for the defendant; and the plaintiff appeals. The material facts shown by the evidence are as follows: While the property involved was held by one Duncan for the benefit of the Pioneer Bank, and was subject to a mortgage in favor of one Bradley, Duncan made a contract to sell it to the defendant, who had no notice of the rights of the bank, for the sum of \$1,800. Of this sum the defendant paid \$1,620, leaving due a balance of \$180. In this condition of affairs the bank was adjudicated a bankrupt, and the plaintiff and one Hyde were appointed assignees. Thereupon Duncan conveyed to the assignees his interest in the property, and in the contract with the defendant. There is mention of a deed from Duncan to the defendant, but that deed does not include the property involved here. Hyde prepared a deed from the assignees to the defendant, signed it, and handed it to the plaintiff, to be by him signed and delivered to the defendant upon his paying the balance due upon his contract. Plaintiff never executed this deed, but kept it in his possession. He purchased the Bradley mortgage, paying full value for it out of his own funds, and subsequently brought suit to foreclose it. It is somewhat uncertain who purchased at this foreclosure sale. No documents were introduced in evidence. The defendant testified that the title passed to Bradley, and that he conveyed it to plaintiff, while the plaintiff seems to testify that he himself purchased at the sheriff's sale, but got a quitclaim deed from Bradley. This uncertainty is immaterial, however; for in either case the title passed to the plaintiff, who thereupon made a deed to "John Warnen," who was plaintiff's brother-in-law, and whose real name was Hardwick or Hardwig. He paid no consideration for the deed, but acted in the interest of the plaintiff, and assumed the name of Warnen at his request, and for the occasion only. The defendant offered to pay the balance due on his contract, but was told by plaintiff that the title had passed to Warnen by the foreclosure proceedings. He, however, introduced defendant to Warnen as the man who had the title; and an arrangement was made by which Warnen made a deed to the defendant, and the latter paid therefor \$200 in cash, and gave his note for \$250 more, secured by mortgage upon the property. This note and mortgage were transferred by Warnen to the plaintiff, and constitute the foundation of the present action.

The defendant contends that there was fraud on the part of the plaintiff. But, so far as the creditors of the bank are concerned, it is a sufficient answer to say that the creditors are not complaining, and that their rights are not involved here; and, so far as the defendant himself is concerned, there is no fraud set up in the answer. Aside from denials, the sole defense pleaded is want of consideration. Nor can it be said that the place of a pleading was supplied by litigating the question without objection. The rule in that re-

gard only covers defects in a pleading, and not a total absence of anything in relation to a defense. Leaving out the question of fraud, as must be done, for the reasons above stated, the only matter discussed by counsel is whether title passed by the deed to John Warnen, and by the deed from him to the defendant; it being assumed by counsel that if it did there was consideration for the note and mortgage sued on, but otherwise that there was no such consideration. We think that the deeds were sufficient to convey the title. It is involved in the very inception of a deed that there must be a grantee, to whom delivery is made, and in whom the title can vest. If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called. He may assume a name for the occasion; and a conveyance to and by him under such name will pass the title. This was held in *David v. Insurance Co.*, 83 N. Y. 265. There the owner of property made a deed to "Max David," which was a fictitious name, and subsequently made a deed by said name of Max David to a third person. It was held that the first deed was void, and that the title remained in the owner, but that it passed by the second deed; the court, per EARL, J., saying: "In executing any instruments, I can find no authorities which hold that one is not bound by the name he adopts or uses. *Pro hac vice*, it is his name." So, where a deed was made out in the name of "James O. Brunius," and signed, "J. O. BRUNIUS," it was held that parol evidence was admissible to show that John O. Brunius was the party who signed the deed, and that if this was proved his title passed. The court said: "If the true owner conveys by any name, the conveyance as between the grantor and grantee will transfer title, and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies the terms already contained in it." *Wakefield v. Brown*, 38 Minn. 365, 37 N. W. Rep. 788. A somewhat similar ruling was made in *Middleton v. Findla*, 25 Cal. 78; and upon the authority of this last case it was held in *Fallon v. Kehoe*, 38 Cal. 44, that a deed made to "Darby O'Fallon," which was the name under which Jeremiah Fallon sometimes passed, was a good deed, and that a conveyance by him under the name of "Darby O'Fallon" transferred the title; the court, per CROCKETT, J., saying: "We do not understand counsel as contradicting the proposition that, if the true owner conveys the property by any name, the conveyance as between the grantor and grantee will transfer the title." See, also, *Garwood v. Hastings*, 38 Cal. 222; *Andrews v. Dyer*, 81 Me. 104, 16 Atl. Rep. 405; *Hommel v. Devinney*, 39 Mich. 522; *Staak v. Sigelkow*, 12 Wis. 234; *Nixon v. Cobleigh*, 52 Ill. 387. Upon the authority of the foregoing cases it must be held that the Warnen deeds transferred the title;

and it makes no difference in the result whether the defendant was a party to the foreclosure of the Bradley mortgage or not. If he was a party, and the decree cut off his interest, it is manifest that whatever rights he has to the property he got under the deed from Warnen, which was ample consideration for what he promised to pay for it. If he was not a party, then, although his rights under the contract were not cut off, yet the purchaser is in equity the assignee of the debt secured by the Bradley mortgage. *Carpentier v. Brenham*, 40 Cal. 221; *Rumpp. v. Gerken*, 59 Cal. 496; *Henderson v. Grammar*, 66 Cal. 335, 5 Pac. Rep. 488. And a conveyance by him or his grantee operates as a release of this right, and consequently was consideration for a promise to pay for it.

The plaintiff asks that final judgment be ordered in his favor. But, inasmuch as all the allegations of the complaint were put in issue by the answer, and as the only thing found was that the note was without consideration, it is hardly necessary to say that final judgment cannot be ordered as requested. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

I CONCUR: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

84 Cal. 272

HAWES v. CLARK. (No. 12,783.)

(*Supreme Court of California*. June 2, 1890.)

CONTINUANCE — DISCRETION — FINDINGS — JURY TRIAL — WAIVER.

1. The refusal to continue a case because of the inflamed condition of counsel's eyes is not an abuse of the court's discretion, where he was before the court at the time, and immediately proceeded to conduct the trial in person.

2. If the findings made are sufficient to support the judgment, the failure to find upon other issues is not reversible error, where the record does not show that any evidence was introduced thereon.

3. A defendant cannot demand a trial by a jury after having waived his right thereto in consideration of an agreement to transfer a cause to another department of the court.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Theodore Bradley, (M. G. Cobb, of counsel,) for appellant. Edward J. Linforth, and A. C. Searle, (Henry M. Clement, of counsel,) for appellee.

FOOTE, C. Hawes obtained a judgment against Clark based upon two promissory notes. From that judgment, and an order denying a new trial, the defendant appeals. Appellant claims that the trial court should have granted the motion for a new trial made in his behalf, because it was guilty of an abuse of discretion in not granting a continuance on the ground of the inflamed condition of the eyes of his counsel. The court saw the counsel and his condition at the time the application was made, and was a further

witness to the fact that, notwithstanding his alleged disability, he immediately proceeded to participate and conduct the trial in person. Under this state of facts, we cannot agree with the defendants' contention on that point.

It is next urged in behalf of the appellant that the court erred in refusing to grant a jury trial, as there was no legal waiver of such trial. The facts surrounding the transaction seem to be that the cause was peremptorily set for trial on the 16th of April, 1888, in a certain department of the superior court for the city and county of San Francisco. The defendant's counsel was desirous of having it transferred to another department of that court, so as to secure a delay in the trial. The plaintiff's counsel acceded to this, if the other side would waive a trial by jury. The matter was agreed to upon that basis, and counsel appeared in open court and waived a jury; the cause being also set for trial on the 3d of May, 1888. The waiver was not entered in the minutes in writing; and when the cause came on for trial, on the 14th of the same month, the counsel for defendant asked for a continuance, which, as we have seen, was refused. He then demanded a jury trial. The court, after full examination of the attorneys and the clerk, became satisfied, and properly so, that the defendant's counsel had made the stipulation above adverted to, and had appeared in open court and waived a jury trial. Thereupon, it refused a jury trial, and ordered the clerk to enter the waiver on the minutes *nunc pro tunc* as of the date when the same had actually been made. Without going into the question as to whether the court had the power then to have such entry made, it is plain that the defendant is not in a position to complain of its action. He got the benefit of one part of the stipulation,—that is, the transfer of the cause to another department of the court than the one in which it was peremptorily set for trial,—and secured about a month's delay, which seemed to be his prime object, and should not be allowed to avoid the accompanying burden of a trial before the court without a jury, which he had in open court, by his counsel, waived. *Himmelman v. Sullivan*, 40 Cal. 126.

By a supplemental brief, he now claims that the court made no finding upon certain affirmative defenses set up in his answer at folios 14 and 29. The record contains nothing to show that any evidence whatever was introduced on any such issues. The findings as they stand are amply sufficient to support the judgment, and contain nothing "inconsistent with it." Therefore the failure to find upon an issue, the finding upon which "would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." *Himmelman v. Henry*, 23 Pac. Rep. 1098, (filed in bank May 7, 1890.) We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 291

PEOPLE v. HANSEN. (No. 20,640.)

(Supreme Court of California. June 6, 1890.)

LARCENY—SUFFICIENCY OF EVIDENCE.

Defendant, of mature age, and without money, met a boy of 17 at a lumber camp, and, expressing a desire to go to S., the boy offered to accompany him, and pay his way. They got intoxicated, and entered a restaurant, where the boy went to sleep, placing his vest under his pillow. Defendant openly, in the presence of two other persons, took from the vest \$150, for the purpose, as he claims, of safe-keeping. He then bought tickets to S. for himself and the boy, had his whiskers shaved off, entered a saloon, became drunk, and was arrested. On seeing the officer, he tried to run away. When searched he had a little over \$100 with him. Being released before quite sober, the clerk retained the money, and gave him a receipt for it. He then returned to the restaurant, and asked for his "son," when the boy caused him to be arrested for stealing the money. He was unable to account for the missing \$30. Held sufficient evidence to justify a conviction of grand larceny.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNOM, Judge.

Edgar D. Peixotto, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant, Hansen, was convicted of grand larceny. He appeals from the judgment therein rendered, and from an order denying him a new trial. The sole ground upon which he bases his contention for a reversal of the judgment and order is that the evidence entirely fails to support the verdict of the jury. His claim is that the money which he was charged to have stolen was in fact taken by him from the clothes of his sleeping friend for safe-keeping; that the friend was drunk in a restaurant, and the money alleged to have been stolen was taken openly, in the presence of two other persons, with the avowed intention to keep it safely until the friend and companion should awake, and become sober. The evidence does, without conflict, show that the taking was open, and in the presence of other persons, and with the avowed intention of taking care of it for the sleeping and intoxicated friend. The doubt which is thrown upon the transaction as being *bona fide*, and is really accompanied by the avowed intent, is the subsequent conduct of the defendant, which throws light upon the true and secretly entertained intent to convert the money larcenously to his own use, at the time of the taking.

The defendant was without means, a man of mature age, who fell in with a boy at a lumber camp in Sonoma county. The boy had something over \$170, and, after some little acquaintance between them, the defendant desiring, as he said, to go to Seattle, the boy offered to pay his expenses there, and to accompany him. In pursuance of this plan the two came to San Francisco, and proceeded to get intoxicated, after which they went to a restaurant, and the boy lay down on a lounge, with the apparent desire to sleep off his intoxi-

cation. The defendant, not so drunk as his companion, took \$150 in seven \$20 and two \$5 gold coins from a vest of the boy, which he had taken off and placed under his pillow. This was done in the presence of Gustave Dallinge, a cook and waiter in the restaurant, and of a Mrs. Oswaldt. The defendant then went off, and purchased a ticket for himself and the boy to Seattle, for which he paid \$20, and, getting drunk after a while in a saloon, was put in jail by a police officer. He was found then to have \$100 in gold upon him, and a little less than \$1 in silver, and a knife belonging to the boy. He got out of jail; and, because he was not then considered sober, the property clerk of the police court, where the money taken from him was on deposit, gave him a receipt for the money, but would not give him the money itself. He then went back to where he had left the boy, a day or so having elapsed since he had been there, and asked for his "son," as he called the boy. The boy was there, and at once grabbed him and demanded his money. The defendant told the boy that he had a receipt for the money, and that it was in the city hall. The latter would not take the receipt, but made an outcry for the police, and the defendant was arrested. According to the evidence of the policeman who arrested him before he returned to the restaurant, the defendant had been in a saloon, and was drunk and boisterous, displaying money, and in company with parties before whom, had he been sober, he would not have made the display. He told the policeman a rambling story about the money he had being his own, and was for the support of his wife, and that, if it was taken from him, he could not support her, and that he thought of making a trip to Europe, and spending a good deal of money, etc. When searched preparatory to being "booked" in the jail for being drunk, \$100 in gold coin were found on him, as well as less than \$1 in silver, a knife, and a bag in which the gold was, which bag was the boy's. The defendant had no money when he started to accompany the boy to San Francisco, and the boy paid his expenses, and gave him money to the amount altogether of \$8.50 before the alleged theft. While absent from the boy, after the taking of the money, the defendant had his whiskers shaved off; and, when the officer came into the saloon where the defendant was drunk, he sought to avoid him, and ran away. What became of some \$30 of the money taken the defendant could not account for. The jury, evidently impressed with the belief that the avoidance by the defendant of a police officer as soon as he saw him coming into the saloon, his shaving off his whiskers, and his conduct in apparently recklessly drinking and spending money not his own, and other circumstances in the case, evidenced on the part of the defendant a felonious intent to take and carry away the money in the first instance, which, as he could not do secretly, he did boldly and openly, and with the declared intent to take care of it, but secretly to steal it.

It is urged here that the case of People

v. Stewart, 80 Cal. 129, 22 Pac. Rep. 124, where the judgment was reversed, was not so strong a case on the evidence in favor of the innocence of the defendant there as are the facts shown here. With this contention we cannot agree. The conduct of Stewart at the time of the taking, and ever after, was to all appearances totally devoid of any felonious intent, and without any of the suspicious circumstances as appeared in the conduct of the defendant here subsequent to the taking. We therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 244

HART v. MEAD, Sheriff. (No. 12,688.)

(Supreme Court of California. June 2, 1890.)

SALE—CHANGE OF POSSESSION—EVIDENCE.

In a suit against a sheriff to recover certain cattle, or their value, seized on an execution against plaintiff's father, it appeared that she was living in her father's household; that she received and placed on record a bill of sale of the cattle and other property from him more than a year before, and had finished paying therefor more than four months before the seizure; that when buying she was ignorant of her father's indebtedness to the judgment creditor; that she at once sent written notice of her purchase to other persons interested in the same herd, and immediately began to care for the cattle by riding about and looking after them; that she attended the *rodéos*, and superintended the separation of her cattle from the others, and thereafter took personal charge of them to the same extent as a man would do under similar circumstances. *Held* sufficient evidence to sustain a finding of actual and immediate change of possession, as required by Civil Code Cal. § 3440.

Commissioners' decision. Department 1. Appeal from superior court, Mariposa county; JOHN M. CORCORAN, Judge.

J. M. Congdon, for appellant. G. G. Goucher, Newman Jones, and R. B. Stolder, for respondent.

FOOTE, C. This action was brought by the plaintiff, Nancy J. Hart, to recover of the defendant, as the sheriff of Fresno county, certain cattle alleged by the plaintiff to be her property, and wrongfully taken on an execution against her father, A. W. Bolton, or the value thereof. The cause was tried before a jury, who found a verdict for the plaintiff for the recovery of 23 head of cattle, or for the sum of \$575 if recovery of the property in dispute could not be had. Judgment thereupon followed. Upon motion the court granted a new trial conditionally,—that is, unless the plaintiff would consent to a modification and reduction of the judgment to the sum of \$414; which consent, as required, being given, and the modification made, a new trial was not awarded. From the order made in the premises, and from the judgment, the defendant has appealed.

The contention of the defendant is, in the main, that—*First*, the evidence did not justify the jury in finding the sale of the cattle in dispute to the plaintiff from her father, A. W. Bolton, the judgment debt-

or, to be *bona fide*, under the provisions of section 3439 of the Civil Code; and, *second*, that, supposing the sale to have been shown to be in fact untainted with fraud, the conditions imposed by section 3440, Civil Code, were not sufficiently complied with, under the evidence, to justify the jury in finding the sale of the property involved here to the plaintiff by A. W. Bolton to have been valid.

The plaintiff, it seems, was a young widow, who had been living in the household of her father, A. W. Bolton, most of the time since January, 1885. She testified that the cattle in dispute were in her possession on the 20th day of January, 1887, the date of the levy of an execution on a judgment against her father, and in favor of his creditor, Mr. Reid; that she had bought them from her father on the 2d of September, 1885; that the cattle at that time were part of an undivided band known as the "Pot-Hook" band of cattle, owned in undivided shares by J. J. Westfall, a half interest, and J. R. Westfall and A. W. Bolton each an undivided one-fourth interest. She bought the interest of Bolton in the cattle, and also, in addition, two saddle horses and a mare and two colts. For the whole property she executed her note for \$800, and received a bill of sale for it. This bill of sale was recorded by her on the 16th of September, 1885, in Book G of the Miscellaneous Records of Mariposa county,—the range of the cattle being in both that and Fresno counties; nothing except the cattle being involved in this suit. Her father at the time of this sale owed her \$199.81, which was at once credited on this note. Said amount was made up of \$80 for a horse she had sold him, \$15 she had paid for him at a store, and \$104.81 which she paid for him to Dr. Turner on the day of the sale of the cattle,—this last amount being for some hogs coming to her from her husband's estate, which she gave to Turner; and by the 2d of November, 1886, she had paid up the whole amount of the note. It appears that she began, as soon as she purchased the cattle, to ride around and look after them, as they ran upon the range, just as her father had previously done, and that she performed from that time on all the duties which would pertain to a man similarly circumstanced, and in charge of and owning an interest in cattle running on a range of very considerable extent. At the time of her purchase, she owned some other property exclusive of that coming to her from her deceased husband's estate, viz., some horses, and about 16 head of hogs. She also had delivered to her by her father the branding iron pertaining to this brand of cattle, and branded calves with it. On the 21st of November, 1885, she sent a written notice to the Westfalls, who were joint owners with her of the brand of cattle, that she had purchased her father's interest in them, and seems also to have made this fact known to such other persons as she saw. She stated further that, at the time of the purchase from her father, she did not know that he was indebted to Mr. Reid. She thus succeeded her father at once in the care of the cattle, and looked after them as they were upon

the range, at the time of the purchase, as he had previously done as part owner thereof, and continued to be thus in control of them until about the 25th of April, 1886, when a *rodeo* was had, at which the cattle were gathered up by the parties interested, and those called on to assist at it, and divided out between the plaintiff and the Westfalls; she assisting to gather them up, and being present at the division. The cattle were in charge of her father and J. R. Westfall when she bought; they having gotten them from J. J. Westfall on shares. The notice which she sent to the Westfalls as to her purchase also stated that, she having bought her father's interest in the cattle, they must sell no more of them until a division could be had, and that they would have to settle with her for her share of what they had sold since her purchase, and that she had appointed her father her agent to look after the cattle; but her father did not act under that authority, except some time in December, 1885, when, riding over the range, he would turn the cattle back, if he found them straying off the range, as he would do for any one else. Her father states: "We commenced gathering cattle for the *rodeos* about the 11th of March, and kept on until May 14, 1886. The first division of cattle between J. J. Westfall, J. R. Westfall, and plaintiff took place near the Hart cabin about April 25th. I have been in the cattle business about fourteen or fifteen years. *Rodeos* are usually held from March to May. After the time when I sold the cattle to plaintiff, September 2d, a *rodeo* could not be held until the spring of 1886, as the cattle and horses would be too weak until the grass was good in the spring." The plaintiff is corroborated in the main portion of her testimony, as to the immediate acts of possession and ownership which she exercised over the cattle as changed from that of her father, and the steps which she took to notify others of the change of ownership from her father to herself, by sundry witnesses.

It further appears that Bolton, for some time previous to the sale, had been endeavoring to sell his interest in this band of cattle, in order to wind up his business and quit horseback riding, and try to pay all his creditors, who were not many, nor the amounts due them large, and probably not more than what he owned would suffice to pay; that the plaintiff here did not know he owed Reid, the plaintiff in the execution; that it was uncertain at the time of the sale what the interest in the running cattle would be worth; that she seems to have received at the *rodeo* something over 30 head of cattle, to have driven them off and taken care of them, mainly in person, from that time on to the date of the levy, and to have been as assiduous in her attention to them as a man would be of his own in a like case. From these facts and circumstances surrounding the whole transaction, besides those previously stated, and others which appear in the record, and considering the conditions attending the *status* of the property sold, we cannot say that the jury were not warranted in believing that the sale of the cat-

tle was in fact *bona fide*, and accompanied by an immediate delivery, and followed by an actual and continued change of possession, under the terms of sections 3439 and 3440 of the Civil Code.

We perceive no error of the court in its action upon the giving, refusing, or modification of the instructions; nor is there any other prejudicial error shown by the record. We therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 486

HOME FOR THE CARE OF INEBRIATES v. KAPLAN, Clerk. (No. 12,464.)

(Supreme Court of California. June 12, 1890.)

ABORTIVE APPEAL—CONSTRUCTION OF STATUTE.

1. Under Code Civil Proc. Cal. § 939, which provides that an appeal may be taken from a final judgment within one year after such judgment is entered, an appeal which was perfected after the rendition, but before the entering, of the judgment, was abortive, and did not bring the case up.

2. Where an order substituting a party was made in the supreme court, in a case supposed to be pending there, though in fact the appeal was abortive, the order of substitution will fall with the dismissal of the appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

George Flounroy, for appellant. *Tilden & Tilden*, for respondent.

GIBSON, C. In this proceeding the plaintiff corporation obtained a judgment awarding it a peremptory writ of mandate against the defendant, Kaplan, as clerk of the police judge's court No. 2, of the city and county of San Francisco, commanding him, as such clerk, to pay to plaintiff the sum of \$455 received by him for fines and forfeitures collected in said court during June and July, 1887, from persons arrested for being drunk, or under the influence of liquor. This judgment was rendered on the 25th day of October, 1887, but was not entered of record until the 27th day of the same month. On the same day that the judgment was rendered, which, it will be observed, was two days before the entry of it, the defendant perfected this appeal from it. On the 29th of August, 1889, upon the *ex parte* suggestion of the respondent's counsel of the death of Louis Kaplan, the appellant, and that Francis Doran had been duly appointed and had qualified as his successor in office, being made in this court, an order was made substituting Doran as the defendant and appellant herein, instead of the deceased Kaplan. September 3, 1889, upon proper notice to counsel of record for the deceased, Kaplan, respondent moved to dismiss the appeal on the ground that it was prematurely taken. At the same time, Doran appeared by his counsel, and made a motion to set aside the *ex parte* order of substitution, on several different grounds, not necessary to particularize.

The motion to dismiss the appeal is not opposed by Doran; but the respondent contends that the order substituting Doran for Kaplan should be permitted to stand, and the case remanded with Doran as defendant instead of Kaplan. But, as we shall endeavor to show, the *ex parte* order of substitution was inadvertently made and is invalid, and will, in effect, be set aside by the dismissal of the appeal. It is provided by section 939 of the Code of Civil Procedure that an appeal may be taken from a final judgment within one year after such judgment is entered; and since that section went into effect, which changed the previous rule, found in section 336 of the practice act, under which an appeal might be taken from a final judgment within one year after the rendition of the judgment, this court has uniformly held that an appeal taken before the judgment is entered of record (see section 668, Code Civil Proc.) is premature, and must be dismissed, (*McLaughlin v. Doherty*, 54 Cal. 519; *Preston v. Hearst*, Id. 595; *Thomas v. Anderson*, 55 Cal. 43; *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Scotland v. Mining Co.*, 56 Cal. 625; see *Hayne*, New Trial & App. § 183.) This court, under section 936 of the Code of Civil Procedure, can review a judgment or order in a civil proceeding, which is not expressly made final by such Code, only when it is brought up on an appeal pursuant to title 13 of the same Code, of which title, section 939, above referred to, is a part. *McLaughlin v. Doherty*, supra. Therefore, when an appeal is taken in any other than the prescribed mode, it is abortive, and does not succeed in bringing the case here, but leaves it in the court below, as undisturbed as though no attempt had been made to remove it to this court.

Now, in the present instance, as the futile appeal did not remove the case from the superior court, there was no case here when the order of substitution was made; hence, it must fall for want of a case to support it. We therefore advise that the appeal be dismissed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

LEHMANN v. SCHMIDT. (No. 12,547.)

(*Supreme Court of California*. June 13, 1890.)

FACTORS—LIEN—CONVERSION.

Defendant agreed to sell plaintiff's wine at a certain net price, the excess to be divided equally between them. After receiving a part thereof, and making advances to plaintiff thereon, and paying freight, in accordance with the agreement between them, defendant refused to receive any more; and, before any of the wine had been sold, plaintiff demanded a return of that which defendant had received, without offering to pay back the money which defendant had advanced and expended for freight. *Held*, that under Civil Code Cal. §§ 2026, 3051, 3053, defining a factor, and giving him a lien on the property placed in his hands for money advanced and expended, defendant was a factor, and had a lien on the wine, and a right to retain it, so that his refusal to comply with the demand did not constitute a conversion. PATERSON, J., dissenting.

In bank. On rehearing. For former opinion, see 22 Pac. Rep. 973.

Chapman & Slack, for appellant. *A. Heynemann*, for respondent.

PER CURIAM. This case was decided in department 2 of this court, December 5, 1889; the court, for reasons given in an opinion submitted by Mr. Commissioner BELCHER, reversing the judgment of the court below. Subsequently, a rehearing was granted in bank. Upon consideration of the case, and of the additional arguments made upon such rehearing, we are satisfied that the judgment in department was correct. For the reasons given in the opinion then filed, and on the additional authority of *Evans v. Bailey*, 66 Cal. 112, 4 Pac. Rep. 1089, the judgment appealed from is reversed, and the case remanded.

PATERSON, J., dissenting.

94 Cal. 570

DENNIS v. UNION MUT. LIFE INS. CO. (No. 12,760.)

(*Supreme Court of California*. June 16, 1890.)

LIFE INSURANCE—BURDEN OF PROOF—INSANITY—EVIDENCE.

1. Where, in a suit on a life insurance policy which provides against liability for suicide, whether caused by insanity or not, suicide is pleaded as a defense, the burden of proving it is on defendant.

2. Where the affidavits of plaintiff's proofs of death showed that the insured committed suicide, and such evidence was uncontradicted, a verdict for plaintiff should have been set aside, and a new trial granted.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Estee, Wilson & McCutcheon, for appellant. *Haggin, Van Ness & Dibble*, for respondent.

FOOTE, C. This is an action to recover from a life insurance company the sum of \$2,500 upon the death of a person insured by the company. The jury trying the cause returned a verdict for the plaintiff. From the judgment rendered in the premises, and an order refusing a new trial, the defendant appeals. Under the pleadings, the execution of the policy, the payment of the premium, the death of the insured, the giving notice and making proof of the death in due time, and the repudiation by the defendant of any obligation to pay the policy, are admitted. The defense set up was that, under a clause of the policy which reads thus: "It is hereby declared and agreed that the self-destruction of the person within three years from the date hereof, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract,"—the defendant was not liable, because the death of the insured person was the result of, and caused by, self-destruction. The plaintiff rested, after reading the pleadings, upon the admission of the defendant that, if the jury should give a verdict for the full amount of the policy, the sum of \$131 had accrued as interest. The court then held that the burden of proving the de-

fense set up rested upon the defendant. The defendant objected to this, and demanded a nonsuit, which was refused, and the action of the court is assigned for error.

It was not incumbent upon the plaintiff to plead that the insured person had not committed self-destruction; for it is not necessary to insert allegations in the complaint "for the purpose of meeting or cutting off a defense. Thus, one seeking to recover on an insurance policy must aver the loss, and show that it occurred by reason of a peril insured against; but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks." *Blasingame v. Insurance Co.*, 75 Cal. 635, 17 Pac. Rep. 925. Therefore the burden of proof was not upon the plaintiff to show what it was unnecessary to allege in his pleadings, and the court was right in its ruling.

The defendant then introduced the proofs of death which had been made to the plaintiff, and some other matters of evidence. The plaintiff was then introduced as a witness, and testified that after these proofs were made on his behalf, and the company had refused to pay the loss, he had sought the advice of a lawyer, and had then taken steps to get depositions from the parties who had made the proofs supplemental thereto. It appeared from the positive declarations of the witnesses in their original affidavits of proof that the insured person had committed self-destruction by shooting himself in the head with a pistol while laboring under temporary aberration of mind. The effort made by the supplementary testimony was to show that the death was accidental, and not through any intentional act of the suicide. We think the effort fruitless, and that the evidence shows without any conflict that the death of the insured person was not accidental, but that he committed suicide or self-destruction with a pistol while temporarily insane. This being so, it becomes unnecessary to discuss any of the other points made, and we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

84 Cal. 327

HAVEMEYER *et al.* v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 13,709.)

(*Supreme Court of California.* June 7, 1890.)

WRIT OF PROHIBITION—JURISDICTION TO APPOINT RECEIVER.

1. Civil Code Cal. § 399, refers to both the voluntary and involuntary dissolution of corporations, and section 400 declares that, "unless other persons are appointed by the court, the directors or managers * * * of such corporation, at the time of its dissolution, are trustees of the creditors and stockholders * * * of the corporation dissolved, and have full power to settle the affairs of the corporation." By Code Civil Proc. § 565, on the dissolution of any corporation, the superior court, "on application of any creditor of the corporation, or of any stockholder or member

thereof, may appoint one or more persons to be receivers or trustees" thereof, etc. *Held* that, on an involuntary as well as a voluntary dissolution, the directors are the proper persons to wind up the corporation's affairs, unless a receiver is appointed on the application of a creditor or stockholder; and where the charter of a corporation had been declared forfeited because the company had entered into an illegal combination, known as a "trust," to control production and sustain prices, the state had no interest in its affairs whereby to sustain an application for a receiver, either as a punishment for the illegal use of its corporate privileges, or to see that its assets were properly distributed.

2. Code Civil Proc. Cal. § 946, provides that an appeal "stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matters embraced therein." *Held* that, where an appeal had been taken from a judgment abrogating the charter of a corporation because of abuse of its corporate privileges, the subsequent appointment of a receiver to sell its property and wind up its affairs was a proceeding upon the judgment, within the meaning of the statute, and was therefore void.

3. The appointment cannot be sustained upon the ground that to allow the directors to retain control of the assets would amount to a practical rehabilitation of the corporation, and thus defeat the purpose of the forfeiture.

4. A sale, in good faith, of part of the corporation's property to petitioners, who were among its stockholders, pending the proceeding to vacate its charter, was valid; and as purchasers they can sustain an application for a writ of prohibition to restrain the court and the receiver from interfering with their possession of such property.

5. An objection that the evidence in the *quo warranto* proceeding showed the sale to be a sham was not well taken, since the petitioners were not parties thereto in their character as purchasers, and no issue was or could have been made as to the good faith of the sale.

6. The fact that the petitioners, in their character of stockholders, contested the appointment of the receiver for the corporation's property, cannot be construed as a voluntary submission to the jurisdiction of the court in their character of purchasers, so as to estop them from questioning the validity of the appointment otherwise than by appeal.

7. The possession of the receiver is the possession of the court, and a writ of prohibition to the court, by its indirect action through the court upon the receiver, will stay his hand from further proceedings.

8. A writ of prohibition to a court which, in excess of its jurisdiction, has appointed a receiver, will not only stay further proceedings under the receivership, but will restore the property to its owners, even though the receiver has gained complete possession.

9. A writ of prohibition will not lie when there is a plain, speedy, and adequate remedy at law; but the right of petitioners to move in the appointing court for the withdrawal of the receiver affords no such remedy, since, in case the motion were denied, irreparable injury might be caused by the delay.

10. Nor is such remedy afforded by the right of petitioners to apply to the appointing court for leave to sue the receiver in ejectment after he had gained possession of the property.

11. Where the receiver was ordered to close down a great sugar refinery, and sell its stock, machinery, and utensils, the right to appeal from the order of appointment affords no such remedy; especially when the appointing court has already decided that an appeal would not stay proceedings under the receivership.

12. Generally a writ of prohibition will not issue to restrain an inferior court from committing an act in excess of its jurisdiction, unless objection to the jurisdiction was made in such court; but since the applicants, as purchasers of the refinery, were not parties to the *quo warranto* proceeding, and no specific property was mentioned

in the application for a receiver, they had no opportunity to object, as purchasers of the refinery, until the receiver actually attempted to take possession.

13. The fact that they were parties as stockholders, and as such objected to the jurisdiction to appoint a receiver for the property of the corporation only, cannot be construed as a waiver of their right to object as purchasers of the refinery, since they could not know that it was to be made subject to the receivership.

14. The objection that a writ of prohibition will not lie to try a question of title is not applicable to this case, since the act of the court in taking the property from the possession of strangers, without giving them a hearing on the question of title, deprived them of property without due process of law. Possession should be restored irrespective of the actual state of the title.

15. Where a party in interest makes out a case for a writ of prohibition, it issues as a matter of right, and the court has no discretion to withhold it upon the ground that the applicants are members of the sugar trust monopoly, and enemies of the public weal.

In bank.

Wilson & Wilson and Garber, Boalt & Bishop, for petitioners. *William T. Wallace, in pro. per.*, and *Wm. M. Pierson*, for respondent.

BEATTY, C. J. This is an original application for a writ of prohibition to the superior court of the city and county of San Francisco, department No. 6, WILLIAM T. WALLACE, Judge, commanding and directing said court and judge, and the receiver of said court, Patrick Reddy, Esq., to desist and refrain from proceeding or acting upon or in pursuance of a certain order appointing said receiver. The importance of the case, not only as regards the interests at stake, but also in respect to the questions of law and practice which it involves, will justify, if it does not require, a somewhat detailed statement of the facts out of which it arises.

It appears that in the month of November, 1888, the people of the state of California, on the relation of the attorney general, commenced an action in said superior court against the American Sugar Refinery Company, a California corporation, for the purpose of forfeiting its charter. The corporation appeared and answered the complaint, and after trial the judgment of said superior court was pronounced, declaring the forfeiture, and imposing upon the corporation defendant a fine of \$5,000 and costs of suit. The judgment was rendered January 8, 1890, and on the same day, at the instance of the attorneys representing the state, a rule was issued and served requiring said corporation and its attorneys to show cause on the 10th of January why a receiver should not be appointed "to take charge of the estate and effects of the said defendant corporation, and to distribute the same according to law, or to preserve the same pending an appeal herein, if such appeal be taken herein, on the ground that said defendant corporation has been dissolved, and has forfeited its corporate rights." On the return-day of the rule, the corporation appeared, and the hearing was continued until January 20th. Meantime, on January 18th, the corporation duly served and

filed its notice of appeal to this court from the judgment against it, and at the same time filed in due form a bond in the penal sum of \$12,000 to stay proceedings on said judgment. After hearing the motion for a receiver, the judge of the superior court held the matter under advisement until February 17th, on which day he made an order as follows, (after reciting the previous proceedings:) "It is ordered that Patrick Reddy, a resident of the city and county of San Francisco, state of California, be, and he hereby is, appointed receiver of the property and effects of the defendant, wherever the same may be situate, including the American Sugar Refinery, situate at the southwest corner of Union and Battery streets, in this city and county, and its appurtenances. It is further ordered that the defendant, its officers, agents, attorneys, servants, and employees, and all persons and corporations, associations or firms, holding any of the defendant's property in trust for said defendant or its stockholders, do immediately, upon the production of this order, surrender into the possession of said receiver all the said property, real, personal, and mixed, wherever situate, belonging to said defendant, including all its books, records, and papers. And it is further ordered that said receiver do immediately take into his exclusive possession all the books, records, and papers of said defendant, and all the said property, real, personal and mixed, of the said defendant, including the said American Sugar Refinery, so as aforesaid situate in said city and county, and hold the same pending the appeal from the judgment herein, and the final determination of the motion for new trial, and until the further order of this court; and that said receiver at once close the said refinery, and do not dispose of any of the said property of the said defendant until the further order of this court. It is further ordered, and I hereby direct, that the said receiver execute to the state of California an undertaking, with two sufficient sureties to be approved by me, in the sum of \$10,000, to the effect that he will faithfully discharge the duties of receiver in the above-entitled action. Dated February 17, 1890. WM. T. WALLACE, Judge."

On the same day a second order was made, which, after reciting the one above quoted, and the fact that the receiver had executed and filed a sufficient undertaking as therein required, and had taken the oath of office, concludes as follows: "Now, therefore, it is hereby ordered that said receiver be, and he is hereby, invested with all the power and authority mentioned and conferred in said order hereinabove recited, to the same extent as if the same were again here repeated and recited at length. Dated February 17, 1890. WILLIAM T. WALLACE, Judge."

Immediately upon the issuance of this order, Mr. Reddy proceeded to the sugar refinery therein mentioned, which he found in full operation under the direction and control of a superintendent, foreman, and others, in the pay and employment of the petitioners herein, who claim to have purchased the property, and to have re-

ceived a conveyance thereof from the American Sugar Refinery Company in the month of March, 1889, since which time they assert that they have been in full and complete possession, as absolute owners, in their own exclusive right. Mr. Reddy, however, demanded of those in charge that they should immediately transfer the possession of the premises, and everything connected with and contained in the refinery, to him, as receiver; and he claims that on the evening of the 17th he had succeeded in obtaining full and absolute possession and control of the entire establishment. This claim is disputed by the petitioners, and whether it is true or not is one of the principal questions in the case. The facts upon which its solution depends will be reviewed when the question is reached. Meantime, and for the purposes of this preliminary statement, it is sufficient to say that the petitioners and the receiver each claim to have had possession of the refinery on the 17th of February, and on the following day. The receiver claims that his possession was complete and absolute from and after the evening of the 17th. The petitioners contend that, at most, there was a mere scramble for possession by the receiver up to the time when he was served with notice of the alternative writ of prohibition herein, on the afternoon of February 18th.

The first notice that the petitioners or their employes had of the order appointing the receiver, and directing him to take possession of the sugar refinery, was Mr. Reddy's demand for possession, and proclamation of his authority. The agents in charge of the refinery, before yielding to his demands, asked to be allowed an opportunity of obtaining legal advice as to their rights and duties in the matter. This was conceded by Mr. Reddy, upon the understanding that the superintendent of the refinery would notify him at 10 o'clock next morning what course he had decided to take. Availing themselves of this respite, the agents of petitioners consulted counsel, and during the night of February 17th affidavits were prepared upon which to base an application to Judge WALLACE for a suspension or modification of his order. Prior to 10 o'clock on the following morning Mr. Reddy was notified of this intended application, and at about the hour of 10 o'clock he and his counsel, and counsel for petitioners, met Judge WALLACE at his chambers, where, at least, an informal application was made to the judge for a stay of proceedings pending a motion to set aside or modify his previous order directing the receiver to take possession of and close the refinery. What occurred at this interview is one of the principal points of controversy in the case; as involving a question of practice or procedure. The facts will be stated, so far as necessary, when we come to consider that question.

For the present, it is sufficient to say that Judge WALLACE refused to grant any stay of proceedings for even an hour, unless the petitioners would at once desist from all opposition to the receiver, and yield instant and absolute possession of the refinery and other property. This

condition was not assented to, and it was then agreed between Mr. Reddy and his counsel upon one side, and counsel for petitioners on the other, that at the hour of 12 o'clock on that day counsel for Mr. Reddy should be informed what further steps the petitioners had decided to take, and whether they would further oppose his claims as receiver to the possession of the refinery. At 12 o'clock counsel for Mr. Reddy was notified, in substance, that his right to the possession could not be admitted, and that his taking possession would be opposed, so far as it could be done without a resort to actual force or violence. Meantime, Mr. Reddy had again attempted to assert and enforce his possession and authority at the refinery, and had met with such resistance that he felt it necessary to resort to the court for its aid. He therefore made and filed an affidavit entitled in the action against the American Sugar Refinery Company, in which, after reciting the various proceedings and orders therein, including his appointment and qualification as receiver, he proceeded as follows: "That deponent, as such receiver, entered into possession of the American Sugar Refinery, and the property therein situate, in the city and county of San Francisco. That H. C. Mott and R. H. Sprague impede, hinder, and delay this deponent in the discharge of his duties as such receiver, and refuse to allow deponent to take into his possession and control certain property situate on the premises aforesaid. That said parties last above named, notwithstanding the receiver's possession of said premises, dispute his right to said possession, and resist the full enforcement of the order and judgment of this court, and especially of the order hereinabove set forth. Wherefore this deponent prays this honorable court to give its order and direction to the sheriff of said city and county of San Francisco to enforce the orders and direction of this court as duly given and made, in and by the order hereinabove set forth, and to do and perform all acts which may be necessary to place said receiver in complete possession of said American Sugar Refinery, and all and singular the property therein situated, and the property of said defendant of whatever character, and wherever situated."

Immediately upon the filing of this affidavit of the receiver, and at about the hour of 1:30 P. M. of February 18th, Judge WALLACE made and filed an order, which, after reciting the previous proceedings, concludes as follows: "Now, you, the said sheriff, are hereby required to execute and enforce each and every, all and singular, the matters in said order appointing a receiver contained, in so far as may be necessary to place said receiver in possession, and to do and perform all acts which may be necessary to place Patrick Reddy, said receiver, in exclusive, full, and complete possession of the land and premises known as the American Sugar Refinery, situated at the south-west corner of Union and Battery streets, in said city and county of San Francisco, and of all and singular the property, real and personal, of said American Sugar Refinery

Company, in said city and county of San Francisco. And you, said sheriff, are directed to make return of said order appointing a receiver, and of this order within ten days after your receipt hereof, with what you have done indorsed thereon. WM. T. WALLACE, Judge."

This order, which the superior judge and sheriff denominate a writ, was afterwards, on February 28, 1890, filed by the sheriff with the following return indorsed thereon: "I, C. S. Laumeister, sheriff of the city and county of San Francisco, state of California, certify that the annexed and accompanying orders and writs issued out of the superior court of the city and county of San Francisco, were placed in my hands at 1:45 P. M., on Tuesday, February 18, 1890. In obedience to the said orders and writ, I proceeded to the premises designated therein, and found Patrick Reddy, who had theretofore been appointed by said honorable court as receiver in said action, in possession of said premises in said orders and writ mentioned and described. That I found upon said premises certain persons who, I was informed, were interfering with the possession and enjoyment of said premises by said receiver. That I thereupon exhibited said order, and requested said persons to retire from said premises, and that said persons thereupon retired from said premises described in said writ and order, and thereupon left said Patrick Reddy in the peaceful and undisturbed and undisputed possession of the land and premises known as the American Sugar Refinery, situated at the southwest corner of Union and Battery streets in said city and county, with the appurtenances thereto belonging and the fixtures therein, and all property, real and personal, appertaining thereto. That I also found said receiver in possession of the office of the American Sugar Refinery Company at No. 220 California street, and I left him in possession thereof. That I also found said receiver in possession of an office and premises situated in the second story of a building, No. 124 California street, which said office and premises were designated with the name 'The American Sugar Refinery Company,' and I left said receiver in absolute possession of said premises last above described, and all of the premises and property hereinabove mentioned and described. That all of said actions and proceedings done, had, and performed by me, under and in obedience to said orders and writ, were done, had, and performed and completed at and before the hour of 3 o'clock P. M. of said eighteenth day of February, 1890."

While these proceedings, by and on behalf of the receiver, were in progress, the petitioners were applying here for a writ of prohibition, and about the hour of 2 o'clock P. M., February 18th, an order for the issuance of an alternative writ was made and filed. The writ issued in pursuance of our order was served on the receiver about 3:30 o'clock P. M., and upon Judge WALLACE about 6 o'clock P. M. In their petition for the writ, the petitioners set out the whole proceedings in the case of People v. American Sugar Refinery Company down to and including the order ap-

pointing the receiver, and the order supplementary thereto. They allege that ever since the 21st day of March, 1889, they have been the owners in fee-simple in their own right of the several tracts and parcels of land in San Francisco which they specifically describe, and upon which are situate the sugar refinery, and the various shops and offices appertaining; that ever since said date they have been carrying on in said buildings the business of refining sugars for sale in the markets of California and elsewhere; that they also have offices, furniture, books, and other personal property used by them in and about said business; that they do not use, hold, or possess said property, or any part thereof, in trust for the use or benefit of the American Sugar Refinery Company, the defendant in the action referred to, or any of its directors, trustees, creditors, or stockholders, but solely for themselves, and for their own exclusive use and benefit, and have ever since said 31st day of March, 1889, been in the quiet and peaceable possession of the same, claiming title thereto, and the exclusive ownership thereof; that since September, 1889, Henry C. Mott has been the general agent and attorney in fact of the petitioners, in actual charge and custody of all of said property, and duly authorized to conduct said business. They then allege the demands of Reddy to be let into the possession of said property, their refusal and resistance, the damage that would result from a stoppage of the works, and that Reddy is threatening to cause the arrest of said agent and the superintendent of the works for contempt of the superior court in resisting the said order. They further allege that they have, through their said agent, Henry C. Mott, respectfully presented the foregoing facts to said superior court, and called its attention to the excess of jurisdiction by it committed in making said order, and in directing said receiver to enter upon and take possession and control of their said property; and that they have requested said court to modify its said order so as to direct him to bring a proper action for the recovery of said property, instead of taking possession without action, which request they say said superior court has denied. They further allege that said orders, so far as they authorize the receiver to take the property in their possession and claimed by them, are beyond the power and jurisdiction of the court, and in violation of their rights; that they were not parties to said action of the People against said American Sugar Refinery Company, nor did they make any appearance or participate in any respect in said action. They further allege that, after said judgment against the Sugar Refinery Company, said company, on the 18th of January, 1890, had taken and perfected an appeal therefrom to this court, and had filed an undertaking sufficient to stay the execution thereof. And, averring that they have no plain, speedy, or adequate remedy against said proceedings of the superior court in ordinary course of law, they pray: "That a writ of prohibition herein may be issued to said superior court of the city and county of San Francisco, depart-

ment No. 6, and the judge thereof, commanding and directing said court, and said judge, and also its said receiver, Patrick Reddy, to desist and refrain from further proceedings upon the said order aforesaid appointing its said receiver, and from exercising any of the powers in said order granted with regard to any property in the possession of said Havemeyers & Elder, through their agents or employees, and especially said sugar refinery, and from interfering with or disturbing the possession and control of the said Havemeyers & Elder of the said sugar refinery, or any other property by them possessed and claimed in their own right."

The order made by us upon the filing of this petition directed the issuance of an alternative writ of prohibition to department No. 6 of the superior court of the city and county of San Francisco, and to Hon. W. T. WALLACE, judge of said court, in accordance with the prayer of the petition, "commanding said court and judge, either through said Patrick Reddy, receiver, or otherwise, from taking possession of or interfering with the possession or control by said Havemeyers & Elder, through their agents or otherwise, of any property, real or personal, in their possession, and claimed by them in their own right, and especially of the said property situate on the south-west corner of Union and Battery streets, in said city and county, and the refinery situate thereon, or from interfering with the agents and employees of said Havemeyers & Elder in the conduct of the business of the same, or from exercising any of the powers granted to said receiver in the order appointing him, so far as enforcing the same is concerned against said Havemeyers & Elder." Said order further directed said court and judge to show cause on March 3d why said prohibition should not be made absolute and perpetual, and that in the mean time, until further ordered, "all proceedings in said action upon the said order so appointing said receiver be stayed so far as the said Havemeyers & Elder and the property, real and personal, in their possession at the time said order was made appointing said receiver, are concerned." The writ issued in pursuance of this order in the name of the people and under the seal of the court, was, in substance, a repetition of the order, with some amplification of its terms, and not only the writ, but copies of the order and petition upon which it was founded, were served at the hours above mentioned on Judge WALLACE and Mr. Reddy.

On February 25th, which was prior to the day upon which the respondent was required to show cause against the prohibition, affidavits were filed on behalf of the petitioners, alleging that the respondent and the receiver had committed a contempt of this court in proceeding under said order appointing the receiver contrary to the injunction contained in our order for the writ of prohibition; whereupon we made and directed to be served upon Judge WALLACE and Mr. Reddy another order, in which, after reciting the substance of the charge contained in said affidavits, we commanded them to show cause on March

3d why they should not be adjudged guilty of contempt, and why the receiver should not be compelled to withdraw and retire from the sugar refinery, and make restitution of the personal property which he had taken into his possession. On March 3, 1890, Judge WALLACE and Mr. Reddy appeared and answered in both proceedings,—the prohibition and the contempt,—and they were heard, argued, and submitted together.

It is not necessary, in this connection, to set forth in detail the matters contained in the answers of the respondent and the receiver. It is sufficient to say that the answer of Judge WALLACE contains denials and averments upon which he claims that his power and jurisdiction to appoint a receiver of the property of the American Sugar Refinery is complete, and also that he had the like power and jurisdiction in the action against the corporation to command and authorize the receiver to take the specific property described in his order, notwithstanding it was in possession of the petitioners, under claim of exclusive ownership.

As to the matter of contempt, Judge WALLACE takes the position that the effect of our order for and writ of prohibition was simply to tie his hands and shut his mouth, so that he could not, without a violation of its terms, give any order or direction to the receiver whatsoever, or in any manner interfere with his proceedings; and he shows that he strictly adhered to this rule of inaction. Mr. Reddy says that he and his counsel construed our order and writ in the same way, so far as it affected Judge WALLACE, and therefore that he refrained from seeking any advice or direction from the superior court as to his own duties in the premises, relying in that matter wholly upon the advice of counsel, which he followed in good faith. He says that he was advised—and that such was his own opinion—that the effect of the writ and order upon him was to confine him to the exact position in which they found him at the moment they were served. He contends that when the writ and order were served on him he was in complete and absolute possession, to the exclusion of petitioners, of the sugar refinery, offices, shops, machinery, and supplies, books, papers, etc., engaged in working up about \$50,000 worth of sugar then in solution preparatory to shutting down the works, and that he did nothing except to retain the possession which he had, and to shut down the works as soon as possible.

From this general statement of the case, the nature of the questions to be decided is sufficiently shown. We have nothing whatever to do with any question as to the validity, correctness, or propriety of the judgment of fine and forfeiture pronounced against the American Sugar Refinery Company in the action instituted by the attorney general in behalf of the people of the state. For all the purposes of this case, that judgment is assumed to be absolutely just and valid, though suspended by the appeal. But, conceding the perfect validity of that judgment, the question remains whether the superior

court had any jurisdiction to make the order appointing the receiver, and directing him to take specific property from the possession of the petitioners, who were not parties to the action, and were claiming said property in their own right. Subordinate to this main question are a variety of others, which have been elaborately discussed by counsel, as, for instance, whether prohibition is the proper remedy when the court has exceeded its jurisdiction in appointing a receiver; whether, conceding it to be the proper remedy in such case, the petitioners have complied with the necessary conditions of its issuance; whether the court should not, in the exercise of its discretion, refuse its aid to these petitioners, even if they have proceeded correctly in the matter of practice, and this not only because they have other plain, speedy, and adequate remedies, in the ordinary course of law, but principally because they are *participes criminis* with the corporation in the misconduct for which its charter has been forfeited. There are still other questions involved in the matter of the prohibition, and then there are the questions arising in the proceeding for contempt.

We shall proceed to discuss such of these points as we deem material, in about the order in which they have been stated. And, first, as to the power of the superior court to make the order complained of. The appointment of receivers, and their powers and duties, are regulated by section 564 et seq. of the Code of Civil Procedure. It is therein provided that a receiver may be appointed by the court in which an action is pending, or by the judge thereof, in various cases, and, among others: "Five. In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights." It is not necessary to refer to other grounds for the exercise of the power of appointment, because it is distinctly admitted by respondent and his counsel that the order here in question finds its sole support in the clause just quoted. The learned judge of the superior court, respondent here, in ruling upon the motion for a receiver, prepared and filed a written opinion, to which we have been referred as containing the essence of the argument on his behalf respecting the question under consideration, and we know of no better way to state the position for which he contends than to quote the opinion in full. It is as follows:

"It was lately decided here that the corporation defendant had grossly abused its corporate franchise,—united itself with 'The Sugar Refineries Company' in maintaining a monopoly of the article of refined sugar, destroying competition in its production, deteriorating its quality, and arbitrarily increasing its cost to consumers. Judgment of forfeiture of its corporate charter and the imposition of a fine of \$5,000 followed. The attorney general now applies for the appointment of a receiver of the corporate estate and effects.

"(1) It is to be observed, *in limine*, that the application for a receiver in a case of this impression is not to be dealt with as

one made to a court of equity in the exercise of its preventive jurisdiction. The proceeding is for a forfeiture. That circumstance would, of itself, be fatal to an application made to a court of equity for a receiver; for equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either. As observed by Chancellor KENT in *Livingston v. Tompkins*: 'It may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture, or anything of the nature of a forfeiture.' 4 Johns. Ch. 431. The proceeding is now, as in its inception, distinctively a law, and, as observed by the learned counsel for the defendant, 'without a single incident of a court of equity connected with it.' The information in the nature of *quo warranto* with which it began, the judgment which followed, and the present application for a receiver, are but the successive steps taken in an action at law, and therefore to be governed by rules of mere law, and wholly irrespective of equitable consideration. Whether the receiver shall be appointed is dependent upon a statutory condition of fact; the fact that the corporation has forfeited its corporate rights. The Code of Civil Procedure, (section 564,) so far as pertinent to the case, is as follows: 'A receiver may be appointed * * * when a corporation * * * has forfeited its corporate rights.' And that the defendant is precisely in that category is the purport of the decision already rendered. Under the New York Code, (sections 1798, 1801) a receiver is provided for in the judgment itself; under the California Code, by an order entered subsequent to judgment. The difference is practically but one of sequence. The principle common to both statutes is that an ascertained forfeiture implies a receiver. So it was substantially ruled in New York in 1865,—the statute of that state being then much the same as ours,—in *People v. Ice Co.*, that an application for a receiver made by the attorney general before forfeiture ascertained was premature, and not to be entertained by the court. 18 Abb. Pr. 383. Recurring, then, to the statute of this state, (section 564, supra,) the language is that upon forfeiture a receiver may be appointed, etc. Now, though the word 'may' is but permissive in ordinary signification, it here means 'must,'—a receiver 'must' be appointed, etc. That this is the settled rule of interpretation is pointed out in *Potter's Dwar. St.*, (text and note, p. 220.) It is there said as follows: "'May' in a statute means 'must' whenever * * * the public have an interest in having the act done which is authorized by such permissive language.' Again: 'Words of permission shall, in certain cases, be obligatory. Where a statute directs the doing of a thing for the sake of justice, the word "may" means "shall."' So in *Turnpike Co. v. Miller*, Chancellor KENT observed as follows: 'And in respect to statutes, the rule of construction seems to be that the word "may" means "must" or "shall" only in cases where the public interest and rights are concerned, and where the public

* * * have a claim *de jure* that the power shall be exercised.' 5 Johns. Ch. 113. That the public have an 'interest;' that the doing of a particular thing is 'for the sake of justice,'—change 'may' to 'must,' convert a word of permission to one of obligation. This principle is peculiarly applicable to the circumstances of this case. To guard the public interest and vindicate justice is the distinctive purpose of this proceeding by the attorney general; to maintain that a corporation, as being but a creature of the law, must obey the law,—cannot be permitted to violate it with impunity; that its stockholders must respect the obligation they assume to the public when they sought and accepted their franchise at the hands of that public; that they must observe the policy upon which the commercial police power of the state proceeds,—the policy which, notoriously disfavoring restraint of trade, absolutely forbids corporations to embark in monopoly in an article classed among the necessities of human life,—these features characterize this as a case of grave public interest, and one in the vindication of which the court is bound to employ all the powers provided by the law, one of which is the power to appoint a receiver of the estate and effects of the delinquent corporation.

"(2) Nor is this conclusion, founded, as it is, upon the text of the Code of Civil Procedure, already referred to, inconsistent with the Civil Code, (section 400,) to the effect that stockholders in a dissolved corporation may, in the discretion of the court, be permitted to administer and wind up its business affairs. In my judgment, this provision has reference only to cases of voluntary corporate dissolution. A similar provision is found in the Revised Statutes of the state of New York, (5th Ed., vol. 3, p. 769, § 77,) and is there limited to cases of voluntary dissolution, as in the nature of things it ought to be here, under the true construction of our statute. In cases of voluntary corporate dissolution the stockholders are without fault, or may be. Therefore, the court has a discretion to permit them to hold and distribute the corporate assets. But this is not such a case. Here the corporate franchise has not been voluntarily surrendered, but has been forfeited because of the misconduct of the entire body of the stockholders, already ascertained,—in fact become the distinct ground upon which the forfeiture proceeds. For, as pointed out in my opinion heretofore filed in this case, the judgment in this action, though in form one against the corporation, is in fact against the stockholders, who, as there said, were the actual owners of the corporate franchise a forfeiture of which was adjudged. The misconduct by which the corporate charter was lost was therefore the misconduct of the stockholders sued, and making defense here by their corporate name, 'American Sugar Refinery Company.' As observed by Mr. Chief Justice NELSON in *People v. Turnpike Road Co.*: 'Though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment

of the court. The powers and privileges are conferred and the conditions enjoined upon them; they obtain the grant, and engage to perform the conditions,' etc. 23 Wend. 205. Upon this view, it would indeed have been somewhat singular had the Civil Code conferred upon stockholders, thus convicted of the breach of one important trust, the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation. Such inconsistency is not to be attributed to that Code. Besides, it will be seen, upon looking into the decisions at large, that such a practice has never been pursued by the court. Stockholders whose ascertained misconduct has already operated a forfeiture of the corporate franchise have never been permitted to assume the administration of the corporate assets, even in cases of voluntary dissolution,—cases in which no malfeasance of the stockholders appeared. Inquiry has often been made by the court as to whether the dissolution had in point of fact been brought about by the misfeasance or mismanagement of the particular person seeking to become a trustee of the corporate affairs. I must therefore decline to permit the offending stockholders here, or their nominees, to become the trustees of the corporate assets.

"(3) But one other question remains to be considered, which will now be stated: An appeal from the judgment of forfeiture has been taken,—taken and perfected in such a form as to stay the judgment, pending the appeal, if that be possible. The judgment was rendered here on the 6th day of January. On the 8th, this application for a receiver was made, and set down for hearing on the 10th; was actually heard on the 20th day of January; the appeal was taken on the 18th, while the application was yet pending, and some two days before it was submitted for decision. It is now claimed that the judgment is stayed by the appeal, and that, as a consequence of such stay, the power of the court to appoint a receiver has ceased. But, in my opinion, no appeal, in whatever form it be taken, can operate a present stay of a judgment of the character of the one rendered in this case. To hold that it can is to imply that a corporation already dissolved for ascertained corporate abuses may, by this means, practically rehabilitate itself at pleasure,—resume its proper corporate existence,—despite the judgment, and so continue its misemployment of its franchise for an indefinite period of time. The correctness of a construction leading to such results may well be doubted.

"But, waiving this, and assuming that the judgment has been stayed by the appeal taken, it would not follow that the authority to appoint has been superseded because of the appeal. The subject of appeals, as well as their effect when taken, is governed by the Code of Civil Procedure, (section 946.) An appeal 'stays all further proceedings * * * upon the judgment. * * * or upon the matters embraced therein, * * * but the court below may proceed upon any other matter embraced

in the action,' etc. That the appointment of a receiver is a matter 'embraced in the action' has already been pointed out in connection with section 564 of the same Code. The appeal from the judgment does not suspend the power to appoint, unless the appointment be a matter embraced in the judgment, which it is not, (as upon inspection of the judgment will appear,) or is itself distinctively a proceeding 'upon the judgment.' That the appointment of a receiver in a cause is not a proceeding upon the judgment in that cause, but is merely ancillary in character, is understood to have been often ruled in our courts. It is not necessary for me, however, to cite the cases, nor to enter now upon an analysis of the text of the statute, because I consider the recent ruling in *Baughman's Case*, 72 Cal. 572, 14 Pac. Rep. 207, as directly in point in support of the power. An appeal from the judgment had been taken in that case, yet the authority of the court over the general subject of receivership appears to have been upheld, notwithstanding the pending appeal from the judgment. In that case it was the power to remove which was immediately in question; here, it is the power to appoint. But these powers must co-exist; any construction of the statute which would uphold either must necessarily uphold the other. The conclusion reached is that the application must be granted, and a receiver appointed. An order to that effect will now be entered. WM. T. WALLACE, Judge.

"Dated February 17, 1890."

As we cannot accept the conclusions reached in this opinion, we will state as briefly as possible in what we think their unsoundness consists. The assumption which forms the basis of the entire argument is that the appointment of a receiver to administer its assets is one of the penalties designed, and in effect prescribed, by the legislature as part of the punishment to be visited upon the stockholders of a corporation which by any misconduct of its own has incurred a forfeiture of its charter. There is, in our opinion, little to justify this assumption, even in the statutes of New York, upon the supposed construction of which so much reliance is placed. But, if such were the declared or plainly implied policy of that state, the significant fact remains that our statutes not only contain no semblance of such a declaration, but that our legislature, in framing the law of this state, while looking to the Statutes and Codes of New York for a model and guide, has deliberately rejected every provision from which such an implication might arise, and in place thereof has substituted one of opposite import. In order to a due appreciation of the force and meaning of these statutes, it is necessary to consider, for a moment, the subject with which they deal.

When a corporation ceases to exist from whatever cause, whether from lapse of time, voluntary dissolution, or judgment of forfeiture for neglect or abuse of its powers, it necessarily results that its property is left to be disposed of according to law. Even in those times when the doctrine prevailed that such of its property

as did not revert to its grantors was forfeited or escheated to the crown, some officer exercising a general authority under the common law or statutes, or invested with a special authority for the occasion, was charged with the duty of collecting the assets for the benefit of the king or his donee; and since it has come to be recognized everywhere that upon the dissolution of a trading corporation its property neither reverts to its grantors nor escheats to the state, but belongs, after payment of its debts, to those who were stockholders at the date of dissolution, the appointment of some officer, with the same or more minutely defined authority, is a recognized necessity. Some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property. But in many of the states statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same function, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts, and distribute the surplus *pro rata* to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object,—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes. They seem to have been enacted with the object, in some instances, of abrogating the old law of forfeiture and reversion; in others, of committing the administration to other courts than courts of equity; in others, to provide general and uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of the courts altogether, as by allowing the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded by the one idea of simplifying, expediting, and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is from beginning to end no suggestion of added penalties or punishment after death.

Now, to revert to the New York statutes in force at the date of the decision in *People v. Ice Co.*, cited in the opinion of Judge WALLACE. They provided, as ours do, for both voluntary and involuntary dissolution of corporations, and in express terms directed the appointment of receivers in all cases, whether voluntary or involuntary. They also contained minute and specific directions as to the duties of receivers, notice to creditors, fees and commissions, settlement of accounts, etc., very

similar to our statutes regulating the proceedings of executors and administrators. The object of such legislation is apparent, and clearly it is not the infliction of penalties, but merely the conservation of rights. In view of these provisions of the New York statute, it is difficult to see how the general principle can be deduced from the decision referred to, that "an ascertained forfeiture implies a receiver." That was not the question litigated in the case, and was not decided. The point decided was that, in an action to forfeit a charter, a receiver could not be appointed until after judgment dissolving the corporation; in other words, that there is no forfeiture, in the sense of the statute, until the judgment of dissolution is entered. All that this implies is that after judgment a receiver may, not that he must, be appointed, and therefore the implication falls short of what the statute under consideration expressly enjoined, viz., that it should be "the duty of the attorney general, immediately after the rendition of such judgment, (of forfeiture,) to institute proceedings for that purpose," (the appointment of a receiver.) Voorh. Code, § 444. Nothing, therefore, can be gained for the argument by reference to this decision. It merely construes the New York statute on a point not in controversy here. And, even if it had been otherwise, the question would have remained whether our law is the same, in substance, as the law of New York. The opinion of the superior court assumes that it was "much the same as ours." We think, on the contrary, that the points of difference between our law and that of New York are much more striking and manifest than the points of resemblance. The laws of New York, it is true, recognize, as our laws do, and as in the nature of things every law on the subject must, the necessity of providing some means of administering the assets of a defunct corporation, and the propriety in the absence of other provision of appointing a receiver for that purpose; but there the resemblance ends. In New York, as we have seen, there was no other provision, and the appointment of a receiver was made obligatory in all cases of dissolution, whether voluntary or involuntary. That was the rule, to which there was no exception. Under our Codes, on the contrary, the rule is not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that, for the protection of his rights, the appointment of a receiver, and the administration of the assets under the control and superintendence of a court of equity, is necessary; and, even then, no receiver will be appointed upon his *ex parte* application without requiring ample security by his undertaking, with sufficient sureties for all damages that may be caused by the appointment, if it shall turn out that it was made without sufficient cause.

In support of this statement, we refer to
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the following provisions of the Codes: Sections 399 and 400 of the Civil Code are as follows: "Sec. 399. The dissolution of corporations is provided for: (1) If involuntary, in chapter 5 of title 10, part 2, of the Code of Civil Procedure. [Sections 802-810.] (2) If voluntary, in title 6, part 3, of the Code of Civil Procedure. [Sections 1227-1233.] Sec. 400. Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation." Sections 565 and 566 of the Code of Civil Procedure are as follows: "Sec. 565. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members. Sec. 566. No party or attorney or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking."

It will be observed that section 399 of the Civil Code refers to those parts of the Code of Civil Procedure which provide for involuntary as well as voluntary dissolutions, and that section 400 by its terms applies as well to one kind of dissolution as to the other. By its own unaided force, without the intervention or any necessity for the intervention of a court, it makes the directors managers of the affairs of the corporation, and trustees for the creditors and stockholders, with full power of settlement. These trustees, like trustees in general, are, of course, amenable to the jurisdiction of a court of equity, and may be called to account there for any neglect of duty or abuse of power. But, until they are so called to account in an independent action or proceeding by a party in interest, no court has any excuse for interference; and if they are sued and brought into court without sufficient cause, even by a creditor or stockholder, they will recover costs.

But in the opinion of the superior court these provisions of our statutes are, upon

their true construction, to be limited to cases of voluntary dissolution. It seems to us that the terms of the law are too plain in an opposite sense to admit of construction, and, even if it were otherwise, that the reasons given for the construction adopted are wholly insufficient. In section 399 of the Civil Code, separate reference is made—*First*, to cases of involuntary dissolution; and, *second*, to cases of voluntary dissolution. Then right on the heels of this reference follows the provision for the settlement of the affairs of "such corporation." If it was the intention of the legislature to limit this provision to cases of voluntary dissolution, nothing could have been easier or more natural than to say so. And if it were true that this section of our Code is similar to the section cited from the Revised Statutes of New York, (volume 3, p. 769, § 77,) and that that section is limited to cases of voluntary dissolution, the fact that our legislature has adopted the provision, without the limitation, would be a strong circumstance indicative of an intention to make its operation general.

But, in truth, the two sections are not substantially the same. Section 400 of our Civil Code, as is apparent, provides a means of a settlement of the affairs of a dissolved corporation without the intervention of a court, unless such intervention is specially invoked, and that is its whole scope. The section cited from the Revised Statutes of New York is part of a scheme in which the rule is to appoint a receiver in all cases; and it merely provides that any of the directors, trustees, or other officers of such corporation, or any of its stockholders, may be appointed receivers. It is not by any means clear, moreover, that this provision was limited to cases of voluntary dissolution. It is true that it is found in an article relating to voluntary dissolutions, but that article is by reference made part of the law of involuntary dissolution. The very section of the New York Code of Procedure (section 444) which enjoins upon the attorney general the duty of applying for a receiver whenever the charter of a corporation has been forfeited at the suit of the state makes the article relating to voluntary dissolutions the measure and limit of the power of the court "to restrain the corporation, to appoint a receiver of its property, and to take an account, and to make distribution thereof among its creditors;" from which it is perfectly evident that the legislature of New York intended no discrimination against the stockholders of a corporation which had forfeited its charter by misconduct; for, if they were to enjoy every advantage in the management and distribution of their property that the law afforded to stockholders in corporations voluntarily dissolved, how can it be claimed that the law was framed with a view to punishment in one case, unless that was its object and effect in all cases? It is therefore plain that, if any foundation exists for the motion that the appointment of a receiver in case of a forfeited charter is part of the punishment prescribed for the offenses of the corporation, that foundation must be sought elsewhere

than in the statutes and decisions of the state of New York. Where, then, is it to be found?

The first general consideration suggested in the opinion of the superior court is that "it would, indeed, have been somewhat singular had the Civil Code conferred upon stockholders, thus convicted of the breach of one important trust, the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation; such inconsistency is not to be attributed to that Code." We admit that no inconsistency should be attributed to the law, but, before we construe a section of the Code contrary to its obvious meaning, we should be very certain that such construction is necessary in order to prevent a conflict with some other provision of controlling force, or some legal principle of general application. It is not pretended that the literal purport of section 400 of the Civil Code, and section 565 of the Code of Civil Procedure, conflicts with any other statutory provision; but the idea seems to be that it is absurd to suppose that the legislature would have left to the directors of a corporation convicted of violating their duty to the people of the state, the power and discretion to pay their own debts and divide their own property, subject to the right of a court of equity to interfere and compel them to proceed properly, if any occasion for such interference should arise. We confess that there does not appear to us to be any absurdity in this supposition. Because a corporation has violated its duty to the public, it does not follow that its members cannot be trusted to look out for their own interests. Quite the contrary, for it is usually a too exclusive regard for their own interests that constitutes their dereliction to the public. As to creditors, their interests must in most cases be opposed to the appointment of a receiver. They will be paid more quickly and more certainly without a receiver than with one. If there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution of the fund out of which creditors are to be paid; for, in the first place, the fees of the receiver, his counsel and assistants, are to be subtracted. Then the estate must in many cases, as it has been in this case, be condemned to unproductive idleness and disuse, and exposed to danger of loss and dilapidation from rust and decay during the long and tedious progress of the legal proceedings that are necessarily entailed. And all this time the creditors must wait and look on while the fund upon which they rely for payment is being depleted by the processes above referred to. On the other hand, supposing the affairs of the defunct corporation to be under the control of its late directors as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or, if payment is refused or delayed, they may proceed to enforce their demands. How much better this is for the creditors than to have to wait upon the motions of a receiver and

the court, under whose order he acts, every one knows who has had any experience of the two methods of settling the business of a partnership or a corporation. And then it is, as we have seen, always at the option of a creditor or stockholder to have a receiver, if they can allege facts showing that a receiver is necessary.

So far, therefore, as the rights and interests of the sole beneficiaries of the trust are concerned, there is no need to construe section 400 of the Civil Code and section 565 of the Code of Civil Procedure contrary to their express terms, in order to rescue the legislature from the imputation of having enacted an absurdity. On the contrary, the rule which they prescribe, according to their natural and obvious construction,—by which they apply as well to cases of forfeiture of charter as to cases of voluntary dissolution,—is most salutary, so far as the beneficiaries are concerned, and such construction must prevail, unless, indeed, it be true that the paramount interests of the people of the state demand a different construction.

This proposition, that the people of the state have an interest in the appointment of a receiver whenever the charter of a corporation has been forfeited, was decided adversely to the contention of the respondent at an early stage of these proceedings, in ruling upon a preliminary objection made by counsel for the state, who appeared specially for that purpose,—an objection founded upon a clause of the twenty-eighth rule of this court, which reads as follows: “* * * In case any court, judge, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings; and in such case it shall be the duty of the applicant obtaining an order for any such writ to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.” Neither the petition nor the writ herein was served upon the state or its attorneys, and the objection made in behalf of the state was that the hearing could not proceed, and that the alternative writ must be quashed, for the reason that it appeared on the face of the petition that the state was the real party in interest, or whose interest would be directly affected by the proceedings. The court, however, were unanimously of the opinion, and so decided, that the state had no interest to be affected, and that the only persons interested were the creditors and stockholders of the corporation. It must be confessed, however, that when this ruling was made we did not understand, and, of course, did not consider, the real position of respondent with respect to this matter. It did not occur to us, and if the point was suggested in the course of the

argument upon this preliminary objection it failed to impress us at the time, that any person could have an interest in the appointment or removal of a receiver except those who would be entitled to share in the distribution of the fund committed to his control; and, as it was conceded that the state had no interest in the fund, we naturally concluded that the interests of the state could not possibly be affected by any result of these proceedings, and ruled accordingly. But, in the light of the fuller argument made at and since the hearing, we perceive that the real claim of the state remains to be stated and considered.

Before, however, proceeding to this discussion, we take occasion to say a few words as to the proper construction of the rule of court above cited. It does not, as counsel seem to suppose, require that the state should have been made a formal party to this proceeding, by being named as a defendant in the petition or writ, but only that the names of the parties really interested should be disclosed by the petition, and that service of a copy of the petition and writ should be made upon them. *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. Rep. 685. The effect, therefore, of a failure to serve such parties, would not be an abatement of the whole proceeding, but, at most, to require a postponement of the hearing or trial until they could be served, and have a reasonable time to appear. On the face of the petition in this case, it did not seem to us that the state could have any interest in the controversy over the appointment of the receiver. If it had been otherwise, it would perhaps have been our duty in advance to order service of the petition and writ upon the representatives of the state, and certainly we should have been bound, of our own motion, to require proof of such service before proceeding with the hearing of the rule to show cause; or if, on the hearing, the fact had been developed that a party not named or served had an interest to be affected, it would have been our duty to suspend the proceeding until such party was served and brought in. As it was, however, we were proceeding properly with the hearing when the objection of the state was interposed. The motion made to quash the alternative writ was not sustainable upon any view of the state's rights or interest in the matter, and after listening to the argument then advanced in support of the state's claim of interest, and its right to the benefit of the rule, we decided that the claim was unfounded, and that the rule did not apply. But if we had then understood, as we now understand, the ground upon which the state bases its claim of interest, we should probably have ordered service of the petition and writ on the attorneys of the state, and should have allowed them in that capacity to take part in the subsequent proceedings. No harm, however, has resulted from our misconception of the state's position. Although there was no service of notice upon its attorneys *eo nomine*, such service was made upon the judge of the superior court, who has been formally represented throughout

these proceedings by one of the attorneys of the state, and actually by both of them. The whole object of the rule, therefore, has been fulfilled so far as the state is concerned; the only difference being that its attorneys have had only one copy of the writ and petition instead of two, and that they have been compelled to speak in the name of the superior judge, instead of that of the state. But in his name, and upon his behalf, they have presented every argument and raised every issue which could have been made in behalf of the state if it had even been a formal party to the proceedings, which, as we have seen, the rule does not require.

We will now return from this digression to consider what those arguments are. It will be seen, by reference to the opinion of the superior court above quoted, that the provision of section 564 of the Code of Civil Procedure, to the effect that a receiver may be appointed when a corporation has forfeited its charter, is construed to mean that in such case a receiver must be appointed, and this because the public has an interest that the power should be exercised. To our minds, it is perfectly clear that the true construction of this clause of section 564 is found in the very next section of the Code, wherein it is specifically enacted that "upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers," etc. Here is an express enumeration of the parties, and the only parties, (*expressio unius est exclusio alterius*), whose interest demands that "may" should be read "must," and, considering this language in connection with section 400 of the Civil Code, which, as we have seen, provides that the directors in office at the date of its dissolution shall settle the affairs of a corporation, unless some other persons are appointed, we should never have thought of looking further for a definition of the circumstances under which a receiver could be appointed. In terms, both sections apply as well to cases of involuntary as to cases of voluntary dissolution, and they do in fact provide a most salutary rule for the protection of all persons interested in the property. But it is held that they must be construed out of their obvious sense, and limited in their application to cases of voluntary dissolution, because, and only because, in cases of forfeiture for corporate misconduct, the stockholders cannot be adequately punished or restrained without the intervention of a receiver, and, consequently, that the interest of the public, in the imposition of such punishment and restraint, requires the conversion of "may" into "must," thus making the appointment of a receiver obligatory in all cases of forfeiture.

This proposition, which is, in effect, stated in the opinion above quoted, is much more plainly and directly put in the argument made by the respondent here. He asks if it is possible that this controversy between the state and a con-

cern with millions of capital is limited to the imposition of a fine of \$5,000, and the cancellation of a charter, the duplicate of which can be obtained while we are talking here; and he answers his own question as follows: "I understand the great interest of the state is to break down the monopoly. To do that it seizes the means and utensils—the business—with which the monopoly has been proceeding. It scatters it. It divides it up. A receiver is appointed for that purpose. That is part of the penalty. That is a part of the penalty provided by law, because they have forfeited their corporate rights,—no other reason." Translated into terms specifically applicable to the case before us, the meaning of this is that, if a corporation organized for the purpose of refining sugar enters into a combination with other corporations, through the medium of what is called a "trust," for the purpose of limiting the production and keeping up the price of refined sugar, the courts will not only forfeit its charter and impose the utmost fine which the law prescribes for such offenses, but they must go further, and, by the hands of a receiver, seize into their possession all the property of the defunct corporation, and especially its sugar refining plant, not for the purpose of preserving and protecting it, and as speedily and economically as possible distributing it to those who are equitably entitled, viz., creditors and stockholders, but for the quite opposite purpose, of shutting it up and condemning it to rust and idleness, until such time as it can be unfitted completely for the purpose to which it is best adapted by dividing it up and scattering it. We confess that this is to us a novel doctrine, and one which does not, upon any ground, commend itself to our judgment. It may not be the rule in this state to construe penal legislation strictly, but even here, when a court is asked to impose a penalty for infraction of a law, the first inquiry is, what penalty does the law prescribe? The answer to this question is sought, not in labored construction of other statutes, but in the express term of the act defining the offense.

Now, what is the case here? In section 803 of the Code of Civil Procedure, the legislature has enjoined upon the attorney general the duty of bringing actions for the forfeiture of corporate franchises whenever he has reason to believe that they are unlawfully held or exercised. This was his sole authority for bringing his *quo warranto* against the American Sugar Refinery Company, and it is upon this chapter of the Code that the judgment of forfeiture depends. Section 809, in the same chapter, defines the character of the judgment that must be rendered when the defendant is found guilty, viz., that the defendant be excluded from the franchise it has abused; and "the court may also, in its discretion, impose upon the defendant a fine not exceeding \$5,000, which fine, when collected, must be paid into the treasury of the state." This is absolutely all the punishment that the legislature has in terms prescribed, and, if any other was intended,—especially if such other punishment was designed to be severe beyond

comparison with that expressly defined,—it is passing strange that the courts should have been left to work it out by a doubtful construction of other parts of the Codes.

But, to our minds, the gravest objection to the doctrine lies in the consequences which it involves. Obviously, there is no measure or limit to the punishment which may be inflicted in the manner indicated, except in the discretion of the court and the moderation of its receiver. The duty of the receiver is not conservation, but destruction. In whatever business the offending corporation may have been engaged, his first step must be to shut up its works; however vast the capital invested, it must be condemned to lie idle and unproductive until it can be divided up and scattered. It must not be sold as a whole, complete and adapted to the work for which it was designed, and for which alone it possesses any considerable value. To do so would defeat the whole object of the receivership; for not only would the offending stockholders get off without adequate punishment, but there would be nothing to prevent them from buying in their own property, and again putting it into the combination. It must therefore be divided up and scattered, and its value in great measure destroyed. The stockholders, when they finally realize upon their property, must be content to receive, not the proceeds of a well-appointed manufactory, in complete running order, but the price of a lot of old iron and second-hand machinery, sold in lots according to the discretion of a receiver acting with a view, not to their interest as stockholders, but solely with a view to the interest of the public in punishing them. We cannot assent to a doctrine involving such consequences. If it is really true that our laws, as they are written, provide no adequate punishment for corporate transgressions, let the legislature take the matter in hand. It is no part of the function of a court to supply the want of penal legislation. Its judgments in such case, besides being wholly unauthorized, would always operate as bills of attainder or *ex post facto* laws, both of which are not only abhorrent to our ideas of justice, but are expressly forbidden by our charters of government.

But perhaps it is not fair to regard the doctrine under discussion as implying that the primary object of the laws, as it construes them, is the punishment of the stockholders. It may be said that the real purpose is only to break up the monopoly, and that the punishment involved is merely incidental and unavoidable; that it is right to break up the monopoly, and if, unfortunately for them, the stockholders suffer in the process, they have themselves alone to blame. Regarded from this point of view, it seems to us that the doctrine is still wholly indefensible. When a corporation is dissolved, its property, as we have seen, vests in its stockholders subject only to the claims of creditors, and is thereafter held upon the same tenure, and subject to the same conditions, as similar property owned by other natural persons. What others may do, they may do. They owe no further or

higher duty to the public, and are under no other restraints. Therefore, unless some ground can be shown upon which the state can take a sugar refinery away from a private citizen who has inherited it, or bought it, or built it, and can shut it up, preparatory to dividing and scattering it, upon the ground that he has entered into an agreement with some other private citizen, owning another refinery, to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the state in taking similar property from natural persons who have succeeded thereto on the death of a corporation. Confessedly, there is no warrant to be found for such a proceeding in case of a natural person. That contracts in restraint of trade are unlawful, or at least opposed to the policy of the law, is conceded, but the only penalty they entail is that courts refuse to enforce them, just as they refuse to enforce any contract which is opposed to public policy or good morals; but no one ever heard of a proceeding to confiscate or destroy, either wholly or partially, the property which is the subject of such a contract. So far the legislature has seen fit to attach no other punishment to contracts of natural persons in restraint of trade than to make them non-enforceable; and, where the legislature has stopped, it is not only becoming but necessary that the courts should stop. As to the property of a corporation, the legislature has given no indication of an intention to forfeit it or take it away from the stockholders, except to the extent of a fine of \$5,000, which the court is authorized, in its discretion, to impose. What is forfeited to the state, and all that is forfeited, is the charter,—the right to be a corporation; and this is resumed solely upon the ground that the condition upon which it was granted has been violated. The doctrine is that corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage, of the state. If this condition is broken, the charter which the state has given is taken back by the state; but the property which the corporation has acquired, with its own means, goes to those who have paid for it, and they have the right to deal with it just as others similarly situated may deal with their property. Whatever the law prevents other natural persons from doing, they are prevented from doing; nothing more. This doctrine is plainly enough indicated in the case of *People v. Refining Co.*, 22 Abb. N. C. 164, 3 N. Y. Supp. 401, cited and relied upon by respondent, and in the cases therein referred to; and it is shown, moreover, in those cases, that the privileges and powers of a corporation are essential to membership of the trust, and to any effective monopoly. To become a member of the trust, the sugar refiner must be a corporation; and, the corporation being dissolved, it is impossible that its stockholders should keep up the arrangement. And so, as to monopolies in general, they are only dangerous when corporations are the parties to the

agreement by which they are attempted. *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. Rep. 363. At least this is the opinion of some courts, and it suggests a reason why the legislature has omitted to prescribe any penalty beyond non-enforcement in case of such agreements between natural persons. But we need not speculate upon these matters. The law being plain, we are not concerned with its expediency.

The conclusion which inevitably follows from these views is that, in an action under section 802 et seq. of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the superior court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation. Code Civil Proc. § 565. Such new and distinct proceeding upon the part of the beneficiaries, or some of them, is the essential condition of any jurisdiction in the court to take the property out of the control of the trustees designated by law. Civil Code, § 400. An order appointing a receiver without such application is therefore void, not only as to strangers to the *quo warranto*, but is even void as to the corporation and its stockholders and vendees. We have no doubt of the correctness of this conclusion; but, if we were wholly mistaken in our views, and if it were true, as held by the respondent, that the appointment of a receiver for the purpose of inflicting one of the penalties designed by the law, and essential to its efficacy, is obligatory, we cannot see how it is possible to avoid the conclusion that the enforcement of this as well as other parts of the penalty was suspended by the appeal from the judgment. According to the plain and unambiguous terms of the statute, proceedings upon any appealable judgment or order may be stayed by the filing of a sufficient undertaking except in a few enumerated cases, of which this is not one. Code Civil Proc. § 949. Confessedly a sufficient undertaking was filed in this case to stay the judgment, if that was possible. Opinion of Judge WALLACE, *supra*.

But it is held, in the face of the statute, that a stay was not possible; and this, again, upon the plea of necessity, in order to prevent an apprehended abuse. We do not think the reason suggested is sufficient to override the law. The allowance of an appeal in such cases implies the right of the corporation to question the validity of a judgment of forfeiture until it has been affirmed here, and it is not correct to say that a stay of proceedings would operate a rehabilitation of a dissolved corporation when the sole object of the appeal is to determine the question whether there has been a valid judgment of dissolution. But evidently the respondent was unwilling to stand upon the proposition that a stay was not possible. Waiving that, and assuming that the judgment has been stayed, he concludes that the power to appoint a receiver is nevertheless not suspended, because the order of appointment is not embraced in the judgment, and is not a proceeding upon the judgment. It is true that

the order of appointment is not embraced in the judgment, but that is not the test. An execution is not embraced in the judgment, but an appeal duly perfected stays execution. In truth, it is not correct to say that a judgment, or matters embraced in a judgment, are stayed by the appeal, and the statute does not say so. What it says is that proceedings upon the judgment and matters embraced therein are stayed by the perfecting of an appeal. Id. § 946. That is to say, the execution—the enforcement—of the judgment is suspended. Now, here it is conceded that no receiver of the corporation could be appointed until after judgment, and that the only purpose of his appointment is to carry the judgment into effect, by taking away the property of the corporation, and scattering and dividing it. How, then, is it possible that this is not a proceeding upon the judgment? According to the argument, the things to be done by the receiver constitute the only substantial and effective punishment which it is in the power of the state to inflict. The rest is a mere trifle. But it is nevertheless held that this ruinous penalty which follows the judgment, and but for the judgment could never be inflicted, is not a proceeding upon the judgment, and therefore is not stayed by the appeal; and this conclusion is rested upon the authority of rulings which, it is said, have often been made by our courts. Undoubtedly, it has often been held that the appointment of a receiver is merely ancillary, and undoubtedly his appointment often is merely ancillary; that is to say, he is appointed before judgment for the purpose of protecting, pending the litigation, property which is the subject of the litigation. But sometimes he is appointed after judgment for the purpose of carrying the judgment into effect, in which case his appointment, and his proceedings thereunder, are not merely ancillary. In the former case, his functions are not necessarily suspended during the appeal, and neither is the power of the court to remove him or control him suspended by the appeal. But in the latter case—as, for instance, where a receiver has been appointed to sell mortgaged premises under decree of foreclosure—his proceedings are suspended by the appeal.

The only case cited by respondent—a case supposed to cover the whole ground, and to conclude the question—is that of *Baughman v. Superior Court*, 72 Cal. 572, 14 Pac. Rep. 207, which was of the former class. There the litigation was about the right to certain grain described in the pleadings. Upon the filing of the complaint, and upon the *ex parte* application of the plaintiff, the court appointed a receiver to take charge of the grain, pending the action, to preserve it for the benefit of the party who might prove to be entitled to it. The defendant demurred to the complaint. His demurrer was sustained, and final judgment entered in his favor, from which plaintiff appealed to this court. After the appeal was perfected the superior court discharged the receiver, and this court decided that the power of the superior court to do so was not suspended by the appeal. We do not doubt the correctness of that decision; but we are un-

able to see the resemblance between the case where a receiver is appointed before judgment to preserve property pending the litigation, and one in which he is appointed after judgment to dispose of the property in order to make the judgment effective. We know of no case that comes nearer supporting the proposition to which it was cited than this case, and we feel certain that there is as little to support it in the rulings of our courts as in the text of the Codes. As to considerations of expediency, they should not weigh when the law is plain, but, if we were to look to the consequences of the doctrine contended for, we should find therein nothing to commend it.

We assume, for every purpose of this decision, that the judgment of forfeiture in this case was not only just but legal—correct not only in substance but in form—free from error. But it does not follow that all similar cases will be equally well decided. It is possible—the constitution and the laws assume the possibility—that some case may arise in which the judgment of forfeiture will be not only erroneous, but unjust, and that it will be reversed on appeal. But the rule applied in this case must also be applied in that case. If this judgment must be executed in the manner indicated, so must that. A receiver must be appointed. He must seize all the property. He must shut up the factories, discharge the employees, prevent the fulfillment of contracts, subject the corporation to every sort of loss and damages that can be inflicted by the stoppage of a great and complicated industry having its ramifications throughout the business centers of the entire coast. And not only this; for, if he must go to this extent,—if nothing the corporation or its stockholders can do will stop him,—then nothing but the forbearance of the superior judge will prevent the completion of the process. For this injury caused by an erroneous judgment, a reversal on appeal affords no redress, for no security has been given, by the undertaking of sureties or otherwise, to indemnify the corporation or its stockholders. The sureties of the receiver merely undertake that he will faithfully execute the orders of the court; and, according to the precedent in this case, they are bound in a trifling amount. If the receiver obeys orders, they are exonerated; and, if his orders contemplate the infliction of punishment by the indirect and partial destruction of the property, the more completely they are exonerated, the greater the damage inflicted for which there is no redress. Unless it is to be assumed that such results as these comport with the justice and policy of a great state, the inevitable consequences of the doctrine contended for utterly condemn it. If, therefore, the state could demand the appointment of a receiver upon the ground and for the purposes stated, the appeal operated as a stay of such proceeding, and for that reason the appointment in this case would have been an excess of authority. But we do not rest our decision on this ground. We rely upon the proposition that a receiver of a dissolved corporation is only to be appointed when neces-

sary for the purpose of preserving and distributing the property, and only upon application of a party interested, viz., a creditor or stockholder. This conclusion relieves us of the necessity of dwelling at length upon other objections to the validity of the order of the superior court. If it was totally void as to all the world, it was, of course, void as to these petitioners, without regard to the special manner in which they were affected by it.

It is proper, however, to add that we think these objections urged by petitioners in their character as purchasers of the refinery are well founded. They were not parties to the *quo warranto*, in their character of purchasers. It may be true that the stockholders of a corporation are in a certain sense parties to an action to forfeit its franchise, but they are not parties in any other sense than that they are bound by the consequences of such judgment as the court in that action has power to give. If the court goes outside of the issues in the action, and renders a judgment or makes an order embracing matters entirely foreign to such issues, certainly the stockholders are not bound by such judgment or order. Even conceding, then, for the sake of the argument, that the order of the superior court would have been valid if confined to property of the corporation, it cannot be claimed that it was valid if it embraced the property of vendees of the corporation. There does, indeed, seem to be a sort of claim, hinted at rather than directly asserted, in one of the briefs, that a purchase *pendente lite* is in fraud of the rights of the state in such cases as this, and therefore void. But there appears to be no foundation for this claim. The state, by its action, acquired no lien on any of the property of the corporation, and it is difficult to understand upon what ground it can attack a sale *pendente lite*. Up to the date of its dissolution, the corporation had the same power of disposing of its property honestly and in good faith that any corporation has, and, like any other corporation, it could sell to its stockholders. It matters not, therefore, that these petitioners were stockholders. They had the right to purchase; and if they did so, and entered into possession of the property, they had the same rights in their character of purchasers that any stranger would have had.

It is claimed by respondent that the evidence in the *quo warranto* case showed that the transfer to the petitioners was a sham. This may be so, but the petitioners were not parties to that proceeding for the purpose of defending their purchase. Its validity was not in issue in that action, and could not by any legal possibility have been tried and determined therein. If any evidence came out in relation to the transfer, it was but incidental to other issues, and the petitioners could have no opportunity of rebutting it. If the *bona fides* of their purchase was to be attacked, and the validity of the transfer drawn in question, they were entitled to their day in court, and an opportunity of adducing testimony to sustain their claim of ownership. But it is said these petitioners did appear, did submit themselves to the juris-

diction of the court, and did have an opportunity to contest the making of this order, and consequently that the order, even though erroneous, is binding on them until reversed. The foundation for this assertion is that, in response to the rule to show cause why a receiver should not be appointed, these petitioners, in common with all the other stockholders of the corporation, filed an affidavit showing that there were no creditors, and a request that the trustees of the corporation might be allowed to settle its business. In other words, they opposed the appointment of a receiver upon the ground that no party in interest asked or desired a receiver. This is all that can be said. They opposed the appointment of a receiver of the property of the corporation. There was not a word in the pleadings or judgment in the original action, or in the rule to show cause, about any specific property, and of course no issue or opportunity to try the validity of the transfer of the refinery to the petitioners. The order, therefore, assumed to determine a question that was never tried, and never anywhere put in issue. But the form of the order is defended on the ground that "the rule is well settled that the order should describe with sufficient certainty the property which the receiver is to take, and unless this is done he cannot hold it." Of course the property must be described with sufficient certainty; but it is sufficient, in appointing the receiver or assignee of an insolvent or a corporation or partnership, or the executor or administrator of a decedent, to mention generally all the property of the insolvent, the corporation, the partnership, or the decedent. If a specific description was necessary, what would justify the receiver in this case, or in any of the cases supposed, in taking property not specifically described? The truth is, in all such cases the receiver justifies and defends his possession by showing title in the person under whom he claims. Of course, when a litigation concerns some specific property described in the pleadings, it is proper, in appointing a receiver, to so describe the property in the order. But such is not the case here; and, even in cases where a specific description is appropriate, it gives the receiver no right to take the property from the possession of a stranger to the action.

The case of *In re Cohen*, 5 Cal. 494, is cited to sustain the proposition that the court had power and jurisdiction to decide whether the petitioners herein were in possession as agents or trustees of the corporation. The case does not sustain the proposition. It merely holds that a court may in a proper case order not only the party, but his agents and servants, to deliver property to a receiver. But it does not decide that when a third party is in possession, claiming to be owner in his own right, a court may determine without a hearing that he is a mere agent or servant. To say that a court may make an order binding upon the servant or agent of a party to the action does not mean that a court or the receiver may take property out of the possession of a stranger claiming it as a purchaser in good faith, and

throw upon him the burden of proving that he is not an agent or servant.

Another objection urged by counsel for respondent is that these petitioners, having tried the *quo warranto* case in the superior court on the theory that the corporation was carrying on the business of the refinery, are estopped from asserting here that they are the owners. There are many answers to this objection, but we deem it sufficient to say that we can look only to the pleadings, findings, and judgment in the *quo warranto* case to find what was tried, or what was the theory of the trial. The issues in that case all related to the conduct of the corporation prior to the filing of the information by the attorney general, while the claim of the petitioners is that they purchased the property after all the pleadings were filed, and just before the trial. Besides, the evidence to which we have been referred shows very clearly that the transfer to petitioners was disclosed on the trial, and it cannot be said that they practiced any concealment or deception as to their claim, even if their purchase, pending the action, had been material. We do not see how it was material; but, whether it was or not, it cannot be doubted that the superior court was fully advised of their claims before the receiver was appointed. How else, indeed, could it have been concluded that the transfer was a sham?

We have thus gone cursorily over the propositions most strongly pressed by counsel in the attempt to sustain this order. They all rest upon the assumption that the court was authorized, without any application by a creditor or stockholder, to appoint a receiver. That assumption being shown to be unfounded, all the propositions resting upon it necessarily fall; but nevertheless we thought it proper to notice them. We also desire, before taking leave of this branch of the case, to say a word as to the decision in *Railroad Co. v. State*, 12 S. W. Rep. 690, cited in an *addendum* to respondent's brief as "decisive of the whole question raised by petitioners." We cannot see that it decides anything in point. It merely holds that a Texas statute which directs the appointment of a receiver in cases of forfeiture of corporate franchises is constitutional. There is no question here as to the constitutionality of a statute. We have no such statute.

We come now to the questions as to the remedy. Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Code Civil Proc. §§ 1102, 1103. We have shown that the superior court, in appointing the receiver, exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If, then, they have no plain, speedy, and adequate remedy in ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order. It is claimed, how-

ever, that, so far as the superior court is concerned, there is nothing to arrest, that its order was made and executed before the alternative writ was issued, that the receiver alone is now acting, and that the writ does not run against him. It is true the writ does not run against ministerial officers, and it is also true that its operation is preventive, rather than remedial. But property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver which holds, administers, and disposes of the property in his hands; and, so long as the property remains undisposed of, action by the court is necessary. In such case there is judicial action to be arrested, injury to be prevented, and a writ of prohibition is appropriate for that purpose. The writ runs to the court, and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority. In this case, when the petition was filed, and our alternative writ directed to issue, the receiver, as we shall see, was still striving to gain complete possession of the refinery and other property claimed by the petitioners; and, even if he had been in complete control, that would have been but the first of a series of steps to be taken in carrying out the purpose of his appointment. The keeping of the property in such a case is a continuous wrong. The closing down of the works is an independent wrong. The use of a portion of the property to preserve the rest is an unlawful interference with the rights of those lawfully in possession. Besides all this, there remained to be carried out the sale and final distribution of the property. By the very terms of the order appointing the receiver, he is to hold the property subject to the further orders of the court concerning it; and the necessity of such further orders would be implied, if it had not been expressly indicated. As we understand the authorities on this point, the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed; and, if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone. If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy.

Great reliance is placed by counsel for respondent upon the decisions of this court, such as *Chester v. Colby*, 52 Cal. 517, and *Railroad Co. v. Superior Court*, 59 Cal. 476, to the effect that, when an inferior court or tribunal is proceeding, or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior court or tribunal, and by it over-

ruled, before resort is had to a higher court for a writ of prohibition; and, undoubtedly, such is the established rule of practice in this state. But, if this is the law, it must inevitably happen in every case, as it would probably happen in many cases under any rule, that the lower court will make its ruling on the question of jurisdiction before any prohibition can be sued out; and, if it holds that it has jurisdiction, and makes orders in consonance with that view, the writ of prohibition will be of no avail unless it affords the means, not only of arresting future action, but of undoing past action. In other words, the two positions contended for would practically abolish the remedy. No better illustration of the working of this theory can be found than is afforded by the present case. When the order to show cause why a receiver should not be appointed was served, neither these petitioners, nor the defendant corporation, nor its stockholders, could have got a writ to prohibit the appointment of a receiver without first objecting in the superior court to its want of jurisdiction. Such objection, as we have seen, was made. It would have been sufficient to have objected that there was no application by a creditor or stockholder for a receiver, and no grounds alleged for such appointment; but the defendant corporation, or its stockholders, went further. They showed affirmatively that there were no creditors, and that all the stockholders desired the statutory trustees to settle the business of the corporation. They showed everything, in short, necessary to sustain their objection to the jurisdiction; and the opinion of the superior judge, *supra*, shows that their objections were strenuously argued and maturely considered. But what happened? After holding the matter under advisement for nearly a month, the respondent filed an opinion overruling the objections to his jurisdiction, and on the same day appointed a receiver, who on the same day qualified by taking the oath and filing his bond, procured an order approving his bond and confirming his powers, and actually, according to his own views, had possession of the vast property in controversy, before the agent of the petitioners or their attorneys had any notice that their objections to the jurisdiction had been overruled. If such proceedings, conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed. But happily there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed.

We are referred by counsel for respondent to a number of decisions of this court which are supposed to sustain their position on this point, but we do not find them at all in conflict with our views. Not one of them related to a case like this, and the general expressions to be found in the opinions must of course be construed with reference to the facts of the particular case. In *Hull v. Superior Court*, 63 Cal.

179, it was said that prohibition was not available to prevent the acts of a *de facto* ministerial officer, nor to prevent judicial acts already done. The attempt in that case was to try the right to the office of sheriff. It was decided that this could not be done by prohibition, and what was said as to judicial acts already done had reference to the acts of the superior judge recognizing the official character of the incumbent *de facto* of the office. Such acts must of necessity have been complete, and ended past remedy. In *More v. Superior Court*, 64 Cal. 345, it was held that the order of the superior court was not in excess of its jurisdiction, which was a sufficient reason for dismissing the proceeding, and it was in fact dismissed on that ground. What else was said in the opinion seems to have been in answer to a claim that the court had power to undo something that the receiver had done in excess of his authority. It ought not to be necessary to point out the distinction between that case and this. Here the order of the court is in excess of its jurisdiction, and the court, through its receiver, is doing and continuing to do, and threatening to complete, a series of proceedings which are a wrong and injury to the petitioners. In that case the order of the court was regular and valid. The court, to which the writ alone runs, had done nothing in excess of its jurisdiction; but the receiver, as was claimed, was doing or had done something which as a receiver he had no right to do. Of course the writ of prohibition was not the proper remedy in such a case. The case of *Coker v. Superior Court*, 58 Cal. 177, does not touch the point; the decision being that the superior court had not exceeded its jurisdiction. Other decisions, cited from the reports of other states, are equally inapplicable, but we have no time to review them. We will, however, refer to the language quoted by counsel from High, Extr. Rem. § 766. He quotes the following: "Another distinguishing feature of the writ is that it is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed." To show what this means, he should have quoted what follows in the next sentence: "When, therefore, the proceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie," etc. This is really the whole extent of the rule. Where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is no remedy; but, where anything remains to be done by the court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done. See forms of writs cited, 2 Chit. Pr. 354, 355. *Ex parte Morgan Smith*, 23 Ala. 94; *Jones v. Owen*, 5 Dowl. & L. 669; *Marsden v. Wardle*, 3 El. & Bl. 695, and cases therein cited; *Serjeant v. Dale*, L. R. 2 Q. B. 558. In

White v. Steele, 12 C. B. (N. S.) 383, the court says (page 412:) "The writs in the register and elsewhere which conclude with a *mandamus* to the Court Christian to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the *mandamus* to revoke the unauthorized proceeding only accessory to the peremptory prohibition, and necessary to give it effect." Here is a clear indication of the extent of the remedial office of the writ. It is primarily and principally preventive. Its office is to arrest proceedings; but, when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction the court will afford complete relief. A party will not be compelled to resort to more than one proceeding, or more than one court, for redress of one injury. See, also, *French v. Noel*, 22 Grat. 454. Many other cases are cited in the brief of counsel for petitioners to this point, and might be cited here, but it is unnecessary. In the nature of things, it must be true that when a receiver has got possession of property under a void commission, and the future acts of the court, *i. e.*, the sale of the property and distribution of its proceeds, are arrested by prohibition, the writ will also require a restoration of the property to the petitioner; for otherwise prohibition would be worse than no remedy at all. It would prevent the owner from getting either the property or its proceeds. The receiver would continue to hold it discharged of the duty of accounting for it.

We will next consider the objection that prohibition will not lie because the petitioners had other plain, speedy, and adequate remedies in due course of law. It is suggested that they might have moved the court below to withdraw its order for a receiver. But suppose the court insisted that everything should be absolutely given over to the possession of the receiver before he would listen to any application for a revocation or modification of his order. Can it be said that a motion only to be considered on such conditions afforded an adequate remedy, or any remedy? And suppose the motion had been heard and denied. Would that have helped them? After all, it would have been necessary to appeal to some other court for relief. But surely counsel can scarcely be serious in contending that, because a party can move a court to set aside an invalid order, therefore he cannot have a writ of prohibition; for, if this were so, there never could be a writ of prohibition. Such a motion would always be possible. The most that can be claimed is that an application should be made to the lower court before moving for the writ. But this is another point to which we shall refer hereafter.

It is also suggested that the petitioners might have bowed to the authority of the receiver, given him possession of everything, and then obtained leave from the superior court to sue him in ejectment, or

that they might have sued him in forcible entry. It is true the petitioners might have done this, but the remedy would have been neither speedy nor adequate. They had the right, not merely to get their property back after a long and expensive litigation, they had a right to keep it. The wrong with which they were threatened when they applied for the writ, and when the writ issued, was the deprivation of the possession and the use of their property. To give the property up in the hope of being allowed by the superior court to sue for it, and recover it after years of litigation, was neither an adequate nor a speedy remedy. It would be as reasonable to say that an injunction should never issue to restrain a threatened injury, because the party injured may always have his action for damages. But there is a distinction affecting this question which counsel seem to have wholly overlooked,—a distinction, that is to say, between acts of the receiver and acts of the court. When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court, he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. If he attempts to take property lawfully in the possession of another, and to which he is not entitled, his attempt may be resisted just as any other trespasser may be resisted, and the person defending his lawful possession is not brought in conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or, if the title is in doubt, permit an action to be brought against him to try the title. But, when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court. The wrong is in the order of the court, not in the receiver's transgression of the order. In such case, it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrong-doer, or in such an action as may be brought against a private person who has committed a trespass. However confident he may be of his right to resist, no prudent man will take the risk of resisting the plain terms of an order of court; and no rule of practice should be laid down which will compel a man in that situation to defend his possession by force in order to avoid the necessity of resorting to an action to recover it. On the contrary, all men should be encouraged to avoid forcible resistance to orders of courts, no matter how plainly in excess of jurisdiction, by firmly upholding and freely administering the remedies provided for the summary correction of such excesses.

But it is said that the order appointing the receiver was appealable, and therefore

prohibition will not lie. The statute does not say that the writ will not issue in any case where there is an appeal. There must not only be a right of appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused because there was a right of appeal, but in all of those cases the appeal afforded a complete and adequate remedy for the threatened excess of jurisdiction. In *Childs v. Edmunds*, 10 Pac. Rep. 130, the petitioner had a right to appeal, and by his appeal he could stay the enforcement of the writ of assistance. More than this, it does not appear that any excess of jurisdiction had been committed in ordering the writ of assistance; and, if so, appeal was the only remedy. In *Mancello v. Bellrude*, 11 Pac. Rep. 501, and *Levy v. Wilson*, 69 Cal. 105, 10 Pac. Rep. 272, appeal was a complete and adequate remedy. In *Clark v. Superior Court*, 55 Cal. 199, and *Wreden v. Superior Court*, Id. 504, there was no excess of jurisdiction, and appeal was the only remedy. The same is true of the case of *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. Rep. 143. The difference between this case and all those referred to is that here an appeal would have afforded no remedy for the wrong with which the petitioners were threatened. By means of an appeal, at the end of about a year and a half, in the ordinary course, they could have procured a reversal of the order,—if, indeed, as strangers to the action in which it was made they had any right to appeal; but in the mean time they would have been irreparably damaged, unless upon the taking of the appeal the court would have suspended action under the order. But the court had already decided that no appeal could by possibility stay the appointment of a receiver, and the seizure of the property by him; and so it would have been necessary to make a motion to suspend the order, and for a restoration of the property or a withdrawal of the receiver,—wait until that order was overruled, and a bill of exceptions settled, and take another appeal from that order, as was done in *Lee Chuck v. Quan Wo Chong*, 81 Cal. 222, 22 Pac. Rep. 594. Or some other proceeding would have been necessary, involving ruinous delay; for in the mean time the receiver would have gained complete possession of the refinery and other property, the refinery would have been closed, stock injured, contracts broken, employes discharged or kept in idleness, and every possible damage inflicted, without any security for the loss. In such a case, there was no adequate remedy except by a proceeding which would prevent the receiver from taking possession of the property; and the writ of prohibition was, as has been shown, the appropriate remedy for that purpose. It has, it is true, been in great measure shorn of its efficacy by the precipitate haste of the receiver in proceeding under the order of the superior court; but the propriety of the course pursued by the petitioners is to be judged, not by the consequences of what the receiver has done, but by the case upon which their

petition was founded, and our writ awarded. The fact, therefore, if it be a fact, that the petitioners could have appealed from the order appointing the receiver, does not preclude them from having the writ of prohibition.

The case of Haile v. Superior Court, 78 Cal. 418, 20 Pac. Rep. 878, so much relied on by counsel at the oral judgment, and cited again with emphasis in the briefs since filed, is, as we pointed out at the hearing, radically different from this case. There the order of the superior court was in no respect in excess of its jurisdiction. The receiver was regularly appointed, in a proper case, to take charge of the estate of a voluntary insolvent. He was not directed to take any specific property. The court had decided nothing against the claims of the petitioner, and was not assuming to decide anything with respect to his claims. The court, in short, had done nothing which could have been prohibited. But it was feared by the petitioner that the receiver might sell property previously assigned to him by the insolvent, and he wanted such action by the receiver restrained. He feared, in other words, that the receiver would exceed his authority, and commit a trespass. We said, in vacating the alternative writ, that, if the receiver had taken any property belonging to the petitioner under the order of the superior court, he had done so without authority, and was a mere trespasser, for which plaintiff had a remedy by action, and that he could not resort to the extraordinary remedy of prohibition. What bearing this decision can be supposed to have upon a case where the order of the court is in excess of its jurisdiction, and where the object of the proceeding is primarily to restrain the court in its judicial action, and only indirectly affects the receiver, who has done nothing except what the court has commanded him to do, we have thus far failed to comprehend. We have pointed out in another connection the reasons for allowing a summary remedy to arrest judicial action in excess of jurisdiction, and the difference between the situation of a person wronged by such action and one threatened by a private trespasser. In the one case the party threatened has a right to resist the trespass by force, if necessary. In the other, though he may have the right to resist, it is against the policy of the law to encourage such resistance, and a summary remedy is given to arrest the proceeding.

It is next urged in behalf of respondent that prohibition will not lie to try title to property, which means, in its application to this case, that the petitioners cannot be allowed to show in this proceeding that they are the owners of the refinery. But we think counsel have misapprehended the bearing of the proposition which they lay down, and to which we assent. It is true the title to the property cannot be tried in this proceeding; but what this means is that when a court, by its order, has taken property out of the actual possession of a stranger to the proceeding, who claims it as his own, the order is in excess of jurisdiction, irrespective of the actual state of the title. Whether the

party in possession really held the title or not, the order is void, because no man can be deprived of his property without due process of law. A court cannot take property from his possession without a hearing, and compel him to prove title in order to regain it.

It is next suggested that the writ of prohibition does not issue *ex debito justitiæ*, but is to be granted or withheld in the sound discretion of the court, and that in this case it ought not to be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination. There is no competent proof before us of these facts; but, assuming them to be so, the law is not such as counsel claim it to be. A decision may be found here and there saying in a loose way that the issuance of the writ is in the discretion of the court, and a statement in general terms to the same effect may be cited from text-writers who merely echo the decisions; but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases. In England the practice in prohibition was analogous to the practice in other actions at law. An original writ (of prohibition) issued for the purpose of securing an appearance, and after appearance the pleadings followed; that is, the plaintiff declared, the defendant pleaded or demurred, and so on. But there was this difference between the writ of prohibition and other original writs; that, whereas the writs in ordinary actions issued of course on application of the plaintiff, the writ of prohibition did not issue of course, but only upon affidavit showing grounds for its issuance. Another difference was that not only the party injuriously affected by the proceedings of the inferior court, but any subject of the king, was allowed to interfere to prevent an excess of jurisdiction; and, in case of suit by a stranger to the proceeding to be stayed, the superior courts exercised a discretion in granting or withholding the writ, but never when the party affected was the plaintiff. This whole subject is reviewed exhaustively in the case of Mayor v. Cox, L. R. 2 H. L. 278, 280. The following quotation from an opinion of Lord Chief Justice COCKBURN therein cited (page 280) shows what the law on this point is: "I entirely concur in the proposition that, although the court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that it is not *ex debito justitiæ*, but a matter upon which the court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ* if he suffers from the usurpation of jurisdiction by another court." In re Forster, 4 B. & S. 187. In this state, it is always the party aggrieved who sues;

and, if he shows a case for the issuance of the writ, the court cannot refuse it on the ground that he is a bad man, and deserves the punishment he is threatened with, or upon any other consideration which appeals to the mere discretion of the judge.

We come finally to the proposition upon which counsel for respondent insists most strenuously, viz., that the jurisdiction of the court to grant a peremptory writ of prohibition depends absolutely upon the allegation and proof by petitioners that, before filing their petition here, they had pleaded to the jurisdiction of the superior court, and that their plea had been overruled. To sustain this proposition, they cite the decisions of this court above referred to, (*Chester v. Colby*, 52 Cal. 517, and *Railroad Co. v. Superior Court*, 59 Cal. 476,) and they cite a number of decisions from the courts of other states. It is clear that the California cases do not support the contention of respondent. In each of them a party to the proceeding in the lower court was the petitioner for the writ, and all that was held in the first case was that, an objection to the jurisdiction of the lower court having been taken by demurrer, and being undecided there, this court would not interfere by prohibition before that court had overruled the objection. In the second case, it was held that the party must in some form object to the want of jurisdiction of the lower court before the writ of prohibition would issue. In neither case was the failure to make such objection held to be jurisdictional, but the refusal to issue the writ was put upon the ground that prohibition is a prerogative writ, and consequently that the court had, and ought to exercise, the right to make its issuance, subject to reasonable conditions, and that it was reasonable to give the lower court an opportunity to correct itself before calling the judge to answer here. We have no doubt that both decisions are correct in all that they decided, and in all that was said in the opinions on this point. To the extent that its issuance may be made subject to reasonable conditions, applicable equally to all cases and all suitors, the writ of prohibition is no doubt a "prerogative" writ, though it may be doubted if that is a correct term of description; for, in the same sense all writs may be called prerogative writs. And we are satisfied that the rule of practice established by these decisions is a proper and wholesome rule, recommended by important considerations of expediency. When a party has an opportunity of objecting in the lower court that it is proceeding, or is asked to proceed, in a matter without, or in a manner exceeding, its jurisdiction, he ought to make the objection there. It is only fair to the court that the objection should be brought to its attention in some proper form. If no objection is made, the party having every opportunity to object, the court may reasonably infer that no ground of objection exists; and not only is the court entitled to the advice and suggestions of the party with reference to objections apparent on the record,—there are many cases in which the ground of objection would not appear un-

less set forth by plea in some form, and it is to be presumed that any valid objection, properly brought to the attention of the court, would generally prevail, and that all necessity for a writ of prohibition would be obviated; therefore the interest of the public in preventing unnecessary litigation, as well as consideration for the judge of the lower court demand that the objection should be made at the first opportunity. These are the reasons of the rule, and they indicate its scope and the extent of its application, as the authorities very fully show.

We have not time to review the cases, other than those cited from the reports of the state; but we refer to the case of *Mayor v. Cox*, supra, in which the learning of the subject is exhausted. That was a case appealed from the court of exchequer to the exchequer chamber, and finally to the house of lords. Before deciding it, the lords requested the opinion of the justices of the queen's bench on two questions; the second being as follows: "Whether the garnishees in the lord mayor's court could maintain an action for a prohibition without having pleaded in the lord mayor's court;" to which the justices unanimously responded that they could. This was in accordance with the unanimous decision both of the court of exchequer and exchequer chamber, which was accordingly affirmed in the house of lords. The answer of the justices, prepared by Justice WILLES, contains a full review of all the cases, showing that even in England the subject had not been clearly understood, and that some inconsistent and erroneous decisions had been made. It is not surprising, therefore, that in some of the United States the same confusion has arisen, and that some cases have been erroneously decided, to the effect, for instance, that the issuance of the writ is in the discretion of the court, and that a formal plea to the jurisdiction of the lower court is an essential prerequisite to its issuance. Fortunately, no such decisions have been made in this court, though, in deciding *Chester v. Colby*, supra, an Arkansas case (*Ex parte City of Little Rock*, 26 Ark. 52) is cited with approval which apparently does go to the extent claimed by respondent. But we are fully at liberty, without questioning the authority of any case decided in this court, to adopt the correct rule and doctrine as expounded and laid down in the case of *Mayor v. Cox*. Without going into the niceties of the subject, it may be said that the following propositions applicable to this case are fully supported by the decision in that case: (1) If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition. (2) If the proceeding in the lower court is not on its face without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form in order to make the want of jurisdiction appear. (3) But this is not essential to the jurisdiction of the superior court to grant prohibition. It is only laches, which may or may not

be excused, according to circumstances. Accordingly, we find that frequently a failure to plead in the lower court was excused for the reason that it appeared that the plea would have been rejected if made. The whole question, in fact, was one of practice merely, not of jurisdiction; and the objection which most frequently prevailed to the granting of the writ was not that the application came too early, but that it came too late. The rule which we have adopted is founded upon the same considerations, and directed to the same end. Our jurisdiction is ample to arrest by prohibition any proceeding without or in excess of the jurisdiction of the superior court, but by statute we are forbidden to do so when there is a plain, speedy, and adequate remedy in ordinary course of law; and, by the practice which we have adopted and prescribed for ourselves, we will not issue the writ until the objection to its want or excess of jurisdiction has in some form been made in, and overruled by, the lower court; the whole foundation of the rule being the respect and consideration due to the lower court, and the expediency of preventing unnecessary litigation.

Applying these principles to the present case, we find that the petitioners were not, in their character of purchasers of the specific property described in the order appointing the receiver, parties to the *quo warranto*, or the rule to show cause why the receiver should not be appointed, and in that character they had no opportunity to object until after Mr. Reddy appeared at the refinery armed with an order of court authorizing him to take it into his possession. As stockholders of the corporation, however, it is contended and may be conceded that they were virtually defendants in the *quo warranto*, and parties affected by the rule to show cause. But it clearly appears that, in that character, they made every objection that could be made to the order asked, which did not refer to any specific property. They filed an affidavit showing that there were no creditors of the corporation, and a certificate showing that all the stockholders had requested the directors to close up the business of the corporation. They also brought to the attention of the court the fact that an appeal from the judgment of forfeiture had been taken and perfected. All these objections went to the jurisdiction. They were all argued, all maturely considered, and all overruled in a carefully prepared opinion in writing. What more could possibly be necessary in order to authorize us, under any rule prevailing anywhere, to examine and decide upon the objections so made and so overruled? Certainly, nothing that has ever been decided by this court, and nothing in the reason of the rule. Even as to the objections to the order as made, upon grounds peculiarly affecting the petitioners as purchasers of the specific property therein described, they did everything which the reason of the rule requires. It is objected that they did not file a formal plea, make a formal motion, and await a decision of the superior court, before moving here. But what opportunity were they allowed

to take these steps? The first notice they had of the order empowering the receiver to take the property claimed by them was his appearance at the refinery, demanding immediate possession, and asserting his authority and control. In the short respite of one night which was granted them, they prepared affidavits setting forth their claims upon which to base an application for such a stay as would enable them to move for a suspension or modification of the order. Their attorney sought the respondent at his chambers at the earliest possible moment, stated to him the substance of the affidavits, and the nature of his application. He also stated that there was a scramble for the possession of the refinery between the receiver and the agents and employes of the petitioners. Thereupon the respondent distinctly informed him that his application would not be considered unless full and complete possession of the property was first delivered to the receiver. To have yielded to this condition would have been to give up the whole controversy, and submit to the very wrong which it was their object to prevent. They were not bound, therefore, to move upon such terms; and being advised, and fully believing—what the event proved to be the fact—that the respondent and the receiver would proceed with all expedition to enforce the invalid order, they were justified in filing their petition without further delay.

It is unnecessary, in this view, to determine whether the affidavit of Mr. Mott was actually read to Judge WALLACE or not; and we shall not attempt to reconcile the conflict in the testimony upon that point. In any event it is certain that our jurisdiction to issue a peremptory writ is complete, and equally certain that the respondent has no reason to complain that objections to his order were not submitted to his decision before this proceeding was instituted. It is also unnecessary to enter into any detailed discussion of the testimony as to the extent or completeness of Mr. Reddy's possession at the time the writ was served. It is the time when the writ is ordered, not the time when it is served, that fixes the extent of our power to interfere with the proceeding in the lower court. But even this is immaterial in this case; for we have shown that so long as property in the hands of a receiver remains subject to further judicial action which may be arrested by the prohibition, the remedy will be made complete by ordering its restoration. So far, therefore, as the prohibition is concerned, it makes no difference if we assume that Mr. Reddy had complete possession at the time we ordered the alternative writ. It is only with respect to the proceeding for contempt that the facts relating to the possession of the receiver are material. In considering the question of contempt, it will be necessary to examine with some care the evidence on this point; and, as this will necessarily occupy some time, and as it is important that the petitioners should have as speedy relief as possible, we will make that matter the subject of a separate opinion to be filed at our earliest convenience. In the mean

time an absolute and peremptory writ of prohibition will issue, in accordance with the views herein expressed.

We concur: SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.; WORKS, J.; FOX, J.

Mr. Justice THORNTON, being absent from the state, did not participate in the decision.

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PEOPLE v. SANSOME. (No. 20,618.)

(Supreme Court of California. June 10, 1890.)

CRIMINAL LAW—PRIOR CONVICTION—EVIDENCE.

1. Under Pen. Code Cal § 1093, providing that where one indicted for felony is also charged with a prior conviction, which he confesses, the clerk, in reading the indictment to the jury, shall omit all that relates to such former conviction, it is prejudicial error to direct the clerk, reading an indictment for robbery, to read that part charging a prior conviction for burglary, which was confessed, and permit him to announce that "the defendant confessed the same, and was guilty."

2. Such an error is not waived by the introduction in evidence of a pardon for such prior offense, nor is it cured by an instruction to the jury that they "have nothing to do with the prior conviction of burglary. All you have to do is—*First*, to determine whether the alleged robbery was committed; and, *second*, if it was, whether the defendant committed it. Of course, if no robbery was committed, you will acquit the defendant."

3. The defendant, on trial for robbery, was arrested, at a place far distant from the scene of its commission, 41 days thereafter. *Held*, that evidence that, at the time of his arrest, burglars' tools were found on his person, was incompetent, it not appearing that like tools were used in aiding the commission of the offense charged.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

L. L. Chamberlain, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.

BELCHER, C. C. The defendant was convicted of the crime of robbery, and sentenced to imprisonment in the state-prison for life. He appeals from the judgment, and an order denying him a new trial. The indictment under which defendant was tried charged him with the crime of robbery, and also with a prior conviction of the crime of burglary. On being arraigned, he pleaded not guilty to the charge of robbery, and confessed the prior conviction of burglary. When the case came on for trial, a jury was impaneled and sworn; and thereupon the court directed the clerk to read to the jury the indictment, and state defendant's pleas thereto. The defendant objected to the reading of that part of the indictment which charged a prior conviction, and to the statement of his plea thereto. The court overruled the objection, and the defendant reserved an exception. The clerk then, by the direction of the court, read to the jury the whole indictment, and stated, "that, to the said charge of prior conviction, the defendant confessed the same, and he was guilty."

This ruling is complained of by the appellant, and we think it clearly erroneous. The Code provides: "If the indictment or information be for felony, the clerk must read it, and state the plea of the defend-

ant to the jury; and, in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction." Pen. Code, § 1093, subd. 1. And see *People v. Meyer*, 73 Cal. 548, 15 Pac. Rep. 95.

It is, however, contended for respondent that the error was rendered harmless by the subsequent proceedings. The facts relied upon are these: In the progress of the trial, counsel for defendant asked one of his witnesses if he had assisted the defendant in procuring a pardon from the state-prison, and the witness answered that he had. He was then asked if he had the pardon, and answered that defendant left it with him, and that he had it in court. On cross-examination the witness was asked where the pardon was, "and he took it out of his pocket, and it was offered and admitted in evidence without any objection by defendant or his counsel. The pardon was then read without objection, and proved to be the pardon of the defendant for the very offense, the prior conviction of which had been charged against him in the indictment;" and the court, of its own motion, instructed the jury as follows: "The defendant is charged with the offense of robbery, and also with a prior conviction of burglary. Now, you have nothing to do with the prior conviction of burglary. All you have to do is—*First*, to determine whether the alleged robbery was committed; and, *second*, if it was, whether the defendant committed it. Of course, if no robbery was committed, you will acquit the defendant."

The argument is "that the error, if any, was waived by defendant himself bringing to the attention of the jury the fact of such prior conviction," and "that the error, if any, was cured by the court's instruction to the jury." We do not think the argument sound. The rule is that every error is presumed to work injury to the party against whom it is committed, unless it clearly appears from the record that no injury could have resulted from it. This does not appear here. The evident purpose of the provision of the Code above quoted was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of a criminal offense, and this is based upon well-settled and familiar principles of law and right. In the first place, it is elementary law that every one accused of crime is presumed to be innocent until proved to be guilty, and is entitled to a fair and impartial trial before an unbiased jury. In the next place, it is well known that ordinary jurors are more ready to believe the accused guilty if it be understood by them that he has suffered a previous conviction for a similar offense. To hold, therefore, where, as here, the plain letter of the statute has been violated, to the manifest prejudice of the defendant, that he waived the error and is remediless because he vainly attempted to avoid its effects by showing that he had been pardoned, would not, in our opinion, be warranted either by law or justice. Nor was the error cured by the instructions of the court. The learned judge did not tell the jury that he had

erred in allowing the charge of a previous conviction, and the confession thereof, to be brought to their attention, and that, in determining as to defendant's guilt, they should wholly discard this knowledge from their minds, but only that they had nothing to do with the prior conviction, and were only to find whether defendant was guilty of robbery or not. This left the jury to infer that the ruling complained of was proper, and that they were rightfully informed of the previous conviction, but were simply not required to make any finding in regard to it. Under such circumstances, we cannot say that the information of the prior conviction thus wrongfully imparted to the jurors did not exercise its baneful influence upon their minds.

It is urged for appellant that several other prejudicial errors were committed, but one of them only, we think, need be noticed. The robbery charged against the defendant was committed on the 11th day of August, 1887, near Michigan Bluff, in Placer county, and consisted in stopping a stage-driver, and taking from Wells, Fargo & Co.'s express box, which he was carrying, the sum of \$265 in gold coin. The defendant was arrested for the offense on the 21st day of September following, at Elk Grove, in Sacramento county, and was taken thence to Sacramento city. The officer who made the arrest was a witness, and was asked by counsel for the prosecution if he searched defendant in the city prison. He answered that defendant was searched in his presence, and that certain articles were found upon him there. Counsel then exhibited to the witness and jury a number of articles taken from the person of defendant, and "proceeded to examine said witness as to the character of said articles, and the uses to which they were supposed to be adapted." To this examination, counsel for defendant objected on the ground that the articles had no bearing on the case, and had nothing to do with the commission of the crime charged. The court overruled the objection, and the defendant duly excepted. The witness then proceeded to testify as follows: "There are some of these things I recognize. This bit I remember. There are two bits and a knife I remember distinctly, and the putty-knife. Those drills, in the right man's or men's hands, are called 'safe drills,' and used as such, and then they would drill most anything else. This is a putty-knife, I should presume, and a whetstone and watch-spring. The whetstone, I presume they would use that to sharpen a knife or tool. This, I presume, could be used for unlocking some lock,—a skeleton key for a padlock. This would possibly be used in blowing up a safe, and this is used for picking open a window sash. This would open a handcuff, if in the right shape. I don't know whether you could use it for anything else. This is an old key, and would make a skeleton key. This is used for sharpening tools, and it would make a saw out of that spring. That is an ordinary skeleton key,—not exactly a skeleton key, but could be used for it. That might be used for a blow-pipe, or something of that kind, used sometimes for blowing powder

into a safe." Counsel for defendant moved the court to strike out all this testimony on the ground that the tools exhibited and described had no connection with the offense charged, but the court denied the motion. In *People v. Winters*, 29 Cal. 659, the defendant was convicted of burglary, and the only question on appeal related to the admission and exhibition as evidence to the jury of certain burglarious tools which were found in the defendant's carpet-bag at the time of his arrest. It was held that burglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged in the indictment. But, before such tools can be received in evidence, it must be shown that the burglary charged was in fact committed, and that it was committed with the aid of burglarious tools like those proposed to be shown in evidence, and that the defendant was in the vicinity at or about the time the offense was committed; and, if it appears that the burglary was not committed by means of burglarious tools, as where the burglar entered by an open door or window, the possession of burglarious tools cannot be shown.

The defendant here appears to have been convicted upon evidence wholly circumstantial. James Murray was called as a witness for the prosecution, and testified: "I was the driver of the stage running between Michigan Bluff and Forest Hill on the morning of August 11, 1887. I was stopped by a man, after going fifteen or twenty minutes, at a tree near the ditch, about 4:30 A. M. The man had a gun, and had something over his face that looked like barley sacks. Did not notice his feet. I was not much excited. I thought at the time I recognized the man by his voice as Steve Robinson, of Michigan Bluff, as I had been acquainted with Steve Robinson several years, and knew him well. I made a statement to the justice of the peace at Michigan Bluff—and made affidavit that it was correct—that Steve Robinson was the man that stopped and robbed the stage August 11, 1887, also swore at the preliminary examination that Robinson was the man. The only occupants of the stage were a Chinaman and myself." Now, how the articles found on defendant in Sacramento, 41 days after the robbery was committed, can be said to constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the robbery is more than we can understand. It does not appear that the robbery was committed by the aid of articles like those shown in evidence, nor that defendant was in the vicinity at or about the time the offense was committed. The only evidence, so far as the record shows, as to where the defendant was at any time prior to his arrest, was, on the part of the prosecution, that he was at or near Forest Hill on the 18th of August, and, on the part of the defense, that he was at Grass Valley, in Nevada county, between 1 and 2 o'clock in the afternoon of August 11th,

distant more than 30 miles from the place of the robbery.

We think the court erred in admitting the evidence objected to, and in refusing to strike it out after it was admitted. We therefore advise that the judgment and order be reversed, and the cause remanded for new trial.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

McFARLAND, J. I concur in the judgment, and in the opinion of Commissioner BELCHER; but I wish to add that some of the instructions given at the request of the prosecution, and not noticed in the opinion, were clearly wrong. For instance, the jury are told, that "when direct evidence cannot be produced, minds will form their judgments on circumstances, and act on the probabilities of the case." This would probably be understood by the jury as instructing them that their minds must "act on probabilities" in determining the guilt of the defendant, which would clearly be erroneous. But the instruction proceeds as follows: "As absolute certainty is seldom to be obtained in human affairs, reason requires that the jury, in forming an opinion of the truth of the facts, should be governed by the superior number of probabilities on the side of the people or the defendant." This is not only against the settled rule as to the amount of proof necessary to convict in criminal cases, but is against the express language of the Code. Code Civil Proc. § 2061; Pen. Code, § 1096. The instruction was also given that, "in order to convict, the circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony." This, in my judgment, is a doubtful and dangerous proposition. I do not mean to say that it would be sufficient to reverse a judgment; for I am aware that somewhat similar language was held not to be erroneous in *People v. Cronin*, 34 Cal. 191, and in at least two subsequent cases. But the doctrine has never been satisfactory to the profession, and can be upheld only by the most stringent use of the rule of *stare decisis*. In my judgment, it had better be abandoned by prosecuting officers, for its use in the future may put just convictions in peril.

84 Cal. 616

PEOPLE v. WILLIAMS. (No. 20,627.)

(Supreme Court of California. June 24, 1890.)

CRIMINAL LAW—APPEAL.

Where defendant moves to set aside the information on the ground that a certain person by whom he was committed for trial had no jurisdiction, but the record does not show that such person ever committed defendant for trial, it will be presumed on appeal that defendant was so committed by a duly qualified magistrate.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

v.24p.no.3—10

Hugh J. & Wm. Crawford, for appellant.
Frank P. Kelly, for respondent.

FOOTE, C. The defendant, Harry Williams, was convicted upon an information for robbery. From the judgment rendered in the premises, and an order refusing a new trial, he appeals. The ground apparently relied on for a reversal of the judgment and order is that the defendant was committed for trial after a preliminary examination before M. T. Owen, assuming to act as a committing magistrate by virtue of his being a judge of the police court in and for the city of Los Angeles, at a time when there were two justices of the peace or magistrates in and for said city, who had jurisdiction to act in the premises, which it is claimed the police judge had not; that consequently the court erred in denying the defendant's motion to set aside the information, based on the claim that he had never been legally committed by a magistrate. The record does not show by any evidence whatever that M. T. Owen, claiming to be such police judge, ever committed the defendant for trial. We must presume, in the absence of anything showing the contrary, in favor of the action of the court below, that some duly-qualified magistrate had, previous to the trial in the superior court, properly committed the defendant for such trial, but who he was does not appear; for it will not be taken for granted that the facts set up in the defendant's motion are true, without any proof as to the matter. It follows, therefore, that the judgment and order should be affirmed, and we so advise.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 560

VACA VAL. & C. L. R. CO. v. MANSFIELD et al. (No. 13,334.)

(Supreme Court of California. June 14, 1890.)

FRAUDULENT DEED—ESTOPPEL—ANSWER—EVIDENCE.

1. Where the signature of a railroad president, together with the corporate seal, was procured to a blank deed by false representations, and the deed was subsequently filled out by the grantee with a description of lands not sold, the deed was void, and the mortgagee of the grantee, who took without notice, acquired no interest thereunder, and the company was not estopped from proving the facts by the apparent regularity and validity of the deed.

2. Where, in an action to quiet title, the answer averred that defendants had an interest in the land, they were not entitled to a nonsuit because plaintiff's evidence failed to show a cloud upon the title, as the answer constituted an admission of that fact.

3. Where the statute of limitations was not pleaded, evidence as to possession of land during 10 years preceding the action was properly excluded, especially when it only tended to show that no one was in possession.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Defendant D. E. Allison appeals.

Matt F. Johnson, for appellant. R. Craig and Craig & Harding, for appellant.

BELCHER, C. C. The plaintiff brought this action to quiet its title to two blocks of land (4 and 11) in the town of Winters, Yolo county. The defendants answered separately. Defendant Mansfield alleged that in 1878 the plaintiff sold and conveyed the two blocks to him, and that under his conveyance he took possession, and had ever since held possession of the same. Defendant J. Allison filed a disclaimer. Defendant D. E. Allison alleged that on the 25th day of July, 1878, defendant Mansfield was the owner in fee of the premises in dispute, and that on that day he executed a mortgage upon the premises to defendant J. Allison to secure the payment of his promissory note for the sum of \$5,000; that the mortgage was duly recorded, and afterwards the note and mortgage were assigned and transferred to him, (D. E. Allison,) who thereupon became, and had ever since continued to be, the owner and holder thereof; and that shortly after executing the note and mortgage defendant Mansfield departed from this state, and had since continuously remained outside of its boundaries. Upon the trial it was proved that the plaintiff was a corporation duly organized under the laws of this state, and that in February, 1877, it became the owner of the premises in question. A. M. Stephenson was then called as a witness for plaintiff, and testified that he was the president of the plaintiff corporation, and had been for more than 12 years; that he knew the two blocks of land described in the complaint; that "the corporation never sold the land to any person. Plaintiff never intended to sell this land, as we wanted it for railroad purposes. It never parted with its title to the land. I have heard that defendant Mansfield claimed these two blocks, but no person has been in actual possession, or asserted a distinct claim to it. During all the time mentioned it has lain as an open common, unused, though the plaintiff may at times have unloaded some scraps of iron or old lumber upon it. I have heard that Mansfield claimed the land, and there was a cloud on the title in that way. He mortgaged it to Allison." The plaintiff then rested its case, and the defendants moved for a nonsuit, on the ground "that the evidence failed to show that defendant possessed any title or interest in the premises that would constitute a cloud upon plaintiffs' title, and the evidence disclosed no facts which would require defendants to go on with their defense." The motion was denied and an exception reserved. Stephenson was then called as witness for defendants, and testified that he was president of the plaintiff in 1878. He was then shown a deed, and asked if the name "A. M. Stephenson," signed thereto, was his signature, and said it was. The deed was then offered in evidence. It was dated July 17, 1878, and purported to be a deed from the plaintiff to T. Mansfield and to convey the two blocks of land in question. The last clause of the deed was as follows:

"In witness whereof the said party of

the first part have hereunto set their hand and affixed the corporate seal the day and year first above written.

"VACA VALLEY AND CLEAR LAKE RAILROAD COMPANY.

[Seal.] "By A. M. STEPHENSON.

[Seal.] "By F. ALLISON, Secretary."

[Corporate Seal.]

Attached to the deed was a certificate of a notary public that Stephenson, president, and Allison, secretary, etc., personally appeared before him and acknowledged that they executed the same. The defendants next offered in evidence the mortgage and note set up in the answer of defendant D. E. Allison, with the assignments thereof to him. They then called a witness and asked him: "Who has been in possession of these blocks for the last ten years prior to 1886?" The question was objected to as irrelevant and immaterial, and the objection sustained. They then offered to prove by two witnesses, who had known the land in dispute for the last 12 or 14 years, "that no one has occupied that land during the ten years just prior to the commencement of this suit." This was also excluded by the court, and exceptions were reserved to both rulings. The defendants here rested their case, and A. M. Stephenson was recalled by the plaintiff. He testified: "The way my signature happened to be to that deed [the deed above referred to and set out herein] is this: Mansfield came over to Vacaville to get my signature to some deeds to land that had been sold. He was a notary, and I acknowledged them before him. He then said if I would sign my name to a blank deed he could sell some other lots at a bigger price than the others sold, and that he would fix it up afterwards when I came to Winters. I did so with the understanding that he was to sell some different lots. The blocks 4 and 11 the railroad never expected to be sold to anybody. The railroad needed them, and would not sell them for any money. This deed [the deed in evidence] is entirely in the handwriting of T. Mansfield, where it is written, except the signature. The acknowledgment, with the exception of the notary's certificate, is in his handwriting. At the time I signed this deed it was a blank deed, and I never went before any notary public and acknowledged this deed. The directors of plaintiff never, by any resolution, authorized the president and secretary to sell this land. Defendant Mansfield was treasurer of the corporation on the day said deed was executed. He was also a director of the company." The defendants objected to all this testimony in rebuttal, on the ground that it was irrelevant and immaterial, but the court overruled the objections, and they excepted. The foregoing is in substance all the evidence introduced in the case, and upon it the court gave judgment for the plaintiff. The defendant D. E. Allison then moved for a new trial, and his motion was denied. He appeals from the judgment and order.

1. It is argued for appellant that the court erred in denying the motion for nonsuit. It is said: "The respondent failed absolutely to show that there was any

cloud upon its title. On the contrary, it showed, so far as its side of the case was concerned, that it had a clear and unobstructed title to the premises, and does not show that either of these defendants, and especially appellant, had any claim, title, or interest in the same." The obvious answer to this argument is that the complaint alleged, and the answers admitted, that the defendants claimed and asserted an interest in the property. It was not necessary, therefore, for the plaintiff, in opening its case, to offer any proof upon this subject. Besides, if such proof had been necessary, and the defendants were entitled to a judgment of nonsuit for the want of it, the error was cured when they afterwards introduced in evidence the deed, mortgage, and note, on which they relied to defeat the action. *Smith v. Compton*, 6 Cal. 24, *Perkins v. Thornburgh*, 10 Cal. 190.

2. It is claimed that the court erred in refusing to allow the defendants to prove who had been in possession of the premises in controversy during the 10 years prior to the commencement of the action. But the statute of limitations was not pleaded, and, as shown by their offer, the defendants sought only to prove that no one had actually occupied the land. The evidence, if admitted, could not in any way have aided the defendants or strengthened their case, and there was no error in its exclusion.

3. Finally, it is urged that the evidence was insufficient to justify the decision of the court, because the deed was regular on its face, had the corporate seal attached to it, and was therefore presumptively valid, and, so far as appellant is concerned, must be treated as valid and binding. The argument is that when the corporate seal is found attached to the deed of a corporation it is *prima facie* evidence that it was placed there by proper authority, and that the deed was duly delivered; that, everything appearing to be regular when appellant acquired his mortgage interest, the plaintiff had no right to attack the conveyance made by its officers under its corporate seal, and the evidence introduced in rebuttal was therefore inadmissible. The proposition above stated as to the corporate seal, and the presumption arising from its being affixed to the deed, is undoubtedly correct, and well supported by authority. See *McCracken v. San Francisco*, 16 Cal. 639; *Association v. Bustamente*, 52 Cal. 192. But *prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It may, however, be contradicted, and other evidence is always admissible for that purpose. It was competent, therefore, for the plaintiff to prove all the facts and circumstances connected with the deed in question, and to show whether it was a valid deed or not. Now, the uncontradicted testimony shows that the directors of the corporation plaintiff never sold or authorized a sale of, the two blocks in controversy, nor did its president ever agree to sell them, and that the deed, when signed, was a blank, and was never acknowledged. Under these circumstances,

the deed was as absolutely void and as ineffectual to convey any title as it would have been if an entire forgery. There was no ground, therefore, for the application of the doctrine of estoppel. In our opinion the judgment and order appealed from were proper, and we advise that they be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

84 Cal. 7

DENNERY v. SUPERIOR COURT OF SACRAMENTO COUNTY *et al.* (No. 13,635.)

(*Supreme Court of California*. May 3, 1890.)

INSOLVENCY—APPEAL—STAY.

Under Insolvent Act Cal. 1880, § 67, which provides that an appeal from an order in involuntary insolvency shall be governed by the general laws relating to appeals, and Code Civil Proc. Cal. § 946, which provides that the filing of notice of appeal and an undertaking stays all further proceedings in matters embraced in the order appealed from, after a compliance with such provisions, the court can take no further proceedings, except such as may be necessary to take and preserve the property of the debtor through a receiver.

In bank. Application for a writ of prohibition; JOHN W. ARMSTRONG, Judge.

Grove L. & Albert M. Johnson, for petitioner. Naphtaly, Friedenrich & Ackerman and Add C. Hinkson, for respondent.

McFARLAND, J. This is an application for a writ of prohibition to restrain respondent from continuing certain proceedings in a case of involuntary insolvency, after an appeal to this court by petitioner from a decree declaring him an insolvent. From the petition and answer it appears that certain creditors of petitioner filed a petition in the court of respondent, praying to have petitioner herein (Dennery) adjudicated an insolvent debtor. After a contest on the issue of insolvency, the court, on November 22, 1889, rendered a judgment and decree adjudging that petitioner was an insolvent debtor, directing that he file his inventory and schedules within five days, and fixing a day, viz., January 3, 1890, for the meeting of creditors to choose an assignee. On December 2, 1889, petitioner filed and served a notice of appeal from said judgment, and on the next day filed a sufficient undertaking on appeal in the sum of \$300. The petition avers that notice of the day for the meeting of creditors to choose an assignee is being published, and that an assignee will be chosen unless the writ prayed for herein issue; that petitioner has been cited for contempt for not filing his inventory, and will be held for such contempt; and that respondent is pursuing said insolvency proceeding in other respects as though no appeal had been taken. Respondent practically admits these averments, and asks to be advised in the premises. It further appears that prior to the judgment of insolvency the respondent had appointed George C. McMullin receiver of the property and estate of the petitioner, with direc-

tions to take and keep possession of said property, and to "do such other acts in relation thereto as the court from time to time should authorize and direct;" that said order "is still in full force and effect;" and that said McMullin has "qualified and entered upon the discharge of his duties as such receiver." Section 67 of the state insolvent act of 1880 provides that "an appeal may be taken to the supreme court in the following cases: (1) From an order granting or refusing an adjudication of insolvency." And the section further provides that "the notice, undertaking, and procedure on appeal shall conform to the general laws of this state regulating appeals in civil cases."

The general laws regulating appeals are found in the Code of Civil Procedure, from section 936 to section 980. The general provision is that an appeal is perfected by serving and filing a notice of appeal, and filing an undertaking in the sum of \$300. By several sections immediately preceding section 946, it is provided that in several enumerated cases the appeal shall not stay the judgment or proceedings unless an additional bond be given in an amount either fixed by the Code or to be determined by the court. And by section 946 it is provided that "whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; * * * but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from." We think it clear that the appeal in the case at bar does not come within any of the enumerated cases in which an additional undertaking is required to stay the execution of the judgment; and, the appeal having been "perfected" in accordance with the requirements of the Code, it stays all further proceedings upon the judgment appealed from, and "upon the matters embraced therein." To afterwards compel the petitioner to prepare and file his inventory and schedules, and to proceed to the selection of an assignee, would be to proceed to execute the judgment appealed from. If that could be done during the pendency of the appeal, we see no reason why the estate could not be conveyed to the assignee, and why the latter could not "as speedily as possible convert the estate, real and personal, into money," and proceed to distribute it, under the order of the court, *pro rata* among the creditors.

It is argued by respondent that it is the right and the duty of the court to protect and preserve the property of the alleged insolvent during the litigation, and that this cannot be done without proceeding to the selection of an assignee. The pendency of the appeal would not prevent the court from preserving the property, but that can readily be accomplished through the receiver, whose functions are not suspended by the appeal.

It is contended by respondent that the receiver could not maintain an action for property or assets which had not come into his possession, or which had been fraud-

ulently transferred by the alleged insolvent. In this contention respondent is, we think, mistaken. The functions of a receiver depend very much upon the powers conferred by statute. Section 63 of the insolvent act provides for the appointment of a receiver where there is danger of the property being lost, removed, etc., and "in all other cases where receivers are appointed by the usages of courts of equity. And thereupon the appointment, oath, undertaking, and powers of such receiver shall, in all respects, be regulated by the general laws of the state applicable to receivers." And the general laws of the state provide that "the receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property; to receive rents, collect debts; to compound for and compromise the same; to make transfers; and, generally, to do such acts respecting the property as the court may authorize." Code Civil Proc. § 568. This provision clears the way of all former niceties as to the questions whether a receiver could sue in his own name, and whether he could recover property which had not once been in his actual possession. The power of a receiver to maintain necessary actions in insolvent cases was expressly recognized in *Re Real Estate Associates*, 58 Cal. 356. See, also, *Ex parte Hollis*, 59 Cal. 416; *Adams v. Woods*, 15 Cal. 207. Moreover, it has been held that a receiver in insolvency may apply for the examination of an insolvent concerning his affairs. *Goodday v. Superior Court*, 65 Cal. 580, 4 Pac. Rep. 626. By means of the receiver, therefore, the court can fully preserve the property of the insolvent, and protect the rights of creditors. We are of opinion, therefore, that the writ of prohibition should issue substantially as prayed for in the petition, but not to interfere with the power of the court, through the receiver, to take, by suit or otherwise, and to safely keep, the property and assets of the insolvent.

Petitioner has also instituted another proceeding (No. 13,648, post, 149) in this court for the purpose of obtaining a *superseas* upon the supposition that perhaps prohibition would not be considered the proper remedy; but as respondent makes little objection to the form of the remedy, provided that it be held that the right exists, we shall assume that prohibition is the proper proceeding. The statements in respondent's answer concerning certain litigation between petitioner's wife and the receiver are not necessary to be considered here, as that litigation is not affected by this proceeding. It is ordered and adjudged that a writ of prohibition issue to the respondent,—the said superior court and the said judge thereof,—prohibiting and restraining said court and judge, during the pendency of the appeal herein, from continuing to publish said order for the meeting of creditors; and from ordering said petitioner to file his inventory or schedules; and from proceeding against him for contempt for not doing so; and from proceeding to the choice of an assignee by said creditors; and from doing any further thing in the said proceeding in

insolvency against said petitioner, except only such things as may be necessary to be done through the receiver for taking and preserving the property of said petitioner.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

In re DENNERY. (No. 13,648.)

(*Supreme Court of California.* May 3, 1890.)

In bank. Application for a *supersedeas*; JOHN W. ARMSTRONG, Judge.

Grove L. & Albert M. Johnson, for petitioner. *Naphtaly, Friedenrich & Ackerman and Add C. Hinkson*, for respondent.

PER CURIAM. This is an application for a *supersedeas*; but as the object here sought was accomplished by the writ of prohibition in *Dennery v. Superior Court*, ante, 147, (No. 13,635,) this proceeding is dismissed, without costs.

84 Cal. 249

CALANCHINI v. BRANSTETTER. (No. 12,627.)

(*Supreme Court of California.* June 2, 1890.)

SPECIFIC PERFORMANCE—MUTUALITY OF CONTRACT—LIMITATION—LACHES.

1. The boundary between two tracts of land was uncertain, and the owners agreed that a certain east and west line was the true one, believing it to be such, but with a proviso that if by subsequent survey it was found to be too far north, then either the southern owner was to buy the part between the temporary and the true line at its value in its then uncleared state, or the northern owner was to pay for the clearing of the strip, at the election of the latter; and if the line was too far south these conditions were to be reversed. *Held*, the contract was not incapable of enforcement for want of mutuality.

2. Where both parties and their respective grantees, after taking possession to the line fixed, allowed the matter to stand thus for several years, the fact of mutual acquiescence prevented the statute of limitations from running against the contract.

3. The delay was not such laches on the part of plaintiff as to estop him from asking specific performance.

4. That a vendee of lands under a parol contract actually took possession, and made valuable improvements thereon, was sufficient to take the contract out of the statute of frauds, and enable him to maintain an action for specific performance.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge

P. F. Hart and J. D. H. Chamberlin, for appellant. *S. M. Buck*, for respondent.

BELCHER, C. C. This is an action to enforce the specific performance of an oral agreement for the sale of land. The land in controversy is a strip containing about 8 acres, which lies along the south side and is a part of a certain 40-acre government subdivision of land in Humboldt county. The facts of the case, as found by the court, and undisputed, are as follows: One Baldwin owned the 40-acre tract above mentioned, and one Chamberlin owned the 40-acre tract adjoining it on the south. The line dividing their lands was undetermined and uncertain, and they disagreed as to where the true line should be located. Thereupon, in the month of July, 1882, they entered into an oral agreement that a line, commencing at an agreed

point on the east, should be extended west through their lands, and that each owner should hold, possess, and improve up to that line, and if it should be determined by a subsequent survey that the said line was not the true line, dividing their respective tracts, but was too far north, then Chamberlin was to pay Baldwin the then value, in its uncleared state, of all the land lying between the temporary and the true line, or Baldwin was to pay Chamberlin the cost of clearing the same, as the latter might elect; and, if the said line should be too far south, then Baldwin was to have the same option in regard to purchasing or receiving pay. Immediately after making this agreement Chamberlin took possession of the land in controversy, claiming a right to its possession under the agreement, and also claiming that it was a part of his 40-acre tract, and that the temporary line agreed upon was the true line. Under such claim of ownership, and also relying upon the said oral agreement, he cut the brush from the land, and constructed a small ditch thereon, at a cost of about \$25 per acre. Subsequently, Baldwin conveyed his tract to Rachael Branstetter, who thereafter conveyed it to the defendant, and both took with notice of the before-mentioned agreement; and in July, 1884, Chamberlin conveyed his tract to the plaintiff, and placed him in possession of all the land in controversy here.

At no time did Baldwin or defendant or his grantor tender to Chamberlin or plaintiff a deed of the land in controversy, or call upon Chamberlin or plaintiff to exercise the option of paying for the land, or receiving pay for clearing the same; nor did Chamberlin at any time, or plaintiff, prior to December 27, 1886, ever elect to pay for the land and receive a deed therefor; nor did the parties mutually determine, or attempt to determine, by agreement, the true boundary line dividing their tracts. The defendant never admitted that the agreement between Baldwin and Chamberlin was as above stated, and always claimed that Baldwin only agreed to pay for clearing the land; while Chamberlin and the plaintiff at all times prior to September 25, 1886, always insisted that the temporary line established in July, 1882, was the true line, and that the land in dispute was a part of their 40-acre tract. In September, 1885, the defendant, after first offering to pay both Chamberlin and the plaintiff the cost of clearing and improving the land in controversy, but without requesting either of them to make, or join in making, a survey to determine the true line, commenced an action of ejectment against the plaintiff for the recovery thereof. In that action the defendant (plaintiff here) appeared by Chamberlin as his attorney, and for a defense denied that the land sued for was any part of the plaintiff's tract, and for a further defense set up and claimed a right to the possession of the land under and by virtue of the oral agreement now sought to be enforced. It was found by the court that the defendant in the action had not succeeded to the rights of Chamberlin under the agreement, and therefore had no equitable claim to be enforced thereunder. Judgment was entered in the

action in favor of the plaintiff therein, on the 25th of September, 1886, and the true boundary line, dividing the said two tracts of land, was thereby first adjudicated and determined. Thereafter, on the 20th of December, 1886, Chamberlin assigned all his rights under the oral agreement to the plaintiff herein, and on the 27th of the same month the latter gave defendant notice that he had succeeded to the rights of Chamberlin under the agreement, and that he elected to pay the value of the land in controversy in pursuance thereof, and he then offered to pay the same, and tendered to defendant a bargain and sale deed of the land, and requested him to execute the same, but defendant refused to receive such payment or to execute the deed. From the date of the agreement down to the time when the judgment in the action of ejectment was entered, Chamberlin and plaintiff, as his successor, remained in possession of the land in controversy, and neither of them ever attempted to ascertain whether the line temporarily agreed upon as the boundary line between their respective tracts was the true line or not. Upon these facts the court found as conclusions of law: *First*, that the plaintiff was not entitled to a judgment requiring the defendant to specifically perform the oral agreement; *second*, that plaintiffs' cause of action was barred by the provisions of section 343 of the Code of Civil Procedure; and, *third*, that plaintiff and his grantor were guilty of laches in not earlier electing to purchase the land in dispute. Judgment was then given for defendant, from which, and from an order denying a new trial, plaintiff appealed.

1. It is settled law that a verbal contract for the sale of land is taken out of the operation of the statute of frauds, and may be specifically enforced, when there has been a part performance of the contract; and the taking of actual possession of the land by the vendee, with the consent of the vendor, is held to be a sufficient act of part performance. So the making of valuable improvements upon the land, on the faith of the contract, is held to be a part performance. The ground upon which this doctrine is based is that the vendee might be treated as a trespasser, and thus placed in a situation which would be a fraud upon him, if he could not invoke the protection of the contract. *Arguello v. Edinger*, 10 Cal. 150; *Pom. Spec. Perf.* §§ 115, 126.

2. It is contended for respondent that the contract involved in this case was not mutual, and that it cannot, therefore, be enforced. The general rule undoubtedly is that contracts must be mutual, or courts of equity will not enforce them. But there are many exceptions to this rule, one of which only need be noticed. It is stated by the text-writers, and fully sustained by the authorities, that "a contract for the sale of real estate at the option of the vendee only, upon election and notice, may not only be specifically enforced, but the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election." *Wat. Spec. Perf.* §

200; *Pom. Spec. Perf.* § 169; *Hall v. Center*, 40 Cal. 63; *Ballard v. Carr*, 48 Cal. 74. In view of the authorities upon the subject, the agreement under consideration here was not, in our opinion, incapable of enforcement for want of mutuality.

3. It is further contended that the court below rightly found that the action was barred by the statute of limitations. But when did the statute begin to run? The agreement was made in July, 1882, and this action was commenced a little more than four years thereafter. The parties were evidently induced to make the agreement, because the dividing line between their lands was unknown, and they wished to avoid disputes and complications in consequence thereof. By the agreement it was provided that each party should exercise his option to pay for the land or take pay for the improvements placed on it, when it should be determined by a subsequent survey that the temporary line agreed upon was not the true line. No time was fixed for making the survey, and the burden of making it was not cast upon either of the contracting parties, and, so far as appears, no survey was ever made. Chamberlin took possession of the land in controversy with the consent and approval of Baldwin, and he and his grantee so held it until the action of ejectment was commenced. In the mean time, so far as appears, neither party made any efforts or took any steps to determine the true line, or did any act to prevent such determination or called upon the other to make the election provided for in the agreement, or gave any notice that the agreement was terminated or would be terminated at any given date. Both parties seem to have acquiesced in the delay. When the judgment in the ejectment suit was rendered, it was first ascertained that the temporary line was not the true line, and thereupon the assignee of Chamberlin, within a reasonable time, served notice that he had succeeded to Chamberlin's rights under the agreement, and that he had elected to take the land, and he then offered to pay for the same. Now, until the true line was determined, how could it be known which one of the contracting parties owned the land in controversy, or which one of them was called upon to make the election provided for? And, under such circumstances, how could a cause of action accrue, so as to put the statute of limitations in motion, until the true line was determined, and one or the other of the parties was called upon to exercise his option? It seems to us that the statute did not begin to run before the action of ejectment was commenced, if it did then, and, if we are right in this, the action was clearly not barred.

4. Had the plaintiff and his grantor been guilty of such laches as should deprive plaintiff of the relief which he would otherwise be entitled to? In *Weber v. Marshall*, 19 Cal. 459, it is said: "It is incumbent upon the party asking specific performance to show that he had used due diligence; or, if not, that his negligence arose from some just cause, or had been acquiesced in. It is not necessary for the party resisting the performance to show any par-

ticular injury or inconvenience. It is sufficient if he has not acquiesced in the negligence of the other party, (citing authorities.) Nor does possession by the party seeking performance make the rule different." And in *Fowler v. Sutherland*, 68 Cal. 417, 9 Pac. Rep. 674, the same rule is declared. Here, as we have seen, the duty of making the survey and determining the true line rested as much upon Baldwin and his grantee as upon Chamberlin and his grantee, and the delay was acquiesced in by both sides. The delay on the part of Chamberlin and his grantee may be accounted for by the fact that they claimed and believed, until the judgment in ejectment was rendered, that the temporary line was the true line, and that the land in controversy was a part of their tract. It seems to us, therefore, that the case, under the circumstances shown, does not come within the rule as to laches, and that to deny the plaintiff any relief because he did not sooner act would be inequitable and unjust. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

84 Cal. 85

McMILLAN v. HAYWARD *et al.* (No. 13,073.)

(Supreme Court of California. May 7, 1890.)

APPEAL—FORECLOSURE—BOND—STAY.

The possession of real property of the deceased by his widow and children, pending the administration of the estate, is, in the absence of homestead rights, in subordination to the administrator; and, on appeal from a judgment of the foreclosure of a mortgage thereon, wherein all were made parties upon an allegation that their interests were junior to the mortgage, an order for the stay of execution will be refused, unless a bond is filed under Code Civil Proc. Cal. § 945, which provides that, where defendants are in possession, a stay of execution pending appeal may be obtained by filing a bond conditioned against waste, for the payment of the value of the use, and any deficiency upon the sale, in case the appeal is affirmed or dismissed.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Motion by appellants for stay of proceedings pending appeal.

R. Percy Wright, for appellants. *W. B. Tyler*, for appellee.

HAYNE, C. This is a motion, made in the appellate court, for an order staying proceedings upon the judgment in the court below. The suit was to foreclose a mortgage made by one Frank Scherf in his life-time. He died leaving a will by which all of his property was devised to his widow, Annie Scherf, who was appointed executrix, and qualified as such. Pending administration, she married one Raschke, and the defendant Hayward was appointed administrator with the will annexed. This administrator, the surviving wife, the three minor children of the deceased, and the second husband were made

defendants in the suit, upon the allegation that they had or claimed some interest which was subsequent and subject to the lien of the plaintiff's mortgage. The complaint expressly waived all claim to a judgment for a deficiency, and no judgment for a deficiency was rendered. All of the defendants (except the second husband) appeal, and an undertaking in the sum of \$300 was given.

The argument for the stay is that, if any one of the appellants be entitled to a stay, the whole judgment must be stayed, because it does not command the sale of the interest of any particular defendant, but of the whole property; and that the defendants, other than the surviving wife, are entitled to a stay on their \$300 bond, because, as it is alleged, they are not in possession, and hence are not within any of the sections providing for a special stay-bond. It is true that, if the case does not fall within any of the sections providing for a special bond, the \$300 bond effects a stay; and the only section that can be claimed to provide a special stay-bond is as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon, and that, if the judgment be affirmed or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." Code Civil Proc. § 945.

It is contended that the contents of such an undertaking apply only to an appellant who is in possession, and, that, therefore, one who is not in possession is not required to give it. And this seems to have, in effect, been held. See *Root v. Bryant*, 54 Cal. 182. But, if such be the proper construction, a large meaning must be given to the word "possession." In the first place, it must be held to apply to any person who is actually residing on the premises. If such a person appeal, and desires a stay, he must give the specified bond. He cannot have a stay without it, upon the plea that he is only an agent, or that he occupies in subordination to or in connection with somebody else. And, in the second place, the word must be held to include the persons in subordination to whom the property is held. If such persons appeal, and desire a stay, they cannot have it without the required undertaking, on the ground that another is in the actual occupation of the property, if such other holds in subordination to them. Now, the affidavits upon which the motion

is based do not, in our opinion, show that the case does not fall within the section as above construed. The affidavit of the surviving wife states that "she is now, and has been ever since the death of her former husband, Frank Scherf, on the 31st day of October, 1875, in the sole possession of said real property, and the whole thereof." And the affidavit of the administrator states that "he has not, either as such administrator or individually, at any time been in the possession or occupation of said real property, or had any tenant or other person in possession of the same for him, either as such administrator or individually; that the defendant and appellant, Anna Raschke, is now, and has been, ever since the commencement of said action, in the sole possession and occupation of said real property, and the whole thereof." This is all that the affidavits show concerning possession. Nothing is said concerning the children, who, being minors, must be presumed to reside with their mother. And it is obvious that the statements quoted are mere general conclusions, which, in one sense, would be true if the surviving wife resided on the property, with her minor children, with permission of the administrator. If there is no homestead, the administrator has the right to the possession, and it is his duty to take it, and in the very common case, where he acquiesces in the occupation of the residence by the widow and children pending administration, such occupation must be held to be in subordination to him. Certainly the statute of limitations would not run in favor of such occupants. There is nothing to show that the widow and the administrator are not in perfect accord on the subject, and that there is no conflict between them is to be inferred from the fact that both in the trial court and upon appeal they appear by the same attorney, who certainly would not undertake to represent conflicting interests. Upon the case presented, we are clearly of opinion that there is no sufficient showing that any of the appellants are entitled to a stay without giving the bond required by section 945, Code Civil Proc., construed as we have indicated, and we therefore advise that the motion be denied.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion is denied.

83 Cal. 643

GIBSON v. THE SUPERIOR COURT. (No. 13, 642.)

(Supreme Court of California. May 2, 1890.)

PLEADING—TIME—APPEAL.

1. Code Civil Proc. Cal. § 1054, provides that extensions of time to file pleadings granted by the court shall not exceed 30 days beyond the time fixed by statute, without the consent of the adverse party. *Held*, that the pendency for 54 days of an *ex parte* motion filed by the defendant to strike out the complaint and dismiss the action does not justify the court in extending the time for filing a demurrer or answer until after the decision of such motion. THORNTON, J., dissenting.

2. The error in so doing is reviewable on *certiorari*.

In bank. Writ of review of the action of the superior court, city and county of San Francisco; J. P. HOGE, Judge.

Welcker & Welcker, for petitioner. Smith & Moore, for respondent.

PATERSON, J. This is an application for a writ of review. The petition shows that an action was commenced by the petitioner in the superior court of the city and county of San Francisco against the Sterling Furniture Company, for damages in the sum of \$25,000, on the 29th of August, 1889, and on the same day summons was served upon the defendant therein; that on August 31, 1889, the defendant therein served upon the plaintiff a notice that on the 6th day of September, 1889, it would move the superior court to strike out the complaint and dismiss the action; that on the 10th day of September, 1889, the court extended the time for the defendant to demur or answer 20 days from that date; that on the 30th of September the court granted the defendant a further extension of time within which to answer, namely, until 10 days after the decision of said defendant's motion to dismiss the action; that said orders were made on *ex parte* application, and without the consent of the plaintiff therein; that on the 14th day of October, 1889, no answer or demurrer having been filed by the defendant therein, the plaintiff, petitioner herein, filed proof of service of summons, and moved the court for an order directing the clerk to enter the default of the defendant, which motion was granted; that on November 1, 1889, the court made an order opening the default, and allowing the defendant therein to file a demurrer and answer; that on November 15th petitioner moved the court for a judgment, as prayed for in his complaint, on the ground that the orders extending the time and setting aside the default were in excess of the jurisdiction of the court, and void, which motion was denied.

The respondent has demurred to the petition on the ground that it does not state facts sufficient to entitle petitioner to the writ. The order setting aside the default is an appealable order, and is not reviewable on *certiorari*, there being a plain, speedy, and adequate remedy by appeal. The effect of the orders made by the court was to extend the time in which the defendant might demur or answer from 54 days from the date of the service of the summons. These orders, so far as they attempted to extend the time to plead more than 30 days, were an excess of jurisdiction, (section 1054, Code Civil Proc.;) and, there being no plain, speedy, and adequate remedy, the petitioner is entitled, if the facts stated be true, to have them annulled by this proceeding. *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. Rep. 685. The demurrer is overruled, with leave to answer the petition within five days after notice of this decision.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; FOX, J.

THORNTON, J. I dissent. The rule in this case will so limit the power of the

court as to interfere very injuriously with the orderly and proper dispatch of the business. Why should the defendant be compelled to file his answer until the motion to strike out the complaint and dismiss the action is passed on? *Non constat* that he may ever be called on to answer. The court may dismiss the action by granting his motion, and the labor and expense of preparing an answer might thus be avoided. In my judgment, section 1054 of the Code of Civil Procedure has no application to the case presented here. It only applies to the case where the court makes such an order when there is no case or proceeding pending in his court which authorizes the court to exercise its discretion in granting time. The statute never was intended to limit the discretion of a court to the extent ruled in this case. I am of the opinion that the court had ample power and jurisdiction to make the orders attacked in this case.

84 Cal. 23

PEOPLE v. LUNDQUIST. (No. 20,614.)

(Supreme Court of California. May 3, 1890.)

DEPOSITIONS IN CRIMINAL CASES.

1. On a trial for murder, where the defense was insanity, it was shown by affidavits of defendant and his counsel that, by agreement with the prosecution, there were admitted at the former trial informal depositions of certain witnesses residing in Sweden, to the effect that defendant's mother was subject to epilepsy, and died insane, and his brother was an idiot, and that the prosecution had notified the defense that such depositions would be objected to at the next trial. *Held*, that this showing entitled defendant to the issuance of a commission to take the depositions of such persons in proper legal form.

2. The issuance of such a commission is expressly authorized by Pen. Code Cal. § 1354; and it was error to refuse the application for want of jurisdiction.

In bank. Appeal from superior court, city and county of San Francisco; EUGENE R. GARBER, Judge.

John Flournoy, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

WORKS, J. The defendant was tried for murder, convicted of murder in the second degree, and sentenced to imprisonment in the state's prison for the term of 34 years. It appears from the record that the defendant, some time before the case was set down for trial, applied to the court below for a commission to take the depositions of witnesses out of the state, and in support of his application filed the following affidavits:

"John Flournoy, being duly sworn, says: I am an attorney at law. I was, on the 7th day of August, 1888, appointed by Hon. D. J. TOOHY, judge of said court, to defend the above Carl Albert Lundquist. Carl Albert Lundquist, the defendant, is now confined in the county jail of said county, awaiting his second trial on a charge of murder. The said defendant was first tried in this court upon this charge on and from the 14th day of May, 1888, to the 23d day of May, 1888. At the first trial of defendant the jury disagreed. J. N. E. Wilson, an attorney at law, was counsel for defendant at his first trial, but

has now withdrawn from this case. The defense in this case is insanity produced by epilepsy, which was inherited from the mother of defendant. At the first trial of said defendant the following part of an informal deposition made by Minnie Midland, Louis Lundberg, Minnie Hanson, and August Burquist, all residing in the city of Stockholm, Sweden, was admitted in evidence: 'We state that the mother of Albert Lundquist [meaning defendant] was subject to epileptic fits, which fits occurred several times in our presence, and that his brother was insane at times, and always an idiot.' No objection was made to the introduction of this part of said deposition on the first trial of said case, and the above part of said deposition was admitted in evidence by agreement and consent of counsel for the prosecution. On the 5th day of September, 1888, J. J. Dunn, Esq., assistant district attorney of said city and county, who conducted the prosecution at the first trial of this case, and who is to conduct the prosecution of this case at the second trial thereof, notified me that he would not, at the second trial of this case, consent to the admission in evidence of said part of said deposition. That said deposition, and said part thereof, are not in proper legal form, and cannot be put in evidence unless objections thereto are waived by counsel for the prosecution. The facts stated in said part of said deposition, and the proof thereof, are material and essential and necessary to the defense of this case. I desire to obtain the testimony of said witnesses upon facts in a proper legal form, and I cannot safely proceed to the trial of said case without such testimony. All of said witnesses now reside in the city of Stockholm, Sweden."

"Carl Albert Lundquist, being first duly sworn, says: I am the defendant above named. I am now confined in the county jail of the city and county of San Francisco, awaiting my second trial on a charge of murder. I have entered my plea of not guilty to this charge, and an issue of fact has been joined in this case. My defense is insanity, produced by epilepsy. Minnie Midland, Louis Lundberg, Minnie Hanson, and August Burquist are material witnesses for my defense, without whose testimony I cannot proceed to trial. By the testimony of these witnesses I will prove that my mother, Sophie A. Lundquist, was subject to epileptic convulsions, and died insane, and that my brother, Philip Lundquist, was an idiot, and died insane. All of these witnesses reside out of the state of California, to-wit, in the city of Stockholm, Sweden."

It further appears from the bill of exceptions that the court refused to grant the order for such commission "on the ground that the court had no jurisdiction to make such order." We think the court erred in this ruling. Jurisdiction to make the order asked for is expressly given by Pen. Code, §§ 1349, 1354. The only question is, therefore, whether the showing made was sufficient to entitle the defendant to an order for a commission to take the depositions of these witnesses. Section 1354 of the Penal Code provides that, "if the court

to whom the application is made is satisfied of the truth of the facts stated, and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony."

It is contended on the part of the people that, as the court below must be satisfied by the showing, the matter of ordering the issuance of a commission rests in its discretion, and that no abuse of discretion appears in this case. But, if we concede that the matter rested in the discretion of the court below, it affirmatively appears from the record that no such discretion was exercised. The order was refused on the sole ground that the court had no jurisdiction to make the order. If the court had not been of this opinion, the order would probably have been made. That it should have been made, we have no doubt. The evidence sought to be elicited was material and important to the defense interposed by the defendant. The showing made contained all that the statute requires, and the reason for not having procured the order and the evidence before was sufficient. The informal depositions of these witnesses having been used on a former trial with the consent of the district attorney, the defendant had the right to rely upon the fact that they would be allowed to go in evidence at the second trial until he was notified to the contrary. The record shows that he offered them in evidence, but they were objected to and excluded. By these rulings, he was deprived of competent and material evidence which might have changed the result. He had been once tried, and with this evidence in the jury failed to convict, and without it a second jury found him guilty of a lesser offense than the one with which he was charged, which tends to show the materiality and probable effect of the testimony of which he was deprived. For this ruling the cause must be reversed.

Certain of the instructions given by the the court are objected to, but they are not set out in a bill of exceptions, or authenticated in any way, and for that reason cannot be considered. Judgment and order reversed.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

84 Cal. 263

NORTON v. WHITEHEAD *et al.* (No. 12, - 875.)

(*Supreme Court of California.* June 2, 1890.)

POWER OF ATTORNEY COUPLED WITH AN INTEREST
—REVOCATION BY DEATH.

1. A contractor borrowed from plaintiff, his foreman on the work, various sums of money to enable him to carry on the contract. Afterwards he executed to plaintiff an assignment of all moneys due, or to become due, "for any work I may perform," the assignment "to remain good and in full force until all notes due, or which are to become due, * * * from me are paid." Later he gave plaintiff a power of attorney reciting that "whereas I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid" to plaintiff, and giving him power to collect such moneys. These instruments were deposited with the other parties to the contract. The contractor died, and the work was finished by his adminis-

trator. *Held*, plaintiff had such an interest in the moneys due on the completion of the contract as to prevent a revocation of the power by the contractor's death, and he is entitled, as against the administrator, to a warrant therefor.

2. It is not necessary that plaintiff should receipt for such moneys in the name of the decedent. The assignment is sufficient authority for receipting in his own name.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge. *W. C. Burnett and T. C. Coogan, (W. H. H. Hartland and Aylett R. Cotton, of counsel,)* for appellants. *H. M. McGill and D. H. Whittemore*, for respondent.

VANCLIEF, C. On the 9th day of June, 1885, the deceased, D. Finley, entered into a written contract with the board of state harbor commissioners whereby he agreed to repair (reface) two sections of the sea-wall on the water front of the city of San Francisco, the work to be commenced within 20 days, and to be completed within 150 days, from date of the agreement. The work was to be paid for by drafts on the harbor improvement fund, upon monthly estimates of the value of the material used and of the work performed, at the rates agreed upon; 75 per cent. of such value to be paid monthly, and the remaining 25 per cent. to be paid when the work should be completed. The contract contained the provision that it should not be assignable without the written consent of the board, party of the first part. During the progress of the work, Finley, for the purpose of obtaining money to carry on the work, borrowed from the plaintiff at different times considerable sums of money, for most of which he gave plaintiff his promissory notes. Plaintiff was employed a portion of the time as assistant foreman on the work, for which he was to be paid what his services were reasonably worth. On February 8, 1886, Finley executed to plaintiff a writing of which the following is a copy: "San Francisco, Feb. 8, 1886. To all whom this may concern: I hereby assign, transfer, and set over to W. H. Norton or assigns all moneys due me, or which may become due to me, on any work I may perform, and this assignment to remain good and in full force until all notes due, or which are to become due, to W. H. Norton, or his assigns, from me are paid, and when said notes are paid, this instrument to be null and void. DAVID FINLEY." On March 27, 1886, Finley executed to plaintiff a power of attorney, of which the following is a copy: "Whereas, I, David Finley, of the city and county of San Francisco, state of California, did, on the 9th day of June, A. D. 1885, enter into a contract with the board of state harbor commissioners of the state of California to reface the outer slope of sections one (1) and two (2) of the sea-wall on the water-front of the city and county of San Francisco, state of California; and whereas, I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid to W. H. Norton of said city and county: Now, therefore, to carry out my said desire, I appoint said W. H. Norton my true and lawful attorney, irrevoca-

ble, for me and my name, place, and stead, to collect and receive all sums of money which are or shall be due, owing, or payable to me by reason of my performance of said contract made by me with said board of state harbor commissioners as aforesaid, giving and granting unto my said attorney full power and authority in and about the premises, and in my name, to make, execute, and deliver all and every receipt and instrument required to the secretary of said board, or to said board, hereby ratifying, confirming, and holding valid all that my said attorney shall lawfully do by virtue of these presents. In witness whereof, I have hereunto set my hand and seal this 27th day of March, A. D. 1886. DAVID FINLEY. [Seal.]" On October 4, 1886, Finley gave plaintiff the following letter of introduction: "San Francisco, Oct. 4, 1886. George Tilgham, Esq., Secretary Board of State Harbor Commissioners—Sir: This will introduce to you Mr. W. H. Norton, whom I hereby empower, and of whom I have given a special power of attorney, to receive and receipt for all warrants for money due me on my contracts with the board of state harbor commissioners for facing up sections 1 and 2 of the sea-wall with rocks. DAVID FINLEY."

On November 9, 1886, before the work was completed, Finley died intestate, and the defendant Whitehead was appointed administrator of his estate, and as such administrator Whitehead completed the work on the sea-wall according to the contract, and to the satisfaction of the board of harbor commissioners. At the time of the commencement of this action 25 per cent. of the contract price of the work remained unpaid, amounting to \$3,225. The plaintiff claims that Finley was indebted to him at the time of his death, and at the time the work was completed, on account of said loans, in a sum more than equal to the \$3,225 balance due for said work; and the principal object of this action is to compel the board of state harbor commissioners to draw their warrant for said balance directly in favor of the plaintiff, as the estate of Finley is alleged to be insolvent. The defendants contended that plaintiff was not entitled to this relief, and that the warrant for the unpaid balance due on the contract should be drawn in favor of the administrator of Finley's estate. The court gave judgment for the plaintiff, and the defendants appeal from the judgment, and from an order denying their motion for a new trial.

Among the findings of fact by the court are the following: "That during the progress of said work said Finley, for the purpose of obtaining money to complete said contract, borrowed from the plaintiff the sum of \$2,111.46, and gave plaintiff the promissory notes mentioned in the amended complaint herein, and in May and June, 1886, the further sum of \$239.40, for which no note was given: that said Finley employed the said plaintiff as foreman of said work, and agreed to pay the reasonable value of said services, and that the reasonable value of said services is the sum of \$768.75; that, to secure the said sums of \$2,111.46 and \$768.75, said Finley assigned to plaintiff all the moneys due,

or to grow due, on said contract, and made, constituted, and appointed said plaintiff his attorney in fact by a power of attorney irrevocable, and coupled with an interest to collect and receive the money due, or to grow due, on said contract, and that there is due plaintiff for the performance of said contract, for money so advanced, and for labor so performed, the sum of \$2,880.15, together with interest on the said sum of \$1,572 from May 2, 1886, at the rate of 1 per cent. per month, and on said sum of \$300 from June 21, 1886, at the rate of 1 per cent. per month, making a total interest of \$346.96, no part of which principal or interest has been paid, and that there is due from the said board of state harbor commissioners on said contract the sum of \$3,225; that on the 9th day of October, 1886, the said Finley agreed that the said sum of \$3,225 should be paid to plaintiff to reimburse said plaintiff for the amount so due to plaintiff from said Finley, and assigned said sum to plaintiff, but did not assign said contract; that at all the times subsequent to the 31st day of March, 1886, said board of state harbor commissioners knew of said assignment and power of attorney."

The only attack worthy of consideration made upon these findings is based upon the ground that the evidence does not justify the finding of the assignment by Finley to plaintiff of the former's right to the money to become due on the sea-wall contract, and particularly of the last installment of 25 per cent. thereof as security or otherwise. To sustain this finding, it is necessary to show that the power of attorney from Finley to plaintiff was so coupled with an interest as to prevent its revocation by the death of Finley; and whether it was so or not is the pivotal question in the case. I think the assignment of February 8, 1886, the power of attorney, with its recitals, of March 17, 1886, and the letter of introduction to the secretary of the board, of October 4, 1886, construed in the light of the circumstances under which they were executed, and the subsequent conduct of the parties in relation thereto, as proved by J. M. Polk, A. C. Paulsell, J. C. L. Wadsworth, and John H. Wise, are sufficiently evincive of an assignment, legal or equitable, giving plaintiff an "interest in the subject-matter over or concerning which the power was to be exercised." *Frink v. Roe*, 70 Cal. 309, 11 Pac. Rep. 820; *Hunt v. Rousmanier*, 8 Wheat. 175. The subject-matter upon which the power was to be exercised was "all moneys that have become or may become due to me [Finley] by reason of my performance of said contract," which I desire "shall be paid to W. H. Norton, [plaintiff,] of said city and county." At the time this power of attorney was executed the plaintiff held Finley's written assignment of all such moneys due or to become due for any work he might perform, dated February 8, 1886, which assignment was "to remain good and in full force until all notes due, or which are to become due, to W. H. Norton or his assigns, from me, are paid," and to become null and void when said notes are paid.

It is contended by appellants' counsel that the security by this assignment was limited to notes in existence at the time it was made, and that all such notes had been paid before the execution of the power of attorney. But the language seems broad enough to embrace notes thereafter to be made; and, in view of the circumstances under which it was made, and the subsequent conduct of the parties, I think the trial court properly so construed it. It was deposited with the secretary of the board of harbor commissioners as evidence of plaintiff's right to all moneys to become due to Finley, and it was allowed to remain there after the power of attorney was executed, and until after the death of Finley; and the evidence strongly tends to show that the power of attorney was in like manner deposited with the secretary of the board. If the assignment had fully discharged its functions, or was to be superseded by the power of attorney, why was it not delivered up or canceled when the power of attorney was executed? At the time the assignment was made, plaintiff was on Finley's bond for the performance of the contract, and was "backing him" with money to enable him to perform it; and the defendant Whitehead testified that Finley was indebted to Norton all the time during the year 1886. It is to be fairly inferred from the evidence that it was the continuous understanding between plaintiff and Finley that the former was to furnish from time to time all money necessary to carry on the work until it was completed, and that he did so; and it appears that plaintiff was never fully paid at any time while the work was being done. The power of attorney itself indicates more than that plaintiff was empowered to receive the money merely as Finley's agent. The second recital indicates that the object of the power was to enable plaintiff thereby to obtain payment of money due him. The language of this recital is out of place, and entirely superfluous, if nothing more was intended than to empower plaintiff to receive the money as Finley's agent. The power of attorney also provides that it is irrevocable; and, although this is not conclusive, it nevertheless tends to prove that the parties understood that plaintiff had an interest in the subject-matter upon which it was to operate.

Counsel for appellants further contend, on the authority of *Hunt v. Rousmanier*, supra, that, conceding that plaintiff had such an interest in the subject-matter of the power of attorney as would have deprived Finley of the power to revoke it during his life-time, yet, inasmuch as plaintiff, in receiving and receipting for the warrants and money, must have acted in the name of Finley, he could not have done so after Finley's death. I think the learned counsel mistaken in assuming that it was necessary that plaintiff should receive or receipt for the warrants or the money in the name of Finley. Upon the construction of the assignment, power of attorney, and letter of October 4th, properly, as I think, given by the trial court, the plaintiff was entitled to receive and receipt for the warrants or money in his

own name both before and after the death of Finley; and such receipt in his own name, in connection with the papers above named, would have protected the board of harbor commissioners and the state against all demands of Finley or his administrator for the same warrants, or the money for which they were drawn. It is true that the power of attorney expressly authorized the plaintiff to act in Finley's name, but this detracted nothing from plaintiff's right to act in his own name as the assignee of Finley. In the case of *Hunt v. Rousmanier*, supra, there was no sale nor assignment of any interest in the subject-matter (vessels at sea) of the power of attorney, by way of mortgage or otherwise. The bill shows that the complainant intentionally and expressly declined to take a mortgage of the vessels. There was, however, a proviso in the power of attorney reciting that it—the simple power of attorney—was intended to secure certain promissory notes, and was to be void on their payment; but the court held that this proviso did not have the effect of a sale, assignment, or mortgage of any interest in the vessels, and, having no such interest, the complainant could do nothing except to exercise his simple power of attorney to sell, which could only be done in the name of his constituent, who was dead, and therefore could not be done at all, as he could not sell in the name of a dead man. In the case at bar the court has found, upon evidence substantially tending to prove the finding, not only that Finley executed to plaintiff an irrevocable power of attorney, but also that "said Finley assigned to plaintiff all the moneys due, or to grow due, on said contract," to secure the payment of the money found due the plaintiff, with interest, amounting at the date of the judgment to \$3,225.

By no possibility could the appellants have been injured by the overruling of their objection to admitting in evidence plaintiffs' letter of November 16, 1886, to the board of harbor commissioners. The only effect that letter could have had was to show that, by waiving his right to warrants numbered 64 and 65, dated November 4, 1886, Finley did not waive his right to warrants thereafter to be drawn. There was and is no pretense of any such waiver. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 163

In re HONG YEN CHANG.

(Supreme Court of California. May 17, 1890.)

NATURALIZATION OF CHINAMEN—ADMISSION AS ATTORNEYS.

1. Under Rev. St. U. S. § 2165, providing for the naturalization of aliens, as amended by Act Feb. 18, 1875, limiting such right to free white persons, and aliens of African nativity or descent, and Act May 18, 1882, forbidding the naturalization of Chinamen, a certificate of naturalization issued to a Chinaman is void.

2. By Code Civil Proc. Cal. § 279, only persons who are citizens of the United States, or who have declared their intention to become such in the manner provided by law, are entitled to be admitted to practice as attorneys in the supreme court, on presentation of a license to practice in the highest court of a sister state. *Held*, that a motion for the admission of a Chinaman will be denied, although he presents a license to practice in the supreme court of New York, and exhibits naturalization papers issued by the court of common pleas of the city of New York.

Fox, J. Motion made in due form for the admission of Hong Yen Chang to practice as an attorney and counselor of this court, and his moral character duly vouched for. Upon the motion there is exhibited to us a license admitting him to practice as an attorney and counselor at law in all the courts of the state of New York, issued by the supreme court of that state at a general term held at the city of Poughkeepsie, May 17, 1888; also a certificate of naturalization issued by the court of common pleas of the city of New York, November 11, 1887.

Title 30 of the Revised Statutes of the United States provides for the naturalization of aliens. The first section of that title (section 2165) reads: "An alien may be admitted to become a citizen of the United States," etc.; and that and subsequent sections provide how, and the conditions of such admission. As the statute originally stood, there was no express language to indicate a limitation upon the class of aliens who might be so admitted; but by "An act to correct errors and supply omissions in the Revised Statutes of the United States," passed February 18, 1875, this provision was amended so as to limit the right of naturalization to "aliens, being free white persons, and to aliens of African nativity, and to persons of African descent." Under this statute it was held by the federal courts that persons of the Mongolian race are not entitled to be admitted as citizens of the United States. In re Ah Yup, 5 Sawy. 155; In re Look Tin Sing, 21 Fed. Rep. 905. We have no doubt about the correctness of this ruling. Then, by section 14 of the act of May 6, 1882, (22 St. U. S. p. 61,) courts are expressly forbidden to issue certificates of naturalization to any native of China. Under the constitution of the United States, congress alone has the power to determine who shall and who shall not be entitled to the privileges of the naturalization laws. We are therefore of opinion that the certificate of naturalization presented in this case was issued without authority of law, and is void; it being conceded that the holder of it is a person of Mongolian nativity. Only those who are citizens of the United States, or who have *bona fide* declared their intention to become such in the manner provided by law, (and we hold that this requires that they shall be persons eligible to become such, as well as to have declared their intention,) are entitled to be admitted to practice as attorneys and counselors of this court, on presentation of license to practice in the highest court of a sister state. Code Civil Proc. § 279. Holding, as we do, that the applicant is not a citizen of the United States, and is not eligible under the law to become

such, the motion must be denied. So ordered.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.

83 Cal. 491

FRESNO NAT. BANK v. SUPERIOR COURT,
SAN JOAQUIN COUNTY. (No. 13,473.)

(*Supreme Court of California*. March 31, 1890.)

VENUE—JURISDICTION OF COURTS—PROHIBITION.

1. By Rev. St. U. S. § 5198, providing that a national bank may be sued in any state or county court in the county in which it is located having jurisdiction of similar cases, and section 5136, providing that such bank may be sued in any court of law and equity as a natural person, jurisdiction of an action on contract against a national bank is not prohibited to a state court of a county other than that in which it is situated.

2. Const. Cal. art. 12, § 16, provides that corporations may be sued in the county where the contract is made or to be performed, or where the liability arises or breach occurs, or where its principal place of business is, subject to the power of the court to change the place of trial as in other cases. Article 6, § 5, provides that the superior courts shall have jurisdiction in all cases in which the demand exceeds \$300, and their process shall extend to all parts of the state. *Held*, in an action against a national bank, commenced in a county other than those mentioned in section 16, to recover \$6,000 on a contract for building it a house in the county of its principal place of business, that the court had jurisdiction of the person of defendant as well as the subject-matter of the action.

3. In such case the action is improperly commenced, and the proper remedy for defendant is a motion for change of venue under Code Civil Proc. Cal. § 397, providing that it may be granted when the county designated in the complaint is not the proper one for the commencement of the action; and prohibition will not lie.

Commissioners' decision. In bank. On application for a writ of prohibition.

Const. Cal. art. 6, § 5, provides that the superior courts shall have jurisdiction in all cases at law and in equity in which the demand, exclusive of interest, exceeds \$300. Code Civil Proc. Cal. § 397, provides that a change of venue may be granted when the county designated in the complaint is not the proper county.

Nourse & Short, for petitioners. Baldwin & Campbell, for respondents.

VANCLIEF, C. This is an original application to this court for a writ of prohibition commanding the superior court of San Joaquin county to desist from further proceeding in an action by White and Thomas against the petitioner to recover a balance of \$6,000 upon a building contract. The petitioner is a banking corporation incorporated under the laws of the United States, having its principal place of business in the county of Fresno, in this state. The contract was for the building of a house for the petitioner in Fresno county, and was performed on the part of the plaintiffs in that county; but the contract, which is in writing, does not state where payment for the work was to be made. The summons in the action was served on the petitioner in Fresno county. Without appearing for any other purpose, the petitioner—defendant in that action—moved to dismiss the action on the ground that the superior court of San

Joaquin county had no jurisdiction of the person of the defendant. This motion was denied. A bill of exceptions by the defendant on the denial of this motion, and a copy of the complaint, are set out in the petition as the basis of this application. It appears that, after the denial of the motion to dismiss, the defendant filed a demurrer and answer to the complaint, and demanded a change of the place of trial to Fresno county, and gave notice of motion for that purpose; but it does not appear that the court ever acted, or was moved to act, upon the demurrer, or the matter of the change of venue. There is nothing, however, in the demurrer, answer, or demand for change of venue, having the effect to waive any right that the defendant ever had to a dismissal of the action.

1. It is admitted by counsel for petitioner that, by virtue of section 5 of article 6 of the constitution, the court had jurisdiction of the subject-matter of the action; but they contend that section 16 of article 12 deprives the court of jurisdiction of the person of the defendant, for the reasons that the defendant is a corporation having its principal place of business in Fresno county; that the contract upon which the suit was brought was not made, and was not to be performed, in San Joaquin county; and that no obligation on that contract arose, or breach thereof occurred, in San Joaquin county. Whether these are sufficient reasons or not, it appears that they are true as matters of fact. The section of the constitution relied on is as follows: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It is claimed that this section, though not mandatory in form, is made so by section 22 of article 1, which is as follows: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." But the express words "may be sued," in section 16 of article 12, are, expressly, merely permissive; and by these express words that section is "declared to be otherwise" than mandatory, if mere permission is different from a command. No other express words were necessary to indicate that a command was not intended, or to declare that something different from a command was intended. It will not be contended that section 22 of article 1 has the effect to make the first clause of section 9 of the same article mandatory, viz., "Every citizen may freely speak, write, and publish his sentiments on all subjects;" or the clause in section 16, art. 4, "He [the governor] may object to one or more items, while approving the other portions of the bill;" or the following clauses of section 2 of article 6, "Any four justices may, either before or after judgment by a department, order a case to be heard in bank," and "the chief justice may sit in either department;" yet there is no ex-

press word, except the word "may," in any of these clauses, declaring or indicating that it is "otherwise" than mandatory. It therefore seems plain that in these instances the word "may" was used and intended expressly to "declare" that these clauses are not mandatory, and no reason is perceived why it was not so used and intended in section 16 of article 12. It is not questioned that the proviso in section 5 of article 6 is mandatory, viz.: "That all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." It can hardly be presumed that the framers of the constitution failed to foresee that there might be just occasion for suing a corporation to recover, quiet the title to, or enforce a lien upon real estate not situated in any of the counties enumerated in section 16 of article 12; yet upon the occurrence of such an occasion, if this section is to be deemed mandatory, there would be a square conflict between it and the proviso above quoted, in which one or the other must yield, or there would be no remedy against the corporation. Surely no extraordinary meaning, resulting in such a conflict or failure of remedy, should be attributed to the words of section 16 of article 12, if their ordinary meaning would give any effect to the section without conflict. Without leading to any conflict, this section has the effect to permit a corporation to be sued in certain counties other than that of its residence or principal place of business, at the option of the plaintiff, and to deny to corporations the absolute right to a change of venue when sued in such other counties. This effected an important change in the law as it existed before the adoption of the present constitution, in so far as it denies the absolute right of the corporation to a change of venue to the county of its principal place of business when sued in any one of the other counties named in the section; and this seems to be the only effect intended.

It is suggested that the expression of certain counties in which a corporation "may be sued" is exclusive of all other counties. But the maxim cited in support of this excludes only what is not expressed. Here it is expressed in the same instrument (section 5, art. 6) that all superior courts have jurisdiction of the subject-matter of the action in question, and that "their process shall extend to all parts of the state." The whole and exclusive subject-matter of section 5, art. 6, is jurisdiction of superior courts, whereas the only expressed subject-matter of section 16, art. 12, is venue of actions against corporations. To extend the ordinary meaning of the words of the latter section by the application of the maxim cited, would be to bring it into direct conflict with what is clearly expressed in section 5 of article 6. The very question under debate is, does section 16 of article 12 exclude what is expressed in section 5 of article 6? Section 1243 of the Code of Civil Procedure, relating to judicial proceedings to con-

demn private lands for public use, provides that "all proceedings under this title must be brought in the superior court of the county in which the property is situated. They must be commenced by filing a complaint, and issuing a summons thereon."

There are two cases reported in 65 Cal.—one at page 394, (California S. R. Co. v. Southern Pac. R. Co., 4 Pac. Rep. 344,) and the other at page 409, (Same v. Same, 4 Pac. Rep. 388)—in which the Southern Pacific Railroad Company was sued to condemn a portion of its land. In the first case the land was situated in San Diego county, and in the other case in San Bernardino county. In each case the defendant moved for a change of venue to San Francisco,—its principal place of business. In each case the motion was denied on the ground that section 1243 of the Code of Civil Procedure required the action or proceeding to be brought in the county where the land was situated. As neither of these cases was founded upon contract nor upon tort, it would seem, if section 16 of article 12 is mandatory, that the defendant had an absolute, constitutional right to a change of venue to the county of its principal place of business, and that section 1243 of the Code of Civil Procedure (enacted April, 1880) is unconstitutional so far as corporations are concerned. It is true that this constitutional question does not expressly appear to have been considered in either of these cases, yet it is not therefore to be presumed that the court unwittingly disregarded a constitutional requirement, but rather that, being aware of section 16 of article 12 of the constitution, neither court nor counsel considered it inconsistent with section 1243 of the Code of Civil Procedure. If section 1243 of the Code of Civil Procedure is constitutional, no reason is perceived why section 396 of the same Code should be considered unconstitutional. It was said in one of these cases, overruling *Jenkins v. Stage Co.*, 22 Cal. 537, that a corporation has no place of residence in the sense of section 395 of the Code of Civil Procedure, but section 16 of article 12 says nothing about residence. It simply provides that a corporation may be sued in the county where it has its principal place of business. But, as to the point of residence of a corporation, these cases were overruled in *Cohn v. Railroad Co.*, 71 Cal. 488, 12 Pac. Rep. 498, wherein *Jenkins v. Stage Co.* was reaffirmed, and wherein it was also decided that, as the suit was not commenced in any one of the counties designated in section 16, art. 12, of the constitution, the defendant was entitled, upon its motion and a proper showing, to have the place of trial changed to the county of its principal place of business; and this decision is expressly based upon section 16 of article 12 of the constitution, and the authority of the case of *California S. R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394, 4 Pac. Rep. 344, and therefore furnishes a sufficient answer to the point made by counsel for petitioner to the effect that the remedy by motion for change of venue was not available to the petitioner, for the reason that the superior court had no jurisdiction even to hear or

determine such motion, or any other except his motion to dismiss. In *Lewis v. Railroad Co.*, 66 Cal. 209, 5 Pac. Rep. 79, the defendant corporation, whose principal place of business was in the city and county of San Francisco, was sued in the county of Santa Clara for damages on account of a personal injury, and moved for a change of venue to San Francisco. It was held that this motion was properly denied, because section 16 of article 12 authorizes such a suit to be commenced in the county where the liability arose, as well as in the county of the principal place of business of the corporation, and is not limited to actions *ex contractu*; and, for the purpose of ascertaining the meaning of this section, the court considered the reported proceedings of the constitutional convention. By this decision it is settled that, where a corporation is sued in any one of the counties mentioned in this section, it cannot demand a change of venue as matter of absolute right, but only "as in other cases," and for other reasons than that the county in which the action is commenced is not the proper county.

2. It is contended by counsel for petitioner that, inasmuch as the petitioner is a national banking association incorporated under the law of congress, a state court, outside of the county or city in which it is located, has no jurisdiction of an action against it of the character of the action in question here. Rev. St. U. S. § 5198. I do not think this point should be sustained. An able discussion of all the points involved in it may be found in the analogous case of *Claffin v. Houseman*, 93 U. S. 130, wherein the conclusions seem to be adverse to the position of the learned counsel for the petitioner here. In *Casey v. Adams*, 102 U. S. 66, the defendant objected to the jurisdiction of a state court of the state of Louisiana "upon the ground that a national bank cannot be sued in a state court, except in the county or parish in which it is located." There was no question as to the truth of the alleged facts constituting the grounds of the objection. The state court overruled the plea, and the supreme court of the United States affirmed the judgment. It is true that the supreme court remarked that it thought section 5198, Rev. St., "relates to transitory actions only, and not to such actions as are by law local in their character;" but this remark was not necessary to the decision, and there is nothing in section 5198 relating to the distinction between local and transitory actions. So far as it relates to the courts in which national banks may be sued, this section is as follows: "That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." The only other part of the national banking law touching this question is the fourth division of section 5136, which provides that such associations "shall have power— * * * Fourth, to sue

and be sued, complain and defend, in any court of law and equity, as fully as natural persons." This of itself would authorize suits by and against them in any state court having jurisdiction of the subject-matter. *Bank v. Deveaux*, 5 Cranch, 61. It seems probable that it was the intention of congress, by sections 5136 and 5198, to confer jurisdiction of all actions and proceedings by and against national banks upon state courts having jurisdiction, by state laws, in similar cases; and this must be the result, according to the principles laid down in *Clafin v. Houseman*, supra, since such jurisdiction is not excluded by any express provision. After noticing the elaborate discussions of this question, Mr. Justice BRADLEY (page 136) says: "But the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction [of the state courts] where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case. When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction." After illustrating this principle at considerable length, the learned justice arrives at the conclusion "that the assignee in bankruptcy, under the bankrupt act of 1867 as it stood before the Revision, had authority to bring suit in the state courts wherever those courts were invested with appropriate jurisdiction suited to the nature of the case."

Nor is there anything in the distinction between transitory actions and local actions which should affect the application of sections 5136 and 5198 of the United States Revised Statutes, or of the principles announced in *Clafin v. Houseman*, except, perhaps, when local actions are purely *in rem*, and therefore require no actual service of process upon any person, natural or artificial. Actions to enforce mortgages and other liens upon real property, and actions to condemn real property for public use, are actions against the owners of the property, of whose persons the court must acquire jurisdiction by actual service of process before it can render any judgment affecting their property rights. Beside, in the United States generally, and particularly in this state, the distinction between local and transitory actions, so far as any consequence attends it, depends entirely upon statutory law, which is not necessarily nor actually uniform throughout the states, and does not coincide with, or depend upon, the distinction between actions *in rem* and actions *in personam*. Then, again, all those large classes of actions which are said to be *quasi in rem* require jurisdiction of the individual persons interested, and most of them are prosecuted without any seizure of the thing.

From the foregoing considerations I conclude (1) that the superior court of San Joaquin county had jurisdiction of the person of the defendant, having acquired it by service of summons; (2) that, upon the showing made here, San Joaquin county was not the proper county in

which to commence the action of White & Thomas against the petitioner; and (3) that a motion by the petitioner for a change of venue according to the provisions of the Code of Civil Procedure was a plain, speedy, and adequate remedy, in the ordinary course of law, for the error and wrong of commencing the action in an improper county. I therefore think that the writ should be discharged.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the writ is discharged.

84 Cal. 299

KNOTT v. PEDEN. (No. 13,264.)

(Supreme Court of California. June 7, 1890.)

TAXATION—ASSESSMENT—APPEAL—ASSIGNMENT OF ERRORS.

1. Const. Cal. art. 13, § 4, provides that mortgaged property, less the value of the mortgage, shall be assessed to the property owner, and the value of the mortgage to the mortgagee. Pol. Code Cal. § 3650, provides that the assessor must specify in his assessment book, "in separate columns, under appropriate heads," the value of the mortgage, and deduct the same from the value of the property, and then enter the remainder in another column as the amount to be assessed to the property owner. *Held*, that where the assessor enters the value of the mortgaged property in the appropriate column, but fails to enter the value of the mortgage in the property owner's assessment, and to deduct it from the value of the property, the assessment and all subsequent proceedings thereunder are void, and a sale for the non-payment of the taxes so assessed will not divest the property owner's title.

2. Code Civil Proc. Cal. § 659, subd. 3, which requires one who appeals, because the evidence does not sustain the decision, to specify wherein the insufficiency consists, is sufficiently complied with by an allegation that there is no evidence to support the decision appealed from.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Action to quiet title by Knott against Peden and others. There was judgment for plaintiff, and defendant Peden appeals. Code Civil Proc. Cal. § 659, subd. 3, provides that, where an appeal is taken because of "the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient."

John F. Ellison, for appellant. Chipman & Garter, for respondent.

GIBSON, C. Plaintiff brought this action against appellant, Peden, and two others, to quiet his title to a certain tract of land in Tehama county. A joint answer was filed, in which the co-defendants of Peden disclaimed any interest in the land, and the latter admitted that prior to the 16th day of March, 1885, the title thereto was in plaintiff, but averred that such title was on that date transferred to his grantor, one Gale, by virtue of a sale of the land for delinquent taxes, upon which Gale, in due course, received a certificate of sale of and a tax-deed to the premises. The trial court, with other facts, found the assessment upon which the sale and deed rested to be void, and gave judgment for plaintiff.

This appeal is from that judgment and an order denying a new trial. Insufficiency of the evidence to sustain the findings is the only reason presented for a reversal of the judgment.

In the statement 12 findings are specified as being unsupported by the evidence, but none of the specifications, as required by subdivision 3 of section 659 of the Code of Civil Procedure, shows wherein the evidence is insufficient, except the first, in which it is stated that there is no evidence to support the finding assailed; for, if there is no evidence to support a finding, such a specification would, of course, be sufficient. And, as it has been repeatedly held that such requirement cannot be dispensed with, we could properly confine our examination to this one finding; but as respondent's counsel have not objected upon this ground, and have treated the specifications as sufficient, we have examined the evidence, and find that it is sufficient to support the findings. The main fact disclosed by it, and upon which the case turns, is that the assessment made by the county assessor of Tehama county for the year 1884 is invalid.

The assessment roll for that year shows that in addition to the property in controversy, which is valued at \$2,340, two town lots and the improvements thereon, valued at \$325, and certain personal property of the value of \$70, were assessed to the plaintiff. The town lots were subject to a mortgage interest of the value of \$300 in favor of one Potts, and the land in question to a mortgage interest of the value of \$2,000 in favor of one Dowling. The assessment and taxation of property subject to a mortgage, and the mortgage itself, are governed by the following rule, established by the constitution of the state: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situate." Article 13, § 4. A complete listing by the assessor of all the taxable property of each tax-payer, including the manner in which property subject to mortgage liens shall be assessed, is provided for in section 3650 of the Political Code. It prescribes: "The assessor must prepare an assessment book with appropriate headings, alphabetically arranged, unless otherwise directed by the state board of equalization, in which must be listed all property within the county, and in which must be specified, in separate columns, under the appropriate head," the name of the person to whom the property is assessed, together with a proper description and valuation of each parcel or article of property assessed, exclusive of money; the amount of

money; the school, road, and other revenue districts in which each piece of property assessed is situated; the total value of all property; the poll-tax, if the person assessed is liable to pay one; and by subdivision 15: "When any property except that owned by a railroad or other *quasi* public corporation is subject to or affected by a mortgage, deed of trust, contract, or other obligation by which a debt is secured, he must enter in the proper column the value of such security, and deduct the same. In entering assessments containing solvent credits subject to deductions, as provided in section 3628 of this Code, he must enter in the proper column the value of the debts entitled to exemption, and deduct the same. In making the deductions from the total value of property assessed, as above directed, he must enter the remainder in the column provided for the total value of all property for taxation. * * *

The assessment of the property in question here was not made in conformity with either the constitution or the Code. It is entered at \$2,340 in the column of the assessment roll designed to show, "Value of real estate other than town and city lots;" while on the same page, in a different assessment, viz., that of Dowling, appears a mortgage interest in the same land, entered at \$2,000, in a column with this heading: "Total value of all property after deductions." If the amount of this mortgage interest were deducted from the value of the land, as required by the constitution, the value of the land assessable to the plaintiff as owner would be but \$340. This value is all the plaintiff could be properly assessed for under the constitution, and it nowhere appears separately in his assessment. The value of the mortgage interest in the land held by Dowling is not shown in the assessment. It is only found in the separate assessment of Dowling, and seems to have been, together with the mortgage interest of Potts in the town lots, which is also only found in the separate assessment of the latter, carried to the assessment of plaintiff, and entered in the column headed, "Deductions on account of mortgages, deeds of trust, contracts, or other obligations by which a debt is secured by a lien on property," and deducted from the gross value of all the property of the latter, leaving the sum of \$435 as the amount assessable to him, after all deductions. This amount, however, can only be ascertained by taking the three separate assessments of plaintiff and his two mortgagees together as one, and deducting the value of the two mortgage interests as above shown.

It is apparent, then, that the assessor not only failed to comply with the constitution, but ignored the plain object of section 3650 of the Political Code, which requires the assessment of each tax-payer to be complete within itself. Furthermore, the assessment of plaintiff is defective in another particular. The court found that at the time the assessment was made the land in dispute was in the "Tehama road-district;" yet the district is not shown upon the roll. There is no entry in the column headed, "Road-District." The con-

clusion we have reached renders it unnecessary to consider the other points made, and for the reasons given we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 621

SOMERS v. SOMERS. (No. 13,636.)

(Supreme Court of California. May 1, 1890.)

APPEAL—DISMISSAL.

An appeal will not be dismissed because the transcript was not filed within the required time after the appeal was perfected; a rule of court providing that, if there be a statement which may be used in support of the appeal, the time limited does not commence to run until such statement is settled, and it appearing that appellant prepared and served such a statement to be used on the motion for a new trial, but that it has never been settled because of the refusal of the trial judge to act upon it.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Matt. I. Sullivan, for appellant. R. B. Mitchell, for respondent.

BEATTY, C. J. This is a motion to dismiss an appeal from the judgment in the action above entitled upon the ground that no transcript has been filed here notwithstanding more than 40 days have elapsed since the appeal was perfected. But it will be seen, by reference to rule 2 of this court, that the time within which a transcript must be filed does not in all cases commence to run from the date of perfecting the appeal. If there be a bill of exceptions or statement which may be used in support of the appeal, the 40 days allowed by the rule for filing the transcript does not commence to run until such bill or statement is settled. In this case it appears that the appellant is moving for a new trial; that he prepared and served a statement to be used on that motion within due time, but that it has never been settled, owing to the refusal of the trial judge to act upon it. He is still endeavoring to procure the settlement of this statement, and makes affidavit that it will constitute a material part of the record on his appeal. That it may be used in support of his appeal from the judgment is clear. Code Civil Proc. § 950. Such being the case, the motion to dismiss must be denied, and it is so ordered.

We concur: PATERSON, J.; THORNTON, J.; FOX, J.

83 Cal. 636

BROWN v. STARK. (No. 12,778.)

(Supreme Court of California. May 2, 1890.)

DEDICATION—RECORD OF PLAT—SALE OF LOTS.

1. In an action for trespass, it appeared that the owner of certain land had it surveyed and platted with a street 50 feet wide running north from a highway, which street was marked on the plat "Hester Avenue." This plat was shown to purchasers, and a copy thereof posted on the premises. The lots sold to defendant were described as

bounded on one side by this avenue. Prior to this sale the avenue was thrown open to public travel, and the deed to defendant was recorded before the balance of the property was sold to plaintiff. Held, that defendant had a right to remove a fence in said avenue, and that there was no need of showing that the avenue was a necessity.

2. The owner of the land having dedicated the avenue, and it having been accepted and used not only by defendant, but by the public, the deed to plaintiff conveying said avenue could not operate as a revocation of the offer.

3. The court properly refused to allow the owner of the land to state whether she intended to dedicate any street when she sold the lots.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; FRs. E. SPENCER, Judge.

W. C. Kennedy, for appellant. Thomas H. Laine, for respondent.

VANCLIEF, C. This is an action in the nature of trespass for entering upon the plaintiff's land, a five-acre lot, and removing and destroying a fence, and for a perpetual injunction restraining defendant from repeating the trespasses complained of. The answer of the defendant confesses the entry upon the lot described, and the removal of a portion of the fence, and seeks to justify these acts by averring that the portion of the fence removed was an obstruction to a public road or way through said lot; and specially alleges the facts, and acts of the plaintiff and his grantor claimed to constitute a dedication of the way to public use, and an acceptance and use thereof by the public and by the defendant; and further alleges that the entry of the defendant upon the way, and the removal of that portion of the fence obstructing it, were the acts complained of as trespasses. In response to the issues made by the pleadings, the court found the facts and law as follows:

"(1) On the 12th day of October, 1871, Craven P. Hester was the owner in fee of the land described in the plaintiff's complaint, consisting of five acres, fronting 263 4-12 feet on the Alameda road, referred to in the complaint, and running back 830 3-12 feet; that on said day said Craven P. Hester conveyed to his daughter, Sallie P. Maddock, for the consideration of natural love and affection, said tract of land, which thereupon became and was her separate property. (2) Afterwards, and prior to the 19th day of April, 1878, said Sallie P. Maddock, the said owner of the whole of said land, caused the same to be surveyed and laid off into lots of convenient size for the purposes of sale, with a street or road fifty feet wide running through it about the center, and extending from the Alameda road to the opposite or northern end thereof, and caused a plat of said survey to be made showing said road or avenue, which was called and laid down on said map as 'Hester Avenue,' which plat was exhibited to buyers, and a copy thereof posted up on the premises, offering the lots for sale. (3) That afterwards, and in the year 1878, Sallie P. Maddock sold three of said lots by said plat, and made, executed, and delivered (with her husband) deeds of conveyance thereof; describing said lots as bounded on one side by said Hester

avenue. Two of these were sold in one parcel to S. A. Bishop, which fronted 100 feet on said Hester avenue, and ran back 110 feet, and is the same property conveyed by said S. A. Bishop, by deed dated May 11, 1881, to Maggie Stark, wife of the defendant, which lots Mrs. Maggie Stark has continuously owned and improved, and are located about 235 feet north of said Alameda road. The other lot was sold and conveyed as aforesaid to Mrs. Mary Pillot in December, 1878, and fronts 50 feet on said Hester avenue, and lays just north of the said Bishop lot. Said 'Hester Avenue' was thrown open to public travel by said Maddock and wife prior to the sale of said lots, and was by them fenced off 50 feet wide as far north as the north line of the Pillot lot prior to the purchase by the plaintiff, as hereinafter found, with the whole width left open to the Alameda road, or northern end. All of said deeds were recorded in the office of the county recorder of said Santa Clara county prior to plaintiff's said purchase. (4) That after said sales and the recording of the deeds as in the last finding stated, to-wit, on the 6th day of December, 1882, the plaintiff purchased the remainder of said 5-acre tract from Maddock and wife, obtained their conveyance therefor, and went into possession. Soon after his said purchase he extended the fence on the north line of the Alameda road fifteen feet further west, and ran a fence north therefrom, so as to include in his inclosure a strip of land, fifteen feet wide, running north as far as the north line of the Pillot lot, now owned by W. S. Clark, which reduced the width of said Hester avenue to thirty-five feet for said distance, which fence still remains there. (5) The only road-way available to reach the lots sold as aforesaid to Bishop and Mrs. Pillot from any public road is the said 'Hester Avenue,' there being no other road by which they can be reached; and said 'Hester Avenue' has been used continuously by all persons having occasion to go to or from said lots, as far as the north line of said Pillot lot, ever since they were sold as aforesaid, until the same was fenced up by plaintiff, as hereinafter stated. (6) About the 14th day of February, 1887, the plaintiff, intending to close up said Hester avenue, and prevent travel thereon, erected a fence entirely across it at the point where it joins the Alameda road. The defendant removed said fence as a nuisance and obstruction to his free use of said avenue. The plaintiff restored it several times, and the defendant as often tore it down, and threatened to continue to tear down and remove the same as often as it should be erected. Said acts of defendant are the acts of alleged trespass complained of by the plaintiff herein, and none other. (7) Said Hester avenue was by the said Sallie P. Maddock intentionally laid out fifty feet wide, and dedicated to the public as a highway for travel in the year 1878, through her said 5-acre tract of land, as far north as the said north line of the Pillot lot. Beyond that I make no finding, as it is not involved in this contest."

"Conclusions of Law: From the foregoing facts, I find as conclusions of law: (1)

That Hester avenue, as above set forth, is a public road for travel, fifty feet wide, for all persons having occasion to go that way, as far north as the north line of the Pillot lot, and beyond that I make no decision, as it is not involved in this case. (2) The defendant has a right to remove all obstructions from said road as far north as the north line of said Pillot lot, and is entitled to a judgment for costs, and it is so ordered.

"FRS. E. SPENCER, Superior Judge."

The plaintiff appeals from the judgment, and from an order denying his motion for a new trial. That the findings of fact are sufficient to support the conclusions of law is not questioned; but it is claimed that some of the findings of fact are not justified by the evidence. Of these, only those which are specified in the statement on motion for new trial can be considered.

1. It is specified that "there was no evidence to show the authority or agency of J. K. Maddock to dedicate, or lay out, or authorize a public street or way on behalf of Mrs. Sallie P. Maddock, and does not sustain finding 2." There is no finding of any such "authority or agency of J. K. Maddock in finding 2, or elsewhere."

2. It is specified that the evidence fails to show any width, length, or termination of the proposed way. F. Brown, plaintiff's son, testified of it as "a lane from the Alameda back to the north end of Pillot's lot," and further said: "This lane was fifty feet wide when father bought it." Other witnesses testified that a map or plat of the 5-acre lot was posted up on the property within a few feet of Mrs. Maddock's dwelling, showing this way, 50 feet wide, through the entire lot, and naming it "Hester Avenue." This "Hester Avenue" is mentioned as a boundary in two deeds and one mortgage from Mrs. Maddock. This evidence strongly tends to prove the finding and is quite sufficient to sustain it.

3. It is specified that "there is no evidence to show that said road-way was required as a necessity, and does not sustain finding 5." There is no finding that said road-way was required as a necessity; nor was such a finding necessary to sustain the judgment, the voluntary dedication and acceptance of it being sufficient. Finding 5 consists of two distinct propositions, neither of which is touched by this specification.

4. Nor is there any finding that the "road of necessity should be fifty feet wide."

5. The evidence substantially tends to prove that the 5-acre lot was subdivided and plotted into lots; and that "Hester Avenue" was a part of the plat, and was dedicated as a public way, to induce purchasers to buy the lots. Therefore the fifth specification, if it may be so-called, is not sustained.

6. Counsel for appellant contends that the court erred in sustaining the objection of defendant's counsel to the following question asked Mrs. Maddock: "Did you intend to dedicate any public street when you sold these premises?" Waiving the indefiniteness of this question as to time, and as to what sale of "these premises" was referred to by the question, it is a suf-

ficient answer to the objection to say that the acts and deeds of Mrs. Maddock enumerated in the findings numbered 2 and 3, to which there is no exception, plainly indicate that she intended to dedicate, and did dedicate, to public use "Hester Avenue," as laid down on the plat, at or before the dates of her deeds to Bishop and Pillot; that she intended it to be so understood by purchasers of lots fronting on that avenue; and that Bishop and Pillot purchased three lots fronting upon it with that understanding, induced by such acts and deeds. She does not deny that she caused the tract to be subdivided into lots and platted, and the plat to be posted on the lot, as stated by other witnesses, and only says: "It [the avenue] was not to be a public street, but simply a private right of way." This is only her construction of the acts and deeds properly construed by the trial court as being an accepted offer to dedicate to public use. Under these circumstances her unexpressed intention, called for by the question ruled out by the court, was of no material consequence.

7. The deed of Mrs. Maddock to the plaintiff of December 6, 1882, did not, and could not, operate as a revocation of an offer to dedicate, which had been accepted before the date of that deed. The court having found an acceptance of the offer to dedicate, and a user by the public as well as by the purchasers of lots, the cases of *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474, and *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. Rep. 693, cited by appellant's counsel, are not in point. I think the judgment and order should be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 409

MITCHELL v. CLINE *et al.* (No. 12,940.)

(Supreme Court of California. June 9, 1890.)

ILLEGAL CONTRACTS—PARTITION.

1. Where plaintiff's intestate, defendants' testator, and others, for the purpose of locating, as mineral land, a tract of land larger than they were entitled to under Rev. St. U. S. § 2331, providing that "no such location shall include more than twenty acres for each individual claimant," entered into an agreement to use the names of sham locators with the understanding that the latter would afterwards convey to the real locators, and the sham locators accordingly did convey, without consideration, their interests to plaintiff's intestate, and a patent was issued upon the title so obtained, defendants had no claim upon the land so conveyed which a court of equity would enforce.

2. Any equities which defendants' testator may have obtained by mining upon a portion of the tract located prior to such location were surrendered by his subsequent agreement with his associates, and by his application for a patent based upon such location.

3. Under Code Civil Proc. Cal. § 763, providing that, if it appears to the satisfaction of the court that a partition of property cannot be made without great prejudice to the owners, the court may order a sale thereof, a decree ordering partition will not be disturbed where the evidence, as to whether a partition would be prejudicial to the owners in any degree, is substantially conflicting.

Inbank. Commissioners' decision. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Ira H. Reed and Reddick & Solinsky, for appellants. *W. H. H. Hart, Aylett A. Cotton, and T. W. Nowlin*, (*Thomas B. Bishop*, of counsel,) for respondent.

JANCLIEF, J. A. M. Mitchell died intestate in February, 1882, seized of undivided parts of two placer mining claims, situated in Calaveras county, adjoining each other. The plaintiff, Sarah Mitchell, is the widow, administratrix, and one of the heirs of A. M. Mitchell, and individually and as administratrix brought this action for a partition of said mining claims, making the other heirs—the children of A. M. Mitchell and the other tenants in common, the devisees of John Batten, deceased—defendants. One of the claims sought to be partitioned is known as the "Bowling Green Placer Mine," containing 152 acres, and the other is called the "Dashaway Placer Mine," and contains about 154 acres. The complaint alleges that Mitchell died seized of seven-twelfths of the Bowling Green claim, and of five-twelfths of the Dashaway claim, and that the devisees of John Batten own five-twelfths of the Bowling Green, and seven-twelfths of the Dashaway. The prayer is that the whole body of land constituted of these two claims be partitioned into two parts, giving to the heirs of Mitchell one part, equal in value to their alleged undivided interest in both claims, and to the devisees of Batten the other part, equal in value to their alleged undivided interests in both claims.

It appears that the Bowling Green claim was located upon public mineral land, in January, 1873, by and in the names of John Batten, Thomas Batten, George Batten, A. M. Mitchell, Edward Thomas, William Thomas, A. B. Preston, and W. D. Newton; eight persons being necessary to locate the 152 acres of which it was composed. Upon this location a United States patent was issued June 15, 1883, to John Batten and the heirs of A. M. Mitchell; John Batten and Mitchell having acquired the titles of all the other locators. It also appears that the Dashaway claim was located upon public mineral land, on March 23, 1876, by and in the names of Joseph Pownell, W. Mansfield, G. Wing, W. G. Long, D. McLean, A. M. Mitchell, John Rolls, and John Batten. Upon this location a United States patent issued March 17, 1884, to John Batten and the heirs of A. M. Mitchell; the other locators having conveyed their interests to Batten and Mitchell, or to one of them, before the patent was issued. There is no question that it appears from the conveyances of the other locators to John Batten and to A. M. Mitchell that the heirs of Mitchell are entitled to seven-twelfths of the Bowling Green, and five-twelfths of the Dashaway, as alleged in the complaint. But in their cross-complaint, the devisees of John Batten allege that Mitchell acquired the interests of some of the original locators in such manner, and under such circumstances, as that he should be adjudged an involuntary or constructive trustee of those interests for the use and benefit of the dev-

isees of John Batten, who are defendants and cross-complainants herein. The result of this claim, if sustained, would be to give to these devisees three-fifths of the Bowling Green, and two-thirds of the Dashaway. The trial court found the interests of the respective parties to be as alleged in the complaint, and also found all other material issues in favor of the heirs of Mitchell, and rendered an interlocutory decree, accordingly, ordering a partition of said claims so as to give to the heirs of Mitchell a portion of the Bowling Green equal in value to the undivided seven-twelfths thereof, and a portion of the Dashaway equal in value to the undivided five-twelfths thereof, and giving to the devisees of Batten the remainder of each claim, and appointing referees to make the partition. The devisees of Batten appeal from the interlocutory decree, and also from an order denying their motion for a new trial.

1. Counsel for appellants contend that the court erred in not finding and decreeing that, at the time of his death, Mitchell held the legal title to three-twentieths of the Bowling Green mine in trust for John Batten, and one-twelfth of the Dashaway mine in trust for John Batten and John Rolls. The principal grounds upon which counsel rest this point, as stated in the cross-complaint, and as the evidence on the part of the appellants' tends to prove, are substantially as follows. In January, 1873, John Batten, his two sons,—Thomas and George Batten,—A. M. Mitchell, and Edward Thomas came to an understanding and agreement to make a location of a portion of the mineral land which they and others afterwards located as the Bowling Green claim. After examining the ground, they concluded to locate 160 acres, which was 60 acres more than five persons were entitled to locate under the act of congress of 1872. It was thereupon suggested, probably by Mitchell, and agreed to by all the others, that they should use the names of three additional persons as locators, who would voluntarily convey their interest to the company of five after the location should be completed. For this purpose, Mitchell proposed the names of Preston and Newton, and Edward Thomas proposed William Thomas; and it was agreed by all that these names should be used as they were used. Between August 20, 1873, and November 10, 1874, George and Thomas Batten conveyed their interest to their father, John Batten. In October, 1873, William Thomas conveyed his interest to John Batten, Ed. Thomas, and A. M. Mitchell without any consideration. In November, 1875, Preston and Newton, without consideration, conveyed their interests to Mitchell. In November, 1879, Edward Thomas, for a valuable consideration, conveyed all his interest to Mitchell. Thus, John Batten and Mitchell acquired the title of all the other locators, and upon this title the patent from the government was obtained. It is upon the conveyances from Newton and Preston to Mitchell that the constructive trust as to the Bowling Green claim is alleged to have arisen. In the location of the Dashaway

claim a similar state of facts existed, with the difference that the names of five dummy locators were used, viz., Joseph Powell, William Mansfield, G. Wing, W. G. Long, and D. McLean; the real locators being John Batten, A. M. Mitchell, and John Rolls. Of these sham locators, one of them, W. G. Long, conveyed all his interest to Mitchell on the 30th day of March, 1880, without any valuable consideration. Hence it is claimed that Mitchell held two-thirds of the title thus acquired from Long, equal to one-twelfth of the whole, in trust for Batten and Rolls; and that, as Batten afterwards purchased the entire interest of Rolls, his devisees are equitably entitled to this one-twelfth part of the Dashaway claim. It is not claimed by counsel for appellants that there was any express trust either as to the Bowling Green or the Dashaway claim; but they contend that it was understood and agreed in both cases, by and between the real locators, that the names of the dummy locators were to be used for the equal benefit of the real locators, and that the taking of conveyances to himself, for his individual benefit, by Mitchell, from Newton, Preston, and Long, in violation of this understanding and agreement, was such a breach of confidence and good faith as that he should be adjudged a trustee for his associates. As to the original understandings and agreements in regard to the division of the land to be acquired through the sham locators, and in regard to whether Mitchell took the conveyances in question in violation thereof, and thereby acquired an unfair advantage of his associates, the evidence is mostly circumstantial, and more or less conflicting; but there is no conflict and no question that as matter of fact none of the three locators of the Bowling Green, or of the five locators of the Dashaway, above named as sham locators, had, or pretended to have, any interest whatever in either of those locations. They merely permitted their names to be used as locators to enable their friends to obtain possession of, and patents for, more mineral land than they were entitled to by law; and they executed conveyances to such friends without any valuable or lawful consideration therefor.

Section 2331 of the United States Revised Statutes provides that after the 10th day of May, 1872, "no such location [of placer claims] shall include more than twenty acres for each individual claimant." The policy and object of this law are to limit the quantity of placer mineral land which may be located by one person to 20 acres; and, although one person may obtain a patent for more than 20 acres, he can do so only by representing to the government that he is a purchaser of the excess from one or more *bona fide* locators, whose locations were made in conformity with the above statutory limitation as to quantity. For this purpose he is required to present, with his application for a patent, an authenticated abstract of his title, showing its derivation from lawful locations. The alleged agreements and understandings relied upon by the appellants are contrary to the express provision of the Revised

Statutes above quoted, and contrary to the policy of the express laws of the United States regulating the occupation, possession, and sale of the public mineral lands. The avowed purposes of those agreements were that, by false and fraudulent representations, the parties thereto should obtain from the government the title to about 150 acres of mineral land in violation of express provisions of law, and that they should make an equal division of the land thus obtained among themselves. Now that they have succeeded in thus obtaining the land, will a court of equity stoop to investigate and enforce those parts of the agreements and understandings relating to a division of that land among the conspirators? I think not. Civil Code, §1667; *Damrell v. Meyer*, 40 Cal. 166; *Huston v. Walker*, 47 Cal. 484; *Snow v. Kimmer*, 52 Cal. 624. The following language of this court in *Beard v. Beard*, 65 Cal. 356, 4 Pac. Rep. 229, is applicable to this case: "The entire transaction between the parties is tainted by fraud, and the plaintiff must content himself with so much of the benefit of it as he has already secured unchallenged. The reason why the common law says such contracts are void is for the public good, and we think that the public good requires that this transaction should be held to be void in all its parts. It was a contract which contemplated the perpetration of a fraud upon a court of justice, and we think it the duty of courts to discountenance and discourage such transactions to the utmost limit of their power." In the case at bar, a fraud upon the government was not only contemplated, but was actually and successfully perpetrated; and the appellants are shown to have "secured unchallenged" about one-half of the benefits thereof, with which they should content themselves. See, also, 1 Pom. Eq. Jur. §401, where, among other things in point here, it is said: "Where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves."

Counsel for appellants further contend that John Batten was in possession of, and had mined upon, a portion of the Bowling Green claim prior to the location thereof upon which the patent was obtained, and that this should be considered as an equity in favor of his devisees. It appears that he had inclosed by fencing about 50 acres, for agricultural purposes, several years before the location of the Bowling Green claim, and that he had mined in portions of the field thus inclosed. It also appears that a considerable portion of this field was taken into the location of the Bowling Green claim, and forms a part of it; but there is not sufficient evidence to prove that Batten ever located any part of the inclosure as a mining claim, or that he claimed possession by virtue of any such location prior to the location of the Bowling Green claim. It

seems to have been understood by all the locators that all the mineral land within Batten's inclosure was open and subject to location for mining purposes by any person qualified to locate; and one of the express reasons for locating the Bowling Green claim was to prevent others from locating mining claims within Batten's field. But, whatever may have been the prior rights or equities of Batten, he voluntarily surrendered them to the locators of the Bowling Green claim; and, by his application for a patent upon the Bowling Green location, he represented to the government that that location was valid and lawful, which implied that the land was vacant mineral land, unoccupied by any valid location prior to that of the Bowling Green. Under these circumstances the patent itself is conclusive as against the devisees of Batten, that the location upon which it was founded was a valid location upon unappropriated mineral land. The appellants also claim a similar equity in the Dashaway mine, founded upon alleged prior rights or equities of John Rolls. But these are quite as destitute of merit as those of John Batten in the Bowling Green claim, and may be disposed of in the same way. John Rolls was one of the three real locators of the Dashaway claim, and on March 10, 1882, conveyed all his "right, title, and interest," in and to that claim, as afterwards described in the patent, to John Batten. There is no evidence tending to prove that Rolls, after the location of the Dashaway claim by the three real and five dummy locators, claimed any right or interest therein as thus located other than such as he acquired by virtue of that location, nor does his deed to Batten purport to convey any other or prior interest; and it was upon that location that Batten and Mitchell applied for and obtained the patent for the Dashaway claim, thereby representing to the government that the location was lawful and valid.

2. It is contended that the court erred in decreeing a partition of the property and in refusing to order a sale and division of the proceeds. As a rule, the Code of Civil Procedure requires partition, but, as an exception to this rule, provides for a sale, "if it appear that a partition cannot be made without great prejudice to the owners." Section 752. Section 763 provides that, "if it appear by the evidence, * * * to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court." Whether or not a partition can be made without great prejudice to the owners is a question of fact, the decision of which is not to be aided by judicial notice of any fact or circumstance not proved. Under the Code rule, the party asking for a sale instead of a partition has the burden of proving that a partition cannot be made without great prejudice to the owners. The appellants assumed this burden, but, in the opinion of the trial court, failed

to sustain it. The evidence on this point is substantially conflicting as to whether or not a partition would be prejudicial to the owners in any degree. On the part of the devisees of Batten, Rolls, Joy, and George Batten testified that in their opinion a partition would be prejudicial to the interests of the owners, and that a sale would be preferable. On the part of the heirs of Mitchell, Livingston, Preston, and Sarah Mitchell testified that in their opinion a partition would not be prejudicial to the owners, and would be preferable to a sale. The witnesses on both sides stated the reasons for their opinions. I therefore think the finding that partition can be made without great prejudice to the owners is justified by the evidence.

3. It is contended that the court erred in overruling the demurrer to the complaint on the ground of misjoinder of Sarah Mitchell, administratrix, as a party plaintiff with Sarah Mitchell in her individual capacity. While I am inclined to the opinion that the court did not err in overruling the demurrer, I think it unnecessary to a proper and just disposition of this appeal to decide the question, since it appears that the alleged error, admitting it to be such, did not injure the appellants. The decree as to the appellant's interest in the land is the same as it must have been if the administratrix had not been a party. No relief to which appellants have a right to object was granted to the administratrix. The decree limits the right of the administratrix to sell land for the payment of debts of the estate to the portion allotted to the heirs of Mitchell by the partition, which is certainly not to the prejudice of the appellants. With this exception, the joinder of the administratrix as a party had no effect upon the trial or upon the decree. I think the decree and order appealed from should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the decree and order appealed from are affirmed.

84 Cal. 95

In re BAIRD. (No. 12,774.)

(Supreme Court of California. May 8, 1890.)

RES JUDICATA—FRAUDULENT CONVEYANCE—
INSOLVENCY.

1. An insolvent's petition to be discharged from his debts was opposed because he had executed a certain fraudulent deed of lands. To this he answered, setting up a prior adjudication in an action brought by his assignee to set the deed aside, wherein it was adjudged not fraudulent, but valid. *Held*, the answer was sufficient, and a demurrer thereto was improperly sustained.

2. It was error to exclude the judgment roll in said action when offered in evidence.

Department 2. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

N. C. Briggs, for appellant. McCroskey & Hudner, for appellee.

SHARPSTEIN, J. On August 17, 1886, said insolvent filed in the superior court of San Benito county his petition and schedules praying to be discharged from his debts as

provided by the insolvent act of 1880. Thereafter, in due course of procedure, the creditors named in the schedules appeared, and on September 5, 1887, filed their written opposition to such discharge. The specified grounds of such opposition were: *First*, the execution of a deed dated August 10, 1886, by the insolvent to Elsie Briggs, of a tract of land; *second*, the statement in his schedules of his indebtedness to one G. H. Briggs for a greater sum than he owed said Briggs. During the trial before a jury, against the insolvent's objection and exception, the court permitted the creditors to amend the grounds of their opposition by adding a third, to-wit: *third*, that said insolvent on August 10, 1886, made a fraudulent gift, transfer, and conveyance of personal property to said G. H. Briggs. To this amendment the insolvent demurred and objected—*First*, because the charge is not an amendment, but an original charge, and was not filed within the time permitted by law; *second*, that the charge did not state facts sufficient to constitute grounds of opposition. The demurrer was overruled, and the insolvent excepted. Insolvent then, by leave of the court, filed an amendment to his answer to the first charge of said creditors. The amendment set up a former adjudication in an action brought by the assignee of the insolvent to set aside said deed from insolvent to said Elsie Briggs on the ground that the same was fraudulent and void, by which it was adjudged that said deed was not fraudulent, but was valid. This was demurred to by the creditors on the grounds—*First*, that it did not state facts sufficient to constitute a defense; *second*, that it did not state that said alleged judgment had not been appealed from, or that it had become final; *third*, that it did not appear therefrom that the parties are identical, or that the subject of the litigation is identical, in the action referred to in said answer, and in this action or proceeding. The demurrer was sustained, and insolvent excepted. The court erred in sustaining said demurrer.

Afterwards insolvent offered in evidence the judgment roll in said action, to the admissibility of which the court sustained an objection of the creditors. In so ruling, we think the court erred.

After a careful examination of the evidence introduced by the respective parties, we are forced to the conclusion that it does not tend to prove any of the alleged grounds of opposition to the discharge of the insolvent. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; MCFARLAND, J.

84 Cal. 168

BUNTING v. SALTZ *et al.* (No. 12,241.)

(Supreme Court of California. May 24, 1890.)

SALE—CHANGE OF POSSESSION—EVIDENCE—INSTRUCTIONS.

1. In an action for the wrongful attachment and sale of plaintiff's wagon, to satisfy the debt of plaintiff's vendor, her right to recover depends not only on a transfer to her, but on her "actual" possession at the time of the taking, under Civil Code Cal. § 3440, providing that a transfer of per-

sonalty, unaccompanied by an immediate delivery, and followed by an actual and continued change of possession, is conclusively presumed to be fraudulent, and therefore void, as against creditors of the vendor.

2. Plaintiff's vendor, who was her son, executed to her a conveyance of his homestead, which was void because of the non-joinder of his wife. On the homestead was the wagon. Plaintiff was never near it personally. After the conveyance the vendor visited the premises occasionally only, but his wife and her father remained there, and they were made plaintiff's agents to look after her interests in the premises, and the property, including the wagon, transferred to her. The vendor's children also continued to live on the place. *Held*, that the jury were not warranted in finding that the sale was "accompanied by an immediate delivery and followed by an actual and continued change of possession." *PATERSON, J., dissenting.*

3. In no conceivable case would it be proper to instruct that "if you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor."

4. It was error to refuse to instruct that "the possession which the law requires the vendee to have after a transfer to him of personal property is not sufficient if it amounts simply to constructive possession or the mere possession which the law attaches to the ownership of land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title, then or thereafter, the mere transfer of ownership to the land is not sufficient to constitute a change of possession of the personal property so sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it."

5. Defendants were also entitled to an instruction that a conveyance of a homestead by the husband alone, if his wife be living, passes no title even to an innocent purchaser for value.

6. An appeal from a judgment which is not taken within a year after its entry, as required by Code Civil Proc. Cal. § 937, will be dismissed.

In bank. On rehearing. For former report, see 22 Pac. Rep. 1132.

Thos. C. Huxley, for appellants. *Moore & Reed* and *F. B. Ogden*, for respondent.

SHARPSTEIN, J. This is a case in which the plaintiff's right to recover depends not only upon a transfer to her of the property which, she alleges, was wrongfully and unlawfully taken from her possession and converted by the defendants to their own use, but likewise upon her actual possession of it at the time of such alleged taking and conversion. If the transfer was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, it is conclusively presumed to be fraudulent, and therefore void as against the creditors of the vendor. Civil Code, § 3440. "Actual" means existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, virtual, or theoretical. If there is no evidence of an actual change of possession of the property claimed to have been transferred by the plaintiff's vendor to her, then the verdict of the jury was not justified by the evidence, and the defendant's motion for a new trial should have been granted on that ground, and the order denying said motion must be reversed. The plaintiff resides in the state of New York, and is not shown to have been ever in this state. Whatever right she had in the wagon in controversy she acquired from

her son, John A. Bunting, who, at the time of and before the transfer of it to her, resided with his family upon a small farm in Alameda county, in this state. In the month of October, 1883, Fleda O. Bunting, wife of John A. Bunting, duly filed a declaration of homestead upon said farm. There is no evidence that said homestead has ever been abandoned. In December, 1883, John A. Bunting made a conveyance of said farm to his mother, plaintiff herein, but Fleda O. Bunting, his wife, did not join in the execution of said conveyance. There is evidence tending to prove that after the execution of said conveyance John A. Bunting ceased to carry on farming upon said farm, and spent most of his time elsewhere, occasionally returning to the farm where his wife and children remained. There is also evidence tending to prove that his wife and her father, one Overacker, were authorized by the plaintiff to act for her, as her agents, in regard to the interests acquired by her from the conveyance and transfer of property to her by her son, John A. Bunting. The deed of John A. Bunting, purporting to convey to plaintiff the premises upon which a homestead had been impressed, was wholly inoperative as a conveyance of such homestead, and did not constitute any evidence of a change of possession of the premises, either actual or constructive. "The possession by the plaintiff of the farm upon which the personal property was when it was purchased by him, provided it was an actual and exclusive possession, would be strong evidence of the like possession of such personal property." *Cahoon v. Marshall*, 25 Cal. 201. "If the actual and exclusive possession of the farm by the plaintiff would be strong evidence of his like possession of the personal property, then the possession of the farm by the vendors, or the concurrent possession of it by the vendors and vendee, would at least tend very strongly to show that the plaintiff had not that actual possession of the personal property necessary to place it beyond the reach of the creditors of the vendor." *Id.* Aside from the deed of John A. Bunting to the plaintiff, which did not convey any right, title, or interest in the premises, the transaction, taking the view of it most favorable to the plaintiff, amounted to nothing more than an authority from him to her to take actual possession of the wagon, which she failed to do. Therefore the transfer is conclusively presumed to be fraudulent and void as against the defendants, who were creditors of the vendor while he remained in possession. The language of section 3440 of the Civil Code is too plain to admit of construction. It means what the Statutes of 13th and 27th Elizabeth were construed to mean in *Edwards v. Harben*, 2 Term R. 587, and in *Hamilton v. Russel*, 1 Cranch, 310.

We think the opinion of this court in *Engles v. Marshall*, 19 Cal. 320, quite as applicable to this case as to that. In that case the court said: "Upon examining the record in this case, we think the judge below did not err in instructing the jury that the facts showed no valid sale for want of such change of possession of the

property in controversy as is required by the statute of frauds. The property seems to have remained, to all external appearances, in the same condition in which it was before the sale, with nothing to notify third persons of the sale or of the claims of the new owner. In *Stevens v. Irwin*, 15 Cal. 506, we said: 'Delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the word of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely when it is *bona fide* and openly taken, and it is kept for such a length of time as to give general advertisement of the *status* of the property and the claim of it by the vendee.' An application of these principles to the evidence shows that the case of the plaintiff is within the statute of frauds."

One of the instructions given to the jury contains this clause: "If you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor." This was excepted to, and the exception must be sustained. In no conceivable case would such an instruction be proper. The defendants requested the court to give the following instructions, which the court refused to give, and defendants excepted to that ruling. They should have been given. The following are copies of them: "The possession which the law requires the vendee to have after a transfer to him of personal property is not sufficient if it amounts simply to constructive possession, or the mere possession which the law attaches to the ownership of land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title then or thereafter, the mere transfer of ownership of the land is not sufficient to constitute a change of possession of the personal property so sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it. A conveyance of homestead property by the husband alone, if his wife be living, passes no title to the property so conveyed. The law requires both the husband and wife to unite in such conveyance. Even an innocent purchaser for value acquires no right whatever to a homestead so conveyed to him by the husband alone." There are many more exceptions to rulings of the court which, in our opinion, did not affect the substantial rights of the parties, and we therefore disregard them. There is in this case an appeal from the judgment as well as from the order denying the motion for a new trial. The appeal from the judgment was taken more than a year after its entry, and is therefore dismissed. The order denying the motion for a new trial is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; FOX, J.

PATERSON, J. I concur, but cannot say that the evidence was insufficient to warrant the jury in finding that the sale was "accompanied by an immediate delivery, and followed by an actual and continued change of possession," within the meaning of the phrase as explained and illustrated in the decisions. I cannot see that any harm was done by the refusal to give instruction numbered 15. As to other matters I concur in the opinion of Justice SHARPSTEIN.

84 Cal. 544

MADDEN v. OCCIDENTAL & ORIENTAL S. S. Co. (No. 12,799.)

(*Supreme Court of California.* May 26, 1890.)

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Taylor & Craig, for appellant. *W. H. L. Barnes*, for respondent.

PER CURIAM. The motion to dismiss the appeal is denied. We remark that the respondent's attorney admitted service of a copy of the interlined transcript without objection. The objections to the transcript, which are very technical, we regard as of little or no weight. At any rate, we do not think the appeal should be dismissed.

84 Cal. 295

BEAMER v. FREEMAN. (No. 13,260.)

(*Supreme Court of California.* June 14, 1890.)

ATTACHMENT—CHattel MORTGAGE—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An attachment is good as against a prior mortgage which was not recorded until after the attachment.

2. Where an attachment lien, superior to a recorded mortgage because levied before the recording thereof, was dissolved by an assignment made less than a month after the levy, as provided in section 17 of the insolvency act of California of 1880, the title to the chattel vested in the assignee for the benefit of all the creditors alike, since the attachment prevented the subsequent recording of the mortgage from vesting the title in the mortgagee.

Commissioner's decision. Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Hudson Grant, for appellant. *R. Clark*, for appellee.

GIBSON, C. Action of replevin. Judgment passed for defendant, from which the plaintiff appeals. November 4, 1882, Jeans executed and delivered to defendant a chattel mortgage of a portable steam-engine, then in Yolo county, to secure the payment of a promissory note for \$1,150. This mortgage was not recorded until August 13, 1886, when it was placed of record in Yolo county, and on the 16th day of the same month it was recorded in San Joaquin county; Jeans having on the 1st of the same month, in the same year, removed the engine to the latter county. August 11, 1886, Baker & Hamilton, creditors of Jeans, attached the engine in San Joaquin county; Jeans having retained the possession of it until that time. On

the 20th of the same month, nine days after the attachment was levied, Jeans was adjudged an insolvent debtor, and the plaintiff was by his creditors elected as his assignee; and, after having qualified as such, the clerk of the superior court of Yolo county, as required by law, executed and delivered to plaintiff an assignment of all the property of the insolvent debtor, Jeans. Thereupon the sheriff of San Joaquin county, who held the engine under the attachment levy already referred to, delivered it to the plaintiff as such assignee. The engine, which is of the value of \$800, was then taken from plaintiff's possession by defendant, Freeman, who claimed it by virtue of the terms of his chattel mortgage upon it, and, upon demand of the assignee therefor, refused to return it to him. Between the date on which the mortgage was made, and that on which it was recorded in Yolo county, three years and nine months had elapsed, during which time Jeans incurred numerous liabilities, among which was the one upon which Baker & Hamilton obtained their attachment, who with other creditors have filed their claims against the insolvent's estate. It thus appears that the contest is between the creditors of the insolvent and his mortgagee under the chattel mortgage.

A mortgage of personal property is void against the creditors of the mortgagor unless it is recorded in the same manner as grants of real property. Civil Code, § 2957. This law substitutes the record of the mortgage for the actual delivery and continued change of possession made essential to effect transfers in other cases by section 3440, Id. *Martin v. Thompson*, 63 Cal. 3; *Berson v. Nunan*, Id. 550. Appellant contends that the effect of the first-mentioned provision of the Code is to make an unrecorded chattel mortgage absolutely void as to creditors, and all other persons except the parties to it, and that whether the creditors secure liens by attachment, judgment, or execution before the mortgage is recorded makes no difference. The position assumed regarding the creditors is not free from doubt. In *Jones, Chat. Mortg.* § 237, it is stated: "The only effect of delay in recording or filing a mortgage is to render it void as against intervening purchasers or mortgagees or creditors obtaining liens by attachment, judgment, or execution." But, from the view we take of this case, which will let the property in dispute inure to the benefit of all the creditors of the insolvent in the insolvency proceedings, we deem it unnecessary to resolve this doubt. We think it clear, however, that, as Baker & Hamilton acquired a lien by attachment upon the engine before the mortgage upon it was recorded, that as to them the mortgage is void under section 2957 of the Civil Code, and prevented the title of the mortgagor from passing to the mortgagee. See *Shipman v. Insurance Co.*, 29 Conn. 254. The lien so acquired by them was within one month prior to the commencement of the insolvency proceedings, and was, by force of the provisions of section 17 of the insolvency act of 1880, dissolved when the assignment of all the property of the in-

solvent was made pursuant to that section, which reads as follows: "As soon as an assignee is appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution." What was the effect of the dissolution of the attachment? Assuming, without deciding, in accordance with the views of the trial court, that, when the mortgage was placed of record, it became operative against all the creditors whose right to the property of the insolvent did not attach until he was adjudged to be such, still the fact remains that, before the recording of the mortgage, Baker & Hamilton acquired a valid lien upon the mortgaged chattel. This lien, though, was acquired subject to the provisions of section 17 of the insolvent act, which, when brought into operation, deprived them of their special lien. Now, to hold that the release of the lien thereby made was absolute, and deprived them of all right to pursue the property in the insolvency matter, would give an advantage to the mortgagee, to their detriment, which he (the mortgagee) failed to acquire in the first place by his laches in not recording his mortgage, and in effect convert the insolvent act, which is designed to protect creditors, into an instrument of wrong against them. It must receive a reasonable construction in order to effectuate its object and promote justice. Applying this rule to it convinces us that the dissolution of the attachment made by it was not absolute, so as to let the record of the mortgage intervene, and cut off the right of Baker & Hamilton, and leave them with other creditors, who might have been up to that time without recourse against the chattel, but only released the lien and transferred the title to the property to the assignee as part of the assets of the insolvent under section 17 of the above act; and, as the title of the mortgagor was prevented from passing to the mortgagee by the attachment of Baker & Hamilton, it remained in the mortgagor until it was by operation of law transferred to the assignee as the representative of all the creditors. Such transfer made him the owner of the chattel, but in trust for the creditors of the insolvent, and as such owner he is entitled to recover either it or its value in order to execute his trust. Insolvent Act 1880, § 21. The engine, then, having become a part of the assets of the insolvent, is it there for the benefit of Baker & Hamilton alone, or are all the other creditors entitled to a *pro rata* share

of its proceeds? "All creditors," declares section 31 of the same act, "whose debts are duly proved and allowed, shall be entitled to share in the property and estate *pro rata*, without priority or preference whatever other than as provided in this act and in section 1204 of the Code of Civil Procedure." None of the exceptions referred to embrace this case. We therefore think it apparent that, as the assignee has no other power to discriminate between the creditors of the insolvent, the chattel in dispute must be regarded as a portion of the general assets, which must be disposed of for the common benefit of all the creditors.

The complaint, which is excepted to by the respondent, states a complete cause of action in replevin. In it is set forth the making of the mortgage on the engine; the failure to record it until after the attachment of the engine by Baker & Hamilton; the subsequent adjudication of the insolvency of the mortgagor; the appointment of plaintiff as assignee in the insolvency proceedings; the assignment to the latter of all the property of the insolvent; the taking of such property, including the engine, into the possession of the assignee; the value of the engine; the taking of the same by the defendant from the possession of the assignee; the demand of the assignee for the return of the engine; the defendant's refusal to restore it, and the damages sustained by its detention; together with a prayer for the restitution of the property or its value, and for damages. As the findings show all the facts first above stated, and cover all the issues except as to the one relative to damages for the detention of the engine, and the appellant seems willing to waive such damages by requesting that judgment in his favor be ordered upon the findings, we therefore advise that the judgment be reversed, and the trial court directed to enter judgment in favor of plaintiff upon the findings in accordance with this opinion.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to enter judgment in favor of plaintiff on the findings in accordance with the above opinion.

(84 Cal. 295)

SCRIVNER v. DIETZ. (No. 12,750.)

(Supreme Court of California. June 7, 1890.)

MORTGAGES—MERGER—INTERVENING LIENS.

A land-owner, to secure money borrowed from a bank, executed a mortgage to the bank's manager. Subsequently, certain of the land-owner's creditors caused an attachment to be levied on the mortgaged property, and thereafter, but before rendition of judgment in the attachment proceedings, the land-owner, with the consent of the attaching creditors, conveyed the property to a trustee to sell, and apply the proceeds (1) in payment of the bank's mortgage, (2) judgment liens, and (3) unsecured creditors. Held, that a subsequent conveyance of the land, subject to the same trusts, by the owner and the trustee, to the bank's manager, in whose name the mortgage to the bank had been executed, would not merge the bank's mortgage lien in the legal title so as to enable a subsequent purchaser under the judgment in the attachment

proceedings to hold the land freed from the lien of the mortgage, as equity will not permit the acquirement of the legal title by the mortgagee to operate as a merger of the mortgage where there are intervening liens.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Davis & Hill and E. C. Robinson, for appellant. Winaus, Belknap & Godey and J. B. Harmon, (D. P. Belknap, of counsel,) for respondent.

Fox, J. Action for foreclosure of mortgage. Decree for plaintiff, from which the defendant, Dietz, holding under a conveyance subsequent to the mortgage, appeals. The case comes up on the judgment roll. The only question in the case is whether the mortgage lien was extinguished by merger into the legal title. The facts, briefly stated, are: The entire tract covered by the mortgage was conveyed by Blaise to Grant for the sum of \$25,000. Of this sum, \$6,000 was paid down, and a deed executed, and placed in escrow to be delivered upon payment of the balance. Before the balance was paid, Grant became involved. Mechanics' liens were filed upon the property. Other creditors were pressing, and among the rest the London & San Francisco Bank, to which Grant was indebted in the sum of \$5,000. To secure this last indebtedness, and a further advance of \$1,000, Grant gave his note to the bank for \$6,000, and executed a mortgage of the property to Latham, the then manager of the bank. The property was in one body; but we infer, from the manner in which it is referred to in the briefs, it was used or handled as three parcels differing in character, and differently occupied. In the briefs they are designated as parcels 1, 2, and 3; and a specific description is given of each. Subsequent to the date and record of the mortgage, and before any further conveyance of the premises had been made, the entire mortgaged premises were attached at the suit of McAfee and Spiers; and, under judgment recovered in that case, after the legal title of the property had passed into Latham as hereinafter stated, parcel No. 3 of the mortgaged premises was sold by the sheriff, and bid in by McAfee and Spiers, who in due course received the sheriff's deed therefor, and subsequently conveyed the same to the defendant Dietz. After the levy of the attachment, but long before the judgment, Grant, the mortgagor, conveyed the entire mortgaged property to Taylor in trust to sell the same, and use the proceeds of the sale, which he was authorized to make either at public or private sale, in paying off the debts of Grant in the following order: (1) the balance of the purchase money due to Blaise; (2) amounts due under mechanics' liens; (3) the debt secured by the mortgage here in suit; (4) judgment liens; and (5) unsecured debts of Grant *pro rata*. Very shortly after this conveyance and the creation of this trust, Grant and Taylor united in a conveyance of the whole property to Latham. The court finds that at the time of this conveyance there was a verbal agreement between Grant, Taylor, and Latham that the latter take the title sub-

ject to the same trust, and with the same powers, as Taylor held it. Respondent claims that this fact could not be proved by parol, and the trust could not be created by parol. The answer to this is that the trust was already created by the deed to Taylor, which was of record, and of which Latham had full notice. That trust could not be revoked without the consent of all the persons for whose benefit it was created,—the creditors of Grant. Latham, therefore, necessarily took subject to the trust, and the title which he received was charged in his hands with the same trust as it had been in the hands of Taylor. No agreement on the subject was necessary, and none could have been made by the parties acting in the matter which could have released the trust. Without the consent of the beneficiaries, the trust could only be extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful. Civil Code, § 2279. Latham having taken with knowledge of the trust, he occupied the same position as the original trustee. *Price v. Reeves*, 38 Cal. 457. Equity would enforce the trust against him as it would have done against the original trustee. *Lathrop v. Bampton*, 31 Cal. 17. We should have stated before that McAfee and Spiers, the attaching creditors, consented at the time to the conveyance to Taylor and the creation of the trust, and that the property should be sold for the purposes named in the trust. Afterwards, and before the recovery of judgment by McAfee and Spiers, Latham, upon due notice, sold at public auction, in execution of such trust, that part of the property designated as "parcel No. 1." The sale realized, over and above expenses, \$19,792.62. After the sale, and pending the receipt of the money, the bank advanced the money to pay off the balance of the purchase price due to Blaise, amounting, with interest, to \$20,186.30. Upon receipt of the money on the sale a few days later, Latham paid the same into the bank on account of the money so advanced on the purchase price paid Blaise. The land so sold was formally released by the proper parties from the lien of both the mortgage and the attachment. Subsequently Latham assigned the mortgage to the plaintiff, his successor in the management of the bank, in trust as he had held it, as security for the payment of the debt due the bank, and also made a conveyance of the land which remained unsold to the plaintiff. This conveyance is described in the findings as one made to the plaintiff as trustee for the bank; but, under the authorities cited, the title so conveyed was of course charged with the same trust as in the hands of Latham. After all this had transpired, judgment was recovered in the Case of McAfee and Spiers; and under such judgment sale was made of parcel No. 3, and the title thus acquired came down to defendant Dietz. The decree of foreclosure is for the sale of parcels 2 and 3, described in the decree as "parcels 1 and 2." Dietz claims that his title relates back to the date of the attachment, and that, the mortgage having been extinguished, as he claims, by the merger of the same into

the superior title, he now holds the parcel purchased by him released from any claim of plaintiff. Merger is always a question of intent when the question is as to whether a mortgage lien is merged in the fee, upon both being united in the same person. *Jones, Mortg.* §§ 848, 856, 857, 870, 872, 873. Equity will keep the legal title and the mortgagee's interest separate, although held by the same person, whenever necessary for the full protection of the person's just rights. *Carpentier v. Brenham*, 40 Cal. 221. If there is an intervening mortgage, the acquirement of title will not operate as a merger. *Brooks v. Rice*, 56 Cal. 428. The same rule would apply as to an intervening attachment or other lien. The same rule as to merger is laid down in *Rumpp v. Gerkens*, 59 Cal. 496. The rule would apply with still greater force in this case, where the mortgage was held in trust for one person, and the title in trust for another. This being the only question in the case, the judgment is affirmed.

We concur: PATERSON, J.; WORKS, J.

86 Cal. 500

WATSON v. SUTRO. (No. 12,596.)

(*Supreme Court of California.* June 7, 1890.)

VENDOR AND VENDEE—BONA FIDE PURCHASERS—
CONSTRUCTIVE NOTICE—TRUSTS—ESTOPPEL—
LIMITATIONS.

1. Tenants in common of land conveyed it to a trustee by a deed absolute on its face, which was duly recorded; the trustee executing a declaration of trust, which was not recorded, reciting that the deed to him by the parties, naming them, had been made to facilitate the perfecting of title. Subsequently one of the tenants in common was substituted as trustee, and he also executed a declaration of trust to the same effect as the first, but omitting the name of one of the tenants in common, owning an undivided five acres, and crediting his share to one of his co-tenants. *Held*, that a purchase of this five acres by the substituted trustee from the co-tenant did not constitute him an innocent purchaser, as it was his duty, when he accepted the position of trustee, to know for whom he was acting.

2. In an action by the owner of the undivided five acres to charge the substituted trustee as a purchaser with notice, it appeared that the co-tenant who sold them had acted as administrator of the estate of plaintiff's father-in-law, and had acquired 15 acres, as tenant in common, during such administration. Long before the conveyance in trust, he had conveyed the five acres now in dispute to plaintiff, whose deed was duly recorded. After the conveyance in trust, plaintiff, with his wife and other heirs, in settlement of the administration, executed to the co-tenant a written instrument reciting that the latter, during the course of his administration, had acquired land, "the legal and equitable title to which is now in him," and empowering him to sell such land. *Held*, that this instrument conferred no authority on the co-tenant to sell the five acres previously conveyed to plaintiff, as the co-tenant had neither the legal nor the equitable title thereto; the legal title being in the trustee, and the equitable title in plaintiff.

3. The distinct statement in the power of sale that it embraced only such lands, "the legal and equitable title to which is now" in the co-tenant, will limit a subsequent general description of such land as "15 acres or thereabout," and these general words will not enlarge the power of sale previously conferred.

4. Where the attorneys for a purchaser from the substituted trustee have examined all the various conveyances under which he claims the five acres now in dispute, their knowledge is the pur-

chaser's knowledge, and he is chargeable with constructive notice of all that appears on the face of the instrument; and the fact that the attorneys made a mistake of law in interpreting the power of sale, and advised the purchaser that it embraced the five acres now in dispute, does not constitute him an innocent purchaser thereof.

5. As plaintiff deceived neither the substituted trustee, nor the purchaser from him, the power of sale, which was accessible to both, and which was actually examined by the attorneys for the latter, does not estop plaintiff from asserting his title to the land.

6. Code Civil Proc. Cal. § 752, which permits an action of partition to be brought by a tenant in common having an estate of inheritance, does not confine the right of action to the holder of the legal title, but a tenant in common having an equitable estate of inheritance may establish his right to the land, and have a partition thereof, in one and the same action.

7. As plaintiff was ignorant of the omission of his name from the second declaration of trust, and of the conveyance by his co-tenant to the substituted trustee, the possession of the substituted trustee, who was also plaintiff's co-tenant, must be deemed to have been for his benefit; and hence Code Civil Proc. Cal. § 319, which provides that plaintiff in an action affecting the title to land must have been in possession thereof within five years of bringing the action, and section 322, which provides that the possession of land by one entering under a written instrument purporting to convey it shall be deemed to be adverse, have no application to the case.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by W. C. Watson against defendant, Sutro, to charge defendant as purchaser of land with notice of plaintiff's title. There was a judgment in plaintiff's favor, and defendant appeals. Code Civil Proc. Cal. § 319, provides: "No cause of action * * * arising out of the title to real property can be effectual unless it appears that the person prosecuting the action * * * or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted." Section 322 provides: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title exclusive of this right, founding such claim upon a written instrument as being a conveyance of the property in question * * * and that there has been continued occupation and possession of the property included in such instrument, * * * or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely."

Lloyd & Wood, for appellant. Stanley, Stoney & Hayes, for respondent.

THORNTON, J. On the 12th day of January, 1870, John H. Baird, the plaintiff, W. C. Watson, E. L. Sullivan, and nine other persons, tenants in common of the tract hereinafter mentioned, conveyed to David W. Connolly, by deed, bearing date the day just named, a certain parcel of land, situate in the city and county of San Francisco, known as the "Byfield Tract." The consideration named in the deed was one dollar. It was acknowledged and recorded on the 29th of the month and year

above mentioned. Subsequently other deeds were executed to Connolly of interests in this tract, which, as they do not figure in the controversy, need not be mentioned further. The Byfield tract is in that portion of the city and county of San Francisco affected by the provisions of the act of congress of March 8, 1886, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco." On the 25th of January, 1870, Connolly executed to the parties above mentioned and referred to an instrument in writing, reciting the conveyance to him by the parties (naming them) of their several interests in the Byfield tract, and further reciting that such conveyance was made for the purpose of facilitating the settlement of the title to the same, by deeding to the city and county of San Francisco the reservations made for public purposes by the outside land committee of the board of supervisors of the city and county, and for the procurement of the title of the city and county to the said tract to him. This instrument then sets forth that Connolly binds himself, his heirs and assigns, as soon as the objects above stated shall have been accomplished, to reconvey to his grantors their respective proportions of the tract as shall remain in it after deducting the reservations made by the committee. This instrument, called the "Connolly Declaration of Trust," was acknowledged on the day it bears date, but was not recorded until the 25th day of June, 1880. The above instrument clearly sets forth a trust, in which Connolly was the trustee, and the other persons named in it were the *cestuis que trustent*. On the procurement of the title of the city, the tract so acquired was to be conveyed to the proper claimants, as above set forth. Connolly was to look to the matter referred to for all the beneficiaries of the trust, adjust all matters necessary to procure the title from the city and county of the lands referred to, execute the necessary conveyances to the city of the portions reserved, and then to reconvey, as above stated. Of these beneficiaries, the plaintiff, Watson, was one expressly named in the instrument executed by Connolly on the 25th day of January, 1870. Deeds were subsequently executed to Connolly by the city and county, of the land to which he undertook to procure title. These deeds were three in number, executed in the months of March, April, and September, 1870, and were recorded on the day of their date. The lands thus conveyed to Connolly include the parcel in controversy here. Afterwards, on the 2d day of December, 1871, Connolly executed to John H. Baird, who was one of his grantors, and one of the beneficiaries under his declaration of trust, a deed absolute in form, and purporting to convey to the grantee the Byfield tract. This deed was recorded on the 20th day of August, 1872.

It is found as a fact that the deed just above mentioned was executed by Connolly, and accepted by Baird, without consideration, and subject to, and in furtherance of, the trusts upon which Connolly was then holding title to the premises, and with full knowledge of the trusts un-

der which Connolly held the property which he conveyed to him. In fact it seems that Baird was but a substituted trustee substituted in place of Connolly,—and, from what subsequently occurred, so substituted with the consent (of what may have appeared to Baird) of all the beneficiaries; for on the 3d day of January, 1872, Baird executed a declaration of trust in which it is set forth that the Byfield tract, less a portion reserved for a public park, had been conveyed to him in trust, and was held by him in trust, for the persons named in this declaration. In this declaration the share of each is specifically set forth, Baird's own share is stated to be 41-160, Sullivan's 15-160, and others in like manner sufficient to cover the aggregate 160 shares. It should be remarked here that this tract was supposed to contain 160 acres, and the proportion of each was designated by a fraction, in which the supposed number of acres was taken as the denominator. Among the names of the owners or beneficiaries in Baird's declaration of trust, the plaintiff's name does not appear. E. L. Sullivan's name appears in it as the owner of 15-160, as above stated. The controversy in regard to the land involved herein turns in great part on the disappearance of Watson's name from the list of beneficiaries, and the appearance of Sullivan's name for a share or proportion which seems to include both his share and that of Watson's. Watson's share had been conveyed to him by Sullivan on the 10th day of December, 1862, which specified as the portion conveyed 5-160 of the Byfield tract. This conveyance purported to be for value, and was properly recorded on the 4th day of December, 1865. All the parties to the Connolly deed claimed under mesne conveyance from one John K. Moore, which conveyance had been properly recorded prior to the date of the deed to Connolly. The findings show that at the date of the deed just mentioned to Connolly, the 12th day of January, 1870, Sullivan held 15-160 of the Byfield tract after his conveyance to Watson. He subsequently conveyed 5-160 to another beneficiary, Sharpstein, by deed dated the 7th day of May, 1868, leaving in him 10-160 of the tract, when, on the 12th day of January, 1870, he joined in the execution of the deed to Connolly. On the 1st day of February, 1879, Sullivan executed to Baird a deed, purporting to be in consideration of \$10,000, which conveyed to Baird certain lands by the following description: "All the interests of the first party in and to the tract of land situate in the city and county of San Francisco, state of California, known as the 'Byfield Tract,' the interest of said first party in said tract of land being about thirteen acres, more or less," which deed was duly acknowledged on the 18th of February, 1879, and on the same day recorded in the proper office of the city and county of San Francisco. It is found that, at the date of this deed, Sullivan had no greater interests than he had on the 12th of January, 1870, the date of the deed to Connolly of his 10 undivided 160th parts. In June, 1880, the defendant, Sutro, purchased of Baird the interest which Baird claimed to own in the Byfield

tract, which Baird represented was 55-160 of the tract. This quantity was made up of his (Baird's) 40-160, and the 15-160 which he claimed had been sold and conveyed to him by Sullivan. This 15-160 was represented by Baird to Sutro as embracing the 5-160 which Sullivan in 1862 had conveyed to Watson. The negotiation for the purchase by Sutro commenced in 1880, and was consummated by a deed from Baird to him, bearing date the 26th of that month. This deed purported to convey 15-160 of the property described in the complaint, which was the same proportion of the Byfield tract, after the deduction of the reservation above mentioned. This deed was for a valuable consideration, and was executed by Baird, and accepted by Sutro, as a conveyance of the 10-160 of Sullivan, and the 5-160 of Watson. About the same time, Sutro acquired and received conveyances from other beneficiaries of their interests to the Byfield tract; but, as they do not bear on the questions to be determined herein, they need not be further adverted to. This action was brought by the plaintiff to charge Sutro as purchaser with notice of his interest, 5-160, in the tract above mentioned, as described in the complaint, and for a partition. The court below found that Sutro was a purchaser with notice of Watson's equitable rights, and charged him as a trustee for Watson to the extent above mentioned. The question to be here passed on relates to the sufficiency of the evidence to justify the above finding of the court.

Pending the negotiations between Sutro and Baird for the purchase of this land, Sutro employed able and distinguished attorneys to examine and pass on the asserted title of Baird. These attorneys did examine and pass on that title; and, on their representation, Sutro paid the purchase money, and took a conveyance from Baird. Baird and the defendant had notice by the record of the deed from Sullivan to Watson conveying to the latter his interest in the Byfield tract. This deed had been regularly recorded in the proper office in December, 1865. He also had like notice of the deed of the 12th of January, 1870, made to Connolly by his tenants in common, of whom Watson was one, which was recorded on the 29th of January, 1870. The registry of deeds then showed that the title had passed from Watson to Connolly. The registry further showed that Connolly had received deeds for the land held by him in trust from the city and county of San Francisco. At the time of the negotiation for the purchase from Baird the record showed that the title to this interest was in Baird. In the progress of the examination the declarations of trust executed by Connolly and Baird, which had never been recorded, were furnished to Sutro's attorneys. The Connolly declaration showed plainly that he was trustee for Watson, as well as for Sullivan. The extent of Watson's interest did not appear on this paper, nor did the amount of the interest held by either of the beneficiaries. The Baird declaration did not mention Watson's interest. It showed the interests of the other owners, but Watson's was omitted. The above

attracted the attention of the attorneys, and their inquiry was at once directed to this interest, to ascertain what had become of it,—whether it had been acquired by some other of the co-owners, and, if so, by whom. In pursuing their investigation in regard to this interest, application was made to Baird and Sullivan. One of the learned gentlemen called upon Baird. He gives in his testimony a full account of the interviews with both Baird and Sullivan. After stating, in regard to his investigation of the title, that he had found the Connolly declaration of trust, the deed of Connolly to Baird conveying the property known as the “Byfield Tract,” and the Baird declaration of trust mentioning the proportions of the several co-owners,—among others, Sullivan’s, stating his interest at 15-160, omitting Watson’s altogether, the proportions named making up 160 acres,—he proceeds: “I proceeded to inquire what became of Watson’s interest, and why he was left out. I called upon Baird, and he said: ‘Why, that is all right. That declaration of trust embraces the parties who are now in interest.’ I said I do not see what has become of Watson there. He said: ‘There is a family arrangement between Watson and Sullivan.’ He then told me that Watson was related to Sullivan by marriage, which I didn’t know before. I didn’t know who he was at all. He said: ‘You had better go and see Sullivan yourself.’ He said: ‘There was an arrangement that was satisfactory between them, as I understood it always, in regard to this.’ He said, furthermore: ‘It has been in my name, as you see, for a long while.’ I did not, I think, take the paper to him in the first instance. I did afterwards, and he says: ‘It has been ten years or so; and, if it is wrong, he has been very patient about it. But you had better go and see Sullivan, and he will explain it all to you.’ The attorney then went to see Sullivan, and told him his errand: “That Baird was about conveying property, and I find that he [Sullivan] had conveyed 15-160 of it, and I wanted to know where Baird got his title; and he told me there was an arrangement between him and Watson in respect to this little interest which he had. And he mentioned, also, that he had spent, or that Watson had cost him,—I think that was his expression,—a good deal of money, and that he had an arrangement by which he could take this property, treat it as his own, sell it, and dispose of it in any way he chose. I asked him if that was in writing. ‘Yes,’ he said, that it was all in writing. He says: ‘Hadm’t you seen it?’ I say: ‘No.’ And he says: ‘It is on record.’ I said: ‘No, it is not. It is not in my abstract at all.’ He said: ‘There were several copies of it. I thought it was recorded.’ Well, I asked him if he had a copy. He said: ‘Yes.’ I asked him if he would not find out where he could get it. He said he would look it up, and asked me to come the next day; or he said: ‘I’ll call on you.’ I said I wished him to call on me at the office, which he did, and then he had a paper which I have identified on the stand about as nearly as I can. I don’t know who had charge of Sullivan’s papers.

Since his death, I asked Watson, and he said he finds it very difficult to get any knowledge at all about Sullivan’s papers. I had it in my hand, and read it, but it was not in my possession. I spoke to Mr. Sullivan about it. He produced it either the next day or the day after, and I found it had not been recorded. I told him that it ought to be recorded; that it was explanatory of the title of Baird. I made no inquiries about Watson’s interest after that.” This witness afterwards testified that “Sullivan said, also, that the conveyance to Watson did not cost him a cent; that it was a gift, but, in consequence of the cost which he had been put to on Watson’s account, he intended this to be used for the benefit of the family, and the instrument between them evidenced his right to use it.”

On the trial the original of an instrument in writing, and executed by Sullivan as a party of the first part, and George J. Bucknall, his wife, William C. Watson, the plaintiff, Elizabeth Anne, his wife, and John C. Davis, parties of the second part, was produced by Watson, and was put in evidence by Sutro. This paper, in our judgment, was the paper, a copy of which was shown by Sullivan to Sutro’s attorney at the interview between Sullivan and the attorney, an account of which is given above. We think it was sufficiently identified by the attorney when giving his testimony. Much stress is laid on this paper by counsel for appellant as bearing on the question of notice, and it becomes necessary to examine and consider it. It bears date on the 25th day of April, 1870, soon after the execution of the deed to Connolly, and his trust declaration, and was executed in quadruplicate. Watson had a copy. This paper, after stating the parties of the first and second parts as above set forth, proceeds to witness and declare that, whereas the parties of the second part have, by an indenture executed before this paper, and bearing date the same day, granted, bargained, sold, and conveyed to the party of the first part, Sullivan, all their right and title to three lots in the city and county of San Francisco, bounded southerly by Washington street, easterly by Montgomery street, and westerly by Kearny street, and northerly by a line parallel with Washington street, and distant from it northerly 137½ feet, and the money consideration expressed in said indenture is merely nominal, and it is considered proper, prudent, and just to set forth and declare these considerations referred to in said indenture as good, valuable, and sufficient, moving the parties of the second part to the execution of that indenture; now, this instrument is intended to set forth and declare not only the true nature of the considerations last above mentioned, but also the respective relations of the parties hereto to the abovenamed lot and other real estate hereinafter described. The instrument just named sets forth the respective interests of the parties named—E. L. Sullivan, Mary Eliza, Elizabeth Anne, and John C. Davis—in the lots aforesaid, describing Mary as the wife of Bucknall and Elizabeth as the wife of the plaintiff, Watson. It recites that the

interests of Mary and Elizabeth and John C. Davis are claimed and owned by devise from their father, John C. Davis, and, failing this devise, by descent, and also by devise, from their mother, Elizabeth Davis, and that any additional title acquired by possession, and by any act of the legislature, or by act of congress, by Sullivan, shall inure to the parties hereto according to their several interests as set forth herein. It is further declared that Sullivan had administered the property aforementioned from 1850 to the date of this instrument, first as agent of Elizabeth Davis, next as executor of her will, and afterwards in his own behalf to the extent of his interest, and as guardian of the said Mary, Elizabeth, and John C. Davis until they attained majority, and since that time as the agent, and throughout that time has rendered his services gratuitously, moved thereto by his love and affection to the parties to the second part, and especially to the said Mary, Elizabeth, and John C. Davis, regarding them as his own offspring, and has improved the said property, and maintained possession thereof, during this administration, has incurred large indebtedness, amounting to about \$350,000, resulting from the expenses of administration of said real estate, the purchase of certain real estate hereinafter mentioned, the education and maintenance of said Mary, Elizabeth, and John C. Davis, the greater part of which indebtedness is secured by a mortgage of the three 50-vara lots above described in said indenture, which mortgage was executed by all the parties to this instrument except John C., who did not join in the execution by reason of his minority; that said John, having become of age, subjects, as between himself and the other parties hereto, his title to the said property to the said mortgage to the same extent as if, being of age, he had joined in its execution, and each one of the parties hereto waives and releases all claim as against each other which either might have or set up against the others by reason of having received more or less of the proceeds of said property heretofore mentioned. The instrument then proceeds to declare that the party of the first part, Sullivan, has acquired during the period of said administration, of the city and county of San Francisco, certain other valuable real estate, described hereinafter, the legal and equitable title of which is now in Sullivan, the party of the first part; and all parties hereto have agreed that all the real estate last above mentioned, so acquired as above stated, and all the said 50-vara lots, shall be deemed to be the property of Sullivan, and of the said Mary, Elizabeth, and John C. Davis, each to have an undivided fourth part thereof, subject to the indebtedness in like proportion, and that the legal title to the same shall be and remain in the party of the first part to facilitate the administration thereof, the sale and other disposal of portions of the whole thereof, the payment and extinguishment of said indebtedness, and finally the partition and division of the same, or the proceeds of the same, or the remainder thereof, at some future day. The foregoing basis of judg-

ment is declared by the instrument as being deemed by all the parties equitable and just, and is the true consideration for the said indenture, and this agreement and said indenture has been executed in pursuance and part performance thereof. The instrument then further states and witnesses, and the parties do hereby declare, that Sullivan "holds the following described property in trust, and to administer, bargain, sell, convey, mortgage, or otherwise incur and dispose of the same, or any estate or interest therein, and to discharge out of the rents, issues, and profits, or other proceeds thereof, the aforesaid indebtedness, and all incumbrances now or hereafter to be a lien on the same, and afterwards to make partition or division among all the parties to these presents of all and singular the remainder of said property,—that is to say, to each of the said Mary Elizabeth Bucknall, Elizabeth Anne Watson, and John C. Davis, one-fourth in severalty of said remainder, reserving to himself the other fourth likewise in severalty; and it is expressly declared that all authority and power for the execution of, all and singular, the said trusts, and for the purpose of doing and performing all of the acts and things necessary for the carrying out of the same, is hereby delegated to the said party of the first part by the parties of the second part, and that the authority and power so conferred and delegated, coupled as it is with an interest, is irrevocable. A general power of attorney, irrevocable so far as the property hereinafter described is concerned, and bearing even date herewith, has been executed and delivered by the parties of the second part hereto to the party of the first part, for the purpose of aiding him in executing the power and authority herein and hereby conferred and delegated, and carrying out the intents and purposes thereof." The instrument then sets forth by description the real property "so as aforesaid held in trust by the party of the first part." The three 50-vara lots, and the several parcels of outside lands, are described, and among these a parcel of outside lands is described in the following words: "An interest in another tract of outside lands, known by the name of the 'Byfield Tract,' amounting to fifteen acres or thereabout." This instrument was executed in quadruplicate, and was under seal. It is clearly a deed of conveyance.

The foregoing sets forth all the facts ascertained by the learned gentlemen retained by Sutro in their investigation of the title which the latter desired to acquire by his purchase from Baird. It appears, and is found as a fact, that Sutro had no actual knowledge of any of the foregoing facts on which the question of notice turns. The only notice which he had was that which the law attributes to him from its having been brought to the knowledge of his attorneys. Knowledge, by notice to attorney or counsel or agent, acquired during the negotiation for a purchase, is constructive notice to their principal. If it were otherwise, it would cause great inconvenience, and notice would be avoided in every case by employ-

ing agents. See cases cited in 2 Lead. Cas. Eq. pt. 1, pp. 133, 134. That notice to an agent is notice to the principal has been held in this state ever since *Connolly v. Peck*, decided in 1856, and reported in 6 Cal. 348; followed in *May v. Borel*, 12 Cal. 91; *Stanley v. Green*, Id. 148; *Hunter v. Watson*, Id. 363. See other cases referred to in *Gear's California Index-Digest*, on page 97. Notice to counsel or attorney is constructive notice to client. *Bierce v. Hotel Co.*, 31 Cal. 161, (decided in 1866,) and *Donald v. Beals*, 57 Cal. 399. All these cases in regard to an agent apply to an attorney or counsel, for they are a species of agent. Justice BRADLEY, in the *Distilled Spirits Case*, 11 Wall, 368, states the principle on which the rule rests. "The general rule," says the learned judge, "that a principal is bound by the knowledge of his agent, is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." It will be of no avail to the purchaser that the agent omitted to communicate what he ascertained to his principal. *Williamson v. Brown*, 15 N. Y. 359. In other words, one who acts through another will be presumed to know all that the agent learns during the transaction, whether it is actually communicated to him or not. There is no difference in this respect between actual and constructive notice; for, if there were, an agent would be employed whenever it was convenient to remain in ignorance. *Bank v. Davis*, 2 Hill, 451-461. Or, as the reason of the rule was stated by Lord BROUGHAM: "Policy, and the safety of the public, forbid a person to deny knowledge while he is so dealing, as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself profit by that knowledge." *Kennedy v. Green*, 3 Mylne & K. 699-719. It is plain that the ordinary dealings of men could not be carried on without imperiling the rights of property to a degree which could hardly be conceived, and infinite wrong done to innocent persons, unless the rules above pointed out were established canons of law.

Now, if Baird was an innocent purchaser, Sutro, though he had notice, could not be charged. Equity acts on and charges a person by reason of the obligation which rests on his conscience, and in regard to the duties he owes to others. Baird could only be innocent by reason of the fact that he had no knowledge or notice of Watson's rights which bound him to regard them; and, if he was innocent, his conscience could not be charged, and, through his innocence, Sutro, though aware of Watson's rights, would be discharged. Was Baird, then, an innocent purchaser? We think it is plain he was not, unless he was made so by the provisions of the instrument of the 25th of April, 1870, above fully set forth. It is too plain to admit of argument that he bought with notice of the equity of Watson. He had at least constructive notice, imparted by the record of Watson's deed from Sullivan, executed in

1862, and regularly recorded in December, 1865. When he took the deed from Connolly, in 1871, he must be held to have been aware of the conditions of the title which Connolly had. Connolly was a trustee, and Baird was nothing more when he received the conveyance from the former. As a matter of ordinary prudence, he would have ascertained from Connolly for whom he was trustee, and to whom, as Connolly's grantee, he assumed that relation. He was tenant in common with others. This he must have known. It would be inconceivable to conclude that Baird did not know the purpose of the transaction with Connolly, and that purpose as set forth in a paper executed by Connolly for the benefit of his (Connolly's) grantees, of which Baird was one. Baird was co-tenant with the other grantors, and the transaction with Connolly was made in the interest of himself and his co-tenants. In the transaction, Connolly became a trustee to carry out a desired and declared purpose and intent. It will be the height of fatuity to conclude and hold, when Connolly conveyed to Baird, and put him in his place as trustee, that he did not tell Baird, and Baird did not seek to know, for whom he was to undertake the duties and responsibilities of a trustee. If he did not know, it was his duty to know this when he accepted the position; and certainly it was his duty to inquire when he executed his declaration of trust, in 1872. It cannot be held that he did not know that his trust was co-extensive with Connolly's, and that he became trustee for the same persons. When he accepted the trust, no doubt, he knew that some question might arise as to Watson's title; for the gap here was plainly discernible. That he knew that there was no conveyance from Watson to any one but Connolly, one of the co-owners and *cestuis que trustent*, when he executed his declaration of trust, and put in Sullivan for 15-160 of the trust property, may be justly inferred from what he stated to Sutro's attorney, above quoted. Reference is here made to the conversation with Baird in relation to the declaration of trust, and that Sullivan was the true party in interest when the declaration of trust was made, in consequence of a family arrangement, to which Sullivan and Watson, who was related to Sullivan by marriage, were parties. In any event, Baird, when he assumed the position of trustee instead of Connolly, was bound to know, as a matter of law, that he was trustee for the same parties as Connolly, and that he could not displace one beneficiary, and substitute another in his place, by ignoring the right of the former, and recognizing another as holding his interest. Neither Sullivan nor Baird, nor both together, could so deal with Watson's equitable title as to acquire it from him, and transfer it to another person, without Watson's consent. That Watson could have compelled Baird to convey to him would not have been questioned, and it would have been no defense to Baird that he had recognized Sullivan as the owner of Watson's interest, unless Baird was protected by the instrument above particularly set forth, ex-

executed by Watson and wife with others to Sullivan. On this depends the fact, too, whether Sutro is protected; for neither, though they paid value, is an innocent purchaser, or acquired Watson's title, unless under the provisions of the instrument. If this instrument vested in Sullivan the full legal title to the property in controversy, with power to use and sell it as his own property, and divide the proceeds, giving Watson his share thereof,—that is, with accountability only to Watson for the proceeds,—both Baird and Sutro acquired this title through Sullivan's conveyance to Baird, which would end this litigation. Did this instrument, then, which had all the requisites of a conveyance, pass such a title to Sullivan? Let it be conceded that the words used are operative to carry Watson's interest in the litigated property, if the instrument shows an intent by him to convey, still these words must be limited to the property described in it.

Now, as to this Byfield tract, in which Watson was only individually concerned, (as to other property, it is clear it was owned by his wife,) the words employed confine it to such interest the legal title to which was at the date of the instrument in Sullivan. The paper sets forth that Sullivan, (see the language fully set forth above) during his administration of the property mentioned and described in it, had acquired in the city and county of San Francisco certain other real estate therein described, the legal and equitable title to which was then in him. The fair construction of these words is that they include the real property described in it, in which he held the legal and equitable title, and exclude that in which he did not hold such title. This designates the property with particularity, to which reference is made. As seen above, Sullivan held the equitable title, when this instrument was executed, only to 10-160 of the Byfield tract. Connolly had held by conveyance from him to this extent. By conveyances previous to the conveyance to Connolly, he had transferred to other persons (Watson and another) all except the 10-160. He held this interest under the Connolly trust, which was made in January, 1870; the instrument we are here considering having been made the April following, before any change had been made by the transfer of Connolly to Baird. Sullivan did not have in April, 1870, the legal title to any part of the Byfield tract. It was in Connolly, or more properly in the city and county of San Francisco, under the act of congress of March 8, 1866. If the words are restrained to the property of which he had both the legal and equitable title, this instrument did not transfer any of the Byfield tract, for he had neither the legal nor the equitable title to any portion of it. But the rule to construe deeds, *ut magis valeat quam pereat*, compels the holding that it would pass such interest in this tract of which he held the equitable title. If this is not so, then it may be conceded for the argument that it passed the portion of which the equitable title was vested in him. Then this deeded to Sullivan only 10-160 and not 15-160, and did not

include Watson's interest, of 5-160. Nor is this quantity enlarged by the description of the interest in the Byfield tract given in a subsequent portion of the instrument, where it is spoken of as containing 15 acres or thereabouts. The distinct statement in the instrument referring to certain property acquired by Sullivan during the course of administration, commencing in 1880, the legal and equitable title of which was then in Sullivan, limits the general and indefinite words of description as to the Byfield tract, and the interest which Sullivan had in it. The description of quantity expressed in acres, qualified by the words "more or less," has always been regarded indefinite and general. A purchaser by such description can get no relief on that feature only unless the disparity is so great between the generally declared number of acres, and the actual number, as to be evidence of intentional fraud. That general words in a deed may be restrained by the particularity of recital is an established canon of construction. *Jackson v. Stevens*, 16 Johns. 110; *Shurtz v. Thomas*, 8 Pa. St. 359; *Barnard v. Martin*, 5 N. H. 536; *Woods v. Manufacturing Co.*, Id. 467; *Payler v. Homersham*, 4 Maule & S. 423; *Simons v. Johnson*, 3 Barn & Adol. 175. And the effect of general words confined where the intention to confine it can be collected from the context. *Munro v. Alaire*, 2 Caines, 320; *Wilkes v. Ferris*, 5 Johns. 335; *Smith v. Strong*, 14 Pick. 128; *Woodman v. Lane*, 7 N. H. 241; 2 *Smith*, Lead. Cas. (8th Ed.) 529, notes to *Roe v. Trammar*. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct. Civil Code, § 1067. Again, the circumstances in which the parties stood, and their knowledge at the time of the state of the title, should be considered in arriving at their intent. When he affixed his signature and seal to this instrument, Watson knew that he had never parted with his equitable title, and Sullivan must be held to have known the same thing. Connolly was then Watson's trustee. Watson was cognizant that his legal title was then in his own selected trustee, and it should be noted that this paper was executed long before the deed was made by Connolly to Baird, or the execution of Baird's declaration of trust.

A purchaser must be held to have notice of everything which appears on the face of the deeds under which he buys. He has constructive notice of what is contained in them, or which is a necessary inference from what is contained in them. 2 *Lead. Cas. Eq. pt. 1*, p. 125. It cannot be limited to the recorded deeds and instruments, for notice is equivalent to registration. Id. 37, 98, 149, 213, 299. Surely no such limit can exist where the deeds and documents relating to the title are shown him. The recitals in a deed, however, to bind the conscience of a purchaser, must be sufficiently clear and certain to convey the requisite information or put him on his guard. A vague, general statement will not operate as notice, whether in a deed or elsewhere. Assaid by WALWORTH, Ch.: "The recital must be such as to explain itself by its own terms, without reference to some deed or circumstance which explains

it, or leads to its explanation." Here the deed refers to property to which at the time Sullivan had the legal and equitable title. This is sufficiently certain. A purchaser was certainly put on inquiry when he and others executed the deed of the 25th of April; and, on seeking information in regard to it, it would have appeared to have been then in Connolly, and limited to 10-160 of the Byfield tract, and included no part of Watson's. This deed was produced to Sutro's attorney. He testifies that he had it in his hands, and read it. He had notice of what was in it; and, though it was constructive notice to Sutro, it bound him. As stated above, notice to an agent in course of a transaction is constructive notice to the principal, and it will not avail the latter to show that the agent failed to communicate to him what he was told. *Williamson v. Brown*, 15 N. Y. 359. This constructive notice, when it exists, is irrebuttable. It is not merely *prima facie* evidence, for then it could be rebutted. It is conclusive against the truth of the fact, as said by GIBSON, J., in *Weidler v. Bank*, 11 Serg. & R. 134: "Constructive notice is not *prima facie* evidence of actual knowledge of the fact; the presumption of notice, when it arises at all, being conclusive even against the truth of the fact."

The cases cited by counsel for defendant as to constructive notice lay down no rule in conflict with those set forth. In the case from 6 Wallace, (*Wilson v. Wall*), it was attempted to charge a purchaser under a patent issued by the United States government in the execution of a treaty made with the Choctaws. The rule approved in the case referred to as to notice, as stated in *Sugd. Vend.* 622, coincides with the rule acted on in this case. "When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution, have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence." 6 Wall. 91. In *Carrier v. Town of Shawangunk*, 10 Fed. Rep. 220, an attempt was made to defeat a recovery in an action brought by the holder on certain negotiable bonds purchased for value before maturity. The issuance of the bonds depended on the consent in writing of a majority of the taxpayers of the town. As stated by the court, and as fairly to be gathered from the statute, certain commissioners were invested with the power to decide whether the proper number of tax-payers had consented. No infirmity appeared on the face of the bonds. They recited that they were issued in pursuance of an act of the legislature, and by duly-appointed commissioners. The court held that the purchaser of municipal bonds is charged with notice of the laws of the state which authorized their issue, and of a want of power in the

municipality or its officers to issue them, and that the recitals in the bonds, when held by a *bona fide* purchaser, are conclusive. The recitals protected such a purchaser. To this point the court (United States circuit court, S. D. New York) cites *Coloma v. Eaves*, 92 U. S. 484; *Humboldt Tp. v. Long*, Id. 642; *Walnut v. Wade*, 103 U. S. 683. The gist of the judgment is in these words, which conclude it: "Knowledge by the purchaser of municipal bonds before maturity of their invalidity, when there are no marks of infirmity on the face of the instrument, and there is no want of power in the municipality or its officers to execute and issue the bonds, is a question of fact. It being admitted that the purchaser before maturity, for value, had no actual notice or suspicion of any defect, and the bonds in substance reciting a compliance with the conditions precedent which were required by the statute, the arbitrary rule claimed by the defendant, which declares that he did have constructive notice of a defect, does not exist."

In this case it may be said that the marks of infirmity are on the face of the deed. The question is whether Sullivan acquired by the deed of 1870 the equitable title of Watson. A just interpretation of the language of the deed shows that he did not. Sullivan did not have it when he sold to Baird, and Baird could not transfer it to Sutro. A vendor cannot convey that which he has not, nor can a grantee take anything beyond what is conveyed to him. *Caveat emptor* is the rule in all purchases as to the title, unless stipulated to the contrary. The purchaser must see that his grantor has the title which he seeks to acquire. He has the right to call on his vendor to show that he can sell and convey what he proposed to sell and convey, and to which the vendee seeks to acquire an unincumbered legal title in fee; and, if the vendor cannot make such a title, the purchaser has the right to decline the purchase. Whether the attorney turned away, and with gross negligence failed to make inquiry of facts of which he was put on inquiry, need not be considered here. The notice and information of the infirmity of Sullivan's title was given on the face of the papers, and the failure of the attorney to inquire of Watson could not make Sutro an innocent purchaser when the papers furnished him gave him notice of Watson's interest in the land he desired to purchase. The rules as to notice adopted in this case are in accord with the judgments in the two cases referred to above, as cited by counsel. The epithets used as qualifying negligence in the two cases cited are not applicable here, for the reason that the notice was given on the papers furnished to Sutro's attorney. The error fallen into here by the attorney was not one involving negligence in making inquiry as to facts. It was in misinterpreting a written instrument, which is a question of law.

We see nothing in the instrument (the deed of the 25th of April, 1870) which can work an estoppel against Watson. Watson did not deceive Baird or Sutro. This paper was accessible to both of them before they

purchased. If Baird did not see it, it is because he took Sullivan's word for its contents,—that it was a family arrangement which allowed him to do with the land as he chose. Baird had a right to have Sullivan produce it for his inspection. If he did not see it, it was because he did not care to see it on account of Sullivan's representation of its contents. Sutor's attorneys saw it, and read it. Watson did not intend to deceive, and did not deceive, either Baird or Sutor. Without the element of deceit, there can be no estoppel. *Davis v. Davis*, 26 Cal. 40, 41, etc., and cases there cited. Neither party was deceived or injured by the conduct of Watson. Under these circumstances, there can be no estoppel. *Davis v. Davis*, supra.

Some other points raised by counsel for appellant remain to be considered. The contention is made that the plaintiff had not a right to maintain this action; and it is said that this is an action under section 752, Code Civil Proc., which provides that when several co-tenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance or for life or lives, this action may be brought by one or more of such persons for the partition thereof, according to the respective rights of the persons interested therein. It must be further stated, to present properly the contention of counsel, that the plaintiff in this action must himself hold a legal title to whatever interest he claims in the land of which partition is sought; that, in this case Watson must have a legal title to his estate which he seeks to recover in order to maintain the action. But, if the party has an estate of inheritance, it is sufficient. An equitable estate at common law was an estate of inheritance. The estate is held in trust for the *cestui que trust* will descend, and may be sold and transferred by conveyance. Blackstone, in his second book, (page 337,) uses this language: "The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances (by the express provision of the statute of frauds,) to forfeiture, to leases, and other incumbrances, nay, even to the curtesy of the husband, as if it was an estate at law." An equitable estate in land is real property, and must descend as in case of intestacy as legal estates. This has been so by the statute ever since this state had an existence. See section 1 of the act of 1850, to regulate descents, etc. Civil Code, § 1384. "Where any person having title to any estate * * * shall die intestate as to such estate, it shall descend," is the language of the first section of the Act of 1850. By section 1384, Civil Code, all property, real and personal, shall descend, etc. That equitable estates descend, see *Grover v. Hawley*, 5 Cal. 486; *Everson v. Mayhew*, 57 Cal. 144. In fact, in most cases in this state the difference between equitable and legal estates is of no practical importance. They are both estates originating by law and held under law, and in that sense are legal estates; and, where a court is at liberty to rely on the rule of equity of considering that as done which ought to be done, the differ-

ence between an estate so regarded, and an estate at law, is not worthy of consideration. The mode of administering law in this state, under our jurisprudence, is clearly and admirably stated by CROCKETT, J., in *White v. Lyons*, 42 Cal. 279, in these words: "Under the Code, there is but one form of action in this state; and, if the complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. If the facts stated are such as address themselves to the equity side of the court, the appropriate relief will be granted by the court, sitting as a court of equity. On the other hand, if the facts alleged are purely cognizable in a court of law, the proper relief will be administered in that form of proceeding; but a complaint which states a sufficient cause of action, either at law or in equity, is not demurrable as not stating facts sufficient to constitute a cause of action." See also, *Wiggins v. McDonald*, 18 Cal. 126. In note 3, page 102, of Pomeroy's *Remedies and Remedial Rights*, that learned and able jurist says, in discussing the union of legal and equitable remedies in the same action: "In *White v. Lyons*, Mr. Justice CROCKETT states the general doctrine in a very accurate and comprehensive manner." The object of the Code being to permit but one form of action, in which either or both legal or equitable remedies may be sought, it would be unwarrantable to hold that this did not apply to actions of partition. When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case. As legal and equitable remedies may be sought and had in the same case, especially where they relate to the same subject-matter, we see no reason why the owner of the equitable title may not sue to establish his right, and when so established, if he is a tenant in common, ask for and have a partition of the common estate. As, where the reformation of a deed from mistake or fraud is sought, the plaintiff, he succeeds in procuring the reformation, may sue for and obtain the possession of the land to which the deed relates in the same action, why have two suits when one is sufficient? Equity will not permit litigation by piecemeal, but will determine the whole controversy, so as to prevent future litigation. *Irwin v. Phillips*, 5 Cal. 144; *Ord v. McKee*, Id. 515; *Kile v. Tubbs*, 23 Cal. 431; *McPherson v. Parker*, 30 Cal. 456; *Wilson v. Castro*, 31 Cal. 420; *Quivey v. Baker*, 37 Cal. 472; *Kraft v. De Forest*, 53 Cal. 656; *Cross v. Zellerbach*, 63 Cal. 643; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. Rep. 135. The contention we have been considering is not maintainable.

It is urged that the action of the plaintiff is barred by sections 319 and 322 of the Code of Civil Procedure; but, as there has been no adverse possession, this cannot be. There has been no adverse possession by any one of the tenants in common. *Love v. Watkins*, 40 Cal. 569; *Unger v. Mooney*, 63 Cal. 586. Watson was as much in possession as any of the co-tenants; or if possession was had by the trustee, it

was as much the possession of Watson as of the other co-tenants. There was no possession such as to put Watson on inquiry. There was no open repudiation of any trust by Baird, and certainly none ever known to Watson. Watson was certainly ignorant of Baird's declaration of trust, and of Sullivan's conveyance to Baird, until a short time, which was less than five years, before the commencement of this action. The evidence discloses nothing which in any way barred Watson's cause of action.

The court below committed no error in ruling on the admissibility of testimony. We have examined the points in this record made on behalf of defendant, and are of opinion that they are not well taken.

In regard to the motion to dismiss the appeal from the order denying a new trial, from the conclusion reached, it is unnecessary to decide it. We will say, however, that we are inclined to think that this appeal was regularly taken, and the motion should be denied; but we do not wish to be understood as deciding the point.

The power of attorney executed by Bucknall and wife, the plaintiff and wife, and John C. Davis, to Eugene Sullivan, was offered in evidence, on which some stress is laid as authorizing Sullivan's conveyance to Baird; but, as Sullivan does not assume to have acted under this power of attorney in his conveyance to Baird, we do not see that any effect can be given to it in this action. It appears that Sullivan conveyed the property as his own, and not as agent for any one. He claimed to own Watson's interest when he sold and conveyed to Baird. We cannot see anything in this paper to change the conclusion arrived at in this case. Nor does it make any difference that the power of attorney is stated to be coupled with an interest, and irrevocable. If he had acted under it, it should appear that he acted by the procurement of Watson. The record is without error. Order affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

WORKS, J. I concur. An equitable estate may be one of inheritance. If so, and the title is one under which the party holding it is entitled to possession, I am of the opinion that he may maintain an action for partition.

McFARLAND, J. I dissent. I do not think that, under section 752 of the Code of Civil Procedure, an action for the partition of land can be maintained by one who has not title, but has a mere asserted right to compel some one who has title to convey it to the plaintiff. He should establish his claim against the one whom he asserts to be his trustee, and settle accounts with him, before bringing the other co-tenants into litigation. At least, he should be able to aver that he has title to an estate of inheritance for life or for years, in the land. And title, within the meaning of the said section of the Code, is "the means whereby one holds that which he hath" not the right to get that which he hath not. And it has never been held by this court, to my knowledge, that such

an action can be maintained. To allow it would be to invite complicated and unnecessary confusion. Of course, when the owner of an undivided estate rightfully commences an action for partition, all persons claiming liens or equitable rights on or in the estates of other co-tenants are properly made defendants, from necessity; otherwise, one tenant in common, by keeping his share covered by liens and trusts, could deprive his co-tenants of their right of partition. And to this extent only have the decisions gone. I think, also, that, on the merits of the contest between plaintiff and the defendant, *Sutro*, the judgment should have been for the defendant, and therefore should be reversed.

VIERA V. DOBYUS. (No. 13,584.)

(Supreme Court of California. May 10, 1890.)

In bank. Appeal from superior court, Lassen county; M. MARTELLER, Judge. *F. A. Kelley*, for appellant. *Shinn & Masten, E. V. Spencer* and *C. McClaskey*, for respondent.

PER CURIAM. The appeal in this cause must be dismissed, and it is so ordered, for the reason that no properly certified transcript has ever been filed, and the time for filing the same has long since passed.

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Ex parte SING AH TONG. (No. 20,693.)

(Supreme Court of California. May 17, 1890.)

SENTENCE—FINES—IMPRISONMENT.

Pen. Code Cal. § 330, provides that any person convicted of gaming thereunder shall be "punishable by fine of not less than \$200 nor more than \$1,000, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid; such imprisonment not to exceed one year." Petitioner, having been convicted thereunder, was sentenced to pay a fine of \$250, and in default of payment to "be imprisoned in the county jail * * * at the rate of one day for each \$1 of fine until such fine is satisfied." *Held* that, although the sentence seems to be based upon Pen. Code Cal. §§ 1205, 1446, which provide for an imprisonment of not to exceed one day for each \$1 of the fine, which do not apply to convictions under section 330, yet it will be upheld, since it practically means an imprisonment until the fine is paid, not exceeding 250 days, and therefore conforms to section 330, under which a definite term of imprisonment must be fixed.

In bank. On petition for *habeas corpus* to release petitioner from imprisonment upon a judgment of the police court of San Francisco; JAMES LAWLER, Judge.

Joseph Coffey, for petitioner. *Dist. Atty. J. D. Page*, for respondent.

BEATTY, C. J. The petitioner was prosecuted under section 330 of the Penal Code, and convicted of the offense therein defined. It is provided that persons so convicted shall be "punishable by fine of not less than \$200, nor more than \$1,000, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid; such imprisonment not to exceed one year." Pen. Code, § 330. It appears by the return to the writ that judgment was rendered against the petitioner in the following terms, (after reciting the convic-

tion;) "It is ordered and adjudged as a punishment therefor that the said Sing Ah Tong pay a fine of \$250, and in default of payment thereof that said Sing Ah Tong be imprisoned in the county jail of this city and county at the rate of one day for each \$1 of fine until said fine is satisfied." It is argued that this judgment is void because it is evidently based upon the provisions of section 1205 or of section 1446 of the Penal Code, which have been held not to apply to convictions under section 330. *Ex parte Harrison*, 63 Cal. 299. It is true that in the case cited those sections, and the judgment which they prescribe, were held to be inapplicable to convictions of the offense with which the petitioner was charged; and it certainly does appear that the court in pronouncing sentence upon the petitioner had in mind the provisions of section 1205 or section 1446, which are applicable to finable offenses generally, though not to this offense. But it does not follow that the judgment is void merely because it conforms to sections 1205 and 1446. On the contrary, it is only void if it fails to conform substantially to the requirements of section 330; and it happens in this case, in our opinion, that the police judge, though apparently intending to found his judgment upon section 1205 or 1446, has not transgressed the provisions of section 330. The fine imposed is the definite sum of \$250, which is within the minimum and maximum limits prescribed by that section; and imprisonment "at the rate of one day for each one dollar of fine, until said fine is satisfied," may be rationally construed to mean imprisonment until the fine is paid, (there are no costs,) not exceeding 250 days. This satisfies all the requirements of the decision in *Ex parte Harrison*, wherein it was merely decided that a judgment in case of conviction under section 330 must prescribe a certain, a definite, term of imprisonment, not exceeding one year, during which the defendant must be confined unless before its expiration he pays the full amount of the fine and costs without any deduction or credit on account of the imprisonment already undergone. Read by itself, there is nothing in this judgment which implies—still less directs—that the petitioner is to be discharged before he has undergone 250 days' imprisonment, unless he pays the full amount of the fine. Read in connection with the statutes, its meaning is equally clear to the same effect. If the complaint of the petitioner was that the law had been strained against him by making his punishment more severe than the legislature intended, and if it appeared that his complaint in that particular was well founded, we should feel no inclination to uphold the judgment by any liberality of construction. But the objection which he urges to this judgment is that it is not severe enough; that whereas it ought to have plainly directed his imprisonment for a whole year unless prior to that time he paid the whole of his fine and costs, it, in fact, limits his imprisonment to 250 days at the utmost, and is so equivocally worded that if during that period he should pay as many dollars of his fine as there remained days of imprisonment to

be undergone, the sheriff might deem it his duty to discharge him. An objection so extremely technical, it seems to us, is fairly met by any construction which the judgment complained of will bear. Writ discharged, and prisoner remanded.

We concur: McFARLAND, J.; FOX, J.; SHARPSTEIN, J.

ant's warehouse from the office, where he went every day to deliver a paper. There were two entrances to the passage-way leading through the house, both of which were used, though one was larger and more used than the other. Deceased had entered by the smaller, where there was no one to warn him that goods were being thrown down in the passage-way, though such warning was given at the other entrance. *Held*, that defendants were negligent in not giving such warning.

2. It was not contributory negligence on the part of deceased to enter by the smaller way, where there was no warning of any danger, though he was ordinarily in the habit of entering by the main door, at the other end of the house.

3. Nor was his failure to get out of the way when the men shouted, after having started the bale down from the pile, contributory negligence.

4. A demurrer on the ground that plaintiffs have not legal capacity to sue must be overruled if any one of the plaintiffs has capacity to sue.

5. A demurrer on the ground of misjoinder of parties must specify wherein the misjoinder exists.

6. Where the petition shows that the mother of deceased is his sole heir, and that deceased was killed through the negligence of defendants, whereby she was damaged, it states facts sufficient to constitute a cause of action.

7. When the evidence shows that deceased was 23 years old, of good habits, and the sole support of his mother and her children, to whom he gave from \$40 to \$50 per month, a verdict for \$3,000 is not excessive.

8. Where, on appeal, it appears that during the trial plaintiffs' counsel handed the clerk a paper stating that it was in reference to the guardian *ad litem*, it will be presumed in favor of the judgment that the guardian was properly appointed, though the contents of the paper do not appear.

9. A variance between the allegations of the petition and the proof as to the sex of the minor children, brothers and sisters of deceased, is not material.

Commissioners' decision. Department.

1. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

W. W. Davidson, for appellants. *J. D. Sullivan* and *Henry McCrea*, for respondents.

GIBSON, C. This was an action against the owners of a warehouse to recover damages for the death of one Francis J. O'Callaghan, which is alleged to have been caused by the negligence of the defendants. The plaintiff had a verdict and judgment, and the defendants appeal.

The general features of the case are as follows: The warehouse was oblong in form, and had a wide door and passage at one end, and a small door and passage at the other. These two passages were parallel with each other, and at right angles to the length of the building. Between them was a large room or space in which bales of merchandise, etc., were so piled as to leave a passage or gangway connecting the two passages above mentioned. The office was on the passage-way leading from the small door. On the morning of the accident the employes were engaged in throwing bales of bags from the top of the pile into the gangway. The deceased was in the habit of coming to the building to deliver a publication called the "Guide." He usually entered by the main entrance, (the large door,) came down the gangway to the passage leading to the small door, and put up the Guide in a room adjoining the office. On the day of the accident, however, he entered by the small

door, put up his paper in the usual place, and started to go out through the gangway to the main entrance. The men engaged in throwing down bales into the gangway did not see him until it was too late. He was struck by a bale weighing between six and seven hundred pounds, and almost instantly killed.

The main position of the appellants, on the merits, is that there was no negligence on the part of the defendants, or, if there was, that there was contributory negligence on the part of the deceased. We think that the evidence shows that the defendants were guilty of negligence. The gangway was a place through which persons having business at the warehouse were accustomed to pass. It was the mode of reaching the office from the passage-way at the main entrance. It was the way "that everybody, strangers as well as others in the employ of Bode & Haslett, used in going to the office." And it was the usual route of the deceased in his regular visits to the place where he was in the habit of putting up the Guide. The throwing of heavy bales into such a gangway made it a place of danger. It was a case in which precautions were necessary. Especially is this true under the circumstances of the case. According to the foreman, who was in the employ of the defendants at the time of the trial: "It was not possible for the man standing up there on the top of the bales to see, from his position, where the bales would land when they came down. He knew they would land in the passage-way. That was the only place for them to land down below there. He could not see where they were going to hit." The employees of the defendants seemed to have felt that some precautions were necessary, for a lookout was stationed at the main entrance. This was well enough for that entrance. But some precaution should have been taken for the other entrance. The only thing done to the latter entrance, however, was to throw down a couple of bales near that end of the passage. These, however, did not block the whole of the passage, but left room for a man to pass by them; and we think that such a partial obstruction of such a place would not be a sufficient warning to persons who were in the habit of using the passage. It would have been a very simple matter to have drawn a rope across that end of the gangway, or to have posted a notice of danger there, or even to have stationed a lookout there, as was done at the other entrance. The want of such a precaution, under the circumstances, seems to us to have been negligence; and the fact that other warehousemen were in the habit of acting similarly does not excuse the defendants.

The deceased was not guilty of contributory negligence. He came to the warehouse upon a matter of business. It is true that he was in the habit of entering by the main entrance. But the other, though furnished with a lock, was kept unlocked; and, though it was not much resorted to, it was sometimes used by the employees, and occasionally by teamsters. The fact that the deceased used it on the

day of the accident admits of the inference that he knew about it; and there is no pretense that either he or any one else was forbidden to use it, or notified that it was dangerous to do so. We see nothing in the evidence to show that the entrance by the small door constituted negligence on his part. Being in the building, and having put up the Guide as usual, it was perfectly natural and proper for him to attempt to go out through the gangway. That was the passage which he and others ordinarily used; and, as above stated, its partial obstruction by a couple of bales was not a sufficient indication that it was dangerous.

Nor was he guilty of negligence in failing to appreciate the situation when the employees shouted to him. These shouts were just as the bale was toppling over, and after the man on the top of the pile had lost control of it. The deceased evidently heard the shouts, but did not know just what to make of them. "He made a kind of look. He still walked just as fast as he could. He came right under the bale, making a kind of look up, so fast as he could run." The interval between the shouts and the time the huge mass came bounding down the passage could not have been great; and we do not think that, under the circumstances, an ordinarily prudent and self-possessed man could be expected to do any better.

Quite a number of other points are made, which will be briefly noticed:

It is contended that the demurrer to the complaint should have been sustained. The action was brought by the mother of the deceased, and his brother and sisters. The counsel for the appellants says that "the complaint discloses that the plaintiff, Catherine O'Callaghan, mother of the decedent, is his sole heir," and argues that the other plaintiffs did not have legal capacity to sue. But the demurrer is not drawn so as to present that question. It says that "the plaintiffs" have not legal capacity to sue, and, as it is admitted that one of them had capacity to sue, this ground of demurrer was too broad, and was properly overruled.

It is also said that there was a misjoinder of parties plaintiff, and a misjoinder of causes of action. These points, like the foregoing, are based upon the alleged want of right in the plaintiffs other than the mother of the deceased, but the demurrer does not specify wherein the alleged misjoinders existed. It is not sufficient for a demurrer on either of these grounds to simply follow the language of the statute.

As the deceased left neither wife, issue, nor father surviving him, his mother is his sole heir, under section 1386, subd. 2, of the Civil Code. The complaint shows these facts, and also that the deceased was killed through the negligence of defendants, by which his mother was damaged. This being so, the demurrer upon the general ground that the complaint does not state facts sufficient to constitute a cause of action was properly overruled, because a general demurrer is not sustainable if the complaint states a cause of action in favor of any one of several plaintiffs.

It is contended that there were errors in

rulings upon evidence. It is objected that the judge was absent from the court-room during a portion of the trial. This, however, was not an error. It may have been an irregularity, but the motion for new trial was not on that ground. In the next place, the counsel for the appellants made no objection to the temporary absence of the judge. See Hayne, *New Trial & Appeal*, § 27.

After the sister of the deceased had given several answers, part of one of which was not responsive to the question, the counsel for the defendant said: "I object to the questions on the ground that they are irrelevant," etc. The court stated that it should have to allow them, and the examination drifted to something else. If the counsel had desired the non-responsive part of the answer stricken out, he should have made a motion to that effect. The question was proper, and called for relevant and competent testimony.

The fact that the deceased once owned a route on the Examiner, and sold it for \$1,000, was probably irrelevant; but we do not see how it could have injured the defendants.

The question objected to at folio 121 was substantially answered by the response to the next question. Therefore, if there was any error in sustaining the objection it was cured.

A further contention is that there was error in the instructions to the jury. The first point under this head seems to be based upon the ground that there was a misjoinder of parties plaintiff. But there was no issue as to this. The facts appeared in the complaint, and hence the objection was one that should have been taken by demurrer. This was not done, as already shown in passing upon the points in the demurrer, and in consequence was waived. The warehouse was a bonded warehouse, and there was the usual government agent on the premises to look after the duties. The evidence showed conclusively that the defendants were the persons liable for any negligence in relation to the occurrence in question. The court might properly have given a direct instruction to that effect. It did not give such instruction, but told the jury that the defendants, and not the government agent, were liable under certain conditions. It is claimed that in stating the conditions the court omitted an important one. But, inasmuch as the court might have instructed the jury that the defendants were liable for any negligence that occurred, the error, if such it be, was clearly immaterial. The next point is based upon the use of the word "plaintiff" instead of "decendent" in the instruction marked "XX." It is apparent, however, that this was a mere inadvertence, and that it could not have misled the jury. It is further claimed that the court erred in refusing to give certain instructions to the jury requested by defendants. These instructions number 38 in all; and the only argument in relation to them is based upon the idea of the misjoinder of the parties plaintiff, which has already been disposed of. Hence we do not feel called upon to examine the instructions any further.

It is suggested that the damages given are excessive. The deceased was a young man of 23, of good habits, and was the sole support of his widowed mother and her minor children, to whom he gave out of his earnings \$40 or \$50 a month. The verdict was for \$3,000. We do not think that this amount was excessive.

It is urged that there was no evidence in support of the allegation that a guardian *ad litem* for the infant plaintiffs was appointed. We are by no means sure that the court which appoints a guardian *ad litem* to conduct a particular suit will not take judicial notice of his appointment, so far as the purposes of that suit are concerned. But it is not necessary to express an opinion upon this point. It appears in this case that during the trial the plaintiff's counsel handed a paper to the clerk, saying: "This is the paper in reference to the guardian *ad litem*." Nothing else was said by either party, and presumably the clerk took charge of the paper, as he would in the case of any exhibit in the case. This is not a very formal way of putting a paper in evidence. But we think that all the parties must have understood that the paper was in evidence, and consequently that it must be held to be so. *Wright v. Roseberry*, 81 Cal. 87, 22 Pac. Rep. 336. It therefore appears that a paper in relation to the guardian *ad litem* was in evidence. What were its contents? It certainly was incumbent upon the appellants to show what the contents were. Notwithstanding that it was not a most complete and perfect appointment, the presumption is in favor of the judgment, and the party alleging error must make it affirmatively appear. For analogous applications of this rule, see *Clark v. Sawyer*, 48 Cal. 141, 142; *People v. Grundell*, 75 Cal. 304, 17 Pac. Rep. 214.

It was argued that the evidence is insufficient to show that the plaintiffs were the only heirs at law of the deceased. But we think that these facts sufficiently appear. The witness Mary Kepple testified as follows: "Question. You are the sister of Frank O'Callaghan, who was killed? Answer. Yes, sir; I am. Q. Is your father living or dead? A. My father died the 23d of March; six weeks before Frank was killed. Q. Is your mother living now? A. Yes, sir; she is sick in bed. * * * Q. Who was your support up to the time of the death of Frank O'Callaghan? A. Frank was the sole support. * * * He brought in \$14 a week from the Examiner, and would turn all of that money in to his mother, for her and the four little children,—a brother thirteen years old, a little girl going on twelve; the other baby is going on six; this little boy is two and half years old. He supported all of them. My mother is living. She is in bed, sick. * * * Q. Frank was unmarried,—had no wife? A. No; single. * * * He was twenty-three years and ten months old at the time he died. He worked for the last thirteen or fourteen years for the family." It is true there was a slight variance between the testimony of this witness and the allegations of the complaint respecting the minor children. She says there were two boys, one girl, and another, whose

sex she failed to state, while it is alleged that such children consisted of one boy and three girls, but we do not deem this of sufficient importance to warrant a reversal. This same witness did not say whether her mother and the minor children were the same persons who were named as plaintiffs in the complaint, nor that her deceased brother never had been married, but we think the jury properly inferred these facts from what she did say. We are unable to perceive any prejudicial error in the record, and therefore advise that the judgment and order appealed from be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

3 Cal. Unrep. 265

MURDOCK v. CLARKE *et al.* (No. 13,475.)

(Supreme Court of California. June 7, 1890.)

MORTGAGES—ACCOUNTING.

1. A conveyance of land to secure the payment of money, though the grantee is put in possession under an agreement for an accounting for the rents and profits, is only a mortgage, and does not pass the legal title.

2. By an agreement between a mortgagor and mortgagees, the latter were to have the sole right to the possession of the land mortgaged, accounting for the rents and profits, and were to select a person to manage the property. At an accounting against the mortgagees, the latter testified that they were to send a man to take possession, in order to take care of the personal property security, and that everything was to be run in their name. They also spoke of the man selected, both in their testimony and in the pleadings, as their agent. *Held* that, for the purposes of possession and accounting, such person must be considered as the agent of the mortgagees only, although his selection was approved by the mortgagor, and his salary was paid as a part of the running expenses.

3. In such case the mortgagees are held to the exercise of reasonable diligence in the management of the property mortgaged.

4. Where both the agent and the defendants kept their own cattle on the mortgaged land, along with the cattle of the mortgagor, the wrong done was satisfied by charging defendants with a proportion of the running expenses, and with the value of the use of the land.

5. Nothing was chargeable to defendants on account of horses which they sent to the land, and which were needed and used for farm work.

6. One of the notes given by the mortgagor providing for compound interest if not paid when due, the net receipts were properly applied first to the payment of the interest on such note.

7. Sums advanced to the wife of the mortgagor without any order from him were not chargeable against his estate.

8. It not being necessary, under Code Civil Proc. Cal. § 454, to give an itemized account in pleading, the findings need not give the items of the account.

9. One who accepts a bill of sale purporting to transfer a certain number of cattle is not estopped thereby from denying that he actually received that number.

10. As against respondents on appeal, the findings of the lower court must be presumed to be true. It will not be presumed that an error was the result of inadvertence.

Commissioners' decision. Department 1. Appeal from superior court, Lassen county; PHIL W. KEYSER, Judge.

J. D. Goodwin, D. W. Jenks, and W. N.

Goodwin, for appellant. A. L. Hart and S. Solon Hall, for respondents.

HAYNE, C. This is the second time that this case has been before the court on its merits. The action was by the administratrix of a mortgagor against the mortgagees in possession under an agreement for an accounting of the rents and profits, and to redeem the property. The trial court adjudged that there was due to the defendants the sum of \$31,926.37; that upon payment thereof the defendants should reconvey the real property and redeliver the personal property; and that, if the plaintiff should fail to make such payment within 30 days, the property should "vest absolutely in the defendants." The plaintiff appeals from the judgment, and from an order denying a new trial.

The following facts are undisputed: On February 4, 1875, Adam Murdock, the plaintiff's intestate, borrowed from the defendant Clarke the sum of \$8,500, and gave his note therefor, to become due one year after date, with interest at the rate of 1½ per cent. per month, payable semi-annually, and, if not so paid, to be compounded. To secure the payment of this note, Murdock made a deed to Clarke of a tract of 330 acres known as the "Beaver Creek Ranch," and assigned to him a certificate of purchase of a tract of 4,360 acres situated about 20 miles from the first, and known as the "Big Valley Ranch." Soon after this, Clarke assigned to the defendant Cox a half interest in this note and security. Shortly afterwards, viz., on March 22d of the same year, Murdock borrowed from Clarke and Cox a further sum of \$5,000, and gave his note therefor, bearing interest at 1½ per cent. per month. In order to secure the payment of this latter note, and to further secure the payment of the first note, and of such additional sums as should be advanced, it was agreed that Clarke and Cox should take possession of the two ranches, and of the cattle and other personal property thereon, and out of the rents and profits should pay the running expenses, and apply the balance to the liquidation of the amount due to themselves. The property was to be managed by a person to be selected by the defendants, but whose salary was to be paid as part of the running expenses. Murdock had permission to reside upon the property, and assist in the work, but was not to exercise any control. It was also agreed that, as further security, Murdock should assign to Clarke and Cox a half interest in a portable saw-mill, then on public land, together with the machinery, etc., then owned by him in partnership with one Quinn, who was the manager thereof. In pursuance of this agreement, the defendants, with the approval of Murdock, selected one Stanton to manage the property, and he went there on March 22d; but the formal bill of sale was not made out until April 10th. On the next day after the execution of this bill of sale, the defendants advanced, at the request of Murdock, the sum of \$3,176.45, for which he gave his note bearing interest at 1½ per cent. per month; and subsequently further advances were made. Murdock remained

upon the property until the following December, at which time he died. About eight months thereafter the plaintiff was appointed administratrix of his estate. The property continued to be managed by Stanton until May, 1886, at which time he died, and one Snell was appointed by the defendants as his successor. During the period of Stanton's management, he received various sums of money from sales of cattle, etc., out of which sums he paid the running expenses, and gave the remainder to the defendants. During a considerable portion of the time the defendants had cattle of their own upon the ranches, and Stanton kept his own cattle there also. They were not kept separate from the Murdock cattle, but all were taken care of together. The accounting sought embraces the whole period, and various charges of neglect and misfeasance are made.

A fundamental question in the case is as to the capacity in which Stanton acted. The defendants contend that he was the agent of both sides, and consequently that neither is responsible to the other for his acts, while the appellant contends that he was the agent of the defendants only. We think that the latter position is correct. Until recently the defendants seem to have understood that Stanton was their agent. At the first trial of the case Clarke testified as follows: "We were to send a man to take possession of the property, take a bill of sale of the stock, and everything was to be run in our name." And at the last trial the same defendant testified as follows: "I told Adam Murdock we would have to have a mango there and take possession, or the personal property security would be no good." The other defendant testified at the first trial as follows: "I had the real-estate possession of everything. I was put in possession of everything. Question. Everything he had; for what purpose? Answer. For the purpose that he told me,—that during the year he would pay off the debt, and if not we were to hold the property, and manage it until we got our money." This testimony accords with the circumstances of the case. It is admitted that the agreement gave to the defendants the sole right of possession of the ranches, and we do not understand them to maintain that they did not exercise all their rights under the agreement, so far as the ranches are concerned. But it is not pretended that they had possession in any other way than through Stanton; and we think it follows that, for the purposes of possession, and all its consequent responsibility, Stanton must be held to have been their agent; and at the first trial the defendant Clarke testified distinctly that such was the case. He was asked this question: "This man Stanton was the agent of you and Murdock in taking charge of the property?" And he answered: "No, sir; he was my agent." Furthermore, Stanton seems to have always taken his orders from the defendants; and we do not think that all this is outweighed by the fact that his wages were to be paid as part of the running expenses, or by the fact that his selection was approved by Murdock, or by both cir-

cumstances together. But the matter is put beyond doubt by the defendants' answer, which avers "that according to such agreement the defendants, on or about the 1st day of April, 1875, through their agent, Stanton, took possession of the said two ranches, and have ever since run and operated the same, and are now in possession thereof." Even without this averment, we think that, upon the evidence, Stanton must be held to have been the agent of the defendants only. As we construe the findings, however, the court below did not take this view of Stanton's capacity, but held that he was the agent of both sides; and this is the construction of the counsel for the respondents, for they say: "There is nothing in the record, either in the evidence or in the findings, which would justify the inference that, by their contract, Clarke and Cox assumed to become responsible for the management of the Murdock estate." And they devote several pages to an argument to show that Stanton was the agent of both sides, and consequently that neither was responsible to the other for his acts. It thus appears that the court took the account upon a fundamentally wrong principle. This must have had an important influence upon the result, and there are several injurious consequences which we can see that it did have. In the first place, the court charged the defendants with the value of the use of the property "for their own stock" only, whereas, if Stanton was their agent, they were responsible for his acts, and should have been charged with the value of the use of the ranches for the stock that he kept there. In the next place, they should have been charged with a proportion of the expense of the care, etc., of Stanton's cattle. Upon the former appeal, it was held that they must be charged with a proportion of the expense of the care, etc., of their own cattle, (59 Cal. 695, 696;) and they were so charged by the court below. But for this purpose their agent's cattle must be considered as theirs. Except in the single item of hay, however, they were charged only with a proportion of the expense of their own cattle, and not for those of Stanton. This is apparent from the transcript, where the defendants' cattle are identified as having been bought from one Ames, and they are charged with one-third of the expenses, because such was the proportion of the Ames cattle to the Murdock cattle; and it is expressly stated that it was "upon the principle of this finding" that the proportion of the expenses was determined. These are consequences which can be seen to have resulted from the erroneous principle upon which the court proceeded. But the principle is so fundamental in the accounting that, even if no injurious consequence affirmatively appeared, we think the case would be within the rule that, where error is clearly shown, injury is presumed, unless the contrary appears. See cases collected in Hayne, New Trials & App. § 287.

There is another error in the findings, not flowing entirely from the erroneous principle upon which the court proceeded, but somewhat broader. It is perfectly

plain that the defendants should have been charged with a proportion of the taxes upon the cattle, as well as of the other expenses. But the court expressly excludes the taxes from the amount to be deducted from the running expenses. The respondents' counsel say in reference to this that "the words 'and taxes' were evidently inadvertently put into said finding." But, although the error is plain, we do not see upon what basis it could be set down to inadvertence. As against the respondents, the findings must be presumed to be true; and that an error is the result of inadvertence will not be presumed, but must be made to appear. *Carpenter v. Superior Court*, 75 Cal. 598, 19 Pac. Rep. 174; *Wunderlin v. Cadogan*, 75 Cal. 619, 17 Pac. Rep. 713.

We have considered whether the judgment could not be modified so as to avoid the consequences of the errors above referred to. But the findings afford no basis for such a modification, even as to the injurious results which affirmatively appear. For example, it is not found what was the number of Stanton's cattle, nor how long he kept them on the property. In the judgment of the writer of this opinion, it would conduce to the better administration of justice if the appellate court could look into the evidence for the purpose of modifying a judgment to avoid the consequences of any error that may have crept into the proceedings. But, while it may look into the evidence to see if it sustains the findings, or to ascertain and declare the principles of law which apply to the case, it is settled that it cannot resort thereto for the purpose of making findings to serve as a basis for a modification of the judgment. *Ellis v. Jeans*, 26 Cal. 278; *Carpentier v. Gardiner*, 29 Cal. 164; *Hayes v. Martin*, 45 Cal. 563. And in addition to this, as above remarked, we cannot see that the erroneous principle upon which the court proceeded did not have injurious consequences which do not appear.

There is also a radical error in the decree. The court adjudged, in effect, that the legal title passed to the defendants, and it gave to the plaintiff a certain time in which to redeem, failing which the property was to vest absolutely in the defendants. But, as it is admitted that the conveyances were intended only to secure the payment of money, they were mere mortgages, and did not pass the legal title. "It is the settled rule in this state that, if a deed absolute in form was made merely to secure an indebtedness [to the grantee,] it is a mere mortgage, and does not pass the title." *Smith v. Smith*, 80 Cal. 325, 21 Pac. Rep. 4, and 22 Pac. Rep. 186, 549. See, also, *Hall v. Arnott*, 80 Cal. 352, 22 Pac. Rep. 200; *Booth v. Hoskins*, 75 Cal. 275, 17 Pac. Rep. 225; *Raynor v. Drew*, 72 Cal. 309, 13 Pac. Rep. 866; *Healy v. O'Brien*, 66 Cal. 519, 6 Pac. Rep. 386; *Taylor v. McLain*, 64 Cal. 514, 2 Pac. Rep. 399. And the fact that the mortgagees were put in possession does not change the rule. As was said in *Smith v. Smith*, above cited, "such a deed gives a mere lien upon the property, just as if the parties had put their agreement in the form of a mortgage;" and it has been decided that, in

this state, the interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. *Dutton v. Warschauer*, 21 Cal. 609. The legal title, therefore, remained in *Murdock*, and vested in his heirs, and is not in the defendants; and the court below was not authorized to decree that it should vest absolutely in the defendants upon the failure of the plaintiff to pay what was due within a certain time. The defendants, however, have a right to retain possession until the sums due to them have been paid; and, even if they have not, the court has power to impose proper conditions upon the plaintiff. *Raynor v. Drew*, 72 Cal. 311, 13 Pac. Rep. 866; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. Rep. 225; *De Cazara v. Orena*, 80 Cal. 134, 22 Pac. Rep. 74. And the answer prays that the property be sold, and the proceeds applied to the payment of the debt. The decree, therefore, ought to have provided that, in case of the failure of the plaintiff to pay what was due within a specified time, the property should be sold, and the proceeds applied to the payment of whatever is due to the defendants.

As the case must go back to the court below, it is proper to dispose of certain other questions which will arise upon a retrial, and which have been argued.

1. It is contended for the appellant that the defendants were trustees, and were therefore bound to account as such, and are held to the same strict responsibility in the management of the property committed to their care. It is true that mortgagees in possession are often spoken of as "trustees." But they are so only in a limited sense. *Ten Eyck v. Craig*, 62 N. Y. 422; *Clark v. Sibley*, 13 Metc. 213; *Cholmondeley v. Clinton*, 2 Jac. & W. 184; 1 Hill. Mortg. 391. As remarked by *SHAW, C. J.*, in reasoning to a somewhat different point: "In some very limited respects, a mortgagee is a trustee; as when he has entered, and is in the receipt of the rents and profits, he is liable to account therefor, and in that respect may be denominated a 'trustee.'" *King v. Insurance Co.*, 7 Cush. 7. That they are bound to account for the rents and profits is a matter of course. 2 Story, Eq. Jur. (13th Ed.) § 1016a; *Raun v. Reynolds*, 15 Cal. 471. And we think that the rule as to trustees in general, viz., that their accounts should be clear, distinct, and accurate, and that all obscurities and doubts should be resolved against them, (2 Perry, Trusts, 4th Ed., § 821,) applies here. But the accounting is not to be extended to imaginary profits. Where no negligence or improper conduct is alleged, a mortgagee in possession is chargeable with what he has actually received, and no more. *Benham v. Rowe*, 2 Cal. 407. In this case, negligence and improper conduct are charged, and various claims are based thereon. It is therefore necessary to consider what was the degree of care required of the defendants. Chancellor Kent, in his Commentaries, stated the rule as follows: "If the mortgagee obtains possession of the mortgaged premises before foreclosure, he will be accountable for the actual receipts of the net rents and profits, and nothing more, unless they

were reduced or lost by his willful default or gross negligence. By taking possession, he imposes upon himself the duty of a provident owner; and he is bound to recover what such an owner would, with reasonable diligence, have received." 4 Kent, Comm. 166. This statement of the rule has found its way into the decisions of the courts, and the treatises of text-writers, (see *Hidden v. Jordan*, 28 Cal. 309; *Moshier v. Norton*, 100 Ill. 68;) and a similar passage was quoted from a modern text-writer on the former appeal of this case, (59 Cal. 694;) but it cannot be determined from the opinion whether the court meant to establish a rule or not. But, if the term "gross negligence" is to be taken in its ordinary sense, viz., as denoting the absence of slight care, (see *Shear. & R. Neg.* 4th Ed., § 49,) it is manifest that the passage quoted is somewhat inconsistent; for, if the mortgagee, by taking possession, "imposes upon himself the duty of a provident owner, and is bound to recover what such an owner would with reasonable diligence have received," it is evident that he is bound to something more than slight care, and is responsible for something less than gross negligence. What we think the passage means, when taken as a whole, is that the mortgagee in possession is bound to exercise reasonable care, and is responsible for the want thereof. This was the construction given to similar language by a comparatively recent case in Alabama. The court said: "On a bill to redeem, a mortgagee in possession will not be held accountable for anything more than the rents actually received, unless there has been willful default or gross negligence, which in such case is the measure of reasonable diligence." *Gresham v. Ware*, 79 Ala. 199. That reasonable diligence is required, is laid down in several cases. *Shaeffer v. Chambers*, 6 N. J. Eq. 548; *Strong v. Blanchard*, 4 Allen, 543, 544; *Scruggs v. Railroad Co.*, 108 U. S. 375, 2 Sup. Ct. Rep. 780. It seems plain, upon principle, that the mortgagee in possession is bound to something more than slight care. And we think that Chancellor Kent, and the courts and writers who adopted his language, meant to say that reasonable care was required. Applying this rule to the case before us, we think that the evidence shows, without material contradiction, that, while there were some errors of judgment, the general management of the property was what was required. Especially does this appear when it is considered that it was agreed that the ranches were to be run as they had been by the mortgagor. This does not mean that, if the mortgagor was negligent as to any matter, the mortgagees should be so too, but that the management of the mortgagees should be on the same general lines as that of the mortgagor; and, as above stated, we think it was.

2. Much argument is based upon the undoubted fact that both Stanton and the defendants kept their own cattle upon the ranches, not separate from the Murdock cattle, but together with them. This was certainly wrong. But it was settled on the former appeal that it made them liable for a proportion of the running ex-

penses, (59 Cal. 695, 696;) and, in addition to this, the court below allowed the value of the use of the land. This, we think, was all that could properly be charged against the defendants on this account. In addition to the cattle, the defendants sent some horses to the property. This was because the horses were needed for ranch work, and they were used for that purpose. This was for the benefit of the property, and nothing can be charged against the defendants by reason thereof. Similar remarks apply to the stallion. He was useful as a work-horse, and for breeding the ranch mares. The money made from outside parties during the breeding season belonged to the defendants.

3. Part of the property mentioned in the bill of sale was a half interest in a portable saw-mill located upon public land, and owned by Murdock in partnership with one Quinn. No profits were ever made from this mill, and it does not clearly appear what finally became of it. It was moved once while Quinn was in control. Afterwards, it was moved again, and it seems that one Harris "took it." The court below found that the defendants never had possession, and the evidence leads us to the same conclusion. The defendants incurred no liability to Murdock or his estate by not taking possession; for it was as much his duty to deliver it to them, as theirs to receive it, and there is nothing to show that he tendered it. Even if the defendants be considered as having been in possession, we cannot say that there was a want of reasonable care on their part. Quinn was allowed, with the acquiescence of Murdock, to run it as he had been doing previous to the bill of sale. After Murdock's death, Quinn was the surviving partner, with authority to settle up the affairs and dispose of the property. He is the person who is accountable to the plaintiff in relation to the matter. The defendants are not bound to litigate with him for the benefit of the estate.

4. A point is made in relation to the number of cattle received by the defendants with the ranches. The bill of sale purports to transfer 1,322 head, and it is argued that its acceptance estopped the defendants from denying that they received that number. There is no force in this suggestion. After the bill of sale was signed, it was Murdock's duty to deliver the cattle in accordance therewith. If he did not perform this duty to its full extent, the defendants are certainly at liberty to prove the fact.

5. As above stated, one of the notes provided for compounding the interest if not paid when due. The court below refused to allow compound interest, and the respondents contend that this was error. The theory upon which the court acted was, probably, that the receipts should have been applied first to keeping down the interest upon the note which provided for compound interest; and this, we think, was the right view. The net receipts should be applied first to the payment of the interest upon the note which provided for compound interest, and afterwards to the payment of the interest upon the other

sums due; and, if anything remained, it should be applied to the payment of the principal. There can be no doubt that the note bore interest from its date.

6. Some objection is made to the findings; and, for the guidance of the court below, it may be stated that it is not necessary for the findings to give the items of the account. It is not necessary to give an itemized account in pleadings, (Code Civil Proc. § 454,) and a finding which follows the pleading is sufficient. In this, as in other cases, it is sufficient to find the ultimate facts, or secondary facts from which the ultimate fact necessarily follows.

7. Whatever sums were advanced to Mrs. Anna Murdock upon the order of the mortgagor are chargeable against the estate, but sums advanced to her without any such order are not so chargeable. Sums advanced to the widow personally cannot be charged against the estate. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

83 Cal. 620

Ex parte AH SAM. (No. 20,689.)

(Supreme Court of California. April 30, 1890.)

HABEAS CORPUS—WHEN WRIT GRANTED.

That petitioner was convicted without being informed of all his rights, or that he was sentenced too soon after conviction, are mere irregularities reviewable on appeal, and cannot be inquired into on *habeas corpus*.

In bank. Petition for writ of *habeas corpus*.

L. L. Chamberlain, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

PER CURIAM. The alleged illegality of the imprisonment in this case is that the petitioner is held under a commitment issued upon a conviction of the crime of battery, and that the commitment is void because it does not appear therefrom that the petitioner was informed of all his rights, or that six hours elapsed after conviction and before sentence, or that time was waived. There is no law that makes it necessary that these facts should be recited in the judgment, or copied into the commitment. Besides, if it is true that the defendant was not duly informed of his rights, or was sentenced too soon after conviction, these were mere errors, not excesses of jurisdiction, and were reviewable on appeal. They cannot be inquired into on *habeas corpus*. Writ denied.

3 Cal. Unrep. 259

CURRAN v. KENNEDY *et al.* (No. 13,703.)

(Supreme Court of California. May 3, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT.

Under Code Civil Proc. Cal. § 652, providing that, if a judge refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same, such an application will be granted where the petitioner alleges that a

bill settled by the judge is not in accordance with the facts, pointing out the particulars in which it is incorrect, and the judge alleges that the bill is true.

In bank. Petition to prove bill of exceptions.

Code Civil Proc. Cal. § 652, provides that, if a judge refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same.

Charles F. Hanlon, for petitioner. Gartlan & Curran, for respondents.

PER CURIAM. This is an application under section 652, Code Civil Proc., for leave to prove and to settle bill of exceptions to be used on appeal. The petition concedes that the judge has settled and certified a bill of exceptions, but alleges that the same is not a true bill, in accordance with the facts, and annexes to his petition a copy of the bill as settled, and also a copy of the proposed bill. The respondent alleges that the bill as settled and allowed by him is true and correct. The case presents a direct issue between the petitioner and respondents as to the accuracy of the bill as settled; the petitioner pointing out the particulars in which he claims that it is incorrect. It seems to be a case in which the petitioner should be allowed to prove the truth of the issue thus presented. It is therefore ordered that this cause be, and the same is hereby, referred to Hon. R. Y. HAYNE, a commissioner of this court, to take the proofs, and report the same, with his findings thereon, to this court.

3 Cal. Unrep. 265

WHITE v. WHITE. (No. 13,331.)

(Supreme Court of California. May 9, 1890.)

APPEAL—DISMISSAL.

1. An appeal will not be dismissed because of interlineations in the transcript of the record.

2. An order allowing alimony is appealable.

In bank. Appeal from superior court, city and county of San Francisco, T. K. WILSON, Judge.

E. D. Wheeler and Barclay Henley, for appellant. Henry E. Highton, H. C. McPike, and J. A. Cooper, for respondent.

PER CURIAM. Respondent moves to dismiss the appeal from the judgment in this case on the ground of written interlineations in the transcript of the record. This is not ground for dismissing the appeal, nor was it so held in *Green v. McMann*, 79 Cal. 561, 21 Pac. Rep. 964.

There is also a motion to dismiss the appeal from an order allowing alimony. The order in this case is within the decision in *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. Rep. 456, 635, 8 Pac. Rep. 709. We adhere to the ruling in that case. The certificate of the clerk of the superior court to the transcript is in all respects sufficient. Both motions are denied.

83 Cal. 649

RUMFELT v. TRINITY RIVER CANAL & HYDRAULIC MIN. CO. (No. 13,585.)

(Supreme Court of California. May 3, 1890.)

APPEAL—PRACTICE.

Appellant, not having filed its transcript on appeal within the time required by the rules of

court, made affidavit, for the purpose of obtaining an extension of time, that the transcript had "not yet been printed," for certain reasons; that the manuscript of the record was "ready for printing;" and that it would be necessary for appellant to have further time in which "to prepare and serve" the transcript. An order was made granting appellant further time "to serve and file" its transcript. *Held*, that the order clearly contemplated a printed transcript, and that, appellant having merely delivered a manuscript copy of the record to the clerk of court within the time limited by the order, without any service upon respondent, the appeal should be dismissed.

In bank. Appeal from superior court, Trinity county; T. E. JONES, Judge.

John A. Wright, (W. H. H. Hart, of counsel,) for appellant. J. W. Turner, for respondent.

McFARLAND, J. This cause is before us upon a motion of respondent to dismiss the appeal because no transcript on appeal was filed and served within the proper time. There seems to have been great delay from the start in perfecting the appeal, and taking steps to prepare and print the transcript. Judgment was entered September 29, 1888; the bill of exceptions was settled and certified July 20, 1888; and the notice of appeal was not filed until September 25, 1889. On November 4, 1889, for the purpose of getting an order of this court extending the time for filing and serving the transcript, the attorney of appellant made an affidavit in which he stated that "the transcript on appeal in said cause has not yet been printed owing to unavoidable delay in getting a capable person to prepare the manuscript of the record of said cause; that said manuscript of the record of said cause is now prepared, and ready for printing; that it will be necessary for appellant to have further time in which to prepare and serve its transcript on appeal." Upon the presentation of said affidavit, four justices of the court, on said November 4th, made the following order: "Upon application of counsel for appellant in the above-entitled action, and good cause appearing, it is hereby ordered that said appellant may have twenty days further time from this date within which to serve and file its transcript on appeal in said action." On November 23, 1889, appellant, instead of filing a printed transcript, and serving it on respondent, as was clearly contemplated by the order, merely delivered to the clerk of this court one manuscript copy of the transcript, and on November 25th paid to the clerk the amount of money necessary to pay for printing it. The 24th of November, the last of the 20 days, fell on Sunday; and appellant now contends that, because it had the manuscript transcript on file when the motion to dismiss was made, it is protected against the motion by rules 10 and 3 of this court. Rule 10 is, no doubt, somewhat incomplete; but we think that the general understanding has been that, read in connection with other rules on the subject, the proper construction is that, when an appellant chooses to have his transcript printed by the clerk, he must furnish it to the clerk soon enough for the latter to have it printed and served within the 40 days. But, however that may be, (and we

do not decide the point here,) the appellant in the case at bar did not bring himself within rule 10 or any other rule. It did not file or serve either a printed or a manuscript transcript within 40 days. It depends entirely upon the grace given it in the order extending the time. But there was no compliance with that order. It gave 20 days in which "to serve and file" the transcript, which was not done. Moreover, it was made upon an application and affidavit which showed that the manuscript was ready, but that additional time was necessary in order to have it printed; and it was as much an order giving additional time to serve and file a printed transcript as if the word "printed" had been written in the order itself. The transcript was not "on file," within the meaning of rule 3. The appeal is dismissed, and the written transcript stricken from the files of the court.

We concur: BEATTY, C. J.; PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

84 Cal. 114

PEOPLE *ex rel.* ATTORNEY GENERAL v.
DASHAWAY ASS'N. (No. 11,089.)

(Supreme Court of California. May 10, 1890.)

CORPORATIONS—QUO WARRANTO—ESCHEAT.

1. An information in the nature of *quo warranto* to forfeit the charter of a corporation for perversion of its franchise may be brought by the people, under Const. Cal. art. 6, § 5.

2. The forfeiture of the charter of a corporation cannot be maintained on an averment in the information in the nature of a *quo warranto* that the corporation was formed to "promote the cause of temperance," and that it has abused its trust and misappropriated its funds, as it cannot be said that the perversion of the fund from so vague an object as "temperance" is a public injury.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Atty. Gen. George A. Johnson, S. Heydenfeldt, and Jos. P. Kelly, for appellant. Tilden & Tilden, for respondent.

PER CURIAM. This is an information in the nature of a *quo warranto* to forfeit the charter of the Dashaway Association, a corporation organized and existing under the laws of the state of California, and for a judgment declaring that its property escheat to the state; that a receiver be appointed to take possession of all the property; that an injunction issue, etc. The complaint avers that the object and purpose for which the said corporation was formed was to promote the cause of temperance; that it has no capital stock; that it has members who are elected under the provisions of its by-laws; that it has since its incorporation received at various times from its members and others contributions and donations of money for the purpose for which it was incorporated, to-wit, the promotion of the cause of temperance, with which moneys it acquired by purchase real estate in the city and county of San Francisco; that in 1883, by leave of the court, it sold certain real estate in said city and county for \$156,000; that it paid off a mortgage of \$45,000, leaving a balance in cash on hand of \$111,000, realized from property purchased with

donations as aforesaid, and for the purposes aforesaid; that the corporation has abused and misused its powers, disregarded its corporate trust, and violated its charter, and has fraudulently and unlawfully perverted its funds and misapplied \$72,000 from the object for which the corporation was formed, and from the use for which it was given and received, by dividing, distributing, and paying out the same among its members; that the officers and members have conspired and colluded with defendant to fraudulently and unlawfully accomplish this result, and that the corporation has still the sum of \$39,000 on hand, received in like manner and for like purpose, which, as relator is informed, it will dispose of in like unlawful manner, unless restrained. Defendant demurred to the information upon the grounds: "(1) That the said complaint does not state facts sufficient to constitute a cause of action; (2) that the said court has no jurisdiction of the person of the defendant or the subject of the action." The demurrer was sustained by the court below "on the grounds that the court has no jurisdiction." Judgment was entered in favor of defendant, from which judgment relator appeals to this court.

Corporations are creatures of the law, and when they fail to perform duties which they were incorporated to perform, and in which the public have an interest, or do acts which are not authorized, or are forbidden them to do, the state may forfeit their franchises and dissolve them by an information in the nature of a *quo warranto*. *People v. Insurance Co.*, 15 Johns. 358; *People v. Railroad Co.*, 53 Cal. 694; *Golden Rule v. People*, 118 Ill. 492, 9 N. E. Rep. 342. The grant of corporate franchises is always subject to the implied condition that they will not be abused. *Insurance Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. Rep. 681. "In its relations to the government, and when the acts or neglects of a corporation, in violation of its charter or of the general law, become the subject of public inquiry, with a view to the forfeiture of its charter, the willful acts and neglects of its officers are regarded as the acts and neglects of the corporation, and render the corporation liable to a judgment or decree of dissolution." *Ang. & A. Corp.* § 310; *Life Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. 35; *Bank Com'rs v. Bank of Buffalo*, 6 Paige, 497; *Ward v. Insurance Co.*, 7 Paige, 294. This reasoning proceeds upon the theory that the corporation is cognizant of, and approves of, the acts of its agents; and where it is made to appear that the agent has departed from his duties, as prescribed by the corporation, or violated his instructions in the performance of the acts complained of and relied upon as a basis for forfeiture, no such forfeiture will be declared. *State v. Commercial Bank*, 6 Smedes & M. 237. In *People v. Insurance Co.*, 15 Johns. 358, an application had been previously made by the attorney general to a court of chancery for an injunction to restrain the company from usurping the franchise of banking, which application was refused because there was a complete and adequate remedy at law by an information in

the nature of a *quo warranto*. *People v. Bank*, 6 Cow. 196; *People v. Bank*, Id. 211; and *People v. Bank*, Id. 217, are authority to the point that the action is properly brought in the name of the people, and against the corporations in their corporate names, in cases where they had, as corporations, usurped franchises not granted by their charters. See, also, *People v. Trustees*, 5 Wend. 211. The writ of *seire facias* was formerly used by the government as a mode to ascertain and enforce the forfeiture of a corporate charter, in cases where there was a legal existing body, capable of acting, but who had abused their power. It would not lie in cases of mere *de facto* corporations. It was necessary that the government be a party to the suit, for the judgment was that the parties be ousted and the franchises seized into the hands of the government. 2 Kent, Comm. 313. The writ of *quo warranto* was a writ which issued to bring the defendant before the court to show by what authority he claimed an office or franchise, and was applicable alike to cases where the defendant never had a right, or where, having a right or franchise, he had forfeited it by neglect or abuse. 3 Bl. Comm. 262, 263. An information in the nature of *quo warranto*, which has succeeded the writ of that name, was originally in form a criminal proceeding, to punish the usurpation of the franchise by a fine, as well as to seize the franchise. This information has in process of time become, in substance, a civil proceeding to try the mere right to the franchise or office. It was a peculiarity of both the *quo warranto* and information in the nature of *quo warranto* that the ordinary rule of pleading was reversed, and the state was bound to show nothing, and the defendant was required to show his right to the franchise or office in question; and, if he failed to show authority, judgment went against him. *Ang. & A. Corp.* § 756. The practice has, however, become quite general in this country for the information to set forth the facts relied upon to show the intrusion, misuser, or non-user complained of. In information of *quo warranto* there were two forms of judgment. When against an officer or individual, the judgment was ouster; when against a corporation by its corporate name, the judgment was ouster and seizure. In the first case, there being no franchise forfeited, there is none to seize; in the second case there is, consequently the franchise is seized. 2 Kent, Comm. 312, and note. But there may be a judgment of ouster of a particular franchise, and not of the whole charter. *People v. Railroad Co.*, 15 Wend. 113. By such ouster and seizure the franchises are not destroyed, but pass to and exist in the state. The corporation was destroyed, and ceased to be the owner or possessor of lands or goods, or of rights or credits. The lands reverted to the grantor and his heirs, and the goods escheated to the state.

The principle of forfeiture is that the franchise is a trust, and the terms of the charter are conditions of the trust; and, if any one of the conditions of the trust be violated, it will work a forfeiture of the charter. Cases of forfeiture are said to be divided into two great classes: (1) Cases

of perversion, as where a corporation does an act inconsistent with the nature, and destructive of the ends and purposes, of the grant. In such cases, unless the perversion is such as to amount to an injury to the public who are interested in the franchise, it will not work a forfeiture. (2) Cases of usurpation, as where a corporation exercises a power which it has no right to exercise. In this last case the question of forfeiture is not dependent, as in the former, upon any interest or injury to the public.

We have referred, in a general way, to the modes of procedure under these several writs, and the nature of the relief granted under them, for a purpose which will become apparent when we look into the following provisions of our Code: Section 802 of the Code of Civil Procedure of 1872 provides as follows: "The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions, under the provisions of this chapter." Then follow the provisions of the chapter from sections 803 to 809, both inclusive, providing for an action by the attorney general, in the name of the people of the state, against any person who usurps, intrudes into, or unlawfully holds or exercises, any public office, civil or military, or any franchise within this state. This was the condition of our law until 1879, when the present constitution of the state went into effect, the fifth section of article 6 of which authorizes the superior courts and their judges to issue writs of *quo warranto*; and in 1880 the Code of Civil Procedure was amended to conform in this respect to the constitution. Code Civil Proc. § 76. If, then, it be contended that the effect of the constitution and amendment to section 76 of the Code of Civil Procedure, reviving the writ of *quo warranto*, is to repeal by implication the chapter providing for an action against persons who usurp offices or franchises, the answer must be that it makes little difference, as the power under a writ of *quo warranto* is quite as broad as under the statute.

The mode of proceeding under the several writs we have mentioned has not in modern times been very uniform, and we regard the information or complaint in this case sufficient in its general scope to uphold a proceeding like the present, whether brought under the statute, or in support of a writ of *quo warranto*. We say sufficient in its general scope, in the view that it will uphold the one equally with the other. We are clearly of opinion that the proper parties are before the court, the nature of the relief sought considered. The vital question, however, remaining in either case is this: Has there been a perversion by the defendant of its funds under such circumstances as to amount to an injury to the public? We have already said that in cases of perversion the acts must result in injury to the public who are interested in the franchise, or no forfeiture will be declared. Has the public such an interest here, and has it been injured? The information avers "that

the object and purpose for which the said corporation was formed was to promote the cause of temperance;" that it has received moneys contributed and donated by its members and other persons for "the promotion of the cause of temperance." These are the only allegations touching the objects of the association, the scope of its action, and the manner of its achievement. Whether temperance in eating, in drinking, or temperance generally and in all things, is meant, is not stated, and must be left to conjecture. Whether its operations and efforts are confined to members of the association, or extended to those outside of the pale of the society, does not appear. In *Saltonstall v. Sanders*, 11 Allen, 446, the supreme court of Massachusetts upheld as a public charity a residuary bequest for the following purposes: "First, 'to the furtherance and promotion of the cause of piety and good morals;' or, second, 'in aid of objects and purposes of benevolence or charity, public or private;' or, third, 'temperance;' or, fourth, 'for the education of deserving youths.'" In reference to the third clause, relating to the bequest, viz., that for the furtherance and promotion of temperance, another portion of the will indicated so unmistakably the meaning of the testator, that the court says that the term, "temperance," which is shown by the previous clause above quoted to have been used by the testator in its modern and limited sense of restraining the abuse of intoxicating liquors." That a bequest for the purpose of being used by a trustee for the cause of temperance, in restraining the abuse of intoxicating liquors, is a public charity, and may be upheld as such, we do not doubt. So, too, we are fully alive to the fact that upon the construction of general charitable bequests, "if there are two meanings of a word, one of which will effectuate and the other will defeat the testator's object, the court is bound to select that meaning of the word which will carry out the intention and objects of the testator." The enforcement of charitable uses cannot be limited to any narrow and stated formula. As has been well said, it must expand with the advancement of civilization and the daily increasing needs of men. New discoveries in science, new fields and opportunities for human action, the differing condition, character, and wants of communities and nations, change and enlarge the scope of charity; and, where new necessities are created, new charitable uses must be established. The underlying principle is the same. Its application is as varying as the wants of humanity. Public charities have often been enforced in cases lacking in that definiteness essential to uphold a bequest to individuals. It does not follow, however, that we can by adjudication give a definite meaning to language which, standing by itself, or in connection with its context, has only a general signification, incapable of limitation. The word "temperance" has no fixed legal meaning, as contradistinguished from its usual import. Webster defines it as "habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or

moderate indulgence; moderation, as temperance in eating and drinking; temperance in the indulgence of joy or mirth." Where a testator bequeathed the residue of his estate to the bishop of D., to dispose of the same "to such objects of benevolence and liberality as the bishop in his own discretion shall most approve of," the bequest was held void upon the ground that objects of benevolence and liberality were not necessarily charitable, within the statute of Elizabeth, and were therefore too indefinite to be executed. *Morice v. Bishop*, 9 Ves. 399. Upon the like ground, a bequest "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," has been held void for vagueness and uncertainty, and as not being within the scope of the statute of Elizabeth. *Kendall v. Granger*, 5 Beav. 300.

We are of opinion that the term used in the information here is too vague and uncertain to enable us to say therefrom that the fund in question is a public charity which can be administered by a court of equity. It follows that the perversion of the fund is not an injury to the public, and hence that the forfeiture cannot be maintained. The judgment is affirmed.

Fox, J., deeming himself disqualified, did not participate in this decision.

84 Cal. 316

CLEARY v. FOLGER. (No. 12,843.)

(Supreme Court of California. June 9, 1890.)

VENDOR AND VENDEE—FORFEIT—MUTUAL DEFAULT.

In a contract for the sale of real estate, \$900 was paid as forfeit, \$4,100 to be paid on or before a certain date, the balance secured by mortgage. Time was stipulated to be of the essence of the contract. The installment of purchase money was not tendered within the specified time, nor was a deed tendered, or demand of payment made. *Held*, that the forfeit remains in the hands of vendor as money had and received for vendee, and subject to be recovered by him less the damages vendor may have suffered by the failure to complete the sale.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

B. McFadden, for appellant. R. M. Fitzgerald, for respondent.

FOOTE, C. This was an action to recover the sum of \$900 alleged to have been received by the defendant for the plaintiff's use. The court below, upon the evidence offered by the plaintiff, granted the motion of nonsuit made by the defendant. From the judgment thereupon rendered, and an order denying a new trial, this appeal is taken.

The facts of the case are that the two parties to the action entered into a contract which is as follows: "This agreement made and entered into this 22d day of August, in the year of our Lord one thousand eight hundred and eighty-seven, between J. A. Folger, the party of the first part, and Michael Cleary, the party of the second part, witnesseth that the said party of the first part, in consideration of the

covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and said second party agrees to buy, all the certain lot or parcel of land situate in Brooklyn township, county of Alameda, and state of California, and bounded and particularly described as follows, to-wit, a tract of land containing seven and one-quarter (7¼) acres, more or less, on the south-easterly side of the county road, the said road being the first road running north from Hopkins street, after leaving Fruitvale avenue, going towards the east, now known as the 'Thorne property,' adjoining the lands of Mr. Welsh and Mr. Rhoda, for the sum of \$9,425, gold coin of the United States; and the said party of the second part, in consideration of the premises, agrees to pay, at the times and in the manner hereinafter mentioned, to the said party of the first part, the sum of \$9,425, gold coin, as follows, to-wit: \$900 in gold coin as forfeit; \$4,100 in gold coin on or before September 6, 1887; the balance due of purchase, namely, \$4,425, on mortgage at 8 per cent. per annum. And the said party of the second part agrees to pay all state and county taxes or assessments, of whatsoever nature, which may become due on the premises above described. In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto; and the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying said land free and clear of all incumbrances made, done, or suffered by the said party of the first part. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties, and that time is of the essence of this contract. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written. [Seal.] J. A. FOLGER, Jr. [Seal.] MICHAEL CLEARY. Signed, sealed and delivered in the presence of W. K. MOCKBEE. [Indorsed] Filed, December 8, 1887. CHAS. T. BOARDMAN, County Clerk. By ROBERT EDGAR, Deputy-Clerk." On the 12th of September, 1887, the plaintiff notified the defendant in writing that he rescinded the contract; and he demanded back the \$900 which, under the terms of the contract, had been paid over, and designated as a "forfeit." Up to that time, neither the plaintiff had tendered the payment of the balance of the purchase money, nor the defendant a deed, etc., to the premises. Upon this, the defendant failing to pay back the deposit, the plaintiff institutes this action. The defendant answered, and filed a cross-complaint, the object of which last was to force the plaintiff to comply specifically with the contract, and pay the balance of the purchase money, upon the

defendant's making a good and sufficient conveyance of title, etc., to the premises.

The court below seems to have decided against the defendant on his cross-complaint, evidently, upon the theory that he could not enforce a mutual and dependent covenant of the plaintiff without having on his (the defendant's) part tendered a deed at the date fixed in the contract, and demanded payment of the installment due, but does not seem to have determined anything with reference to the right of the plaintiff to recover back the \$900 sued for. Neither the balance of the purchase money was tendered on the 6th day of September, 1887, by the plaintiff, or a deed by the defendant, or demand made of payment of the installment due. So far, then, as the further carrying out of the agreement was concerned, time being of the essence of the contract, each side had neglected to perform its part of the agreement necessary to consummate the contract, and it was at an end. The plaintiff could not be forced to pay the balance of the purchase money, as no deed had been tendered him, or installment due demanded. *Bohall v. Diller*, 41 Cal. 535. The defendant was no longer obliged to make a deed to the premises conveying a good and sufficient title, as the balance of the purchase money was not tendered. *Englander v. Rogers*, Id. 421. So that the material question is left to be determined, whether or not the plaintiff, upon this state of facts, is entitled to recover from the defendant, as money in his hands held for plaintiff's use, the \$900 which he deposited with the defendant, on the inception of the contract, as a forfeit. Time was undoubtedly of the essence of the contract, under the rule laid down in *Grey v. Tubbs*, 43 Cal. 364, in construing such a contract as the one in hand. In that case this covenant was contained in the contract: "In the event of failure to comply with the terms hereof by the party of the second part, [the purchaser,] the party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto." In the present case the language is: "In the event of a failure to comply with the terms hereof by the said party of the second part, [the purchaser,] the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto." In *Grey v. Tubbs*, supra, it was said of the language above quoted from the contract construed in that case: "It would be difficult to express with greater clearness and certainty than the parties did in this contract that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument. Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have in fact contracted that, if the purchaser make default in the payments as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase, and when it also appears that the

purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default."

Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms. It is not perfectly certain what the intentions of the parties to this contract were with reference to the \$900 paid as a forfeit; but, construing it with reference to the second clause of the agreement, which we have quoted, and compared with that contained in *Grey v. Tubbs*, it appears as if it was intended to be in the nature of liquidated damages, if the purchaser should fail, after the contemporaneous tender of a deed to him of the land, and demand of payment of the installment due, etc., to comply with his part of the agreement. Now, as both parties have failed to comply with their part of the agreement, and, as we have seen, time being of the essence of the contract, the contract is at an end, the \$900 remain in the hands of the defendant as money had and received from the plaintiff, subject to be recovered by the plaintiff, less the amount of damages which the defendant may show for the failure of the plaintiff to complete the purchase. The agreements of the parties were reciprocal, and to be performed, or offered to be performed, contemporaneously at a certain stated time. Both have failed to offer to perform; and, if any damage has been done by the plaintiff, the defendant may recoup for it in an action brought to recover the \$900, which reverts to the plaintiff as money held by the defendant for his use. The pleadings, as they now stand, do not admit of this determination, but the defendant on a retrial may reform his pleading so as to raise that issue.

We perceive no error in the ruling of the court upon the introduction of the judgment-roll in the matter of the cross-complaint. It did not tend to show any determination of the question as to what was to become of the \$900 designated as a "forfeit."

The other points raised it is unnecessary to notice; but, for the reasons above given, we advise that the judgment and order be reversed, with leave to the defendant, within a reasonable time, to frame his pleading as heretofore indicated.

We concur GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to the defendant, within a reasonable time, to frame his pleading as indicated therein.

84 Cal. 444

In re O'SULLIVAN'S ESTATE. No. 11,952.)
(*Supreme Court of California.* June 10, 1890.)

ADMINISTRATION—SALE OF REAL ESTATE—PUBLICATION OF NOTICE.

1. Code Civil Proc. Cal. §§ 1539, 1547, providing that in proceedings by an administrator to sell real estate the order to show cause, and the notice of sale, shall be published in such "newspaper" as the court may direct, does not limit the publication to daily newspapers alone, and a publication in a weekly newspaper of general circulation is a sufficient compliance with the statute.

2. Where an administrator's private sale of real estate was set for February 15th, the publication of notice thereof in a weekly newspaper on January 27th, February 3d, and February 10th, was a sufficient compliance with the provisions of Code Civil Proc. Cal. §§ 1549, 1705, requiring that such notices shall be published "for two weeks successively next before the day on or after which the sale is to be made," and as often during the prescribed period as the paper is regularly issued.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Edward P. Cole, for appellant. *Frank J. Sullivan*, for respondent.

BELCHER, C. C. This is an appeal from an order for the sale of real property, and an order confirming the sale, and directing conveyances to be made. The facts set out in the record are as follows: On November 1, 1885, the administrator of the estate of James C. O'Sullivan, deceased, filed in the superior court of the city and county of San Francisco a petition, verified and in all respects sufficient, for the sale of certain real property belonging to the estate. Thereupon an order to show cause why the prayer of the petition should not be granted was duly made and filed. The order directed that a copy thereof should be published once a week for four successive weeks in the *Weekly Star*, a weekly newspaper printed and published in the said city and county. At the time named in the order, and after proof of its publication for the time specified, and that proper notice had been given, and after taking testimony, the judge of the court made an order for the sale of the property at private sale. Thereafter the administrator caused notice of the sale to be posted up in three of the most public places of the said city and county, and to be published in the *Monitor*, a weekly newspaper printed and published therein, for two weeks successively next before the day on or after which the sale was to be made. The notice was published on January 27, February 3, and February 10, 1886, and the day named for the sale was February 15, 1886. A. P. Sullivan became the purchaser of the property for the sum of \$500, and the administrator then made a return of his proceedings to the court. On the day fixed for a hearing upon the return, Sullivan, the purchaser, appeared, and objected to a confirmation of the sale. The court overruled the objections, and entered an order confirming the sale, and directing conveyances to be executed; hence this appeal. The objections to a confirmation of the sale were: (1) That the order to show cause was published in a weekly, and not a daily, newspaper; (2) that the notice of the sale was published in a weekly, and not a daily, newspaper; (3) that the notice of sale was not published up to and including the day on which the sale was to take place. And the same objections are urged here as grounds for a reversal of the orders appealed from.

The provisions of the Code bearing upon the questions presented are as follows: A copy of the order to show cause must be personally served on all persons interested in the estate, "or be published four

successive weeks in such newspaper in the county as the court or judge shall direct." Section 1539, Code Civil Proc. The court, at the time and place appointed in the order, upon satisfactory proof of personal service or publication of a copy of the order, must proceed to hear the proofs of the petitioners, and of all persons interested in the estate who may oppose the application. Section 1540, Id. If the court is satisfied, after a full hearing, that a sale is necessary, an order of sale must be made. Section 1543, Id. When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted and published in a newspaper for three weeks successively next before the sale. Section 1547, Id. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted and published in a newspaper for two weeks successively next before the day on or after which the sale is to be made. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. Section 1549, Id. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge thereof, may, however, order a less number of publications during the period. Section 1705, Id.

It is argued that proceedings for the sale of property belonging to an estate are statutory, and that every requirement of the statute must be strictly observed and complied with, or the sale, if made, will be void; that the object of the publication provided for in the sections of the Code above referred to is to give notice to all parties interested in the estate, so that they may appear and avail themselves of any rights they may have; that the publication most likely to give such notice in a large city, like San Francisco, is one in a daily newspaper; and that publication in a weekly newspaper in such a city is, therefore, not authorized by the statute, and is insufficient to give the court jurisdiction. It is true that proceedings like those involved here are statutory, and that their validity depends upon a substantial compliance with the law. But the statute provides only that the order to show cause shall be published in "such newspaper in the county as the court or judge shall direct," and that the notice of sale shall be published in "a newspaper, if there be one printed in the same county; if none, then in such paper as the court, or a judge thereof, may direct." In this there is nothing to indicate a legislative intent that the publication should be in a daily, rather than a weekly, paper; and in the absence of anything appearing to the contrary it must be assumed that no such intent existed. The court found that the *Weekly Star* and *Monitor* were "newspapers of general circulation published in the city and county of San Francisco dur-

ing the time referred to in the sworn return of sale on file herein, and that the said notices appeared once a week during the prescribed period, as regularly as the newspapers were issued, in accordance with section 1705 of the Code of Civil Procedure." The publications in the papers named were therefore, in our opinion, sufficient to meet all the requirements of the law. To hold otherwise would require the court to ingraft upon the statute a new provision; and this it has no power to do. *Richardson v. Tobin*, 45 Cal. 33.

It is also urged that it is a matter of absolute necessity that the notice of sale be published up to and including the day when the sale is to take place; and this, it is said, can only be accomplished by having the publication in a daily paper; and in support of this position counsel cite *McCurdy v. Baker*, 11 Kan. 111; *Witaker v. Beach*, 12 Kan. 492; and *Early v. Doe*, 16 How. 610. The last case cited has nothing to do with the question. The other two relate to sales of real property under execution, and the sufficiency of notices thereof. It was held that under the statutes of that state such notices must be published in a newspaper for a certain number of days, "and continued in each successive issue of the paper up to the day of sale;" and in another case in the same state (*Treptow v. Buse*, 10 Kan. 170) it was held that publication in a weekly paper was sufficient. Under our statute, notice of a sale like that involved here must be published "for two weeks successively next before the day on or after which the sale is to be made," and the publication must be "as often during the prescribed period as the paper is regularly issued." This means that the publication must be for two successive weeks, (*Estate of Cunningham*, 73 Cal. 558, 15 Pac. Rep. 136,) and in each successive issue of the paper up to the day on or after which the sale is to take place. The notice, as we have seen, was so published, and was therefore sufficient. We find no error in the orders complained of, and advise that they be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

84 Cal. 484

PEOPLE v. SAMARIO. (No. 20,570.)

(Supreme Court of California. June 12, 1890.)

HOMICIDE—DYING DECLARATIONS—ARRAIGNMENT.

1. On a trial for homicide, where it appears that deceased was stabbed, and that he died two days thereafter, testimony that he said, after discovering that he had been spitting blood for some time: "I am dead;" "I am going to die, but you can say that I die innocent,"—is sufficient to show that he was under a sense of impending death; and his declarations, thereafter made, as to the circumstances of the stabbing, are admissible.

2. The court's denial of defendant's motion to strike out part of the dying declarations relating to occurrences taking place before the killing will not be disturbed where defendant failed to object to the admission of such evidence.

3. Though defendant is unable to understand

English, his arraignment is not insufficient because the record fails to state that an interpreter was appointed, where it does state that the information was read to defendant, that a copy was given him, and that he pleaded not guilty.

4. The court's denial of defendant's motion to amend the record so as to show that defendant never pleaded personally to the information will not be disturbed, as it is a decision of a matter of fact within the knowledge of the court.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; Jos. P. JONES, Judge.

E. R. Chase and *A. D. Splivalo*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

HAYNE, C. The appellant was convicted of manslaughter for the killing of one Antonio Ninuccio. Several points are made upon the appeal.

1. It is contended that the evidence is insufficient to sustain the verdict. It is not disputed that the defendant stabbed the deceased, and the uncontradicted evidence is that the latter died from the effects of the wound within two days after receiving it. It is argued, however, that the defendant acted in self-defense. But, if the evidence of Donati and Coppola is to be believed, he did not act in self-defense; and whether they were to be believed or not was a question for the jury.

2. It is urged that it was error to admit the dying declarations of the deceased, because, as is said, it was not shown that he was under a sense of impending death. One of the witnesses to whom the declaration was made testified as follows: "At about 11 o'clock at night, or a little after, as this man, all the time spitting blood—At one time he had a mouthful of blood, and couldn't throw the blood away from him, and it went all over his face and chin, and then on his breast. I, of course, took a towel to clean the blood from him, and the blood was going all over his face, and I cleaned it the best I could. Finally, there was a little blood left on his eye, and he said: 'Clean there by my eye.' While I was cleaning that, he grabbed the towel that was in my hand, and looked at it, and he said: 'Oh, my countryman, I am dead. That ain't spit I am spitting; that is blood I am spitting. Oh, I am going to die.' * * * When he said that, I said: 'Keep up your courage; you are not going to die. To-morrow, perhaps, you will get up.' His answer to me was: 'O no! I am going to die, but you can say I die an innocent man.'" There was nothing to indicate a revival of hope, and we think that the declaration was properly admitted.

It is argued, however, that part of what the deceased said did not relate to the circumstances of the killing, but to prior occurrences. But there was no objection to the admission of the evidence. The defendant waited until the evidence was in, and then moved to strike it out. In such case, if the court denies the motion, its action will not be disturbed. *People v. Long*, 43 Cal. 446.

3. It is contended that the arraignment was not sufficient because the record does not show that an interpreter was appointed. The record states that the information was read to the defendant, and a copy

thereof given to him, and that he pleaded that he was not guilty of the offense charged. This was sufficient. It was not necessary that it should be stated that an interpreter was appointed.

It is further contended that the court should have granted the defendant's motion to amend the record so as to show that he never personally pleaded to the information. But in the first place that was a matter which took place in the presence of the court, and presumably it recollected the circumstances, and its decision as to the fact will not ordinarily be disturbed. In the second place, if the proposed amendment had been allowed, it would have made no difference. *People v. McCoy*, 71 Cal. 396, 12 Pac. Rep. 272; *People v. Bowman*, 81 Cal. 568, 569, 22 Pac. Rep. 917. The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 535)

DUTERTRE v. SUPERIOR COURT. (No. 13,696.)

(*Supreme Court of California.* June 12, 1890.)

NOTICE OF APPEAL—UNDERTAKING—PROHIBITION.

Where, on appeal from a justice court to the superior court of San Francisco, the undertaking on appeal was filed more than 5 days before notice of appeal was served, the notice of appeal was notice that an undertaking had been or would be filed within the statutory time of 30 days, and a writ of prohibition will not be granted because the applicant complains that he did not have an opportunity to except to the sureties upon the undertaking.

Mr. O'Brien and Morrison & Dalingerfield, for petitioner. *Manuel Eyre*, for respondent.

PATERSON, J. This is an application for a writ of prohibition directed to the Honorable F. W. Lawler, judge of the superior court, prohibiting him from hearing the action of Dutertre v. Calvert, on appeal to the superior court from the justice's court. The grounds upon which it is claimed that the superior court has no jurisdiction to hear the appeal in that case are that judgment was entered in favor of the plaintiff therein in the justice's court on August 12, 1889; that an undertaking on appeal was filed in the office of the clerk of said justice's court on said August 12, but the notice of appeal was not filed until August 19, 1889, and was not served on the plaintiff therein until August 23, 1889; and that no notice of the filing of the undertaking was given plaintiff. It is claimed that because the undertaking was filed more than five days before service of a notice of appeal, and no notice of the filing of the undertaking given, the plaintiff lost the benefit of the statutory time to except to the sureties, and that the appeal was ineffectual for any purpose; that to render the appeal effectual an undertaking must be filed after service of the notice, or at least that notice of the filing of the undertaking must be given in some form.

In *Coker v. Superior Court*, 58 Cal. 177, it was held that the notice of appeal must be filed and served, and an undertaking given, within 30 days after the rendition of the judgment, to render the appeal effectual, but that the order in which they were done is not material. In that case the judgment was rendered June 12th, notice of appeal served June 16th, and filed June 17th, but the undertaking on appeal was not filed until July 7th; and yet it was held that jurisdictional prerequisites had been complied with. In the case before us the plaintiff had no notice that the defendant in the action (in the justice's court) would appeal to the superior court until 11 days after the defendant therein had filed an undertaking. The petitioner herein claims that he was entitled to the benefit of the statutory time of 5 days after notice of the filing of the undertaking to except to the sufficiency of the sureties therein. In this we think he is right. As this court said in *Columbet v. Pacheco*, 46 Cal. 651, referring to provisions of a similar nature, "it would be unreasonable to hold that this period of time may run against the respondent without his having had notice in some mode that the undertaking had been actually filed in the clerk's office, and, the Code having failed to provide for a special notice of that fact, we think it was intended that the service of the notice of appeal should itself operate such notice." But the petitioner did have an opportunity to except to the sufficiency of the sureties. The notice of appeal was notice to him that an undertaking had been or would be filed within the 30 days after the rendition of the judgment. It was not necessary for the appellant to give a new undertaking. The statute gives the appellant the right to file and serve his notice of appeal and his undertaking at any time within the 30 days; and, as we have seen, the order in which these jurisdictional steps are taken is immaterial. Application denied.

We concur: BEATTY, C. J.; FOX, J.; WORKS, J.; SHARPSTEIN, J.; McFARLAND, J.

(84 Cal. 311)

SCAMMON v. WELLS, FARGO & CO. (No. 12,690.)

(*Supreme Court of California.* June 9, 1890.)

CARRIERS OF GOODS—STIPULATED VALUE—SETTLEMENT WITH CONSIGNEE.

1. Civil Code Cal. § 2200, provides that "a common carrier of gold, * * * upon loss or injury of such articles, * * * is not liable for more than the value of the articles named in the receipt or bill of lading," and plaintiff having received that amount, by his agent, cannot maintain an action for damages for the wrongful conversion of property, there being no charge of fraud, malice, or oppression on the part of the defendant.

2. In case of unqualified consignment of property, the carrier has the right to assume that the consignee is the owner, and to settle a claim, for damages for the non-delivery of property, with him.

3. Where an agent was authorized to receive money in payment of damages, he was authorized to receipt therefor, and the principal was charged with notice of the agent's acts.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

J. F. Cowdery, for appellant. Pillsbury & Blanding, for appellee.

PATERSON, J. On April 12, 1875, plaintiff delivered to defendant at Downieville two sealed packages of gold-dust of the value of \$3,758.93, but which he represented to be of the value of \$3,260, to be transported by defendant's express to plaintiff's agent, the London & San Francisco Bank, Limited, at San Francisco. The packages were placed by defendant with other packages of gold-dust, valued at about \$2,000, in the express box. On April 13, 1875, the stage-coach in which the gold was being transported from Downieville was stopped by a highwayman, and robbed of all its treasure. On April 21st the bank (plaintiff's agent) demanded the packages or their value. Defendant thereupon, and without knowing that the bank was not the owner of the property, paid to it the sum of \$3,260, and took a receipt from it, in which the two packages were specified as being a sealed bag, valued at \$160, and a sealed package, valued at \$3,100, "taken by robbers at Oregon Hill, April 14, 1875." At the time this payment was made the defendant had no knowledge that the bank was not the owner of the packages, and did not know by whom the robbery was committed, or where the property was concealed. Through the efforts of the company's chief detective, J. B. Hume, the robber was arrested, and the gold-dust recovered on May 4, 1875. When recovered, plaintiff's gold-dust was mingled with other gold-dust, the property of other persons, taken by the robber, and could not be identified. On May 4th, plaintiff, having learned of the recovery of the gold, called upon defendant, and offered to return the \$3,260 received from it, and demanded the packages shipped by him, stating that the dust was worth more than the value placed upon it when shipped. The agent of defendant stated to plaintiff that the defendant had expended a large amount of money in recovering the property, and asked him if he was willing to stand any part of the expense. Defendant declined to do so, and has never paid or offered to pay any part of the expense incurred in the recovery of the gold-dust. The regular rate of the defendant for carrying gold-dust was \$5 for each \$1,000 worth, but, in consideration of plaintiff's agreement to ship all his gold-dust by defendant's express, defendant was charging plaintiff only \$4 per thousand. The packages were sealed, and, of course, defendant knew nothing of the true value thereof, except from what the plaintiff told it. The court found that, if defendant had known at the time it received the shipments that the property was of greater value than \$3,260, it would have charged and collected \$4 for each \$1,000 worth of dust. Nothing has ever been paid or offered to defendant for transporting the excess of gold-dust above the value of \$3,260. Plaintiff brought this action to recover from defendant the sum of \$498.93. The court gave judgment for the defendant, and from said judgment, and from an order denying his motion for a new trial, plaintiff has appealed.

We think the judgment is right, and should be affirmed. The Civil Code provides that "a common carrier of gold, silver, platinum, or precious stones, or imitations thereof, in a manufactured or unmanufactured state, * * * is not liable for more than \$50 upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt of the bill of lading." Section 2200. This measure of damages was adopted for the protection of the carrier, and does no injustice to the owner. The carrier is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause they may arise, only the acts of God and of the public enemy, and those which arise out of the fault of the owner, being excepted. He therefore has a right in all cases to be truly informed as to the value of the property in order to estimate the risk and determine the care which should be exercised in the protection of the property, and to save himself from loss. *Lawson, Cont. § 20; 3 Suth. Dam. 243.*

This action being for damages for the wrongful conversion of the property, the rule given in section 2200, *supra*, cuts off the right of the plaintiff to recover, there being no charge of fraud, malice, or oppression on the part of the defendant. If the carrier should collude with the robber, or, after rescuing the property, should willfully mingle it with other property of the same kind, so that it could not be identified and segregated, the measure of damages might be different; but nothing of that kind is claimed here. There are other reasons why the plaintiff is not entitled to recover. The defendant did not know that plaintiff was the owner of the property, and, the consignment being an unqualified one, it had the right to assume that the consignee was the owner, and to settle the matter with the bank. *Boston & M. R. Co. v. Warrior Mower Co., 76 Me. 260; 2 Ror. R. R. 1330, 1331; Hutch. Carr. § 720.* If the bank be treated as the agent of plaintiff,—and it is alleged in the complaint that it was,—the same conclusion is reached. If the bank was authorized as agent of plaintiff to receive money in payment of the damages, it was authorized to receipt therefor, and the plaintiff was charged with notice of what its agent had done. Section 2322, Civil Code. The \$3,260 was paid to the bank on April 21st. Not until after plaintiff learned that the gold-dust had been recovered, *viz.*, on May 4th, was any objection made to the settlement made by the agent. That it was a settlement and abandonment, so far as the agent had authority to make it, there can be no doubt. The agreed statement states that the bank "demanded of defendant the said packages or their value, and defendant then and there upon such demand paid," etc. Plaintiff had the right to demand the value of the property which was lost, or to wait until the property was recovered, and then demand the possession

of the property itself. He chose through his agent to accept \$3,260, the value which had been placed upon the property by plaintiff. Thereafter defendant, proceeding upon the assumption that by the payment of the loss it had become the owner of the property, expended the sum of \$1,635 in recovering the property which had been stolen, and of which plaintiff's gold-dust was the greater part. It would be manifestly unfair to allow the owner to abandon the property under such circumstances, accept a certain sum in payment of the loss, lie by until a large sum of money had been expended in recovering the property, (larger than the amount of loss sustained by the owner in the settlement,) and then to set aside the settlement, and require the carrier to pay the full value of the property. If plaintiff had sued defendant, and recovered judgment before the property was restored to defendant, and defendant had paid the judgment, the title to the property would have vested in defendant, regardless of its actual value. *Smith v. Smith*, 51 N. H. 571; *Cooley, Torts*, 458. The acceptance without suit of the amount offered in payment of damages had precisely the same effect, and passed the title to defendant. Judgment and order affirmed.

We concur: BEATTY, C. J. FOX, J.

84 Cal. 537

SMITH *et al.* v. SOLOMON. (No. 3,670.)
(Supreme Court of California. June 13, 1890.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Rule 3 of the supreme court requires the transcript on appeal to be filed within 40 days after the appeal is perfected, and the bill of exceptions settled. *Held*, that an appellant cannot excuse his failure to file the transcript within 40 days after the appeal is perfected by the fact that the bill of exceptions had not yet been settled, where more than 40 days have expired since the entry of judgment without his taking any steps to settle such bill; Code Civil Proc. Cal. § 650, requiring an appellant to draft his proposed bill of exceptions and serve the same on the adverse party within 10 days after the entry of judgment, or within such further time as the judge may allow, which additional time is limited to 30 days by section 1054.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Code Civil Proc. Cal. § 650, provides: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may within 10 days after the entry of judgment, * * * or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party." Section 1054 provides: "When an act to be done, as provided in this Code, relates to the * * * preparation of statements or of bills of exceptions, * * * the time allowed by this Code may be extended, upon good causes shown, by the court in which the action is pending, or a judge thereof; but such extension shall not exceed 30 days without the consent of the adverse party."

Beatty & Fowler, for appellant. *Geo. D. Collins*, for respondents.

Fox, J. Appeal from judgment foreclosing mechanic's lien. Motion to dismiss appeal, for failure to file transcript in time. Judgment was rendered and entered November 25, 1889. Appeal perfected December 7, 1889. The transcript was due in this court January 16, 1890; there being no bill of exceptions or statement settled or filed. Notice of this motion given January 20, 1890, showing that the same would be made on certificate of the clerk of the court below, which was also filed, dated January 17th, showing that no bill of exceptions or statement had been settled or filed in the cause, and that he had not been requested to certify any transcript in the cause. Appellant, by affidavit, attempts to excuse the delay in filing transcript by showing that the bill of exceptions had not been settled, relying upon rule 3 of this court, which requires that the transcript shall be filed within 40 days after the appeal is perfected, and the bill of exceptions and statement, if there be any, are settled. But that does not help out the case; for the same affidavits show that no attempt was made to settle bill of exceptions until January 19, 1890, more than 40 days after the entry of judgment, and then the only attempt was to speak to the counsel of respondent about it. No proposed bill of exceptions has ever been served or offered to the judge for settlement. No extension of the time in which to settle the same had ever been given by counsel; and the time allowed by law, and all the time which the court had power to give in which to prepare and serve upon opposite counsel a proposed bill of exceptions had expired before said opposite counsel had been even spoken to upon the subject. See Code Civil Proc. §§ 650, 1054. It was therefore too late to settle any bill of exceptions in the case, and no satisfactory excuse is given for failure to file the transcript in time. It is therefore ordered that the appeal be dismissed, and the court below is directed, under section 1195, *Id.*, to allow as additional costs in the case a reasonable attorney's fee for the services of the attorney of respondent in this court.

We concur: BEATTY, C. J.; PATERSON, J.

84 Cal. 505

JUDSON v. LYFORD *et al.* (No. 12,032.)
(Supreme Court of California. June 12, 1890.)

FRAUDULENT CONVEYANCE—INTENT—QUIETING TITLE.

1. Civil Code Cal. § 3442, provides that the question of fraudulent intent is one of fact, and not of law, and that no transfer can be adjudged fraudulent, solely on the ground that it was not made for a valuable consideration. One largely indebted attempted to make a voluntary settlement of the only property he had on his children and himself. The trustee testified that this was done to "protect" the children. There was no other evidence to overcome the inference of fraud. *Held*, that a finding that there was no fraudulent intent must be set aside, as against the evidence.

2. A debtor, with intent to defraud a creditor, conveyed land to a trustee, who was directed to divide the income between the debtor and his chil-

dren, and, at his death, to hold in trust for them. The land was sold under execution in favor of the creditor, and bid in by him. *Held*, under Civil Code Cal. § 3439, providing that every transfer of property made with intent to defraud any creditor is void, that the sheriff's deed made on such sale passed the legal title in fee.

3. A purchaser at an execution sale of land, conveyed by the debtor to defraud creditors, may sue a vendee, with knowledge of the fraudulent intent, to quiet title, under Code Civil Proc. Cal. § 733, providing that an action may be brought by any person against another, who claims an estate or interest in land adverse to him, for the purpose of determining such claim.

McFARLAND, J., dissenting.

In bank. Commissioners' decision. Appeal from superior court, Marin county; E. B. MAHON, Judge.

E. F. Swortfiguer, (Walter Van Dyke, of counsel,) for appellant. *E. D. Sawyer* and *Sawyer & Burnett*, for respondents.

HAYNE, C. This was an action by a judgment creditor to set aside a deed made by his debtor to the defendant Lyford, in trust for certain purposes. The court below gave judgment for the defendants, and the plaintiff appeals. The general features of the case are as follows: On and prior to September 15, 1883, the plaintiff was the owner of a judgment against one Deffebach upon which was due the sum of \$9,446.74. On that day the latter inherited from his wife an undivided one-third interest in a tract of 646.51 acres of land in Marin county. Within a month thereafter, and while the judgment against him was in force, he made a deed to the defendant, Lyford, in trust to sell sufficient of the property to pay off certain mortgages upon the property, and to collect the income of the remainder, and, after paying the taxes, etc., to pay one-half of such income to the grantor during his life, and to use the balance for the support of his minor children, and, upon the arrival of the youngest child of age, to convey the property to such children in equal shares. (The mortgages referred to were omitted from the litigation by stipulation.) This deed was entirely without consideration. It was therefore a gift for the benefit of the children, with the reservation for himself of a life provision out of the income. A little more than a month after the execution of the deed a writ was issued upon plaintiff's judgment, and levied upon the property, and all the right, title, and interest which Deffebach then had therein was sold to plaintiff for something less than the amount of the judgment. In due course the plaintiff received a sheriff's deed, and within four days thereafter Deffebach died. This action was commenced soon afterwards. Before the trial Deffebach's administrator paid to plaintiff the balance due upon the judgment, which was thereupon satisfied of record. The foregoing facts appear without contradiction.

The main position of the respondents is that the deed to Lyford conveyed to him the legal title to whatever share Deffebach had in the property, leaving in the latter only an equitable life-interest in half the income; that this equitable interest was all that the plaintiff got by his

sheriff's deed; and, being only for Deffebach's life, ceased at his death; and that, as the judgment was paid and satisfied, plaintiff has no foundation for his action. But this argument overlooks the charge that the deed was made to hinder and delay the plaintiff's rights as a creditor, which is the basis of the plaintiff's case. If it were not for this feature, the case would be like *Kennedy v. Numan*, 52 Cal. 326, cited for the respondents, and we are not prepared to say the position would not be sound. But the charge of fraud introduces an altogether different element. If the charge be true,—that is to say, if the deed was in fact made to hinder and delay plaintiff's rights as a creditor,—then the deed was void as against him, and his sheriff's deed vested in him, not merely an equitable life-interest in the income, but all the interest which Deffebach had in the property before he made the deed, and entitled the plaintiff to have the deed canceled as a cloud upon his interest, as was fully explained in *Hager v. Shindler*, 29 Cal. 48.

The proposition that a deed in fraud of the rights of creditors is absolutely void, as against them, is well settled. It was so under the statute of Elizabeth. "A fraudulent conveyance, made with the view of defeating the claims of creditors, is altogether void by the statute 13 Eliz. Such a deed, therefore, can confer no legal interest on which a trust can be fastened by a court of equity." *Hill, Trustees*, 163. The same rule prevails in the majority of American courts. In this regard Mr. Freeman says: "In many instances the aid of equity is invoked. But generally this is unnecessary, for a transfer made to hinder, delay, or defraud creditors, while as between the parties it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity,—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all." *Freem. Ex'ns*, § 136. The statute of California embodies this rule. It says that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void," etc. Civil Code, § 3439. And in case of *Bull v. Ford*, 66 Cal. 177, 4 Pac. Rep. 1175, the precise point was decided. There, after showing that the conveyance was in fraud of creditors, the court, per Ross, J., said: "The conveyance to defendant being void, as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property, as if no conveyance had ever been made by their debtor. *Freem. Ex'ns*, § 136, and the authorities there cited."

It is obvious, therefore, that the question upon which the case must turn is whether the conveyance was in fraud of

the rights of the plaintiff as a creditor. This, under our statute, is a question of fact, (Civil Code, § 3442;) that is to say, a question of intent. And the intent which is material is that of the grantor. It is immaterial how innocent the grantee was. *Lee v. Figg*, 37 Cal. 336; *Peek v. Peek*, 77 Cal. 111, 19 Pac. Rep. 227; *Swartz v. Hazlett*, 8 Cal. 128. And where, as here, the grantee paid no value for the deed, it is immaterial that he had no notice of the fraud. Nor is it necessary that the grantor should have had any malice against the creditor, or any evil intent to injure him, or any actual intent to do a wrong. It is immaterial whether, as a matter of fact, he supposed that he had a perfect right to conceal his property from his creditor. Concealment of property from one's creditor is what the law forbids, and the intent so to conceal it is considered fraud, and it is sufficient so to plead it. *Hager v. Shindler*, 29 Cal. 59; *Bull v. Ford*, 66 Cal. 176, 4 Pac. Rep. 1175. The question, then, is reduced to this, viz.: Had the grantor, as a matter of fact, an intent to hinder or delay his creditor? The court below found that he had not. But we think that the findings are entirely unsupported by the evidence.

At the time of the execution of the deed, the grantor had no other property than the land he attempted to convey. This is distinctly testified to by the witness Valentine, and by the defendant Lyford himself. And there is no evidence to the contrary. The argument which the counsel for the respondents make against this is that the record does not state that it contains all the evidence, and that the presumption is in favor of the findings. But the point is properly specified. And it has long ago been settled that the presumption is that the record contains all the evidence which is material to the point specified. *Hidden v. Jordan*, 28 Cal. 303; *Smith v. Athern*, 34 Cal. 511; *Clark v. Gridley*, 35 Cal. 403; *Grigsby v. Water Co.*, 40 Cal. 405; *Association v. Willard*, 48 Cal. 619. In the case last cited it was said that the rule "has been so often repeated that it has become trite." The fact that, after the action was commenced, the administrator of the grantor paid the small balance remaining due on the judgment, does not tend to prove that the grantor had at the time of the deed any other property than that which he attempted to settle on his children and himself. For all that appears to the contrary, the administrator (who was the trustee under the deed) may have raised it on the property, or may have advanced it himself. As above stated, the positive testimony is that the grantor had nothing at the time of the deed except the property in question. And this is not contradicted.

The uncontradicted facts, therefore, are that the grantor, being heavily indebted to the plaintiff, attempted to make a voluntary settlement of the only property he had upon his children and himself. Is it not the irresistible inference from these facts that he intended to place the property beyond the reach of the plaintiff's judgment? Compare *Swartz v. Hazlett*, 8 Cal. 128. We can hardly imagine circum-

stances which would overcome the inference from the above facts. Certainly there is nothing tending to overcome it in the record before us. The defendant Lyford says that the deed was made to "protect" the grantor's children. But can a man "protect" his children against the lawful claims of his creditors? If this be the meaning of the defendant's testimony, it is itself sufficient to show that the deed was fraudulent. But, whatever may be its meaning, it certainly does not tend to overcome the inference from the above facts. And there is no other evidence. In our opinion, the uncontradicted evidence shows that Deffenbach made the deed to hinder and delay his creditor, and, this being the fact, it results as a matter of law that the deed was absolutely void as against the creditor, in whom the sheriff's deed vested, not a mere equitable life-interest in the income, but all the estate which Deffenbach had before he made the deed. It may be added that, as we construe the complaint, it is a complaint to remove a cloud, under the doctrine of *Hager v. Shindler*, supra. The respondents say that it is a complaint to "quiet title," by which we suppose is meant a complaint to determine an adverse claim under the statute. We do not take this view of the pleading. But, assuming that it is the correct view, we think that the facts are sufficient to support an action of that character. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

McFARLAND, J., dissenting.

84 Cal. 435

ALBION R. R. CO. v. HEESER. (No. 12,083.)
(*Supreme Court of California*. June 10, 1890.)

EMINENT DOMAIN—COMPENSATION.

A railroad company, having no positive knowledge as to the ownership of land, while guilty of a technical trespass, does not become a tort-feasor by entering on the land, and constructing a bridge and track thereon, intending subsequently to condemn it to the public use; and the land-owner, who himself was ignorant of his title at the time of the entry, is not entitled to have the value of such track and bridge allowed to him as a part of his "just compensation" for the taking of his land.

Commissioners' decision. In bank. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

J. M. Mannon and C. C. Hamilton, for appellant. T. L. Carothers, for respondent.

FOOTE, C. This action was instituted for the purpose of condemning to the public use a right of way for the plaintiff's railway track, over a portion of the defendant's land. Judgment of condemnation followed as prayed for, and the damages were assessed against the plaintiff in

the sum of \$175, as a just compensation for the property sought to be condemned, and as damages consequent to such condemnation. The defendant appeals from the judgment and order denying a new trial. The contention of the appellant is that the court erred in failing and refusing to make and give judgment in his behalf for \$8,500 more than was awarded him. The ground upon which this claim is advanced is that the railroad corporation entered upon the land of the appellant, before any condemnation proceedings had been commenced, and erected thereon a bridge and railroad track, which had become permanently attached and affixed to the soil, which was of the value of \$8,500; and, such being the fact, the defendant became the owner of these fixtures or permanent improvements upon his land, placed there by plaintiff as a trespasser, and, as a consequence, was entitled to have their value allowed to him as a part of his just compensation. The evidence shows that the corporation, at the time of its entry upon the land and the building of the bridge and track thereon, did not know positively who owned the land, nor did the defendant know that it was his land that was being thus intruded upon until he got the field-notes of it from San Francisco.

While the entry of the plaintiff may have been technically a trespass, it was not the act of a mere tort-feasor. It is, therefore, to be determined whether the bridge and track, placed upon the land under such circumstances, with the evident intention, in good faith, to put in operation the constitutional right to condemn for the public use the right of way over the land, is such an act as operates as a dedication, in law, of the materials or structures of the railroad placed upon the land to the owner of the land, so as to entitle him to include them in the assessment of his damages as a just compensation for the condemnation of the right of way over his land. In the case of *Railroad Co. v. Armstrong*, 46 Cal. 85-90, the appellate court said: "The argument on behalf of the defendant on the first point is that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence he claims that its value ought to be included in the estimate of damages, in like manner as though the defendant had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person whose land is taken in the exercise of the right of eminent domain shall be entitled to anything beyond a 'just compensation.' He is to be paid the damage he actually suffers, and nothing more. But, to hold that, in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track, in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over-technical construction of it." Again,

the supreme court of Pennsylvania, in the case of *Justice v. Railroad Co.*, 87 Pa. St. 28-33, has said: "The very intent of an appropriation of land is to place upon it and own and use the structures necessary to carry out the charter purpose. Hence no dedication of the material can be inferred in such a case. In this we perceive how differently the common law itself must view the application of its own rules. The great merit of the common law, so often commended by the jurists, is its plasticity as a system of principles (and not merely of rigid rules) which can be adapted to new conditions in the affairs of men. Modern inventions and discoveries have so far transcended the conditions of former times that to apply the rule as to a mere trespasser, whose entry is a tort pure and simple, to the case of one authorized to enter for a great public purpose, merely because of an irregularity in the manner of proceeding, would be as vain as to attempt to dress a full-grown man in the garb of his childhood. This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter and to place these materials on the land taken for a public use,—materials essential to the very purpose which the state has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to-wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his, and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *volens*, but not so in this case, for, though the original entry was a trespass, it is well settled that the company can proceed in due course of law to appropriate the land, and, consequently, to reclaim and avail itself of the structures laid thereon. *Harrisburg v. Crangle*, 3 Watts & S. 460; *McClinton v. Railroad Co.*, 66 Pa. St. 409; *Railroad Co. v. Burson*, 61 Pa. St. 379." In Illinois it is said in the case of *Railroad Co. v. Goodwin*, 111 Ill. 282: "Even if the entry had been without license or permission, of any one authorized to grant the same, so that it was a trespass at the time, the law would not require the railroad company, in seeking a condemnation of the land so entered upon for a right of way, to pay the owner of the land for structures placed upon it at its own expense, with the view of subsequently acquiring the right of way." Citing numerous cases. In a case entitled *Cohen v. Railroad Co.*, 34 Kan. 158-167, 8 Pac. Rep. 138, it is said: "It has even been held that where a railroad company enters upon land as a technical trespasser, and afterwards procures the land for its right of way by condemnation proceedings, it is

not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way." Citing many cases. In Oregon the matter has been determined in like manner in the case of *Railway, etc., Co. v. Mosier*, 13 Pac. Rep. 300-303, where it was said: "The object of the proceeding is to award just compensation to the owner of the land. The improvements made by the corporation and for the use of the road, and necessary for its successful operation, constitute no part of the damage or value of the land. The just compensation is for the injury which he may sustain for the taking of the land. 'When this is afforded the purposes of right and the constitution are satisfied. It is not intended that compensation shall extend beyond the loss and injury, including that which the land-owner had not when the property was taken, but which is an incident of the appropriation and essential to the uses for which the law confers the right of taking the property.' *Jones v. Railway Co.*, 70 Ala. 233; *Railroad Co. v. Booraem*, 28 N. J. Eq. 450." The views thus expressed in the authorities cited are well sustained by *BRICKELL, J.*, in the Alabama case, *supra*. It is true that the appellant contends that the appellate court of California, in the case of *U. S. v. Land in Monterey Co.*, 47 Cal. 515-517, has reversed the case in 46 Cal. cited heretofore, but an examination of the cases does not bear out the assertion. For the court in the later opinion says: "The law did not authorize the United States to take possession of these lands *manu forti*, and their agents, in entering upon them and ejecting the defendants, were mere tortfeasors. The case is in this important respect wholly unlike that of *Railroad Co. v. Armstrong*, 46 Cal. 85." The *Armstrong* Case was one where the land was entered upon and the structures erected pending condemnation proceedings, but they were dismissed. These condemnation proceedings were again initiated, and the defendant's claim for the value of the corporation's improvements, made before the institution of the last proceedings, was disallowed; the court putting its ruling upon the ground that the structures were erected while the corporation was in possession. The first condemnation proceedings, then pending, were afterwards dismissed. Although not altogether clearly expressed, we gather that the court thought the circumstances in the one case evinced the disposition in good faith to condemn and pay a just compensation, and the other an entry by the strong hand with no such intention. If we are wrong in this conclusion as to the distinction drawn, and it is as contended, that the two cases are irreconcilable, then we think, both upon reason and authority, the case in 47 Cal. should be declared overruled, and the case in 46 Cal. approved.

Under the facts in this case we do not think the rule of just compensation for condemned property would be subverted by holding that the defendant should make the plaintiff pay \$8,500, which the plaintiff expended in good faith to establish a pub-

lic use, and when the defendant expended

not one dollar, and at the time of the construction of the track and bridges did not know that they were being built on his land. To do this would be to pay the defendant for that which he never had, and which the plaintiff, in putting it upon the appellant's land, had no intention, as a tortfeasor, to place there. All the injury the defendant suffered can be paid for, without giving him a large sum of money for injury he never suffered. We therefore advise that the judgment and order be affirmed.

We concur: *BELCHER, C. C.; VANCLIEF, C.*

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 651

PEOPLE v. TILEY. (No. 20,665.)

(*Supreme Court of California.* July 8, 1890.)

WITNESS—CROSS-EXAMINATION ON IRRELEVANT MATTERS.

1. On a trial for burning insured property with intent to defraud the insurers, where the keeper of a bawdy-house testifies to admissions made by defendant to her within a few days after the fire, it is error to permit defendant to be cross-examined as to whether or not he was at the house on a day six months after the fire, as such evidence is clearly immaterial, and evidently offered for the sole purpose of degrading his character, and prejudicing the jury against him.

2. Defendant on his direct examination denied that he had procured a third person to set the fire, as testified to by a witness for the people. On his cross-examination, he was asked how long he had known such third person, and answered, only six or seven days before the fire. *Held*, that the people could not show in rebuttal that defendant had known the third person for a longer period, as a party cannot cross-examine his adversary's witnesses on irrelevant matters for the purpose of eliciting something to be contradicted.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; *J. L. CAMPBELL, Judge.*

Peck & Taylor, for appellant. *H. Conner* and *J. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of burning insured property with intent to injure and defraud the insurers; and he appeals from the judgment, and an order denying him a new trial. The property burned was a two-story wooden building and its contents, situate just outside of the limits of the city of San Bernardino, and known as the "Arctic Saloon Building." It was owned by the defendant and one Myers, and the lower story was used by them as a saloon, and the upper story as a lodging-house. The building was insured for \$1,000, and the furniture, stock, and fixtures for a like sum. The fire occurred between 1 and 3 o'clock in the morning of January 1, 1889. The defendant was not at the saloon at the time the fire was started, and had not been there for some hours before. He could not, therefore, himself have set the fire. This was not controverted at the trial, but it was claimed that he must have procured some one else to set it. The evidence against the defendant was wholly circumstantial, and

most of it was admitted against his objections and exceptions. Among other items of evidence objected to were the following: The prosecution called as a witness a woman known as Josie McFarland, who testified that she was a "sporting lady," and kept a "sporting-house" in the city of San Bernardino. She then proceeded to relate certain conversations, tending more or less to criminate defendant, some of which she said she had with him at her house eight or ten days before, and some eight or ten days after, the fire. The defendant was called as a witness in his own behalf, and denied that he had the conversations, or made the statements, related by the witness Josie, but admitted on cross-examination that he might have been at her house at the times named by her. The following questions were then asked and answered: "Question. When was the last time that you was at Josie McFarland's? Answer. The 5th of July. Q. How long did you stay there when you were there? A. I was there probably fifteen minutes. Q. Now, I will ask you the direct question: Didn't you stay there all night on the night of the 4th of July, 1889? A. I did." The objection to the last question was that it was "irrelevant, incompetent, and immaterial, and not responsive to the examination in chief, and not proper cross-examination, and is asked simply for the purpose of having a tendency to degrade the character of the witness." It is now urged for the appellant that his objections to each of the foregoing questions should have been sustained, and that the rulings against him operated to his manifest prejudice. That the rulings were erroneous is too clear, in our opinion, to admit of debate. The defendant was a married man; and the fact that he went to, and remained over night in, a house of ill fame, was greatly to his discredit, and undoubtedly tended to prejudice the jury against him. It did not, however, tend in the slightest degree to show that he caused his saloon to be burned six months before, or that he ever made any admissions relating thereto. The evidence must have been offered for the sole purpose of discrediting the witness; but for that purpose, or any other, it was clearly incompetent and inadmissible. *Sharon v. Sharon*, 79 Cal. 674, 22 Pac. Rep. 26, 131.

The prosecution also called as a witness one James Tye, who testified, among other things, that he was tending bar for Tiley & Myers during the last days of December, 1888; that, at the time of the fire, he was present in the bar-room of the Arctic saloon; and that he knew a man by the name of Brock O'Neal. He was then asked and answered as follows: "Question. Was he there at the time of the burning of the saloon? Answer. Yes, sir; he was there. He was there ten minutes before the burning of the building. Q. What was he doing there? A. He was shaking dice with me about ten minutes before the fire. He was in the saloon at the time of the fire. I, at least, saw him during the burning of the saloon. Q. Had he any relations there, or not, with Ben Tiley? A. I don't know whether he had anything to

do with Mr. Tiley. Q. Had you done anything as a go-between between him and defendant before the fire,—within a day or two? A. I brought him a package. Q. Where did you get that package? A. From the Calico saloon. Mr. Tiley told me he had a package for to give Brock O'Neal; for me to take it down. I took it down, and don't know whether I gave it to him, or told him where it was. This was a few days before fire. At time he gave me package, he wanted to know who was hanging around there, and I told him; and, among others, I mentioned name of Brock O'Neal. The package was a small soda-water bottle. It had in it a whitish liquid. In my judgment, it resembled water. I don't know what was in it." The defendant, in his examination in chief, testified that he never set the fire, or caused it to be set, and never had any knowledge whatever as to the cause of the fire, and that he never sent to Brock O'Neal any bottle or package, by James Tye, or any one else. On cross-examination, he was asked: "Question. You know Brock O'Neal, don't you? Answer. Yes, sir. Q. How long have you been acquainted with him? A. I have been acquainted with him only a little while. Q. How long had you been acquainted with him before that fire? A. Five or six days. Q. Now, then, I will ask you as a question on this trial, how long did you know Brock O'Neal before the fire occurred at the depot last January? A. How long did I know him before the fire? I should judge, five or six days. It might have been up as high as seven, but not outside of that. Q. And no longer? A. No, sir; I never saw him before." In rebuttal the prosecution called two witnesses to prove that the defendant had known O'Neal for a considerably longer time than that stated by him on his cross-examination. This testimony was objected to "on the ground that it is not proper rebuttal testimony; on the further ground that it is irrelevant and immaterial. If it is asked for the purpose of impeaching the defendant, it is wholly upon a collateral and immaterial matter, and the proper foundation has not been laid." The objections were overruled, and these rulings are assigned as error. We are unable to see that this rebuttal testimony was relevant or material for any purpose other than to discredit and impeach the defendant. But, as said in *People v. Dye*, 75 Cal. 112, 16 Pac. Rep. 537: "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and, if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters." In our opinion the rulings complained of were erroneous, and the evidence thus wrongly admitted tended to prejudice the defendant before the jury.

Other errors are assigned, but we do not think it necessary to notice them particularly. For the errors above noted, we advise that the judgment and order be reversed, and the case remanded for a new trial.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are reversed, and the case remanded for a new trial.

84 Cal. 528

CLIFFORD v. ALLMAN. (No. 12,129.)

(*Supreme Court of California*. June 12, 1890.)

APPEAL—EXCEPTION—DEPOSITION.

1. Under the provision of Code Civil Proc. Cal. § 956, that on appeal from a judgment the court may review any intermediate order or decision which involves the merits, or necessarily affects the judgment, except an order from which an appeal might have been taken, the evidence may be reviewed, on appeal from a dismissal on striking out the complaint as for contempt, though the exception does not specify the particulars in which the evidence is insufficient, and the appeal was not taken within 60 days; the exception to the order to strike not being "an exception to the decision or verdict," within Code Civil Proc. Cal. §§ 648, 939, providing (section 648) that, when the exception is to the decision or verdict for insufficiency of the evidence, the objection must specify the particulars in which it is insufficient, and (section 939) that such an exception cannot be reviewed on appeal from the judgment unless the appeal is taken within 60 days.

2. It is error to dismiss an action because the plaintiff did not appear to give her deposition, continued by consent to a time of which she had no notice; her attorney having told her that he would let her know when to come.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

T. C. Van Ness, for appellant. Metcalf, & Metcalf, for respondent.

VANCLIEF, C. This is an action for seduction, commenced in San Francisco, December 15, 1885, in which the plaintiff, a minor 16 years of age, sues by her guardian, Bridget Drysdale, who is her mother. The summons was served on the defendant March 12, 1886. On March 29, 1886, pending a demurrer to the complaint, and before answering, the defendant duly served notice on plaintiff's attorney that he would take the deposition of the plaintiff, on behalf of the defendant, before a notary in the city of Oakland on the 5th day of April, 1886; and on March 30th the notary issued a subpoena to the plaintiff, commanding her to appear and testify, and give her deposition, at the time and place appointed in the notice. The subpoena was served on the plaintiff on the day it was issued. On the appointed day (April 5th) the attorneys for the respective parties appeared before the notary, but the plaintiff did not appear, having been advised by her attorney that she need not appear until he notified her to do so, as he would have the taking of her deposition postponed; and accordingly, at the request of her attorney, and by consent of counsel for defendant, the taking of the deposition was continued until April 10, 1886, when, at the request of plaintiff's attorney, and by consent of defendant's attorneys, the taking of the deposition was again postponed until April 17th. On the morning of April 17th, plaintiff's attorney, by his clerk, notified defendant's attorneys

and the notary in Oakland that, as he would be engaged in other business in one of the courts in San Francisco, he had not notified plaintiff to appear, and that she would not appear to give her deposition on that day, and asked for another postponement of one week. To this request defendant's attorneys refused to consent, and the notary denied any further postponement; but, as plaintiff did not appear, her deposition was not, and could not have been, taken on that day. In the mean time the cause had been transferred to Alameda county for trial. On July 14th the defendant gave notice that on July 27th he would move the court to strike out the complaint of the plaintiff on the ground that she had disobeyed the subpoena issued by the notary as above stated. Pending this motion, which was continued from time to time, the defendant answered, denying all the material allegations of the complaint. September 6th the motion was heard on a report of the notary, which he made pursuant to an order of the court, and upon affidavits filed by the respective parties, showing the facts substantially as above stated. Thereupon the court ordered that the plaintiff's complaint be stricken out, and dismissed the action. This appeal is from the judgment dismissing the action, and comes here upon the judgment roll, including a bill of exceptions. The appellant asks a review of the order striking out her complaint, claiming it to be an intermediate, non-appealable order, which involves the merits, and necessarily affects the judgment, in the sense of section 956 of the Code of Civil Procedure.

1. The respondent's counsel contends, as I understand their point, that this appeal, as presented, necessarily involves a review of the evidence upon which the motion was granted, and that this cannot be done, because the appeal was not taken within 60 days after the rendition of the judgment. It is true that the appeal was not taken within 60 days after the rendition of the judgment. It is also true that the bill of exceptions contains no specification of any particulars of the insufficiency of the evidence to justify the order, but counsel express no objection on this ground. It appears, however, that an exception was duly taken to the order striking out the complaint. Section 648, *Id.*, provides that "when the exception is to the verdict or decision, upon the ground of insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." Section 939 provides that an appeal from a final judgment may be taken within one year after the entry thereof, but adds that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." Section 956 provides that, "upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or

order from which an appeal might have been taken." In *Coveny v. Hale*, 49 Cal. 555, it was decided that "the decision referred to in section 648 is the statement of facts found, and conclusions of law therefrom, mentioned in section 633 of the same Code;" and I see no reason to doubt that the words "verdict or decision" were used in the same sense in sections 939 and 956 as in section 648. As used in section 956, the phrase, "the verdict or decision," evidently means something different from what is intended by the phrase, "any intermediate order or decision," in the same section; for certainly the latter phrase, as there used, does not mean the written findings of fact and law required by sections 632 and 633 to be filed with the clerk as a result of a trial on the merits. From these considerations, it follows that the word "decision," as used in section 939, means the written findings of fact required by sections 632 and 633, exclusive of the intermediate orders and decisions which may be reviewed upon appeal from a final judgment, and as to which no written findings are required. This conclusion, I think, accords with the practice and general understanding of the profession in this state, and is further strengthened by the consideration that no specification of insufficiency of evidence is required or practiced on appeals from appealable orders, although such orders are as often founded upon evidence *dehors* the pleadings as are non-appealable orders. I see no reason why such specifications should be required on appeals from non-appealable orders which is not equally applicable to appeals from appealable orders. However this may be, the Code does not require them in either case. It follows that an intermediate non-appealable order or decision, excepted to, involving the merits or affecting the judgment, may be reviewed on appeal from the final judgment taken within one year from the entry thereof, and without any specification in the bill of exceptions of the particulars in which the evidence is insufficient to justify such order or decision, since the exception to such intermediate order or decision is not "an exception to the verdict or decision," in the sense of section 939 of the Code of Civil Procedure.

2. Although the complaint or answer of a party may be stricken out as a penalty for disobedience to a subpoena, (*Id.* § 1991; *Keiskar v. Ayres*, 46 Cal. 84,) yet such disobedience must be proved to have been willful or intentional. The affidavits and the report of the notary, on which the court made the order striking out the complaint, do not show that plaintiff intentionally disobeyed the subpoena; but, taken together,—and they are perfectly consistent with each other,—they tend to show the contrary. The subpoena commanded the plaintiff to appear and testify on April 5th. She did not then appear, because her attorney had instructed her that she need not appear until he notified her to do so, as he intended to have the matter postponed until some future day; and accordingly her attorney appeared at the time appointed, and requested a postponement until April 10th, to which defendant's attorneys consented. On April

10th, defendant's attorneys consented to another postponement until April 17th. On the day last appointed, plaintiff's attorney, by his clerk, notified defendant's attorneys that he would be engaged in court on that day, and could not attend to taking the deposition, and that he had not notified the plaintiff that she need attend on that day; and for these reasons he asked another postponement, which was denied. The plaintiff states in her affidavit that her attorney never notified her to appear on either of the days appointed, and there is no evidence tending to show that she had notice of the appointments made by agreement of counsel for the 10th and 17th of April. To justify the severe penalty imposed by the court, the disobedience must have been such as to constitute a contempt of the authority of the notary, and must have been proved by the same degree of evidence as would have been required to prove the plaintiff guilty of such contempt; yet there is no evidence tending to prove disobedience to the subpoena except the fact that she did not appear before the notary on the 5th of April, which was excused by the consent of defendant's counsel to a postponement, since it does not appear that her absence was the cause of the postponement, nor that she would not have appeared on April 5th if the postponement had not been consented to. It will hardly be contended that the notary would have been justified in attaching and punishing her for contempt after the postponement by agreement of counsel. It does not appear that she was advised by her counsel to disobey the subpoena, and it is not intended to decide that the advice of her counsel could have shielded her from the penalties of intentional disobedience. The question is, does it appear that she intentionally disobeyed the subpoena, either by advice of her attorney or otherwise? And I think this question should be answered negatively.

I think the judgment dismissing the action should be reversed, and that the trial court should be directed to restore plaintiff's complaint to its files, and to proceed in the action.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment dismissing the action is reversed, and the trial court is directed to restore plaintiff's complaint to its files, and proceed in the action.

Fox, J., dissenting.

84 Cal. 550

In re COBB. (No. 20,556.)

(*Supreme Court of California.* June 14, 1890.)

ATTORNEY AND CLIENT—DISBARMENT.

In proceedings for the disbarment or suspension of an attorney, the accusation stated that defendant, as attorney for a mortgagee, obtained judgment on the mortgage; that he agreed with C., another creditor of the mortgagor, to postpone the sale, C. putting certain moneys in the hands of defendant, to be applied on the sale in case C. should become the purchaser of the mortgaged property; that at the sale defendant became the purchaser,

and immediately afterwards sold the property to C.; and that the mortgagee repudiated the power of defendant to make such sale to C., and discharged him as attorney. The accusation further averred, upon information and belief, that, although the mortgagee demanded of defendant the moneys which C. had intrusted to him, defendant did not settle for them, except as afterwards stated, to-wit, that, the mortgagee having assigned his claim against defendant to C., the defendant settled with C. *Held*, that the accusation was insufficient.

In bank. Proceedings for disbarment.

Warren Olney and Giles H. Gray, for relator. *Henry E. Wells, J. McKinley, and John F. Burris*, for respondent.

McFARLAND, J. On June 3, 1889, Andrew Crawford filed in this court a written accusation against Moses G. Cobb, charging him with violating his oath as attorney at law, and praying that this court "take such action in the premises as may be just and proper." Cobb filed a demurrer to the accusation, on the ground that it does not state sufficient facts to constitute an accusation or complaint. He also filed an answer, and before any ruling on the demurrer, with the consent of the parties, a referee was appointed to take and report the evidence, and his report has been filed.

The accusation was not sufficient. It states, substantially, these facts: Cobb, as attorney for one Schallard, commenced an action against the Eel River Steam & Navigation Company to foreclose two mortgages on the steamer Ferndale. Judgment was entered for plaintiff in the superior court for \$13,015.50, in November, 1882. Defendant appealed the case, and judgment was affirmed in the appellate court on July 15, 1886. In the mean time the relator herein, Crawford, had obtained another mortgage on the Ferndale, and, being desirous of buying the steamer, or, at least, having it sold when it would bring the most, and saving himself from loss, he made an arrangement with Cobb that the sale of the steamer should be delayed until a more favorable time for sale, and that he should pay Cobb certain moneys which should be applied on the sale if Crawford should become purchaser of the steamer, and should be returned by Cobb to Crawford in case the latter should not become such purchaser. Under this contract Crawford gave Cobb moneys and obligations from time to time, until the aggregate thereof amounted to over \$5,000. Afterwards the steamer was sold under execution. At the sale Cobb bid in the steamer at \$17,500, but immediately afterwards made an agreement with Crawford to let the latter have the steamer for \$16,500,—the amount which Crawford had bid at the sale. "Thereafter the plaintiff in said action [Schallard] came from his residence at Humboldt to the city and county of San Francisco, and discharged said Cobb as his attorney, and refused to let your relator [Crawford] have said steamer for the sum of \$16,500, and repudiated the authority of said Cobb to make any arrangement for the sale of said steamer, or of the sheriff's certificate of sale." It is then averred, upon information and belief, that Schallard demanded of Cobb the money and obligations re-

ceived by the latter from Crawford, and that Cobb refused and neglected to pay the same. It is further averred that Cobb did not pay said moneys to the plaintiff, or to "your relator, or to any person for him, except as next hereinafter stated, to-wit: On May 24, 1888, and after demand made as aforesaid, the said Schallard assigned his claim against the said Cobb, growing out of said payments received by said Cobb, to your relator; and afterwards, and on the 6th day of May, 1889, the said Cobb settled with your relator, and received a receipt in full of all demands on the part of your relator."

It is clear that if Schallard repudiated Cobb's contract with Crawford, and discharged Cobb as attorney, and Cobb settled with Crawford, then there is no case here against Cobb. But if we ignore as far as possible the question of the sufficiency of the accusation, and look into the evidence, we fail to see that the grave charges made against the respondent have been sustained with sufficient degree of certainty. The averments of the accusation above referred to must still be taken as true. Schallard, as before stated, discharged Cobb as his attorney, and repudiated all contracts which the latter had made with Crawford; and it does not appear that any explicit demand was ever made by Schallard, or for him, that Cobb should pay Schallard any sum of money claimed to have been collected by Cobb as attorney for Schallard. Cobb swears that there never was such a demand, and the evidence on the point for the relator is that the attorney for Schallard and the attorney for Crawford made together a demand on Cobb, but it does not appear whether they claimed the money as due to Schallard or to Crawford. (It is to be noticed that the demand was subsequently coupled with a threat of proceedings for disbarment.) And, indeed, Schallard was not in a very sure position to demand money received on a contract which he had repudiated. Crawford had a claim against the steamer in quite a large sum of money for repairs done on it. Cobb had an unsatisfied claim for attorney's fees for prosecuting the original suit in this court. He testified, also, that all Schallard wanted was the amount, in money, of his judgment, and that he (Cobb) had the privilege of making all the steamer would sell for over that amount. As Schallard repudiated the contract between Crawford and Cobb, the latter had strong reasons for thinking that whatever liability he was under was to Crawford, with whom he never had the relation of attorney and client. The sheriff's certificate was in Cobb's name. Crawford claimed the right to purchase the steamer under the contract with Cobb, and was in possession of it. Under these circumstances, an arrangement was made by which Cobb, with Crawford's consent, assigned the certificate of sale to Schallard's agent. Schallard paid a certain amount of money to Crawford, and assigned to the latter whatever demands he might have against Cobb, although this last assignment, Cobb testifies, was without his knowledge. Schallard got ownership and

possession of the steamer, which was worth more than his judgment, and Cobb settled with Crawford. While the conduct of the respondent in the premises may be subject to some adverse criticism, we do not think that the case made out is strong enough to warrant us in disbaring or suspending an old attorney, who has practiced law more than 40 years without any previous stain upon his professional reputation. The accusation is dismissed, without costs to either party.

We concur: PATERSON, J.; FOX, J.; SHARPSTEIN, J.

WORKS, J. I concur in the judgment, on the ground that the accusation is insufficient. I do not concur in the finding that the evidence fails to show any ground for the disbarment or suspension of the respondent from practice. It is clearly shown that he received money from Crawford which he failed to pay over or account for to either his client or Crawford. The money did not belong to the respondent. Whether it belonged to his client or to Crawford was wholly immaterial, as each of them demanded its payment, and he admitted his liability, and agreed to pay the account when he could raise it. It thus appears that he had received this money as an attorney, and converted it to his own use. This was a plain and palpable violation of his duty as an attorney, which, in my judgment, this court should not palliate or excuse.

84 Cal. 634

PEOPLE *ex rel.* HACKE v. HIBERNIA SAV. & LOAN SOC. (No. 12,726.)

(Supreme Court of California. June 30, 1890.)

HIGHWAYS—DEDICATION.

1. The court found that in 1861 B., who was the owner of the northerly half of a block which was 275 feet wide from F. street, on the north, to E. street, on the south, and of the premises in controversy, extending through the center of the block from east to west, filed in the proper office a map of such block, in which the premises in controversy were designated as a street 35 feet wide, and called "O. Avenue;" that B. gave notice upon the map that he would thereafter make all sales in accordance therewith; that in the same year B. constructed a fence as the southerly boundary of the northern half of the block, at a distance from F. street of 120 feet; that until 1870 such fence was maintained continuously, and said premises were used as a street by the public; and that, on two official maps of the city, said premises were designated as a street. *Held*, that a conclusion of law that O. avenue was a public street was correct.

2. The fact that a deed, executed by B. a year and a half after the filing of the map, of certain lots in said block, described the block as bounded by the proper streets, but did not refer to O. avenue, or any street running through the block, did not show a revocation of the dedication.

3. Act Cal. April 25, 1862, provided that all the streets, alleys, etc., laid down on a certain official map of said city made before the filing of B.'s map, and on which O. avenue did not appear, should be considered public for the purpose of grading, macadamizing, etc. *Held*, that the omission of the act to name other streets than those laid down on such map did not show an intention to vacate O. avenue, especially as an act was passed the next day to establish the lines and grades of streets in said city, under which was prepared one of the official maps on which O. avenue was designated as a street.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

A. H. Loughborough, Tobin & Tobin, and Thos. F. Barry, for appellants. Jarboe, Harrison & Goodfellow, for respondent.

McFARLAND, J. This action was brought to require defendant to remove certain obstructions from an alleged street, called "Olive Avenue," in the city of San Francisco, running from Larkin street westerly to Polk street, through the center of block 9 of the Western addition, between Ellis and O'Farrell and Larkin and Polk streets, and being of the width of 35 feet; and to have said Olive avenue adjudged to be a public highway. Judgment went for plaintiff; in the court below, and the defendant appeals from the judgment, and from an order denying a new trial.

Practically the only question in the case is whether or not the findings of fact are justified by the evidence; for those findings clearly support the conclusions of law and the judgment, and the assigned errors of law occurring at the trial are unimportant. The court finds, in brief, that, in the year 1861, Jacob Beideman was the owner of the premises described in the complaint, and of the northerly half of said block 9, which was 275 feet wide from O'Farrell to Ellis streets; that, in January of that year, Beideman made and filed in the recorder's office a map of lands, including said block 9, upon which the premises described in the complaint were delineated as a street 35 feet wide, called thereon "Olive Avenue," and that upon said map said Beideman indorsed and signed the following: "The county recorder of the city and county of San Francisco will please file in his office the above map or plan of the Beideman tract of land, according to which I shall hereafter make all sales and conveyances." It is further found that in said year (1861) Beideman inclosed the said northerly half of said block by fences, and as the southerly boundary thereof constructed a fence running parallel with O'Farrell street, and at a uniform distance southerly therefrom of 120 feet throughout the length of the block from Larkin to Polk; that said fence was maintained in that position by Beideman and his grantees continuously thereafter until the year 1870; "and that thereby the premises in controversy herein, to the width of thirty-five feet, were by said Beideman and his said grantees thrown open to public use as a public street or highway," and "that continuously from said year 1861 until the year 1870 the said premises, to the said width of thirty-five feet, were continuously used by the general public as a street or highway." It is further found that the premises in controversy were delineated as a street on the two official maps known as the "City Engineer's Map," and the "Humphrey's Map;" no name to the street being given on the former map, but being designated as "Olive Avenue" on the Humphrey's map. The former map was approved and adopted by the board of supervisors in January, 1866, and the latter in October, 1870; and the court finds

that by the acts aforesaid the said Olive avenue was dedicated and accepted as a public street or highway. The obstructions complained of were placed on the said street, as found by the court, in the year of 1883.

These facts being taken as true, it is clear that the conclusion of the court that Olive avenue is a public street, and the judgment following that conclusion, is correct, under all the cases and authorities cited by counsel; and it is clear that we would not be warranted in holding that there was not sufficient evidence to support the finding of fact. Indeed, it appears that the strip of land afterwards called "Olive Avenue" was used as a public thoroughfare from an early period in the history of the city; that it had been fenced on both sides prior to the time when Beideman put up the fence mentioned in the findings; and that, several years before 1861, Beideman, who then owned the whole of block 9, sold part of the southerly half, and described it as 120 feet wide, thus leaving room in the center for a 35-foot street; for the distance from Ellis or Farrell street to the middle of the block is 137½ feet. On May 9, 1862, Beideman conveyed to Deane and Wineschanks, through whom appellant claims title, lots 4, 5, and 6 in block 9 of the Western addition. The deed described the block as bounded by O'Farrell, Larkin, Ellis, and Polk streets, but does not mention Olive avenue or any street running through the block; and appellant contends that this omission constitutes a revocation of the dedication of Olive avenue. This mere negative act of omitting in a deed something that was not necessary to a description of city lots, which are usually described by numbers, would not of itself, we think, amount, under any circumstances, to a grave act of revocation. But the deed was made nearly a year and a half after the filing of the Beideman map, and after there had been a public user; and, moreover, the court finds that the fence was continuously maintained by Beideman "and his grantees," and that the premises were continuously used by the general public as a street until 1870.

There was an official map of the city called the "Van Ness Map," upon which Olive avenue does not appear, and some significance is sought to be attached to this fact by appellant. But that map was made and approved by the board of supervisors in 1856, and ratified by the legislature in 1858. All this was several years before the filing of Beideman's map, and therefore before his offer to dedicate; and we cannot see how the absence of the street in dispute from the Van Ness map is of any importance. On April 25, 1862, the legislature passed an act (St. 1862, p. 391) amendatory of the consolidation act, in which, "for the purposes of this law," all the streets, alleys, etc., laid down on the Van Ness map are declared to be public. The "purposes" of the act were to provide for an expensive system of grading, paving, macadamizing, etc., at the expense of persons owning lots fronting on streets; and it is contended by appellants that, because Olive avenue was not

on the Van Ness map, therefore this act of the legislature must be construed as a "rejection" and "discontinuance" of said avenue as a public highway. We think this position untenable. There are no express words of discontinuance in the act; and, as its purpose was to provide for the improvement of certain streets, it would be a strained inference to hold that the omission to name other streets then open meant an intention to vacate them. Moreover, on the very next day, April 26, 1862, (St. p. 407,) an act was passed "To establish the lines and grades of streets in the city and county of San Francisco," under which, and an amendment thereto, approved in April, 1864, (St. 1863-64, p. 460,) the "engineer's map" above mentioned was prepared. This map was adopted by the board in January, 1866, and declared to be "the legal and valid official map of San Francisco, to determine the line of the streets, and the grades thereof." See *Brook v. Horton*, 68 Cal. 554, 10 Pac. Rep. 204. On this map, Olive avenue was delineated, and also on the subsequent Humphrey's map. The acts provided that the maps, when completed, were to be delivered to the board, and notice given by publication, that objections to them might be made by any property holder, and that, if no objections were made, or those made were overruled, they were to become final. In the meantime,—from the passage of the said act of April 25, 1862, relied on by appellant, until the adoption of the engineer's map, in 1866,—Olive avenue was continuously kept open by appellant's grantors, and used by the general public. Under these circumstances, we think that the dedication and acceptance was clearly continuous.

Quite a number of cases involving the dedication of streets and highways have recently been decided by this court. The facts in no two of them were exactly alike, and some of them were of difficult solution. But in none of these cases were any principles stated with which the conclusion of the court in the case at bar at all conflicts. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

84 Cal. 642

SAYERS v. SUPERIOR COURT. (No. 13,598.)

(*Supreme Court of California.* July 5, 1890.)

CERTIORARI.

1. Under Code Civil Proc. Cal. § 1068, providing that a writ of review may be granted when an inferior tribunal "has exceeded" its jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy, a writ of *certiorari* will not issue to prevent a threatened excess of jurisdiction; and an order of court directing an attorney to pay over money to a client, and an order directing the attorney to show cause why he should not obey said order or be punished for contempt, cannot be so reviewed, on the ground that the first order was made without notice to the attorney, as it will not be presumed that, on the hearing of the order to show cause, the court will exceed its jurisdiction.

2. An allegation of the attorney, based upon information and belief, that the court has made an order adjudging him guilty of contempt, will not be considered.

3. Allegations as to the understanding on which the attorney got possession of the money will not

be considered, such allegation relating to matters of fact, on which the decision of the court below, if it had jurisdiction at all, would be conclusive for the purposes of the writ.

In bank. Application for writ of *certiorari*.

King & Saufley, for petitioner. *Harold Wheeler*, for respondent.

PATERSON, J. This is an application for a writ of *certiorari*. The petition alleges that in August, 1888, Nathan S. Sanford commenced an action for divorce against his wife, Hattie T. Sanford, in the superior court of the city and county of San Francisco; that the default of the defendant for failure to answer was duly entered on December 3, 1888, and on the following day the cause was regularly tried and submitted for decision; that a decree of divorce was entered in favor of plaintiff on February 1, 1889; that on December 13th the defendant therein employed petitioner as her counsel to represent her in the proceeding; that he gave the defendant advice, but did not contest the application for divorce, owing to a misunderstanding as to certain instructions from the defendant; that the value of his services exceeded the sum of \$500; that it was understood between all the attorneys representing the parties to the action that, if the divorce should be granted, the defendant should be allowed \$100 per month, under certain conditions, and it was further understood that petitioner should receive the sum of \$500 as counsel fees for services rendered in the action to defendant; that through fault of the attorney for plaintiff the court was misled, and, in consequence thereof, no counsel fees were allowed, but, nevertheless, petitioner received the sum of \$250 cash, and a note for the further sum of \$250 from the attorney for plaintiff, as and for his compensation for services rendered; that defendant in the divorce suit, being dissatisfied with the petitioner as her attorney, requested the substitution of another attorney, whereupon petitioner gave to Harold Wheeler a substitution of attorney, with the express understanding that the \$250 received by petitioner should be retained by him; that petitioner thereupon turned over to said Wheeler the note for \$250, above referred to, and thereupon his connection with the case ceased; that on motion of said Wheeler the default of the defendant in the suit was set aside, November 13, 1889, and the court made an order directing petitioner to pay to said Hattie T. Sanford, his former client, the sum of \$250, received by him as counsel fees, without any notice to petitioner to appear and show cause why said order should not be made; that thereupon petitioner was ordered to show cause why he should not obey said order or be punished for contempt. Petitioner alleges, upon his information and belief, that the court made a further order, adjudging him guilty of contempt for not paying over the \$250 to the defendant in this suit, and ordered petitioner to be committed to jail until such payment should be made. It is claimed by petitioner that the superior court had no jurisdiction to make said or-

ders in his absence, without notice to him, and that he has no plain, speedy, and adequate remedy at law. The respondent has moved to quash the writ of *certiorari* and order for a stay of proceedings, on the ground that the petition does not state facts sufficient to entitle the petitioner to the relief asked therein.

The writ issued herein is premature. The function of a writ of review is not to restrain the proceedings of an inferior tribunal, but to annul proceedings which have been taken without jurisdiction. It cannot be employed to prevent a threatened excess of jurisdiction. It is issued only when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, or adequate remedy. Code Civil Proc. § 1068. Until a final determination has been reached in the court below, we must assume that the court will limit its action to its proper jurisdiction. So long as the proceedings remain *in fieri*, the petitioner has a plain, speedy, and adequate remedy by motion in the court below. We cannot assume that the court below will decide erroneously on any objection which the petitioner may make in his defense to the order to show cause. *Wilson v. Board of Supervisors*, 3 Cal. 386; *Lamb v. Schottler*, 54 Cal. 319.

We cannot consider the allegation of the petitioner based upon his information and belief that the court has made an order adjudging him guilty of contempt. It is an easy matter for the petitioner to determine whether or not such an order was made. We cannot assume that the court below has made an order which has never been filed. Furthermore, if such an order has been signed, it is not an order subject to review until it has been filed. *Mattoon v. Eder*, 6 Cal. 57, is not in point. The allegations with respect to the understanding under which the money was paid cannot be considered. If the court had jurisdiction of the matter at all, it had the right to inquire into and determine the facts, and its determination of these matters is conclusive so far as a writ of review is concerned. The writ cannot be issued on mere errors of law. *People v. Dwinelle*, 29 Cal. 632. If the proper facts existed, the court was justified in requiring the party to turn over the money. *Ex parte Hollis*, 59 Cal. 405; *Ex parte Smith*, 53 Cal. 204; *Weeks*, Attys. §§ 92, 94.

We cannot close this opinion without adverting to the fact that there has been of late an attempt in numerous cases to use writs intended only to test the question of jurisdiction for the purpose of correcting mere errors of law. The original business thus put upon the court has occasioned great labor and much annoyance, not only to ourselves, but to the lower courts, without serving any useful purpose. We do not speak of this matter in a censorious spirit, but simply to call the attention of the members of our bar to the fact, in the hope that in the future more care may be taken in applications for writs of this character. The application is denied,

and the writ heretofore issued herein is discharged.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 639

IPSWITCH v. FERNANDEZ. (No. 12,242.)
(Supreme Court of California. July 5, 1890.)

NEW TRIAL—MISCONDUCT OF JURY.

Plaintiff alleged, on information and belief, as a ground for a new trial, that one of the jurors was so intoxicated during the delivery of the charge and afterwards that he was unable to discharge his duties and that he did not know of such intoxication until after the jury had retired to consider their verdict. The trial court, in passing upon the motion for a new trial, said that it must be conceded that the juror was intoxicated, but he also said that such intoxication "was patent to all parties." The juror denied fully and specifically all the charges of intoxication. *Held*, that the order denying a new trial would be sustained.

In bank. Appeal from superior court, Contra Costa county; T. K. WILSON, Judge.

Moore & Reed (Hiram Mills, of counsel,) for appellant. Chase, Chase & Miller and W. S. Tinning, for respondent.

MCFARLAND, J. Appeal by plaintiff from the judgment in favor of defendant, and from an order denying a new trial. It is unnecessary to determine the motions made to dismiss the appeal, and to strike out a portion of the transcript, which are urged by the respondent, as will appear from the conclusion reached herein. The evidence on the issues of fact involved was fairly conflicting, and we cannot disturb the verdict of the jury on the ground that it was against the evidence. The most serious ground for a new trial taken by appellant is misconduct of the jury based on the allegation that one of the jurors was intoxicated. The evidence on the point consists of two affidavits,—one by plaintiff, and the other by the juror whose intoxication is alleged. Plaintiff states in his affidavit that the trial of the case occupied several days; that the jurors were allowed to separate at all recesses; that "affiant is informed and believes, and so charges the truth to be," that during each and every recess the said juror "drank to great excess intoxicating drinks;" that, "as affiant is informed and believes, at the time the jury were charged by the court, and during their deliberations, the said juror was incompetent from intoxication to comprehend and discharge his duties as a juror; and that affiant did not learn or know these facts "until after said jury had retired to deliberate on their verdict." The affidavit of the juror fully and specifically and positively denies all the charges of intoxication. And, if we are to consider only the evidence introduced on the issue, the order denying the new trial should certainly be affirmed, because there is not only a conflict of evidence, but the evidence clearly preponderates against the allegation of intoxication. But the judge of the court below, when denying the motion for a new trial, stated in writing as follows: "That the juror was intoxicated

must be conceded. The court must take judicial notice of the fact. It was patent to all parties." He then proceeds to give as his reason for denying the new trial that, as nine jurors may render a verdict in a civil case, and as ten united in a verdict for defendant in the case at bar, therefore the verdict was valid, because it was concurred in by the requisite number, not counting the juror charged with intoxication. (This, we suppose, was on the theory that if nine sober jurors cannot be prevented from rendering a verdict by three other sober jurors, they ought not to be so prevented by one drunken juror.) Respondent contends that this statement is mere "opinion" of the court below, and under well-settled practices cannot be considered here; and appellant contends that, as it was included in the order denying the motion, it may be considered. Under any view, it would be going very far to hold what a judge may say in passing on a motion for a new trial as establishing a fact. At all events, if what he said is to be taken for that purpose, the whole of it must be so taken; and we must then take as true that part of it which states that the intoxication of the juror "was apparent to all parties." If, then, the intoxication, which plaintiff avers to have commenced at the beginning of the trial and continued to its close, was apparent to him, he could not keep quiet on the subject, take the chances of a favorable verdict, and then avail himself of it for the first time after defeat. And it may be remarked as somewhat surprising that, if this juror was so manifestly and prominently intoxicated during the whole trial that the court had to "take judicial notice of the fact," no one—neither court nor party nor attorney—made any objection to his well-known condition. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

WORKS, J. I concur in the judgment, on the ground that the evidence as to the drunkenness of the juror was conflicting, and the statement of the judge of the court below that he was intoxicated is no evidence of the fact, and cannot be considered by this court for any such purpose.

84 Cal. 468

PEOPLE v. HAMBERG. (No. 20,609.)

(Supreme Court of California. June 10, 1890.)

FALSE PRETENSES—FORMER JEOPARDY—EVIDENCE—FINE AND IMPRISONMENT.

1. An indictment charging that the defendant falsely and fraudulently represented that he was the owner of certain lots, etc.; that the prosecuting witness, relying on the truth of the statements, accepted a deed thereof, paying therefor a large amount of money and property, (stating amount,) and that defendant knew the representations were false,—sufficiently charges the crime of obtaining property under false pretenses, under Pen. Code Cal. § 532.

2. A trial and conviction of conspiracy by a court having no jurisdiction of the offense is void, and will not support a plea of former jeopardy in a subsequent trial on indictment for obtaining money by false pretenses growing out of the same transaction.

8. Under Pen. Code Cal. § 1151, it is the duty of a court before whom a plea of former jeopardy is entered to submit that issue to the jury, though the plea was incorporated in, and was the basis of, a motion to set aside the indictment for want of jurisdiction.

4. A judgment roll in an action to which defendant was a party, and in which his title to the property, which he falsely claimed to own in the transaction for which he was indicted and is on trial, was declared worthless, is competent evidence to show his knowledge of the falsity of his representations.

5. It is not error to permit the prosecuting attorney to be called as a witness, and testify to facts within his knowledge, pertinent to the issue on trial.

6. Prejudice of the prosecuting attorney against the defendant in a criminal action, made apparent by his own admission and by his method of cross-examination of defendant while on the stand as a witness in his own behalf, though to be severely criticised, did not entitle the defendant to a discharge on its discovery, nor does it furnish sufficient ground for reversal of a judgment of conviction.

7. Pen. Code Cal. § 1205, which provides that a judgment that the defendant "pay a fine" may also direct that he be imprisoned until the fine be satisfied, does not apply to those cases in which the court has imposed a term of imprisonment and also a fine, but only to those cases in which a fine is the only punishment; and a judgment that defendant be imprisoned one year, and pay a fine of \$19,000, and be detained until it is paid, will be so modified as to entitle the prisoner to be discharged at the end of one year's confinement.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Appeal from judgment of conviction for the crime of obtaining money under false pretenses. Among other objections, it is urged that Pen. Code Cal. § 1205,—"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine,"—does not apply to cases in which a term of imprisonment and also a fine is imposed.

Eugene N. Deuprey, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.

FOOTE, C. The defendant was jointly indicted with one Pilcher, for obtaining money under false pretenses from one F. M. Parker. Pilcher, it seems, had pleaded guilty before the present trial, and Hamberg was tried alone. The charge, in brief, is that the parties first mentioned had falsely and fraudulently represented to Parker that Hamberg was the owner and in possession of certain lots in the city of San Francisco, and Parker, relying solely upon the false representations made to him by the parties defendant, had accepted a deed from Hamberg of the lots, and given in return money and other property of the value of \$9,500; that the representations thus made to Parker were untrue, and known to be so by the defendant at the time they were made. A demurrer was filed to the indictment on the grounds—*First*, that the facts stated do not constitute a public offense; *second*, that it contains matters which, if true, contains a legal justification and excuse of the offense charged, and a bar to the prosecution. This demurrer was overruled, and

the defendant thereupon, on the 18th of February, 1888, entered a plea of not guilty. On the 28th of March, 1888, he entered a plea of former jeopardy, and made a motion to set aside the indictment, on the ground that the court had no jurisdiction to try him, as he had already been tried and convicted of the same offense. The court overruled his motion to set aside and dismiss the indictment on the 26th of April, 1888. On the 30th day of the same month the defendant was tried upon the indictment and his pleas thus filed. The jury returned a verdict that the defendant was guilty as charged in the indictment, and upon his plea of once in jeopardy they found for the people. The defendant, by his counsel, then at once moved to set aside the verdict on the ground that the plea of former jeopardy was not before the jury; that it was presented to the court only to be ruled on as a matter of law, and was ruled on before the trial. The motion was denied upon the ground, as stated by the court, that the plea was presented in open court at the trial. The defendant, on the 12th of May following, made a motion in arrest of judgment on the following grounds: Because the court had no jurisdiction to try the defendant; because he had already been tried and convicted for the same offense; because of defects in the indictment, viz., that it did not conform to sections 950-952, Pen. Code; that more than one offense is charged; that the facts stated do not constitute a public offense; that the indictment contains matter which, if true, would constitute a legal justification or excuse of the offense charged, and a legal bar to the prosecution; that the defendant was not properly arraigned upon the indictment in the case as required by law. On the same day a motion for a new trial was made upon various grounds. The motion in arrest of judgment was denied, as also that for a new trial. Thereupon, on the 19th of May, 1888, the court rendered its judgment, based upon the verdict of the jury, and sentenced the defendant to imprisonment for one year in the county jail, and to pay a fine of \$19,000, or, in default of payment of the same, to be imprisoned in the county jail until the fine be satisfied, at the rate of one day for each one dollar of the said fine; such imprisonment, in default of the payment of the fine imposed or any portion thereof, to commence at the expiration of the year's imprisonment first imposed and adjudged. From the judgment, including the orders made before entry thereof, and from an order denying a new trial, the defendant appeals.

The points apparently relied upon by the defendant for a reversal of the judgment and order, as appears from his reply brief, are that, the indictment herein being for a misdemeanor, the superior court of the city and county of San Francisco did not have jurisdiction to try him. He relies on the decision of the appellate court in the case of *Green v. Superior Court*, 78 Cal. 556, 21 Pac. Rep. 307, 541. The same point was made in *Ex parte Neustadt*, 82 Cal. 273, 23 Pac. Rep. 124. That case was where, as here, a party had been indicted, convicted, and sentenced, under section 532 of

the Penal Code, (as it stood at the date of the trial and prior to the amendment of 1889,) and where the fine imposed was over \$1,000, and the same condition imposed as to imprisonment until it should be paid as in the present instance. It was said in the opinion delivered in that case: "The case referred to [Green v. Superior Court] is not in point. The offense named in section 532 is punishable by imprisonment in the county jail not exceeding one year, and by fine not exceeding three times the value of the property. A fine must, in all cases, be imposed; there is no alternative. It must be three times the value of the property. It may be more than \$1,000. The police judge's court, therefore, has not jurisdiction of this offense." It is clear, therefore, that the misdemeanor here tried by the superior court of the city and county of San Francisco was not triable by the police judge's court, but was within the jurisdiction of the superior court.

The order denying the motion to set aside and dismiss the indictment on the ground of the want of jurisdiction to try the defendant, by reason of his having been formerly in jeopardy for the same offense, was properly denied. The former trial and conviction was for a conspiracy, a misdemeanor under section 182 of the Penal Code. It is punishable by imprisonment not exceeding one year in the county jail, or by fine not exceeding \$1,000. The superior court did not have jurisdiction to try the defendant for that offense; hence the judgment of conviction was void. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. Rep. 307, 541. And the defendant had not, prior to the present trial, been placed in jeopardy.

Its seems also to be contended that the court had no right, after refusing to set aside the indictment, to submit the issue to the jury raised by the plea of former jeopardy, and have it passed on by that body. To do otherwise would have been erroneous. The court's duty was to have the jury pass upon that issue under section 1151 of the Penal Code, and find either "for the people" or "for the defendant," as the evidence might warrant, in addition to the general finding upon the plea of not guilty.

The further claim is made that error was committed in allowing the introduction in evidence of the judgment roll in a certain case, (*Courtney v. Hamberg*.) The purpose of that evidence was to show that, at the time when the defendant induced the prosecuting witness to part with his property and transfer and deliver it to the defendant, the latter knew that the title was worthless to the property to which he pretended to have a good title, and which he was deeding to the prosecuting witness in exchange for what the defendant was receiving from him, and that the worthlessness of the defendant's title had been adjudged in that very suit. This evidence, taken in connection with the testimony of Mr. Dunne, who was the prosecuting attorney here and the attorney for the adverse party to the defendant in the action just mentioned, certainly tended at least to show that the defendant did not know at the time he sold to the pros-

ecuting witness that he was selling him property to which the defendant had no title. We do not see why the prosecuting attorney, who was in a situation to know of the facts tending to show guilty knowledge on the part of the defendant as to his pretended title, should not have been allowed to give his testimony in the interests of justice, and we do not perceive any error in the court allowing him to do so.

As to the manner of his cross-examination of the defendant, when a witness on his own behalf, and his declaration of bias and prejudice, it is to be said that it was unfortunate that he should have allowed himself to display and to admit it in the presence of the jury; but the declaration that he made was brought out by the objection of the defendant's counsel, who declared that the prosecuting attorney was prejudiced and biased, and demanded that, for that cause, the court should discharge the defendant from custody, which demand the court very properly refused to accord, and from that action of the court the exception was taken. After his declaration of bias, the prosecuting attorney did not proceed, as he had begun, to exhibit his prejudice to the jury by the form of his questions to the defendant, so far as the record discloses. And so far as the effect upon the jury was concerned, in this instance at least, it seems to us that the frank admission of the prosecuting attorney that he was biased and prejudiced would have tended to the advantage, rather than the prejudice, of defendant, as the jury could then know from what motives the zeal of the officer might, perhaps, proceed. We do not think this a sufficient ground for a reversal of the judgment and order, but it is proper to say that such occurrences have before been referred to with disapproval. *People v. Bowers*, 79 Cal. 417, 21 Pac. Rep. 752; *People v. Lee Chuck*, 78 Cal. 327-329, 20 Pac. Rep. 719.

We think the indictment was sufficient, under the statute, (section 532, Pen. Code,) and that it stated plainly the reliance of the prosecuting witness on the false statements of the defendant as to his title. The evidence, we think, shows very clearly that the defendant knew and believed he had no title to the property he was selling, and yet represented that he had a good title; that he did this with the intent to deceive and defraud, and succeeded by such false pretense in accomplishing his object, and cheating the prosecuting witness out of his property. But it is argued that the title (*Ellis' title*) which the defendant transferred to Parker was a good title, as declared by the appellate court since defendant's trial, in the case of *Association v. Knight*, 23 Pac. Rep. 267, (decided January 2, 1890.) Even if this would relieve the defendant,—which we do not decide,—considering all the facts in the case, a rehearing has been granted, and the judgment of the lower court in the case cited still stands unreversed.

But there is one part of the judgment appealed from which is manifestly void, and that is the portion ordering the retention of the defendant in custody until he pay the fine of \$19,000. The court had no legal right to impose that part of the sen-

tence, and to that extent the judgment must be modified. In re Rosenheim, 23 Pac. Rep. 372; In re Collins, Id. 374.

We perceive no further prejudicial error, but for these reasons we advise that the judgment stand so far as the imposition of imprisonment in the county jail for one year is concerned, and that the order refusing a new trial be affirmed, but that the judgment be so modified as that the defendant be released from custody on the expiration of the one-year term of imprisonment in the county jail.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed. The court below is instructed to modify the judgment by striking out that part thereof which provides that in default of the payment of the fine imposed the defendant "be imprisoned in the county jail until said fine be satisfied, at the rate of one day for each one dollar of said fine, such imprisonment in default of said fine, or the payment of any portion thereof, to commence at the expiration of the one-year imprisonment therein first imposed and adjudged," and the judgment in all other respects is affirmed.

Fox, J., dissenting.

3 Cal. Unrep. 277

MOWRY v. HENEY. (No. 11,705.)

(Supreme Court of California. June 12, 1890.)

SURETY ON APPEAL—JUDGMENT—NOTICE.

A judgment against a surety on an appeal-bond, rendered more than 30 days after the filing of a *remittitur* from the supreme court, is valid, though the surety had no notice of the motion therefor; since the undertaking, as prescribed by Code Civil Proc. Cal. § 942, is that, "if the appellant does not make such payment within 30 days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor, against the sureties, for such amount, together with interest." This is an express waiver of further notice.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

R. Percy Wright, for appellant. Cowdry & McCutchen, for respondent.

McFARLAND, J. Action to quiet title to certain real property situated in San Francisco. Judgment went for defendant, from which, and from an order denying a motion for a new trial, plaintiff appeals. Respondent claims title to the premises in contest under sheriff's sale and deed made under an execution issued upon a judgment against one Laura A. Mowry, who is the mother of plaintiff. This judgment was rendered against Laura A. Mowry on an undertaking on appeal executed by her on an appeal taken from the superior court to this court by the defendants in a certain action entitled Heney et al. v. Alpers et al.¹ The undertaking contained the covenants provided for in section 942 of the Code of Civil Procedure.

The judgment in Heney et al. v. Alpers et al.—which was for \$1,344.18, with interest and costs—was affirmed by this court on March 28, 1883, and the *remittitur* was filed in the superior court May 3, 1883. The judgment on the undertaking was rendered on August 2, 1883,—more than 30 days after the filing of the *remittitur*. It is admitted for the purposes of this present appeal that the judgment against Laura A. Mowry on the undertaking on appeal was rendered without any notice of the application for judgment having been served upon or given her; and it is contended by appellant that, because such notice was not given, the judgment was void. Whether or not, for that reason, the said judgment was void is the main question in this case.

We are satisfied that a judgment on an undertaking on appeal, given under section 942 of the Code of Civil Procedure, may be properly rendered against the sureties without any further notice. Such a judgment is simply in accordance with their express contract. The language of their obligation is that, "if the appellant does not make such payment within thirty days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, in his favor, against the sureties, for such amount, together with interest," etc. This is an express waiver of any further notice, a direct assumption of the result of the appeal, and a disclaimer of the necessity of any further litigation on the subject. The contract of the surety is not that he "will pay" or "will be liable" if his principal fails, but that judgment may be entered against him, on motion, for the amount which has already been adjudicated to be due from his principal. The judgment to be entered against him is nothing more than the natural and anticipated consequence of his own express undertaking. The case of *Coscia v. Kyle*, 15 Nev. 394, has no bearing on the case at bar. There, no contract relation whatever was involved.

Moreover, we think that the point under discussion should be taken as settled against appellant's contention by the case of *Meredith v. Association*, 60 Cal. 617. The very point was elaborately discussed by counsel in that case, and exhaustively considered in the opinion of the court. It is contended that the Meredith Case should not be considered as binding authority, because the point was not absolutely necessary to the decision of that case. Strictly speaking that may be so; but, as nearly as the whole force of the opinion in that case was expended on the point here involved, it is certainly entitled to great consideration as authority. Moreover, we think that the views there expressed are correct. As said in that case: "There is not in this mode of procedure anything which prejudices the rights of the parties to the action; for if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy, under section 675 of the Code of Civil Procedure, to have satisfaction entered, and, for that purpose, to recall any execution which may have been issued against

¹Not reported.

them; or they may have the judgment vacated or annulled." On this collateral attack the appellant has no standing. The case of *Davis v. Heimbach*, 75 Cal. 261, 17 Pac. Rep. 199, was about an entirely different section of the Code, and cannot be taken as weakening the doctrine of the *Meredith* Case.

The finding of the court, that the deeds from *Laura A. Mowry* to plaintiff were not intended to be operative unless in the event of her death from the extreme illness from which she then suffered, was, we think, fully sustained by the evidence, and correct. The objection to the judgment role is not tenable. It contained all that is required to be in it. We see no material insufficiency or defect in the findings, nor do we perceive any other material error.

Judgment and order affirmed.

We concur: **PATERSON, J.**; **SHARPSTEIN, J.**; **FOX, J.**

84 Cal. 499

WITCHER v. CONKLIN. (No. 13,291.)

(*Supreme Court of California.* June 13, 1890.)

LAND-OFFICE RECEIVER'S CERTIFICATE—ASSIGNMENT.

1. A United States land-office receiver's receipt for the purchase money of lands pre-empted under Rev. St. U. S. § 2259, is a sufficient "certificate," under Code Civil Proc. Cal. § 1925, to constitute *prima facie* evidence of title, when in the following form: "Received from *Albert Scherfen*, of *Modoc* county, Cal., the sum of two hundred dollars and — cents; being in full for [land described,] at \$1.25 per acre,"—the words, "Pre-emption under Sec. 2259, Rev. St. Duplicate," being written across its face.

2. The absence of any record in the local land-office showing payment, does not overcome the evidence of such receipt.

3. A conveyance of the land, and delivery of the certificate, by the pre-emptor to plaintiff, was sufficient evidence of an assignment of the certificate, and all rights acquired thereby.

Commissioners' decision. Department 1. Appeal from superior court, *Modoc* county; **G. F. HARRIS**, Judge.

Spencer & Raker and *Clarence A. Raker*, for appellant. *Goodwin & Jenks*, for respondent.

VANCLIEF, C. The action is ejectment. Judgment for plaintiff, from which, and from an order denying his motion for a new trial, the defendant appeals. The plaintiff claimed title under a pre-emption entry made by *Albert Scherfen*, evidenced by a receipt for the purchase money from the receiver of the land-office at *Susanville*, Cal., of which the following is a copy: "No. 1,402. Receivers' Office at *Susanville*, Cal. Nov. 5, 1880. Received from *Albert Scherfen*, of *Modoc* county, Cal., the sum of two hundred dollars and — cents, being in full for the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section No. 29, in township No. 41 N., of range No. 9 E., Mt. D. M., containing 160 acres and — hundredths, at \$1.25 per acre. \$200.00. **ANDREW MILLER**, Receiver." Across the face of this receipt were written in red ink the following words: "Pre-emption under Sec. 2259, Rev. St. Duplicate." It was stipulated by counsel that the lands described in the receipt are within the district of lands subject to en-

try and sale at the land-office at *Susanville*; that such lands had been surveyed by the government and the plat thereof filed in said land-office, and duly approved, prior to April, 1878, after which, in April, 1878, *Albert Scherfen* made a pre-emption filing on said land, which was marked and entered upon the plats and records of said land-office, but that the records of said land-office do not show that any entry of or payment for said land by *Albert Scherfen* was ever made; and that there is no record of any such entry or payment in said land-office. On February 19, 1884, *Scherfen*, by a bargain and sale deed, duly acknowledged, conveyed the land described in said receiver's receipt to the plaintiff, and delivered to plaintiff said receipt. In January, 1887, the appellant entered and settled upon the land, and on January 18, 1889, made and filed in the land-office his declaratory statements as a pre-emptor thereof, and paid three dollars as fees of the register and receiver.

1. It is contended by appellant's counsel that the receiver's receipt, in the form above quoted, is not equivalent to a "certificate of purchase," within the meaning of section 1925 of the Code of Civil Procedure, which is as follows: "A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes." This section embodies the substance of the acts of April 13, and April 18, 1859. *Hittell's Gen. Laws*, §§ 703, 704. The construction given these acts and section 1925 of the Code of Civil Procedure seems opposed to the view of counsel for appellant. In *McDonald v. Edmonds*, 44 Cal. 328, it was said of a receiver's receipt to a pre-emptor, in the precise form of that relied upon by the respondent here, "whatever may be the legal effect of the certificate as between the defendant and the government, it is clear that it establishes in the defendant a right to the possession as against one who shows no title." When the plaintiff's grantor paid for the land, and took the receiver's receipt, he thereby became the equitable owner of the land; and thereafter the government of the United States had no right or power to sell it, or to hold it open to pre-emption by another. *Rev. St. U. S. § 2271; Hutton v. Frisbie*, 37 Cal. 475; *Cornelius v. Kessel*, 128 U. S. 457, 9 Sup. Ct. Rep. 122. Therefore, appellant's settlement and filing upon the land gave him no title or right whatever, and his case is no stronger than was that of the plaintiff in *McDonald v. Edmonds*, supra. To constitute a certificate of purchase in the sense of section 1925 of the Code of Civil Procedure, it is not necessary that it should contain the word "certify." The receiver's receipt in this case contains

the whole substance of an official certificate of purchase; and, that ejectment may be maintained on the title and right of possession evidenced by such certificate, there seems to be no doubt. Toland v. Mandell, 38 Cal. 30; McDonald v. Edmonds, 44 Cal. 328; Laugenour v. Hennagin, 59 Cal. 625; Stanway v. Rubio, 51 Cal. 41; Conlan v. Quinby, Id. 413; Byers v. Neal, 43 Cal. 215; Figg v. Hensley, 52 Cal. 299. The case of Lynch v. Brigham, 49 Cal. 137, cited by appellant, is not in conflict with any of the cases above cited. In that case the only question decided related to the sufficiency of a finding. The finding was held to be wholly insufficient to show any title or right of entry in the plaintiff, "for reasons too obvious to require comment." The reason for this insufficiency of the finding may probably be seen in the point of counsel which the decision sustained, which was that "the fact found must be the very fact in issue, to-wit, in this case, title in the plaintiff at the commencement of this action, and not a fact like this one, which is, at most, merely evidence of the fact in issue, but not the fact itself. It is not sufficient for the jury, or the court sitting as such, to find facts which, however strongly, merely tend to establish the fact in issue, or from which the fact in issue might, in the absence of any contrary proof, be inferred." It was not denied by counsel, nor decided by the court, in that case, that the facts found are not *prima facie* evidence of title, which is all that is claimed in the case at bar.

2. It is contended by appellant that the absence of any record in the local land-office showing payment of the purchase money by Scherfen overcomes the receiver's receipt as evidence of such payment. But the absence of such record is not inconsistent with the fact of payment; and it is not perceived why the rights of the purchaser should be dependent upon a record which, if made, must necessarily have been made by an officer of the government, and after payment of the purchase money, and for the making of which the purchaser is in no degree responsible. The making of a record of the fact of payment seems to be a matter, between the officer and the government, having no more bearing upon the contract of purchase evidenced by the receiver's certificate than would the failure of the receiver to account to the government for the purchase money received by him.

3. The conveyance of the land and the delivery of the certificate by Scherfen to plaintiff was sufficient evidence of an assignment of the certificate, and all rights acquired thereby, (Thurston v. Alva, 45 Cal. 16; Pol. Code, § 3515;) and the certificate was sufficient evidence that Scherfen "had taken the necessary steps towards pre-empting the land," (McDonald v. Edmonds, *supra*.)

4. The allegations in the answer that defendant was a qualified pre-emptor, and filed his declaratory statement in the land office, etc., constitute no defense to the case as proved by plaintiff, and found by the court. It is, therefore, immaterial whether the court found upon the issues tendered by those allegations of the an-

swer or not; for, had the court found upon all of them in favor of the defendant, the judgment must still have been for the plaintiff. For all purposes of this appeal, those allegations of the answer are assumed to be true. It follows that the defendant is not injured by the failure of the court to find upon those issues.

5. As there was no evidence tending to prove any adverse possession of the land at the time Scherfen filed his pre-emption claim, the views above expressed sufficiently answer all the objections resting upon the ground that the findings are not justified by the evidence, since the certificate of purchase supplies all the specified deficiencies. There should be no question that the findings support the judgment. I think the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

84 Cal. 515

MUNRO v. PACIFIC COAST DREDGING & RECLAMATION CO. (No. 12,481.)

(Supreme Court of California. June 12, 1890.)

DEATH BY WRONGFUL ACT—PARTIES—MEASURE OF DAMAGES.

1. In an action by the personal representative under Code Civil Proc. Cal. § 377, providing for the recovery, for a death caused by the wrongful act of another, of "such damages as, under all the circumstances of the case, may be just," the mother of deceased is entitled to compensation for the pecuniary loss sustained by her on account of the death of her son.

2. She is also entitled to damages for the loss of his comfort, society, support, and protection.

3. But no damages can be recovered for her grief, sorrow, and mental suffering.

4. Where the death was caused by the explosion of a blast in a thickly-settled portion of a city, it is no defense that defendant used the highest degree of skill and care in exploding the blast.

5. An instruction that plaintiff is entitled to recover if the jury find that the blast was exploded "as charged in plaintiff's complaint," and that it resulted in the death of deceased, does not withdraw from the jury the material issues necessary to establish the cause of action.

BEATTY, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

T. C. Coogan and W. W. Foote, for appellant. Cary, Sullivan & Sullivan, for respondent.

THORNTON, J. This action is brought to recover damages for death caused by the negligent explosion by defendant of a blast in the city of San Francisco, whereby the plaintiff's intestate was killed. The demurrer to the complaint was properly overruled. The allegations as to the appointment of Munro as administrator of the deceased, Stanton, were sufficient. The court committed no error in its rulings on the admission of testimony.

The court gave, at the request of plaintiff, the following instruction to the jury: "If you find from the evidence that the defendant, through its agents, servants, and

employees, fired and exploded the blast as charged by the plaintiff's complaint, and that it resulted in the death of Michael Stanton, the plaintiff's intestate, then the plaintiff is entitled to recover such damages as from the evidence and proofs, under all the circumstances of the case, you may deem to be just." To the giving of this instruction the defendant excepted. It is contended now on behalf of defendant that this direction was erroneous because it removed from the jury the consideration of all the issues except that the defendant fired and exploded the blast, and that it resulted in Stanton's death; that there were other issues in the case, but by this instruction they were brushed aside. We find no error in this instruction. The language in the first clause that "the defendant, through its agents, servants, and employees, fired and exploded the blast," is qualified by the words "as charged in the plaintiff's complaint;" and the complaint set forth a careless and negligent explosion of the blast. In our judgment the direction embraced all the material issues in the complaint, the finding on which was necessary to establish the cause of action against the defendant.

The giving of the following instruction by the court is likewise excepted to: "It is no defense or answer to an action of this character that defendant, in exploding the blast in question, used and employed skillful and experienced men, and, in everything appertaining to blasting, it used and exercised the highest degree of care; and I charge you that defendant is liable to damages for the death of said Michael Stanton, if you find that his death resulted from the firing of the blast in question, even if it used the highest and utmost care and skill in firing and exploding it." We perceive no error in the above direction. The evidence shows clearly that this blast was exploded in a thickly-settled portion of the city. We are of opinion that no degree of care will excuse a person, where death was caused by such explosion, from responsibility for it. It is said that the above instructions ignore the doctrine of contributory negligence. As there was no evidence of contributory negligence in the cause, the doctrine of such negligence was properly ignored.

The court also directed the jury as follows: "(3) If your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just; and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death, if you find that his mother is living. And the loss which the plaintiff is, in such a case as this, entitled to recover, is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his mother or heirs or personal representatives, taking into consideration his age, health, habits of industry, ability and disposition to labor, and the probability of his length of life. (4) I further instruct you, if from the evidence you should find

for the plaintiff, then the measure of damages is not alone the pecuniary loss and injury sustained by the mother in the loss of her son, as just explained; but, in assessing the damages, then you may, in addition, take into consideration the sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support, and protection of the deceased, by reason of his death." As no question is made on the remainder of this instruction, we do not insert it. To the giving of these instructions, exceptions were reserved by defendant, and it is said on behalf of defendant that the court erred in giving them. Our attention is particularly directed to the following portion of instruction 3: "And that, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death;" and the following portion of instruction 4: "The sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support, and protection of deceased by reason of his death."

Now, in regard to the above-quoted portion of instruction 3, it is argued the mother of Michael Stanton was not the party plaintiff; that the action was not brought by the heirs of the deceased, but by his personal representative; that this action is brought under section 377 of the Code of Civil Procedure. That section is in these words: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person, who is responsible for his conduct, then, also, against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just." In connection with this section, our attention is called to the act of 1862, (St. 1862, p. 447;) and it is said that section 3 of that act prescribed that the action should be brought by the personal representative of the deceased alone, and prescribed the rule of damages in these words: "The jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, *and may take into consideration the pecuniary injury resulting from such death to the wife and next of kin of such deceased person,*"—and that when enacted in the Code the words in italics were omitted therefrom. The counsel for defendant proceeds to give the reason for this change in the enactment. The reason so given by counsel is that the heirs were given the right to maintain the action, and hence its re-enactment was not necessary, because, in an action brought by them, as a matter of course, their pecuniary injuries should be taken into consideration. We do not think that such is the proper construction of section 377. In our judgment, but one action is permitted, and that action may be

brought either by the heirs of the deceased or by his personal representatives; and, when one action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits. As, for instance, when the personal representative of the deceased brings an action to recover damages for the act or neglect causing death, if another action is afterwards brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or, if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second action. The question made on the instruction above pointed out must primarily relate to the circumstances which may be given in evidence on the issue of damage, and on that point the statute is very broad and general in its terms. "Such damage may be given as, under all the circumstances of the case, may be just," is the language of the statute. What these circumstances are may be a matter of difficulty, in all cases, to determine. It would be almost impossible to draw *a priori* the line which separates the circumstances which should be admitted from those which should be excluded. The exact line of inclusion and exclusion it would be hard to determine in advance of the circumstances of any particular case. Here the circumstances are defined in the instruction. As to the portion of instruction 3 objected to, we think that it was correct. The action is permitted by the statute to be maintained for the benefit of the heirs. Certainly the pecuniary loss which the heirs might sustain by the death is clearly one of the circumstances to be considered. *Chicago v. Major*, 18 Ill. 349; *Railroad Co. v. Morris*, 26 Ill. 400; *Blake v. Railway Co.*, 18 Q. B. 93. This is true under all the statutes giving an action on account of the death of a person under 9 & 10 Vict. c. 93, known as "Lord Campbell's Act," as well as under the acts of the same character which have been enacted in the various states of the Union. The damage is to the heirs, and certainly the pecuniary loss to the heirs is one of the principal elements of damage. There was no error in the portion of instruction 3 assailed by defendant.

As to the portion of instruction 4 above quoted there is more difficulty. It has been held in an English case that the jury should not be allowed to take into consideration the mental sufferings or bereavement of the plaintiff or the loss of her husband. *Blake v. Railway Co.*, supra. In this case the widow of the deceased, as administratrix, was the plaintiff. In the case cited, Justice COLERIDGE said: "The title of this act [referring to Lord Campbell's act] may be some guide to its meaning, and it is 'An act for compensating the families of persons killed,' not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly-given action may be maintained, although death has ensued; the argument being that the party injured, if he had recovered, would have been entitled to a *solatium*, and therefore so shall his representatives on his death. But it will be evident that this act does

not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles. Section 2 enacts that 'In every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties, respectively, for whom, and for whose benefit, such action shall be brought.' The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family." In *Franklin v. Railway Co.*, (1858,) 3 Hurl. & N. 211, and in *Dalton v. Railway Co.*, (1858,) 4 C. B. (N. S.) 296, suits were maintained on account of the death of sons for the benefit of parents, and damages allowed to be assessed on the basis of reasonable expectation on the part of the latter, or pecuniary benefit to be derived from the continuance of their sons' lives, but in the latter case the expenses of funeral and mourning were disallowed; Mr. Justice WILLES saying that "the subject-matter of the statute is compensation for injury by reason of the relative not being alive." See, also, *Railroad Co. v. Morris*, supra; *Bradshaw v. Railway Co.*, L. R. 10 C. P. 189; *Leggott v. Railway Co.*, 1 Q. B. Div. 599. We agree with what is said in the opinion above quoted, that the action given by the statute is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury. *Blake v. Railway Co.*, supra; *Pym v. Railway Co.*, 2 Best & S. 759; *Read v. Railway Co.*, L. R. 3 Q. B. 555; *Safford v. Drew*, 3 Duer. 627; *Railroad Co. v. Morris*, supra.

It may be observed that the language of the statute of this state (section 377, Code Civil Proc.) is broader than the language of the English statute. The English statute may be found in 2 Redf. R. R. (6th Ed.) 287. Under the words of the section, we are of opinion that the circumstances mentioned in it do not include the sorrow, grief, or mental suffering occasioned by the death of Michael Stanton to his mother. The extent of the sorrow, grief, and mental suffering was not shown to the jury by any testimony. It was left to be inferred as a natural result of the death of the son. Whether such grief was overwhelming, or of a light and transient character, did not appear. The extent and character of the sorrow and grief were left to be conjectured or guessed at by the jury, with the right conceded to the jury of finding such grief and sorrow to be extreme, should they so elect. The opportunity to run into wild and excessive verdicts would be allowed them, if the rule was as contended by plaintiff. The standard would be too vague and uncertain to be established as a rule of law for the admeasurement of the rights of parties. *Misera est servitus ubi jus est vagum aut incertum*. In allowing the jury to take into consideration the loss of the comfort, society, and protection of deceased, we think we have gone far enough; but this, we think, should be allowed in the case of a wife, as in *Beeson's Case*, 57 Cal. 20, or a mother. We have found no case in which damages for sorrow, grief, and mental suf-

fering are allowed under any of the statutes. We have examined the cases cited on behalf of the plaintiff, and they affirm no such proposition. See *Blake v. Railway Co.*, supra; *Railroad Co. v. Morris*, supra. In *Beeson v. Mining Co.*, 57 Cal. 20, no such damages were allowed. The action in that case was by the widow of the deceased, as heir; and an instruction that, in estimating damages, the jury might take into consideration the pecuniary loss, and also the relations existing between the plaintiff and the deceased at the time of his death, and the injury sustained by her in the loss of his society, was approved. Page 33. In the case of *McKeever v. Railroad Co.*, 59 Cal. 294, the question did not arise. See pages 300, 301. In *Cook v. Railroad Co.*, 60 Cal. 604, no such question arose or was decided. See pages 607-610. Nor did it arise in *Nehrbas v. Railroad Co.*, 62 Cal. 320. The sorrow, grief, and mental suffering of the mother, in our judgment, was too remote a circumstance to be taken into consideration in the estimate of damages, and was not allowable under our statute. Judge Redfield, in the sixth edition of his work on Railways, states: "There seems no doubt, according to the best-considered cases in this country, that the mental anguish which is the natural result of the injury, may be taken into account in estimating damages, although not of itself the foundation for an action," (volume 2, p. 288;) and the same statement is made in the third edition of the same work, and cites to sustain his statement *Canning v. Williamstown*, 1 Cush. 451, and *Morse v. Railroad Co.*, 10 Barb. 623. In neither of these cases did the question arise. The first was an action by the party injured against a town, under a statute, to recover damages for an injury sustained by the plaintiff in consequence of a defect in a bridge in the town of Williamstown. The second case was an action brought by a passenger injured on the cars of the defendant company. Neither of the actions was to recover damages for the death of any person. In *State v. Railroad Co.*, 24 Md. 85, there is the same criticism of the remark of Judge Redfield, above quoted, in relation to damages caused by mental anguish. See pages 106, 107. And in this case from Maryland, which was an action for the benefit of the mother to recover damages for the death of her minor son, brought under the Maryland statute, it was held that the mental suffering of the mother resulting from the death of the child was a matter too vague to enter into the estimate of the damages merely compensatory. In a note on page 288 of 2 Redf. R. R. (6th Ed.) it is stated: "In a suit by a parent for the death of a child, recovery can be had only for the pecuniary injury,—services of child less cost of maintenance, (*Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Railway Co. v. Freeman*, 36 Ark. 41; *Railroad Co. v. Kindred*, 57 Tex. 491; *Railroad Co. v. Delaney*, 82 Ill. 198; see *Walters v. Railroad Co.*, 41 Iowa, 71;) including medical attendance, nursing, and expenses of bu-

rial, but not grief, loss of society, etc., (*Railroad Co. v. Barker*, 33 Ark. 350; see *Barley v. Railroad Co.*, 4 Biss. 430.)" This note is by the editor of the sixth edition, Mr. J. Kendrick Kinney. We are of opinion that the court erred in including in the instruction the words "sorrow, grief, and mental suffering" occasioned by the death of the son to his mother. In thus directing the jury the court fell into an error. In our opinion the damage should be confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of deceased.

The court did not err in refusing the requests of defendant Nos. 1, 2, 3, 4, and 7. All of these instructions, under the facts of the case, would have been misleading. The evidence clearly showed both a wrongful act and neglect on the part of the defendant. It is a wrongful act to explode a blast of powder in a thickly-settled portion of a city, as was done in this case. The uncontradicted testimony showed a clear case of explosion in the city, where many persons were living, and where such an explosion could not take place without strong probability of its injuring some one.

The defendant requested the court to instruct the jury as follows: "The jury have no right to give exemplary or vindictive damages, but are confined to the actual pecuniary damage suffered by the estate of Michael Stanton, deceased." The court refused to give this instruction as requested, but modified the same so as to read as follows: "The jury have no right to give exemplary or vindictive damages, but are confined to the actual pecuniary damage suffered by the estate of Michael Stanton, deceased; but, in this connection, I charge you that the law also permits a jury to make allowance for such a sum as may seem fair and just for sorrow, suffering, and mental anguish occasioned to her by the death." To the refusal of the court to give the instruction as requested, and in giving the modified instruction, the defendant excepted. In refusing the request as made, the court committed no error of which the defendant can complain; but, in giving it as modified, it did fall into an error, as has been shown above.

In relation to the seventh request of defendant, we remark that it related to a matter entirely immaterial in this case. The damages recovered are for the benefit of the heir or heirs, and do not constitute any part of the estate of the deceased. *Leggott v. Railway Co.*, supra; *Railroad Co. v. Morris*, supra. The action is a new one given by the statute; and the damages recovered are, as said above, for the benefit of the heirs. Clearly, they can be no part of the assets of the deceased. For the errors above pointed out the judgment is reversed, and the cause remanded for a new trial.

We concur: MCFARLAND, J.; FOX, J.

I concur in the judgment: WORKS, J.

I dissent: BEATTY, C. J.

84 Cal. 541

CHRISTY v. SPRING VAL. WATER-WORKS.
(No. 12,374.)

(Supreme Court of California. June 13, 1890.)

DISCLOSURE OF TITLE—FAILURE TO FIND.

1. A defendant in a partition suit, who, after answering, but before decree, acquires an independent title by deed, must make disclosure thereof, or the decree will be conclusive as to his title, and will prevent him from setting up the deed in a subsequent action to recover possession.

2. Where, in ejectment, defendant pleaded a bar of the action, and, by cross-complaint, averred adverse possession for five years, under claim of right founded upon a written instrument, but the court failed to find upon either issue, although there was evidence tending to support them, the judgment must be reversed.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

For former report, see 8 Pac. Rep. 849.

C. N. Fox and Kellog & King, for appellant. *I. N. Thorne*, for respondent.

PATERSON, J. 1. On the former appeal this court held that the decision of the court below, which was based upon evidence of a new title acquired by the defendant, after answer filed in the proceedings for partition, but before the rendition of any interlocutory decree therein, was erroneous, that the judgment in partition was conclusive upon all the parties as to any title or claim held by them at the time of its rendition. 68 Cal. 76, 8 Pac. Rep. 849. At the last trial the defendant introduced in evidence entries in the registry of actions showing that the trial of the partition proceeding began on August 15, 1871. The taking of evidence was concluded on the day following. The case was argued and submitted on September 10th following, and the interlocutory decree was entered on October 13, 1871. The deed from Turner to defendant is dated August 28, 1871. It was acknowledged October 6, 1871, and recorded October 12, 1871. Appellant insists that upon this showing it is not a case of title procured *pendente lite*, which it was bound to disclose at the hearing for adjudication in the partition proceedings, and forcible reasons are presented in support of the contention. But discussion of the proposition is foreclosed by the decision of this court on the same question when the case was here before. The facts are substantially the same as they were on the former appeal. It appeared then, as it does now, that the trial of the partition proceedings began August 15th, and that the interlocutory decree was entered October 13th. It is true, it did not appear that the taking of evidence was concluded on August 16th, but, in view of what the court said, that fact was immaterial, it being the duty of the defendant, in the opinion of the court, to "disclose its adverse claims to the land," and, if necessary, to obtain permission "to amend its answer so as to include the deed as evidence of a right in itself acquired pending the proceedings." It was held that the judgment was conclusive on all parties as to title or claim held by them at the time the interlocutory decree was entered.

2. It is claimed that the objection to the introduction in evidence of the judgment roll in the partition suit should have been sustained; that the judgment in that suit includes land not included in the complaint therein; and that the property described in the complaint herein is not included in the property described in the complaint in the partition suit. At the first trial the roll went in without objection, but when the case was presented here the point was made by respondent (now appellant) that the judgment was void on its face because the property described therein was not the property described in the complaint, or in the report of the referee, who partitioned the property under the interlocutory decree of the court. 331 Supreme Court Records, p. 219. The court evidently considered the contention without merit. It was claimed then, as it is now, that a portion of block 774 was included in the decree, and issued for herein, but is not included in the property described in the complaint in partition. The facts before the court then were the same as those before us now. The court looked at the various descriptions in both cases, and, after comparing them with one another, and with the map, properly held, we think, that "there was allotted and set over to Randall that portion of the property which is described in the complaint in the present action."

3. In addition to a general denial the defendant set up as a defense that plaintiff's right of action was barred by the provisions of sections 318, 319, 322, 323, 324, and 325 of the Code of Civil Procedure; and in a cross-complaint for cause of action alleged an exclusive and uninterrupted possession of the premises, adverse to plaintiff and all the world, for over five years, under claim of right founded upon a written instrument of conveyance. The court below failed to find on either of these issues, and for this reason we have to reverse the judgment. If there had been no evidence on the issue, the failure to find would have been immaterial, (*Himmelman v. Henry*, 23 Pac. Rep. 1098, filed May 7, 1890;) but there was. Both here and in the partition suit it appears from the pleadings and judgments that the defendant was in possession of the lands in controversy, claiming title thereto, over 20 years ago, and the evidence of defendant herein tends to establish the claim of continuous, adverse possession. The judgment and order are reversed, and the cause is remanded for a new trial.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; and WORKS, J.

84 Cal. 547

LANDERS v. LANDERS *et al.* (No. 13,680.)
(Supreme Court of California. June 13, 1890.)

BILL OF EXCEPTIONS—REQUIREMENTS.

A judge properly refused to sign or allow as a bill of exceptions a paper indorsed upon the back, "Defendants' bill of exceptions," but not signed, and which did not show upon its face by whom, or in whose interest, it was prepared, or contain a request that it be allowed and certified as such.

In bank. *Mandamus.*

The petition was filed by defendants, and the writ issued to F. W. LAWLER, judge of the superior court of the city and county of San Francisco.

D. L. Smoot, for petitioner. J. I. Bergin, or respondent.

Fox, J. An alternative writ of mandate was issued out of this court, commanding the respondent to settle, allow and certify a bill of exceptions proposed on behalf of defendants in the above-entitled cause, or show cause before this court why he did not do so. The judge answers, and for cause shows that no proposed bill of exceptions has ever been presented to him for settlement and allowance. The paper filed here, denominated a petition for the writ, upon examination appears to be an affidavit, with venue laid in the city and county of San Francisco, concluding with a prayer that a writ of mandate be issued commanding the respondent to certify and allow a certain bill of exceptions, a copy of which is thereto annexed, or show cause before the supreme court of the state of California why he has not done so, etc. It is not entitled, either in its heading, body, or indorsement, or elsewhere, in this or any other court, and is not addressed to this or any other court; nor does it appear out of what court it is desired that the writ shall issue. Such a paper ought not to have been filed in this court, and it was an inadvertence to have issued any writ or process upon it. It is sworn to before a notary public, in the usual form of an affidavit, but is not verified in the form required by law for the verification of pleadings, and is not sworn to by a party in interest, or by anybody purporting on the face of the paper to be acting for or in behalf of a party in interest, and is neither signed nor indorsed by any one acting as attorney for the petitioners or for any party in the cause. Had these defects been noticed at the time, the writ certainly would not have been issued; but, the case being now submitted upon its merits, we look into them, and find it equally defective there. The original of the proposed bill of exceptions, a copy of which is annexed to the affidavit, was presented at the hearing. It bears the simple initials of the judge, said to be in his handwriting, and probably put there for the purpose of enabling him at any future time to identify the paper as one that he had seen before. It is indorsed on the back, "Defendant's bill of exceptions," but upon its face there is nothing whatever to indicate by whom, or in whose interest, it was prepared. It shows upon its face that it was not prepared at the time of the action to which exception was taken. That action was had August 16, 1889. This paper bears date August 26, 1889, and bears this indorsement: "Received within document this Aug. 26, 1889,"—signed by plaintiff's attorney. The paper itself contains no prayer or request that it be allowed or certified as a bill of exceptions, and has no signature or indorsement of any kind to indicate by whom it is prepared or offered. It was a paper which anybody

might present, but for which nobody would be responsible. It was not a paper upon which the judge, or any of the counsel in the cause, were called upon to act, or to which they were required to give any attention. Such a paper must be authenticated in some form, either by the signature or the indorsement of the attorney, or of the party, if he appear in person. It was an attempt to have the judge make a solemn record in the cause, in a matter whereof no record is ever made, except at the request of a party to the action, and it is the duty of the party desiring such a record to make it matter of record that he did so request. The statute itself requires (Code Civil Proc. § 650) that the party desiring a bill of exceptions certified and allowed shall "prepare drafts," etc. When such a paper is served upon opposite counsel, or presented to the judge, it is no draft, unless upon its face, or by proper indorsement, it shows that it is one prepared and presented by a party to the cause. It is only waste paper, and no one need notice it. The writ must be dismissed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

84 Cal. 584

Ex parte WALPOLE. (No. 20,710.)

(Supreme Court of California. June 13, 1890.)

HABEAS CORPUS—PETITION.

A writ of *habeas corpus* to release one held to answer a criminal charge will be denied where the petition merely alleges that no evidence was taken on the preliminary examination showing, or tending to show, petitioner's guilt. The petition should be verified, and the evidence set out in such form that perjury can be assigned upon the allegations, if they are false.

In bank. *Habeas corpus.*

Spencer & Raker, for petitioner.

PER CURIAM. Petition for writ of *habeas corpus* on the ground that the petitioner has been held to answer on a criminal charge before the superior court without reasonable or probable cause. The petition does not show what the charge is upon which he has been committed, but does allege that there is no evidence whatever taken upon his preliminary examination showing, or tending to show, that he is guilty of any offense whatever. But this is merely his conclusion, and it may be an erroneous conclusion. A petition for *habeas corpus* must be verified, and must allege facts showing an illegal imprisonment. When the ground of the petition is that the prisoner has been committed without reasonable or probable cause, it must set out what the evidence on the examination was in such form that perjury may be assigned upon the allegations, if they are false. Writ denied.

84 Cal. 585

VAN BIBBER v. HILTON *et al.* (No. 13,358.)

(Supreme Court of California. June 13, 1890.)

RIPARIAN RIGHTS—CROSS-COMPLAINT.

1. Plaintiff, as riparian owner, seeks to enjoin defendants, riparian owners above him, from diverting the waters of a stream, except a

certain part to which they are entitled by prior appropriation. Defendants, by cross-complaint, allege that plaintiff has drawn off the water so as to prevent it from irrigating their lands as it would do in its natural flow, and by a second cross-complaint allege that he threatens to do so as to the part to which they are entitled, and ask an injunction. *Held*, these matters are proper subjects of cross-complaint under Code Civil Proc. Cal. § 442, which provides that, when a defendant seeks affirmative relief affecting the property to which the action relates, he may file a cross-complaint. *WORKS, J.*, dissenting.

2. Although the matters in the two cross-complaints should have been stated in one, yet, since they are not unintelligible or ambiguous, it is not a ground of demurrer.

3. It was error to adjudge that the water, except as to the part to which defendants were entitled by prior appropriation, be allowed to flow unrestrained to plaintiff's land in its natural course, since defendants would thus be deprived of the reasonable use which is the right of riparian owners.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker, for appellants. *Goodwin & Jenks*, for respondent.

FOOTE, C. This is an action to restrain the defendants from diverting the waters of a stream in the county of Modoc. The stream flows through the lands of both the plaintiff and the defendants, and they are all riparian proprietors; the defendants' land lying on the stream above that of the plaintiff. It appears by the findings that the amount of water carried by the stream is about 250 inches, under a 4-inch pressure, and that, of such amount of water, the defendants were the proprietors, by prior appropriation, of 25 inches. The court also found that the defendants had, by means of dams constructed in the stream, and ditches leading out therefrom, diverted all the water of the stream so that none of it reached, by its natural flow, the lower riparian proprietors; that all the lands of the plaintiff were irrigated by the stream flowing naturally and spreading over it; and that a portion of the defendants' land was also irrigated in the same way, as also by the 25 inches of water obtained by a prior appropriation. Finding that all the parties to the action were riparian proprietors, and that the defendants were also appropriators to the amount of 25 inches of the water running in the stream, the court below enjoined the defendants from diverting any of the waters except that to which they are entitled as such appropriators. From the judgment rendered the defendants appeal.

The pleadings of the defendants are all upon one paper, and were filed at the same time, and are signed at the end of the last part, or what is called the "second cross-complaint." The part denominated the "answer" denies the allegations of the complaint, and pleads the statute of limitations under sections 318 and 319 of the Code of Civil Procedure by way of defense. The demurrer filed to the answer was overruled. The grounds of demurrer to the cross-complaints are that they do not state facts sufficient to show a cause of action, and that they are unintelligible, ambiguous, and uncertain. It is proper to

remark, in passing, that the matters set up separately in two cross-complaints might have been stated separately in one cross-complaint, and one demurrer would then have sufficed. The plan adopted here is confusing.

The question to be determined is whether or not these cross-complaints contained matter proper for such a pleading. The first of them sets out the fact that the defendants are riparian proprietors, and as such entitled to the reasonable use of the waters of the stream; that the plaintiff has, by placing obstructions in the stream, and taking the water therefrom, prevented the flow of the same in their natural channel, and forcibly and wrongfully taken them away from the lands of the defendants, which, in their natural flow, they would have and did irrigate and make fruitful, when otherwise they would be and are unproductive; that such prevention of the natural flow of the waters has been of great damage to the lands of the defendants as riparian proprietors; and that the plaintiff threatens forcibly to continue his unlawful acts, and, unless prohibited by injunction, will cause great and irreparable damage to the defendants and their lands, and will entirely destroy their crops of grain, grass, etc., for which they cannot be entirely compensated unless permitted to use the waters flowing in their natural channel in the manner which they have been doing, etc. That called the "second cross-complaint" is to the effect that the plaintiff is doing, and threatens to do, these same unlawful acts, as against the defendants' rights to the 25 inches of water as prior appropriators, and asks for relief, etc.

Section 442 of the Code of Civil Procedure reads as follows: "Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time—or, by permission of the court, subsequently—a cross-complaint. * * * Did the defendants, in what are called the "first and second cross-complaints," seek affirmative relief thereby, affecting the property to which the action relates? The action relates to the waters of the stream the right to the use of which the plaintiff claimed as a riparian proprietor, and the defendants in that capacity, and as prior appropriators to the extent of 25 inches. The right to the same water, the same property right, was involved in the action as brought, as in the cross-complaints; and therefore a cross-complaint was the proper pleading, as we think, in which to set up the facts, and claim the affirmative relief. There were, then, causes of action stated in the cross-complaints proper to such pleadings, and the question only remaining is whether the causes of action were unintelligible or ambiguously stated. We do not think they were. It follows, then, that the court erred in sustaining the demurrers to the cross-complaints.

The court below found, in effect, among other things, that both parties were riparian proprietors, and that, as to 25

inches of the water of the stream, the defendants were the prior appropriators thereof. But it nowhere appears in any of the findings what amount of water it would be reasonable for the defendants to use as riparian proprietors for irrigation or other necessary purpose, domestic or otherwise. In the judgment or decree the whole of the water is ordered to be allowed to flow unrestricted to the plaintiff's lands in the natural flow of the stream, except the 25 inches given the defendants as prior appropriators. The finding once made that the defendants are riparian proprietors above on the stream, it is not allowable that a judgment be rendered which cuts them off from all reasonable use of any part of the water for irrigation or other necessary purpose as such proprietors. This is contrary to the doctrine of the appellate court in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674; *Gould v. Stafford*, 77 Cal. 67, 18 Pac. Rep. 879; *Heilbron v. Water Co.*, 80 Cal. 189, 22 Pac. Rep. 62.

We think the finding upon the statute of limitations is sufficiently explicit. But, for the reasons stated, we advise that the judgment be reversed, and cause remanded for a new trial, with directions to the court below to overrule the demurrers to the cross-complaints, with leave to the plaintiff to answer the same if so advised.

I concur: GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial, with directions to the court below to overrule the demurrers to the cross-complaints, with leave to the plaintiff to answer the same if so advised.

WORKS, J. I concur in the judgment on the last ground stated in the foregoing opinion. The whole controversy between these parties could have been fully determined under the issues raised by the complaint and answer, and the cross-complaints were entirely unnecessary. The prevailing custom of incumbering the records, and complicating the issues, by unnecessary pleadings should be discouraged; and the judgment, if right, should not be reversed for the reason the demurrers were sustained to these useless pleadings.

(84 Cal. 592)

MURPHY v. SUPERIOR COURT OF SANTA CLARA COUNTY. (No. 13,707.)

(Supreme Court of California. June 20, 1890.)

PROHIBITION—APPEALABLE ORDER—GUARDIAN—ESTOPPEL.

1. Under Code Civil Proc. Cal. § 1758, which provides that "every testamentary guardian must give bond and qualify," one who was appointed guardian by deed of trust, but failed to give bond, was not a legal guardian.

2. Under Code Civil Proc. Cal. § 1754, which provides that, "before the order appointing any person guardian under this chapter takes effect, * * * the court must require of such person a bond to the minor," one who was appointed guardian by the superior court, but failed to give bond, was not a legal guardian.

3. Although a person appointed testamentary guardian by deed applied for and obtained letters

of guardianship, he was not estopped from questioning the validity of his own appointment on the ground that he had never given bond, when he received no money or property under the appointment, and had never acted as guardian.

4. One who has received property for the benefit of minors by a deed of trust cannot be compelled to pay for their support by an order of the superior court, directing him, as guardian, to do so.

5. Such an order is appealable under Code Civil Proc. Cal. § 963, subd. 3, and a writ of prohibition will be denied.

In bank. Prohibition to superior court, Santa Clara county; F. E. SPENCER, Judge.

J. H. Campbell and T. H. Laine, for petitioner. H. V. Morehouse and H. D. Tuttle, for respondent.

WORKS, J. This is an application in this court for a writ of prohibition. Petitioner was, by a deed from his brother, John Murphy, made a trustee of certain property belonging to the latter for the benefit of his (the brother's) children. The deed also contained this clause: "I hereby also order, decree, and appoint my said brother, Bernard, as the lawful guardian, for the purpose of support, tuition, and religious training, of my two sons above named. I also enjoin on him the duty of having them educated at the Santa Clara College, situate in the county of Santa Clara, and state aforesaid, and that the ages I wish them to enter shall be not more than twelve years respectively. I also desire my good and kind sister-in-law, Isabel Hanna, to exercise a control, in connection with my brother Bernard, over my two sons, William Patrick and Henry Bernard." The petitioner filed no bond as such guardian, but subsequently applied to the superior court of Santa Clara county for letters of guardianship, for the reason, as alleged in his petition, that the insurance company refused to pay an amount due them on a policy of insurance on the life of their father, who had since died, without the appointment of a guardian by the proper court. On the filing of the petition for appointment of such guardian the aunt, Isabel Hanna, mentioned in the deed, filed a counter-petition, alleging that the children had been and still were in her custody, and under her care, and asking that she be appointed their guardian alone or conjointly with the petitioner herein. The respondent heard the petitions, and made and entered an order that "Bernard Murphy may be, and he is hereby, appointed sole guardian of the estates of said minors, and joint guardian with Isabel Hanna of the persons of said minors, and that letters of guardianship be issued to him, accordingly, without bonds, upon taking and subscribing an oath, as required by law; the custody of the persons of the said minors to remain with said Isabel Hanna until the further order of the court." No bond was given under this appointment. It will be seen that, while the order provides that the petitioner and the said Isabel Hanna shall be the joint guardians of these children, there is no order appointing her such guardian, and it is alleged in the petition before us that she never qualified as such guardian, but that the children had remained in her custody until they arrived

at the ages of 12, respectively, when it is alleged the petitioner requested her to allow them to be placed at Santa Clara College, as provided in the deed of their father to him, but she refused to do so, and he, from the time of such refusal, or soon after, discontinued an allowance he had been making her for their maintenance. She thereupon applied to the respondent for an order requiring the petitioner to pay her the sum of \$50 per month for the maintenance of the children. The respondent assumed jurisdiction of the latter petition, made an order requiring the petitioner herein to pay said allowance, and this proceeding is to prohibit the enforcement of the order.

We are not called upon to pass upon the correctness or propriety of any of the proceedings complained of. The sole question presented by the application made to us is whether the respondent had jurisdiction to proceed in the matter. If so, the writ must be denied. So, if the petitioner has a speedy and adequate remedy in the due course of law, the writ cannot issue.

It is contended by the petitioner that the respondent had no jurisdiction to appoint him guardian of these minors on his own petition therefor, on the ground that a guardian cannot be appointed by the court where one has been already appointed by deed. The Code provides that the superior court may appoint guardians of minors "who have no guardian legally appointed by will or deed." Code Civil Proc. § 1747; Civil Code, § 243. And provision is made for the appointment of a guardian by deed of the parents of minor children. Id. § 241. But the superior court has general jurisdiction of the matter of appointment of guardians, and as an incident to this jurisdiction it must have the power to hear and determine the fact whether a testamentary guardian has been legally appointed or not. If so, its jurisdiction cannot be attacked in this collateral way. If, upon a direct appeal, it appeared that a testamentary guardian has theretofore been legally appointed, the order granting letters would no doubt be reversed, but not on the ground that the court had not jurisdiction of the subject-matter. The fact of the appointment by deed being established, an order appointing a guardian would undoubtedly be a nullity. *Robinson v. Zollinger*, 9 Watts, 169; *Holmes v. Field*, 12 Ill. 424. But in any event it is absolutely necessary for the petitioner to show, in this proceeding, that there was a guardian legally appointed by deed, in order to sustain his claim of want of jurisdiction in the court to appoint. This we think he has not done. It is not enough that a guardian be named in the deed. He must, under our Code, in order to become such guardian, qualify by giving bond. Code Civil Proc. §§ 1754, 1758; *Wadsworth v. Connell*, 104 Ill. 369. The provision that a bond must be given applies to testamentary guardians, but a guardian appointed by deed must be held to be a testamentary guardian, as such an appointment cannot take effect until the death of the parent. Civil Code, § 241. As no bond was given by him, he was not legally appointed

by deed, and his contention, based on such pretended appointment, cannot be maintained.

It is further contended that he never became the guardian of these children under the appointment made by the court, because he never gave bond. This point we think is well taken. Code Civil Proc. § 1754. But it does not follow that this proceeding can be maintained. It is contended by the respondent that, whether the petitioner was legally appointed guardian or not, the court had jurisdiction to determine who should have the custody and maintenance of these minor children. This is undoubtedly true; but it does not follow that the court has the power to compel the petitioner to pay for such maintenance. In order to authorize such an order, it must appear that the court had jurisdiction over him, which could only be established by a showing that he was the guardian.

It is claimed that, the petitioner having applied for letters and acted as guardian, he is estopped to deny that he is such guardian because of his own neglect to give bond. This has been held where the guardian was attempting to avoid liability for moneys received by him as guardian. *Latham v. Wilcox*, 6 S. E. Rep. 711-714. But there is no pretense in this case that the petitioner ever received any property belonging to these minors as their guardian, or by virtue of his appointment. On the contrary, he held their property by virtue of the deed of trust above referred to. He may have collected the money due on the policy of insurance by virtue of his appointment, but this is not shown. Beside he alleges in his petition that he was informed in the beginning that his appointment was void, and that he never did act as guardian thereunder, and in failing to give bond the petitioner acted in accordance with the order appointing him, which, as we have shown, provided that no bond need be given. Under such circumstances we think no estoppel can work against his right to contest this order. But, in order to entitle the petitioner to the writ prayed for, it must appear that he has no speedy and adequate remedy in the ordinary course of law. High. Extr. Rem. §§ 770, 771. In this case he has such a remedy by appeal. The order made, of which he complains, is one from which an appeal may be taken under section 963 of the Code of Civil Procedure, and for this reason the writ must be denied. It is so ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

84 Cal. 607

PEOPLE v. HARRISON *et al.* (No. 13,369.)
(Supreme Court of California. June 23, 1890.)

JUDGMENT—VACATING ON MOTION.

A judgment which recites that defendants were "regularly served with process, as required by law," is not void on its face for want of jurisdiction over the persons of defendants, and will not be vacated on mere motion, made 16 years after its rendition, though there is some evidence that defendants were not properly served with summons.

In bank. Appeal from superior court, Tulare county; W. C. VAN FLEET, Judge. *W. B. Wallace*, for appellant. *Freeman & Bates*, for respondents.

WORKS, J. This is an appeal from an order made vacating a judgment on motion. The judgment was vacated by the court below. The order was reversed in department 1, (*People v. Harrison*, 22 Pac. Rep. 1143,) and a rehearing granted. The ground upon which it was sought to vacate the judgment was that the summons was not personally served on the defendant, and was published without the affidavit for such publication required by the statute. The motion to vacate was made 16 years after the judgment was rendered. The evidence shows that all the papers in the original action, upon which the judgment was founded, were lost, and the motion was attempted to be sustained on parol testimony alone. There are cases decided by this court which recognize the right of a defendant, or his successor in interest, to vacate a judgment on mere motion after the time limited by statute. *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 348; *People v. Pearson*, 76 Cal. 400, 18 Pac. Rep. 424; *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197. But, as was said in *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66, "We know of no provision of law which can be held to authorize the vacation of a judgment on a mere motion after so long a time." Of course a judgment void on its face may be attacked at any time, directly or collaterally; but, when the attempt is made to vacate the judgment by a proceeding in court for that purpose, it should be done by bringing an action as in other civil cases, that the opposing party may be regularly served with summons, and issues formed, and the case regularly tried.

But it is unnecessary for us to hold in this case that a judgment void on its face cannot be vacated on a mere motion; and, as the cases cited hold that it can be, we content ourselves with saying that an action regularly brought is preferable, and should be required. *Bell v. Thompson*, 19 Cal. 706. The cases referred to carefully limit this right to vacate in this informal way to judgments void on their face. Thus, in *People v. Greene*, supra, it is said: "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant. * * * Section 473, Code Civil Proc., is intended to apply to cases where judgment has been taken against a party by mistake, accident, surprise, or excusable neglect; to cases in which the moving party must move upon evidence *dehors* the record; to cases in which the relief to be granted is largely in the sound discretion of the court, and has no application to a pretended judgment which is shown by the judgment roll to be void for want of jurisdiction either of the person of the defendant, or of the subject-matter. * * *

The judgment roll is set out in the tran-

script, and the certificate of the judge, as well as the stipulation of the attorneys, show that it was used at the hearing. By this roll it appears, as before stated, that there was no personal service on the defendants, or any of them; and, as there is no sufficient affidavit that the summons was ever in fact published, the judgment is void, and should have been set aside, and a trial had upon the complaint and answer of Hyde, on file, which answer was never stricken out or disposed of." In the case before us the judgment roll was not produced. It was shown to have been lost, except the judgment itself, and it was attempted to be shown by parol testimony that no affidavit for publication was filed. The judgment itself is set out in the record, and recites that the defendants were "regularly served with process as required by law." A judgment void upon its face is one that appears to be void by an inspection of the judgment roll. The mere absence from the roll of a paper—for example the return of the officer showing a service of the summons—cannot invalidate the judgment when the judgment itself recites the fact that the defendant was duly served with process.

Mr. Freeman, in his work on Judgments, thus states the rule, and we think correctly: "It may happen, when that part of the record containing the evidence of service shows an insufficient service, that other parts of the record, and especially the judgment, disclose the fact that the matter of jurisdiction has been considered and determined by the court. The conclusion or finding upon this subject may appear by recitals stating that defendant has been cited to appear, or that he has entered his appearance, or that his default for not appearing has been duly entered. These findings are as conclusive upon the parties in all collateral proceedings as any adjudication of the court can be. It must be presumed that they were supported by sufficient testimony not set forth in the record. Thus, though the return upon a summons against A. B. certifies a service of such summons upon C. D., and the judgment states that A. B. has been summoned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of the summons on the proper person, and, since the statement to this effect is made by the court, it will be conclusively presumed that it acted upon ample evidence, and with due deliberation, before making such statement; and the judgment will be impregnable to any collateral assault." Section 130. Tested by this rule the judgment before us was not void on its face, and the wisdom of confining the right to vacate judgments to such as appear on their face to be void is clearly exemplified in this case. The evidence tending to show the want of service consisted of the testimony of the deputy-clerk and district attorney at the time the original action was pending, who testified that no affidavit for publication had been filed, and the fact that there was no entry of such filing on the register of actions. It is clearly apparent that the witnesses had no present recollection of the facts of this

case, but testified that no such affidavits were filed in this class of cases at that time, and therefore none was filed in this case. This evidence was wholly insufficient to authorize a vacation of the judgment as against the recital of due service therein. Order reversed.

We concur: SHARPSTEIN, J.; Fox, J.

McFARLAND, J. I concur in the judgment upon the ground that the judgment sought to be set aside is not void on its face; but I do not concur in the language quoted from *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66. The *Goodhue* Case was properly decided, I think, upon the ground stated in the concurring opinion therein of Mr. Justice PATERSON; but the opinion of the court was concurred in by a majority of the justices, including myself, without, I think, giving due consideration to former decisions. In *People v. Mullan*, 65 Cal. 396, 4 Pac. Rep. 348; *People v. Pearson*, 76 Cal. 400, 18 Pac. Rep. 424; and *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197,—it had been distinctly held that a judgment void on its face could be set aside on motion without regard to the lapse of time; and, in my judgment, there was no occasion to overrule these decisions, or to overturn the established rule on the subject. I think that *People v. Goodhue* should itself be disregarded so far as it conflicts with the other cases above named.

84 Cal. 611

PEOPLE v. BLAKE. (No. 13,370.)

(*Supreme Court of California.* June 23, 1890.)

In bank. On rehearing.

WORKS, J. This case was heard in department 2, and affirmed. 22 Pac. Rep. 1142. A rehearing was granted. After further argument and consideration of the case, we adhere to the conclusion reached by the department. *People v. Harrison*, ante, 311, (opinion this day filed.) Order affirmed.

We concur: SHARPSTEIN, J.; Fox, J.; McFARLAND, J.

PEOPLE v. HEMME. (No. 13,371.)

(*Supreme Court of California.* June 23, 1890.)

In bank. On rehearing. For former report, see 22 Pac. Rep. 1143.

Frederick S. Stratton, for appellant. R. B. Terry and W. B. Tupper, for respondent. Walker C. Graves, *Amicus Curia*.

WORKS, J. This case is in all material respects the same as *People v. Blake*, ubi supra, (just decided,) and on the authority of that case, and *People v. Harrison*, ante, 311, (decided this day,) the order appealed from is affirmed.

We concur: SHARPSTEIN, J.; Fox, J.; McFARLAND, J.

PEOPLE v. BRADY. (No. 13,429.)

(*Supreme Court of California.* June 23, 1890.)

In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

A. M. McCoy and John F. Ellison, for appellant. J. E. Prewett, for respondent.

WORKS, J. This case is in all material respects the same as *People v. Blake*, ubi supra, (just decided,) and on the authority of that case, and *People v. Harrison*, ante, 311, (this day filed,) the order appealed from is reversed.

We concur: McFARLAND, J.; Fox, J.; SHARPSTEIN, J.

84 Cal. 573

PEOPLE v. CLARK. (No. 20,625.)

(*Supreme Court of California.* June 17, 1890.)

MURDER—EVIDENCE—PRACTICE.

1. On trial for murder, it appeared that deceased was about to drive his cattle onto a range claimed by accused, and to thus mix the herds, which accused attempted to prevent. A quarrel ensued, during which accused shot and killed deceased. *Held*, that a witness could not testify whether the mingling of herds in such a way was likely to induce trouble.

2. Where there is conflict of testimony as to whether the shot was fired at close range, or while the parties were at a greater distance apart, evidence is admissible to show at what distance a rifle of the caliber used by accused will powder-burn clothes.

3. Evidence of former trespasses committed by deceased on the same land is inadmissible.

4. Where the prosecution does not attempt to prove guilty flight by the accused, he cannot give evidence to account for it.

5. It is in the discretion of the trial court to a witness to repeat in rebuttal a part of his testimony in chief.

6. The modifications of instructions requested must be shown by the indorsement of the trial judge thereon, or by a bill of exceptions, or they cannot be regarded on appeal.

7. Where all the instructions, taken together, give a correct statement of the law applicable to the facts of the case, they will be held good, though some of them do not contain in themselves the proper limitations and conditions required by the facts.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. M. McGARVEY, Judge.

T. L. Carothers and Henley, Swift & Wright, for appellant. J. Q. White, Dist. Atty., G. A. Johnson, Atty. Gen., and J. A. Cooper, for the People.

GIBSON, C. The appellant, Clark, who was charged with the commission of the crime of murder, and was convicted of murder in the second degree, brings this appeal from the judgment and an order denying a new trial. At the trial the defendant admitted that he killed Garret Fitzgerald, but endeavored to show that he did it in necessary self-defense. The evidence discloses that the homicide took place in the mountains of Mendocino county, where both the defendant and the deceased were engaged in stock-raising. The deceased, with his son, step-son, and another man, were driving a band of about 200 cattle upon or near a tract of land claimed by the defendant, upon or near which the defendant's cattle were then grazing. The defendant, who came up with another man, endeavored to prevent the cattle from being mingled, and said he had a claim there, and would not permit

Fitzgerald's cattle to be driven on it. A quarrel between the defendant and Fitzgerald thereupon followed, from which the other men held themselves aloof, except as hereinafter stated. The defendant and the deceased were on horseback at the time. The defendant was upon the better horse, and had a Winchester rifle; and the deceased had a stick weighing about 20 ounces, which he was, when interrupted by defendant, using in driving his cattle. The deceased advanced upon the defendant three times, brandishing his stick in a threatening manner. From each advance the defendant retreated, and at the same time pointed his rifle at the deceased, and called upon him to stop. During the whole time they were using scurrilous language towards each other. Between the second and third advance the deceased made, he turned around to his son and step-son, and asked each for a pistol, but did not obtain one. The testimony of the prosecution tended to show that, the third time the deceased made an advance in a threatening manner, he stopped within about 15 feet of the defendant, upon the latter pointing his rifle at him, and commanding him to stop, and that after he had come to a full stop, and was at a safe distance from the defendant, the latter deliberately shot him through the left breast, and then rode away, but afterwards returned, and got the stick the deceased had threatened to use; and it further tended to show that the killing was done upon government land. While the testimony on the part of the defense tended to prove that the deceased, on his third advance upon the defendant, did not heed the command of the latter to halt, but rode rapidly towards him, and when they had come together the deceased struck at defendant with his stick, and missed him, but struck the defendant's horse in front of the saddle, and, upon lifting the stick to strike a second blow, the defendant raised his rifle and shot him; that, each time the deceased rode towards the defendant, the son and step-son of deceased would ride up a certain distance, but took no further part in the difficulty; and that the killing was done upon the claim of one Bainbridge, of whom the defendant had previously obtained a lease of it for the season then current. The jury were the sole judges of the credibility of the witnesses, whose testimony tended to establish either of these positions. They might have based their verdict upon the position assumed by the defendant; but, they having found that of the prosecution to be the true one, the verdict cannot be disturbed unless some of the causes urged by the defendant for a reversal can be sustained.

The following rulings on the evidence are assigned as errors: The son of the deceased, who had testified in chief that he was helping his father drive his cattle, and that they were being driven in the direction of a place where the defendant had some cattle, was asked this cross-question: "Well, is it desirable,—is it not apt to give rise to trouble or dispute or embarrassment in mixing cattle together that way?" to which an objection was sustained upon the ground, among others, that it called

for the opinion of the witness. This question was propounded upon the theory, which the defendant claims he tried to show at the trial, that the deceased, with his son and step-son, conspired together to drive him, by violence and intimidation, from the mountains, because he was pasturing stock upon land which they had used for the same purpose before he came, and was thereby limiting their stock range, and that the cattle of deceased were about to be mingled with those of the defendant to provoke a difficulty. We think the court ruled correctly in sustaining the objection on the ground stated. The question called for an opinion or inference, which the jury alone were competent to form upon or infer from the facts in evidence.

Subsequently, and during the cross-examination of the same witness, the following question was propounded, "Did not you know that Clark was endeavoring to prevent these two bands of cattle from mixing?" to which the prosecution objected upon the same grounds as to the preceding one. The court sustained the objection, and at the same time said: "He can state what he said, and what he was doing." If this ruling was erroneous, it was cured by the answer of the witness, who said: "It looks very much like Clark was trying to keep us from driving the cattle down in that direction. He got ahead of our cattle." The ruling next objected to is one admitting the testimony of Charles Yates, who said he had experimented with a Winchester rifle 44 caliber, and found that 15 feet was the furthest distance it would "powder-mark" clothing when discharged at such clothing. The objection to this testimony was that it was immaterial and incompetent. The rifle used by the defendant upon the deceased, who was in his shirt-sleeves—without coat or vest on—at the time, was a Winchester, 44 caliber, and that no powder-marks were found upon the clothing or body of the deceased after being shot does not appear to have been disputed. It was therefore material and competent, as tending to show, as claimed by the prosecution, that the shooting occurred while the defendant and deceased were at a distance of about 15 feet from each other, and not, as claimed by the defense, that it occurred while they were within a few feet of each other, and near enough for the deceased to strike the defendant with his 20-ounce stick. This same witness afterwards testified that his experiments showed that powder-marks would appear upon clothing when fired at from a distance of 10 feet, and another witness, who was familiar with the use of fire-arms, and had experimented in other cases, said: "From my experience, and from what I have done, I can testify as a fact as to how far a 44-caliber Winchester, loaded with ordinary shell, will powder-mark clothing. It depends upon the color, so far as that is concerned. It shows plainer on light clothing. I think it will powder-burn at eight feet on dark clothing, or any kind of clothing. It shows a foot or two further on light clothing. It shows eight feet on dark clothing."

When Bainbridge, from whom the defendant leased the claim for pasture purposes, was being examined in chief for the defendant, the following occurred: "Question. Do you know whether or not any of Kelly's cattle—any of Fitzgerald's cattle—had ever been driven over on your claim before that? Answer. Yes, sir. Q. When? We object as not material." The objection was sustained. The ruling was, we think, correct. A former trespass upon defendant's leased land, it is clear, would not justify him in killing the deceased. If the testimony was intended to prove that it was an act done in furtherance of the conspiracy above mentioned, there was no offer to connect it with other evidence that would tend to establish such a conspiracy. The defendant having failed to make such an offer, the evidence, which was apparently immaterial, was properly rejected. See *McGarrity v. Byington*, 12 Cal. 426. Again, when the defense had reached its side of the case, it tried, for the same purpose, and also to show threats by the deceased, to elicit from W. Hoxie, a witness for the defense, that prior to the killing the witness had been instructed by the deceased to drive the sheep of the latter upon the Bainbridge claim, and that witness thereupon told the deceased that he had been informed by Clark, the defendant, that the latter had rented the claim and did not want the sheep driven on it. The court excluded this as irrelevant and immaterial. The counsel for the defendant, however, said to the court that he desired to explain why he offered it, but the court declined to hear it, saying that it was satisfied that it had ruled correctly. We see no error in this ruling. The evidence was irrelevant. It did not tend to establish the conspiracy alluded to, nor did it show any threat against the defendant. The same witness subsequently said that, on the occasion referred to, the deceased made no threat against Clark. The court seems to have admitted all the evidence offered in the case that tended to show threats by either the defendant or the deceased against the other. It may be well to remark in passing that the evidence viewed as a whole, and in the most favorable light for the defendant, does not show any conspiracy between the deceased and his son and step-son. The first was the sole owner of the cattle, and the others were employed by or were gratuitously assisting him in herding them.

During the re-examination of Bainbridge for the defense an objection on the ground of irrelevancy and immateriality was sustained to the following question: "Did Mr. Clark go to Round Valley as fast as he could, to the officers?" The defendant claims he should have been permitted to prove the fact called for, in order to meet the injurious effect of the testimony of the step-son of the deceased, which tended to show a guilty flight on the part of the defendant. On this point that witness said: "On the day of the homicide, in addition to those that I have already mentioned, I saw Frank Knight. He was about seventy yards away. I saw no one else. I did not see Archie McCauley nor Bainbridge. I know both of them. Clark said

nothing after the shooting, but rode away. He did not stop to assist in taking care of Fitzgerald. He turned his horse around, and looked at him and rode off. * * * After the killing, Clark rode back, and got the stick." This testimony did not tend to establish a guilty flight, nor was there any claim made by the prosecution that it did. Therefore, under the rule that a defendant cannot give evidence to account for his flight unless the prosecution prove the flight as tending to show his guilt, (Whart. Crim. Ev., 9th Ed., § 752,) the ruling must be sustained. Besides, the defendant, in his testimony, gave substantially the same account of how he rode away, and afterwards returned for the stick. The defendant, in his testimony, said that some time before the difficulty, while he was driving his cattle up into the mountains, he met a Mr. Masterson with his flock of sheep, and they had a conversation regarding his (defendant's) experience in the mountains, wherein he said to Masterson: "I told him Billy Kelly had stole one from me, but I expected to prosecute him when I got over there, to beat him through the law. If I could not beat him that way, I would beat him at his own game,—I would steal two for one. That was just the remark that was made." He was then asked: "Was this conversation about stealing two for one,—I will ask you if it was intended for a joke?" An objection of the prosecution to this question was, it is urged, erroneously sustained. Even assuming that the defendant meant what he said to Masterson respecting Kelly, who is the person referred to herein as the step-son of deceased, it could only have, at most, shown the defendant's *animus* towards Kelly, which was clearly irrelevant.

The last objection to the rulings of the court upon the evidence is to that where the court permitted the witness Masterson, in rebuttal, to repeat a portion of what he had testified to upon his examination in chief for the prosecution. This was a matter that was within the discretion of the court, which we think was properly exercised in admitting the testimony, especially as the court said it could not recall at the time whether it called for a repetition of his former testimony or not.

Certain exceptions to the instructions were reserved. It is contended that the court erroneously modified the eleventh and twelfth instructions given to the jury at defendant's request. The only way in which these modifications are attempted to be shown in the record is by the repetition of the last sentence of each instruction below the signature of the trial judge to each of the instructions without any indorsement of the trial judge on either of the sentences to show whether he added them to the instructions under which they respectively appear. The action of the trial judge in modifying instructions requested by either party to be given to the jury must be shown either by his indorsement thereon, or by a bill of exceptions. Pen. Code, § 1176; *People v. Thompson*, 28 Cal. 218; *People v. Martin*, 32 Cal. 91; *People v. Tetherow*, 40 Cal. 287; *People v. January*, 77 Cal. 179, 19 Pac. Rep. 258. Hence,

the modifications complained of not having been shown in either way, the defendant cannot avail himself of them on this appeal. Furthermore, an examination of a certified copy of the instructions complained of, filed in this court by the respondent, does not disclose either of the sentences referred to that appear in the printed record here. They must, therefore, have been inserted by the clerk of the trial court under a misapprehension of what constituted the record on appeal under section 1246 of the Penal Code. It is clear, as was said in *People v. January*, supra: "The clerk cannot give verity to what purports to be the instructions given or refused, by inserting them in the judgment roll. He is not in a position to know at all times what action the court has taken; and, were it otherwise, the power of verification is not, and should not for many and weighty reasons be, vested in him."

But although the modifications cannot be reviewed for the reasons stated, we shall see, however, when the instructions are considered as a whole, that the modifications did not make the instructions erroneous. The court, in addition to the instructions given at the request of the prosecution and the defense, gave certain instructions of its own, among which is the following: "If you believe that any witness has willfully testified falsely to any material fact, it is your duty to discredit him. Now, I emphasize the word 'willfully.' A witness may by mistake testify falsely to a material fact, and you should not certainly discredit him if you believed it to be a mistake. If he intentionally and willfully testified falsely to a material fact, you may disbelieve and disregard his evidence entirely. In making these remarks, I do not mean to be understood that any witness has testified falsely. It is for you to say." This instruction is excepted to because the word "discredit" is used instead of the word "distrust." By the use of the word "discredit," appellant claims the jury, in effect, were told it was their duty to discard the evidence of any witness whom they believed had testified falsely to any material fact. The verbs "discredit" and "distrust" have substantially the same meaning. See *Webst. Dict.*; *And. Dict. Law*; *Abb. Law Dict.* Read in this light, the instruction complained of is, in effect, a compliance with section 2061, subd. 3, of the Code of Civil Procedure, which provides that "a witness false in one part of his testimony is to be distrusted in others." By it the jury were told that, if they believed that any witness had willfully testified falsely to any material fact, it was their duty to regard such false testimony as sufficient to impeach and render less credible other portions of his testimony, and that they might disregard the testimony of such a witness altogether. That the jury have an undoubted right to reject all the testimony of such a witness, in a proper case, necessarily follows from requiring them to distrust it. *People v. Sprague*, 53 Cal. 491.

The remaining exceptions to the instructions are urged upon the ground that the instructions to which they severally relate do not contain the proper limitations and

conditions required by the facts. But, while some of the instructions may be defective in this respect, all the instructions, read and considered together as one charge, without straining the language, show a fair, harmonious, and correct statement of the law applicable to the facts of the case, and contain all the conditions and limitations that are omitted from the instructions complained of. This has been repeatedly held to obviate the objections mentioned. *People v. Doyell*, 48 Cal. 93; *People v. Nelson*, 56 Cal. 77; *People v. Gray*, 61 Cal. 164; *People v. Morine*, Id. 367; *People v. Hurtado*, 63 Cal. 288. We are unable to perceive anything in this case that would justify a reversal, and therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

84 Cal. 420

SILVA v. CAMPBELL. (No. 12,808.)

(Supreme Court of California. June 9, 1890.)

LANDLORD AND TENANT—FORFEITURE—SUMMARY PROCEEDING.

1. In the lease of certain land it was stipulated: "Should default be made in the payment of rent when due, and for three days thereafter, the lessor might re-enter and take possession of the premises, and at his option terminate the lease." *Held*, that after default a summary proceeding for unlawful detainer cannot be brought, under Code Civil Proc. Cal. § 1161, subd. 1, as at the expiration of the term; but that three days notice of the lessor's intention must be given, as required in case of a tenancy at will. Subdivisions 2, 3, Id.

2. Acceptance of rent is a waiver of forfeiture, in a case where the lease provides for re-entry in the event of a breach of the obligation, only where the lessor had knowledge that the condition was broken at the time he accepted it, and it became due after the breach of condition.

Department 1. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

G. W. Bowie and A. H. Griffith, for appellant. Eli R. Chase, for respondent.

PATERSON, J. This is an action of unlawful detainer. On October 5, 1887, the defendant leased from the plaintiff certain premises in Contra Costa county, for the term of one year, at a rental of \$100 per month, payable on the 5th day of each and every month. The lease contains the following provision: "Should default be made in the payment of any portion of said rent when due, and for three days thereafter, the said lessor, his agent, or attorney, may re-enter and take possession of said premises, and at his option terminate said lease." It is alleged and found that the defendant went into possession of the property under the terms of the lease; that on the 5th of June, 1888, there became due from defendant to plaintiff the sum of \$100 rent; that it was not then paid, nor for three days thereafter, and on the 9th of June following plaintiff exercised the option given him by the terms of the lease, and notified the defendant in writing that

he terminated the lease, and on the same day gave defendant a further notice in writing that in consequence of the termination of the lease defendant was required to surrender to plaintiff the possession of the property within three days after service of the notice; that after the lease had been terminated by plaintiff, and notice to quit served upon her, defendant paid to plaintiff the sum of \$100, which was received by plaintiff as rent from the 5th of May to the 5th of June, 1888. Judgment was entered in favor of the plaintiff for the recovery and possession of the premises.

It is claimed by appellant that the acceptance by the plaintiff of the rent after the notice of forfeiture itself operated a waiver of the forfeiture. It is true, forfeitures are not favored, (equity abhors them,) and our Code provides that the party who incurs a loss in the nature of a forfeiture may, upon making full compensation to the other party, except in cases of negligence or fraud, be relieved therefrom, (section 3275, Civil Code;) but to make the acceptance of rent a waiver of a forfeiture in a case where the lease provides for re-entry in the event of a breach of the obligation, it must appear that the landlord had knowledge of the fact that the condition was broken at the time he accepted the rent, and it must further appear that the rent which he accepted became due after the breach was committed by the tenant, (Jackson v. Allen, 3 Cow. 220; Keeler v. Davis, 5 Duer, 507.) More than three days elapsed after the notices above referred to were given before the commencement of this action, and it is claimed by respondent that because of this fact, and the further fact that the defendant neglected and refused to surrender possession to the plaintiff, he is entitled to recover in this summary action under the provision of subdivision 1 of section 1161, Code Civil Proc., which reads as follows: "A tenant of real property for a term less than life is guilty of unlawful detainer (1) when he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without permission of his landlord, or the successor in estate of his landlord; but in case of tenancy at will it must first be terminated by notice, as prescribed in the Civil Code. Unless he can recover under the provisions of this subdivision of the section, he cannot recover at all herein; because it is not claimed that the three days' notice provided for by subdivision 2, requiring payment of rent after default in the payment thereof, or the three days' notice required by subdivision 3 of the section, was given to defendant. The position of respondent, as stated in his own language, is "that this action was brought for the recovery of the possession of the leased premises the same as though the lease by its own terms, and without any forfeiture, ended on the 5th day of June, 1888. * * * The parties, by their lease, have solemnly stipulated * * * that at the option of the lessor it shall terminate at any time upon the failure of the lessee to pay the rent when due, or within three days there-

after. * * * Our contention is, by the terms of the lease, and the exercise of the option therein granted to the lessor, that the lease was terminated and ended on the 9th day of June, 1888." The provisions of subdivision 1, supra, were taken literally from the statutes of New York, and, if we are to accept the construction placed upon them by the courts of New York at the time they were adopted in this state, the contention of the respondent cannot be sustained. In Oakley v. Schoonmaker, 15 Wend. 228, it was held that "the expiration of the term for which it is let to him," mentioned in the statute, means expiration by lapse of time, that is, the term named in the lease; that summary proceedings could not be instituted on the ground of the expiration of the term by forfeiture. This decision was cited and approved in Beach v. Nixon, 9 N. Y. 37. Mr. Taylor, in his Landlord and Tenant, speaking of summary proceedings, says: "These statutes are confined to the particular cases specified in them, the expiration of the term referred to meaning only an expiration by lapse of time, as specified in the lease, and not by a technical forfeiture; in which latter case a landlord cannot proceed under this statute, but must still resort to his action of ejectment." In some states it is provided that landlords are entitled to the benefit of summary proceedings "where the lease is determined by forfeiture for breach of its provisions." Sections 713, 728a, note. In this state summary process will lie upon the breach of any covenant or condition of the lease and a demand for possession, but the three days' notice required by subdivisions 2 and 3 must be given. We presume that subdivision 1, supra, was enacted in this state with an understanding of the construction which had been placed upon it in the state from which it was taken. Giving it this construction, and the plaintiff having failed to prove the notice required by the statute, we must hold that he was not entitled to recover possession of the property. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; FOX, J.

84 Cal. 322

In re BREGARD. (No. 12,674.)

(Supreme Court of California. June 9, 1890.)

INSOLVENCY—DISCHARGE—"FALSE OR FICTITIOUS DEBT."

On the petition of an insolvent debtor for discharge, it appeared that his partner in farming operations, without his knowledge or approval, mortgaged a partnership crop to secure a firm debt for supplies and one of petitioner's individual debts; that petitioner had unsuccessfully resisted the attempt of his partner, after the crop was harvested, to deliver it in payment of the debts secured; that in his schedule he claimed the debts in question among his liabilities, and his interest in the crop among his assets. *Held*, that these facts did not bring the case within Insolvency Act Cal. 1880, c. 87, § 49, providing that no discharge shall be granted where the debtor has sworn falsely in his schedule, or has admitted a false or fictitious debt against his estate.

Department 1. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Application for discharge under Insolvency Act Cal. 1880. Chapter 87, § 49, provides that "no discharge shall be granted * * * if the debtor shall have sworn falsely in his affidavit annexed to his * * * schedule * * * concerning his estate or his debts, * * * or has admitted a false or fictitious debt against his estate."

R. H. Lattimer, for appellant. *Eli R. Chase*, for respondent.

PATERSON, J. The petitioner was duly adjudged an insolvent debtor on October 16, 1886; and following the adjudication the usual statutory orders were made and entered. In May following, D. McKenzie, one of the creditors, and respondent herein, filed an opposition to the petitioner's application for a discharge, in which he alleged that the petitioner had failed to include in his schedule several head of horses and of cattle, a double wagon, and a pre-emption claim to 160 acres of land, all of said property being valued at about \$5,500; that he had included in his schedule three false and fictitious debts, viz., \$66.60, \$1,040, and \$135.39, in which amount he claimed to be indebted to one Shuey; that he had included in his schedule of assets a certain amount of hay, and a three-eighths interest in certain barley and wheat, which did not belong to him. After a trial of the issues the court found that the petitioner was not the owner of the horses, cattle, lumber, or pre-emption claim referred to in the opposition, but that he had included in his schedule the false and fictitious debts above referred to. The court further found that, at the time of filing his petition, he was not the owner of the hay, or of the three-eighths interest in the barley and wheat. Upon these findings the court concluded that the petitioner was not entitled to a discharge, and an order was entered denying his application.

We cannot understand how the learned judge of the court below could have arrived at the conclusion upon the evidence. McKenzie rented a ranch in Contra Costa county for the cropping season of 1885-86, and entered into an agreement with the petitioner, by the terms of which they were to farm the ranch together, each one furnishing one-half of everything needed, to perform half of the labor, and, after the rent was paid, the same being one-fourth of the crop, the profits to be equally divided between them. McKenzie testified: "I furnished the farming utensils, except one plow. Bregard was in partnership with me. Each one was to furnish one-half of everything,—teams, farming implements, seeds, and labor,—and we were to divide the profits. I was responsible for all the debts. There was no other contract between us except this one. I was to pay the debts out of the crop, and we were to divide the balance." Bregard, in his testimony, denied that McKenzie was to be responsible for his share of the debts. This is the only particular in which the evidence is at all conflicting. They bought goods of Shuey on their joint account to the amount of \$1,175.39,—being the amounts given in the schedule, \$1,040 and \$135.39,—and Bregard became indebted

to Shuey on an individual account in the sum of \$66.60. McKenzie gave Shuey a note secured by a chattel mortgage on the crop for this indebtedness and his individual indebtedness to Shuey. The goods purchased from Shuey were charged by him to the joint account of McKenzie and Bregard. Bregard had no knowledge of the fact that McKenzie had made the note and mortgage until after it had been delivered to Shuey. After the crop was harvested and sacked, McKenzie delivered the whole of it to Shuey in satisfaction of the indebtedness of the partnership, and the individual indebtedness of himself and Bregard. When Shuey attempted to take possession of the property, and remove it from the premises, Bregard met him with a shot-gun, and refused to let him enter the premises, claiming that McKenzie had no right to mortgage his interest in the grain, or to dispose of it in that way. Shuey then had the petitioner arrested, and thereafter went and removed the grain in the night-time, and kept the same in satisfaction of the debts due him from the petitioner and McKenzie. At the trial, Shuey testified that he did not consider that the petitioner owed him anything. He did not, however, testify that he never had owed him anything on the account. The account itself shows that Shuey considered both McKenzie and Bregard liable on the joint account.

Whether we accept the statement of McKenzie that he was to pay all the debts out of the proceeds of the crop, or the statement of the petitioner that there was no understanding to the effect that McKenzie should be responsible to Shuey for all goods bought on their joint account, the fact remains that McKenzie had no authority to mortgage petitioner's interest in the crop. Until the crop was harvested and sold, the petitioner had as much interest therein as McKenzie, and he had the right to insist upon the crop being sold to the best possible advantage. He had the further right,—indeed, it was his duty,—upon petitioning to be adjudged an insolvent debtor, to have all the property in which he was interested put in his schedule, and divided among all his creditors. There is nothing in the record to indicate that he acted in bad faith, or with any fraudulent purpose, in putting the debts above referred to in his schedule. They were not "false or fictitious debts," within the meaning of section 49 of the insolvent act. There is nothing to show even that he knew McKenzie had attempted to pay the debts of the partnership, and certainly nothing to show that he knew he had attempted to pay his (the petitioner's) individual debts by a transfer of the grain. The petitioner knew that he was responsible to Shuey, not only for his own individual debts, but for the entire partnership debt; and the evidence shows, we think, clearly, that he believed he was entitled to hold his three-eighths interest in the property, and have it devoted to part payment of paying the claims of all of his creditors. Doubtless, McKenzie believed that he had the right to control and mortgage the entire crop, and acted in good faith in endeavoring to pay the

debts of himself and the petitioner by transferring the property to Shuey. It is equally clear that the petitioner acted in good faith in trying to have his property divided among all of his creditors. He stated that he acted on the advice of his attorney in putting the description of the property and the list of debts in his schedules. There certainly is nothing to show—indeed, there is no claim made—that the petitioner was trying in any way to defraud his creditors, even Shuey. Even if the petitioner was not the owner of three-eighths interest in the crop, no one was injured by the fact that it was described in his schedule as a portion of his estate. Unless we can say that the insolvent debtor must at his peril interpret accurately his relations with third persons, and to all property claimed by him, and can hold him responsible for all errors in relation thereto, though acting in good faith, and upon the advice of competent counsel, the petitioner herein is entitled to his discharge. We think, upon the undisputed evidence in the case, that the petitioner is entitled to a discharge. Judgment reversed, with directions to the court below to enter an order as prayed for in the application for a discharge.

We concur: BEATTY, C. J., and Fox, J.

84 Cal. 126

BRYAN v. TORMEY. (No. 11,873.)

(*Supreme Court of California.* May 12, 1890.)

QUIETING TITLE—EVIDENCE—VARIANCE BETWEEN PLEADING AND PROOF.

1. Where a complaint in an action to quiet title alleges ownership and possession by plaintiff, a judgment in his favor, based on proof that he is the owner, and that defendant had forcibly dispossessed him, will be reversed, and the cause remanded, in order that the complaint may be amended so as to conform to the proof.

2. The holder of the record title of land had declared that he had promised it to his brother, but that he would not execute a deed until he had received the purchase money. The brother subsequently went into possession of the land, cultivated it, and exercised acts of ownership over it. Following this, during a period of nearly 20 years, the holder of the record title made both oral and written declarations that the land was his brother's. After his brother's death, on discovering that no deed to his brother was on record, he voluntarily conveyed the land to his son-in-law, who had knowledge of all the facts. *Held*, in an action to quiet title by the brother's grantees, that the facts established a parol agreement to convey on payment of the purchase price; that the price had been paid; that the holder of the record title thereafter held the naked legal title as trustee for his brother; and that the son-in-law would be compelled to execute a deed to the brother's grantees.

In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action to quiet title by Mary J. Bryan, executrix, etc., against Patrick Tormey. There was a judgment in plaintiff's favor, and defendant appeals. For opinion in department, see 21 Pac. Rep. 725.

Stanly, Stoney & Hayes, for appellant. *W. H. H. Hart* and *Aylett R. Cotton*, for respondent.

BEATTY, C. J. The land in controversy in this action is part of a Mexican grant

patented to the Peraltas in 1857. In 1859 one Jurgo, being owner by conveyance from the Peraltas of a part of the grant, sold and conveyed two adjoining parcels to the brothers John and Peter Mathews, respectively. There was a map of the Peralta grant, known as "Kellersberger's Map of the Ranchos of Vicente and Domingo Peralta," upon which the different subdivisions were designated by numbers, subdivision 56 being north of and adjoining subdivision 53. The conveyance from Jurgo to John Mathews included 53 and the south 27.41 acres of 56. The part of 56 adjoining on the north was included in the conveyance to Peter Mathews. After the conveyances from Jurgo the brothers Mathews were in possession for a time of the parcels conveyed to them, respectively, and John Mathews paid the taxes on the south 27.41 of 56. In 1861 Harmon and Opdyke purchased 53 from John Mathews, and at the same time offered to purchase the south 27.41 acres of 56, but John Mathews refused to sell them this part of 56, for the reason assigned by him that he had promised it to his brother Peter, saying at the same time that he would not give him a deed till he paid for it, and that when he did pay for it he would give him a deed. These declarations were repeated to Harmon on more than one occasion, in substantially the same terms. Subsequently, in conveying 53 to Harmon and Opdyke, John Mathews, in his deed, described the tract conveyed as being bounded on the north by land of Peter Mathews, thus distinctly declaring in writing that the southern part of 56 was his brother's land. About the same time Peter Mathews took possession of said 27.41-100 of 56, inclosed it with other lands of his own, and afterwards cultivated and used it as if it was his own. For two years prior to this date this parcel had been assessed to John, and he had paid the taxes. Ever afterwards it was assessed to, and the taxes were paid by, Peter and his grantees. From the time he so entered into the possession Peter in every way acted as if he was the owner of this parcel, and in 1872 he sold and conveyed 17 acres of it to the plaintiff's grantors. For three years he remained in possession of the part sold as tenant of his grantees, but in 1875 they leased their portion to another tenant, Garin, who occupied, used, cultivated, and resided upon it. It was not, however, separately inclosed, but remained as before in a common inclosure with Peter's other land adjoining. In 1879 Peter died, and his widow administered upon his estate as executrix. His brother John was one of the appraisers of his estate, and as such appraised as a portion of his estate the western 10 acres of the south 27.41-100 acres of 56, being the part thereof which he had not sold to plaintiff's grantors. This was John's second declaration or admission in writing that it was his brother's land. Previous to this, when third parties were endeavoring to get a road opened through this 27-acre tract, John had at their request endeavored to persuade Peter to consent to it, and had said, in effect, that Peter ought to do so because he had got the land for a small price; and at va-

rious dates, and under a variety of circumstances, down to a time subsequent to Peter's death, John had made frequent and emphatic declarations to the effect that this land was Peter's. But shortly after Peter's death record searchers made the discovery that the grantees of Peter had no record title to this particular tract of land. When John was informed of this his first acts and declarations were entirely consistent with his previous acts and declarations as to his brother's ownership, but upon second thought he and the defendant Tormey, who is his son-in-law, seem to have concluded that the claims of Peter and his successors were not as meritorious as they were previously supposed to be. They caused a careful search of the records to be made, and, after satisfying themselves that no evidence could be discovered of any conveyance from John to Peter, and after taking legal advice, concluded, or at least Tormey concluded, that it would be safe to take a conveyance from John Mathews and claim the land. He accordingly took such conveyance in 1880, paying nothing for it, and having full knowledge of the claims and possession of Peter and his grantees. Shortly afterwards he went with 8 or 10 men, and forcibly dispossessed Garin, the tenant of plaintiff, and inclosed in a separate inclosure the eastern 17 acres of the parcel which had been sold by Peter to plaintiff's grantors, but leaving out the unsold 10 acres on the west, the same that John had previously appraised as part of Peter's estate. This 10 acres he shortly afterwards conveyed to Peter's widow, gratuitously and voluntarily, without any request from her. An action of forcible entry was instituted by Garin against Tormey to recover possession of the land, but for some unexplained reason it failed, and thereafter, in 1883, this action was commenced. The action, as above stated, is one to quiet title, and the complaint alleges, among other things, ownership and possession by plaintiff, and unfounded claim by defendant. The proofs on the trial were substantially as above set forth, and the findings and judgment of the superior court were in favor of the plaintiff. Defendant appeals from the judgment and from an order denying a new trial.

The judgment of the superior court cannot be sustained, because the case proved and found is not the case made by the complaint. The facts proved show clearly enough that the plaintiff has a good cause of action, and is entitled to relief substantially as decreed, and, if the complaint had been amended at the trial so as to conform to the proofs, and to correspond with the findings, we should have found no difficulty in affirming the judgment. But this was not done, and the judgment must necessarily be reversed, and the cause remanded, in order that the complaint may be properly amended.

With a view to future proceedings in the cause, it is necessary that we should briefly indicate our views upon some of the points discussed in the briefs. The acts and declarations of John Mathews in reference to the ownership of Peter are competent, and amply sufficient to show that he sold the

land to Peter, put him in possession of it, and received the agreed price prior to the year 1869; that Peter and his grantees were from and after that date the owners of the equitable title; and that John, if he did not execute a conveyance, (which we think it highly probable he did,) thereafter held the naked legal title in trust for Peter and his grantees. The proof, to our minds, is absolutely overwhelming that Peter bought and entered into possession of the land under a parol agreement with John that it was to be conveyed when paid for, and that it was paid for prior to 1869, and that at all times after 1861, until the forcible entry of defendant, Peter and his grantees were rightfully in possession, and entitled to a conveyance, if in fact one had not been made. The acts of John Mathews and his son-in-law, Tormey, after Peter's death, bear every indication of having been prompted solely by the belief that all evidence of Peter's rights was lost, and that they could therefore despoil his grantees of their property. In this, we think, they are mistaken, and that on the facts proved, under proper pleadings, a decree should be made compelling Tormey to convey the title and deliver possession of the 17 acres to Peter's grantees, as he has already done with respect to the 10 acres remaining in possession of the widow. The judgment is reversed, and the cause remanded, with directions to the superior court to permit the parties to amend their pleadings, and thereupon to retry the case in accordance with the views herein expressed.

We concur: FOX, J.; MCFARLAND, J.;
PATERSON, J.

3 Cal. Unrep. 279

PERKINS v. COOPER *et al.* (No. 13,179.)
(*Supreme Court of California.* July 8, 1890.)

BROKER'S COMMISSION—EVIDENCE—APPEAL.

1. Under Civil Code Cal. § 1624, providing that an agreement authorizing an agent to sell real estate for a commission must be in writing, a real-estate agent cannot recover from executors, as individuals, commissions for selling property, when the contract produced is contained in letters from one of the executors only, which show that he was acting as executor, and not individually.

2. When an appeal is taken within 60 days after judgment, a bill of exceptions, containing the evidence, may, even though there is no motion for a new trial, be looked into to determine whether it is sufficient to support the verdict under Code Civil Proc. § 939, providing that such exceptions cannot be reviewed unless the appeal be taken within 60 days.

3. An appeal is taken under Code Civil Proc. § 940, when notice of appeal is served and filed, though the undertaking by which the appeal is perfected is not filed till afterwards.

In bank. Appeal from superior court, Santa Barbara county; R. M. MILLARD, Judge.

E. B. Hall, J. W. Taggart, and R. B. Canfield, for appellants. B. F. Thomas, for respondent.

SHARPSTEIN, J. Action to recover a broker's commission for effecting a sale of the property known as the "Arlington Hotel," in the city of Santa Barbara. Verdict and judgment for plaintiff. Defendants appeal from the judgment. The record contains a bill of exceptions which, respondent contends, cannot, in the absence of a motion for a new trial, be looked into for the purpose of determining whether the evidence is sufficient to justify the verdict. Such was the rule under the practice prior to the adoption of the Code, which contains the following provision: "An exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." Code Civil Proc. § 939. The implication is that, if the appeal be taken within 60 days after the rendition of the judgment, such an exception may be reviewed. *Balch v. Jones*, 61 Cal. 236; *In re Crowey*, 71 Cal. 300-302, 12 Pac. Rep. 230. It is contended, however, that the appeal in this case was not taken within 60 days after the rendition of the judgment, because no undertaking on appeal was filed within that period of time. An appeal is taken when a notice of appeal is served and filed. Code Civil Proc. § 940. The filing of an undertaking perfects an appeal, but is not a part of the taking in the statutory sense. *Lowell v. Lowell*, 55 Cal. 318. Coming to the question, "Is the verdict supported by the evidence?" we are perfectly satisfied that it is not. As we construe the complaint, the action is not against the defendants as executors or trustees of the Hollister estate, but as individuals. This is expressly conceded by the learned counsel of respondent, who states in his brief that the action "was not brought against the defendants as executors of W. W. Hollister, deceased." * * * The defendants were sued as individuals. This being so, it is

difficult to see how a judgment can be sustained which is payable in the course of administration upon the estate of W. W. Hollister, deceased. Assuming, however, in favor of respondent, that this portion of the judgment ought to be treated as surplusage, and treating it as a personal judgment against the defendants, the evidence is not sufficient to support such a judgment. The complaint alleges that "the defendants, by an agreement in writing, employed plaintiff as an agent to procure for them a purchaser," etc. This allegation was denied by the answer, and it devolved on the plaintiff to prove it. The Code provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission must be in writing. Civil Code, § 1624. The only writing introduced in evidence in this case is that of defendant Cooper alone. The other defendants are clearly not liable; nor do we think defendant Cooper is. His letters show (what is apparent from all the evidence) that he was acting as an executor of the Hollister estate, and in no other capacity, and he promised nothing which could make him personally responsible. *Blanchard v. Kaul*, 44 Cal. 440; *Haskell v. Cornish*, 13 Cal. 45. There being no "note, memorandum, or writing" of any contract sufficient to bind any of the defendants, there can be no recovery against them. *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. Rep. 523. Judgment reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; FOX, J.; PATERSON, J.; WORKS, J.

84 Cal. 141

SPAULDING v. WESSON *et al.* (No. 12,391.)
(*Supreme Court of California.* May 12, 1890.)

DEDICATION—EVIDENCE—ASSESSMENTS.

1. Where the issue in an action to recover an assessment for grading a street was whether the street had been dedicated, findings by a court that the supervisors "had no authority or jurisdiction" to order the work done; that the superintendent of highways, etc., "did not legally make, sign, or issue any assessments" therefor; that the land was not "lawfully assessed" for any sum,—do not amount to a finding upon the fact of dedication.

2. The street in question had been an open street long before the grading was ordered; more than two blocks had been previously graded; the superintendent of streets had recommended the grading of the part in question; legal notice of a resolution of intention had been given, and no objections had been filed by abutting property owners. *Held*, that the board of supervisors acquired jurisdiction to order the work under St. Cal. 1871-72, c. 562, art. 4, § 4, which provides that the supervisors can order the completion of the grading of a street, two blocks of which have been previously graded, "without a petition therefor," upon the filing of the recommendation of the superintendent of streets, and the publication of notice of intention, and the overruling of objections filed by abutting property owners.

In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

This action was to foreclose a street assessment, amounting to \$249.17, upon a lot on the south-westerly corner of Union

and Polk streets, in the city and county of San Francisco, for grading Union street from Larkin street to the westerly line of Franklin street. The complaint contains all the allegations necessary to entitle the plaintiff to recover. The answer denies that the defendants, except J. W. and Abby C. Wesson, owned the lot in question; denies that the lot was assessed, and alleges that the board of supervisors never acquired jurisdiction to order the work of grading to be done, or make any assessment therefor; that Union street from Larkin street to westerly line of Franklin street runs over and upon a lot of the defendants', which, before the grading, was inclosed, and is not and never has been a public street or dedicated to public use. The evidence established, *prima facie*, the regularity of the proceedings of the board and of all the acts of the superintendent of streets; that for a long time prior to the grading thereof the street had been laid down on the official map as a public street; that more than two blocks of the street had been graded, and the superintendent of streets had recommended the grading of the balance thereof, including that in question; that on his recommendation a resolution of intention to order the work was passed by the board of supervisors, and notice thereof duly published, and thereafter the order for the work was entered by the board of supervisors; that the defendant did not file objections to the proceedings, nor object to the subsequent grading of the street; that the street had since been one of the oftenest used streets in the city; that the lot over which the street was laid was not the one on which the defendants lived, but another which came by a line of title from the same grantor as the other, and that such grantor obtained the one in the street from an alcalde, after having already received the first one and another; that the territorial acts of November 22, 1835, prohibited an alcalde from granting more than one lot (of 100 varas) to one person. The court sitting as a jury found as follows: (1) That the board of supervisors of the city and county of San Francisco had no authority or jurisdiction to order to be done the work described in the complaint herein; (3) that said superintendent of public streets, highways, and squares did no duly or legally make, sign, or issue any assessment for said work, or for \$8,419.15, or otherwise; (6) that the lot of land No. 18 on said alleged assessment and diagram, and described in complaint, was not assessed for \$249.17, or lawfully assessed for any sum; (18) that all the other allegations in the answer of defendants (and amendment thereto) are true, as therein stated. And on those findings judgment was rendered, from which the plaintiff appeals.

St. Cal. 1871-72, c. 562, art. 4, § 3, provides: "The board of supervisors are hereby authorized and empowered to order the whole or any portion of" streets which have been opened or dedicated, "graded," etc. Section 4 provides: "The board of supervisors may order any work authorized by section 3 of this act to be done after notice of their intention so to do, in

the form of a resolution, * * * has been published for a period of ten days: * * * provided, that no such notice shall be given, or order made, * * * unless the majority of the frontage of the lots and land fronting on the work proposed to be done * * * shall have been represented by the owners thereof * * * in a petition to the said board of supervisors, * * * requesting that such improvements or street work shall be done. * * * At the expiration of any notice of intention the board of supervisors shall be deemed to have acquired jurisdiction to order any work to be done. * * * And it is further provided that where any public street shall have been graded * * * for the distance of two or more blocks * * * it shall be the duty of the board of supervisors, upon the recommendation of the superintendent of public streets, highways, and squares, to order the notice provided in this section to be given without the petition provided first aforesaid; and if the owners of three-fourths of the frontage of the land and lots fronting on such portions of said streets to be graded or improved, shall, within the time prescribed in said notice, file written objections to the improvement of the said street, the board of supervisors shall duly consider said objections before ordering said work; and, if said board of supervisors shall decide and declare by an entry in the minutes of said board of supervisors that the objections so made are not good, thereupon the board of supervisors shall be deemed to have acquired jurisdiction to order any such street work to be done."

Wm. H. H. Hart and D. H. Whittemore, for appellant. J. C. Bates, for respondents.

Fox, J. A vital issue in this case is whether or not Union street, between Larkin and Franklin streets, had ever been dedicated as a public street. Upon that issue there is no finding whatever, unless it be held that the finding "that all the other allegations of the answer of defendants, and amendments thereto, are true as therein stated," covers that issue. If there is no finding covering the issue, the error is fatal. If the omnibus finding quoted covers it, then, in our judgment, the finding upon this point is not supported by the evidence. In either event the order must be reversed.

The first, third, and sixth findings are mere conclusions of law. An allegation that the board had no authority or jurisdiction to order the work to be done raises simply an issue of law. The facts should be alleged and specifically found. *Spaulding v. Bradley*, 22 Pac. Rep. 47. But if the finding in this case on that subject be considered as a finding of fact it is not supported by the evidence. It appearing that two or more blocks on each side of the street had been graded, that the work had been recommended by the superintendent of streets, and that the resolution of intention had been duly passed and published, it was not necessary to jurisdiction that there should be a petition by owners. St. 1871-72, pp. 804, 805, art. 4, §§ 3, 4. Neither the facts nor the

questions raised in *Spaulding v. Bradley* are the same as those involved herein. Order appealed from reversed, and cause remanded for a new trial.

We concur: **McFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.**

(84 Cal. 216)

CURTISS v. BACHMAN et al. (No. 12,884.)

(Supreme Court of California. May 31, 1890.)

INJUNCTION BOND—PLEADING—DEMURRER.

1. In an action upon an injunction bond a complaint is insufficient which contains no allegation of the non-payment of the money claimed under the contract; and such an allegation cannot be implied from an averment that plaintiff has been injured by reason of the issuance of the injunction in the sum named in the bond.

2. Code Civil Proc. Cal. § 472, provides that a demurrer is not waived by filing an answer at the same time. *Held*, that a demurrer to a complaint is not waived by the subsequent filing of an answer upon leave given by the court.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. B. Sharp, for appellants. Charles F. Hanlon, for respondent.

FOOTE, C. On March 26, 1880, Nettie Gilman instituted an action against Gilbert L. Curtiss, the plaintiff in the present action, and the Aetna Life Insurance Company, in order to recover a certain life policy issued by that company to the mother of plaintiff, and assigned by her to him, and also to restrain the company from paying over the money due on the policy to any one but Nettie Gilman, and seeking to have Gilbert L. Curtiss required to assign the policy in question to her. A temporary restraining order was made by the court upon the execution of a bond by the plaintiff in that action in the sum of \$500. A motion was made to dissolve this temporary injunction. That motion was denied on the 30th day of July, 1880, the court at that same time continuing in force the temporary injunction until the final determination of the case, upon the plaintiff in that action giving a bond for \$5,000 within five days, which instrument is the one on which the present action is predicated. The injunction first referred to was dissolved, and judgment for costs given in favor of Gilbert L. Curtiss, on April 9, 1885. Thereupon the present action was brought on the 7th of June, 1886, by Gilbert L. Curtiss, against the defendants here, as the sureties on the injunction bond of \$5,000 heretofore mentioned. The defendants demurred to the complaint, the second ground of which was that such pleading did "not state facts sufficient to constitute a cause of action." The demurrer was overruled, and the defendants granted "ten days to answer." They duly filed their answer in accordance with the permission of the court, and upon a trial being had before the court, a jury being waived, that tribunal decided in favor of the plaintiff, and rendered judgment in his favor for the sum of \$3,452, and costs. From that and an order denying a new trial the defendants prosecute this appeal.

It becomes unnecessary to determine the

questions raised upon the appeal from the order, as the complaint here states no cause of action which will support the judgment. The action was upon a contract to pay money. In such a case the complaint must show a breach of the contract, or it states no cause of action. "A party suing upon a contract to pay money must show a breach of the contract, or his complaint states no cause of action. Therefore it is held that the complaint must, in such cases, allege the non-payment of the money claimed under the contract." *Richards v. Insurance Co.*, 80 Cal. 506, 22 Pac. Rep. 939, and cases cited. The complaint here under consideration contains no allegation of non-payment, nor is there anything alleged in it from which such non-payment can be implied. The allegation "that the plaintiff, Gilbert L. Curtiss, has been injured and damaged by reason of the issuance and continuance of said injunction in the sum of \$5,000," certainly does not allege anything from which non-payment can be held to be in the remotest degree even impliedly, much less directly, alleged. But the respondent claims that inasmuch as, after their demurrer was overruled, the defendants answered, that such action on their part was a waiver of the demurrer. It seems to have been formerly held that the filing of an answer after the overruling of a demurrer is a waiver of the demurrer. *De Boom v. Priestly*, 1 Cal. 206; *Pierce v. Minturn*, Id. 470; *Brooks v. Minturn*, Id. 481. But section 472 of the Code of Civil Procedure, as amended, provides, among other things, that "a demurrer is not waived by filing an answer at the same time." Thus it is expressly enacted that a demurrer is not waived by the filing of an answer at the same time; and *a fortiori* it is not waived by the filing of an answer, upon leave given by the court, subsequently to the filing and overruling of the demurrer. Ever since this amendment the practice has been to review rulings on demurrer, on appeal from a judgment, notwithstanding a subsequent answer. Hundreds of cases have been reviewed in this way; and in view of this universal practice, we are somewhat surprised that counsel should have made the point. For the prejudicial error thus shown the judgment and order should be reversed, and the cause remanded with directions to the court below to sustain the demurrer on the ground as herein indicated.

We concur: **BELCHER, C. C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, with directions to the court below to sustain the demurrer on the ground as herein indicated.

(84 Cal. 276)

PEOPLE v. CHOY AH SING. (No. 20,617.)

(Supreme Court of California. June 2, 1890.)

ASSAULT WITH DEADLY WEAPON—FLIGHT—EVIDENCE.

1. Where, upon the trial of a defendant for assault with a deadly weapon, the evidence is conflicting as to the character of his flight immediately after delivering the blow it is error for

the court to instruct that such flight "is a circumstance tending to establish his guilt," to be taken into consideration with all the other circumstances and testimony.

2. To charge that, if the evidence is "sufficient to satisfy the minds of the jury" that the circumstances relied on to excuse or mitigate the offense existed, they should find the defendant guilty of a simple assault, will not be held prejudicial error, as leading the jury to believe that they must find him guilty unless satisfied of those facts, where, at the end of the charge, they were instructed that they might find the defendant not guilty "in case of a reasonable doubt * * * as to the facts offered in evidence being sufficient to establish his guilt."

3. It is error to permit the prosecuting witness to be asked whether "any person" had spoken to him about dismissing the case, and to permit him to testify that persons other than the defendant had approached him, and offered him a bribe not to prosecute the case. The prosecuting attorney should have first stated that he intended to connect defendant with the attempted bribery, and then framed his question so as to confine the answer to overtures made by the defendant or his authorized agent.

Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNOM, Judge.

Indictment and conviction for assault with a deadly weapon. Among other instructions, the giving of which is assigned as error, was the following: "When the defendant, to excuse or mitigate an act, claims it was in self-defense, the particulars of the transaction may be given in evidence, and if sufficient to satisfy the minds of the jurors that the circumstances were such as to excite the reasonable fears of the defendant that his life was in danger, or that he was in serious danger of great bodily harm, at the time of using the weapon by him, you may find him guilty of simple assault, if you believe from the evidence that he began the difficulty; or you may find him not guilty, in case of a reasonable doubt in your minds as to the facts offered in evidence being sufficient to establish the guilt of the defendant."

Thos. D. Riordan and Jas. F. Smith, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

FOOTE, C. The defendant was convicted of an assault with a deadly weapon. From the judgment in the premises, and an order denying a new trial, this appeal is prosecuted. The first ground of error alleged is that the court instructed the jury wrongfully with reference to the running away of the defendant, after the striking of the blow with a deadly weapon, which he was found, by the jury, to have feloniously inflicted upon the person of one Ah Mow. The part of the charge of the court to which objection is made reads as follows: "The flight of the defendant is a circumstance tending to establish his guilt, but is not of itself alone sufficient to justify a verdict of guilty. The jury may take the evidence of such flight into consideration in connection with the other circumstances and the testimony in the case." The record shows that upon the trial there was evidence of the running away of the defendant from the place

where he had stricken the prosecuting witness, Ah Mow, with an iron bar; but while the prosecution contended that this running away was a flight from the scene, as of one guilty of the crime charged, the defendant claimed in his testimony that he did so to avoid the friends of Ah Mow, who were chasing the former. Such being the facts in evidence, of a conflicting nature, as to the character of the flight, it was for the jury to say whether it was a flight such as tended to show guilt, or a flight merely to avoid injury. The instruction assumes that it was a flight of the defendant of a kind which tended to establish his guilt. This was, under the facts of this case, an instruction which in effect excluded the defendant's account of the nature of his running away from the jury, and was therefore erroneous. Another portion of the charge to which the defendant makes objection is to be found in the transcript at folios 47 and 48. The counsel for defendant contends that "it is not necessary that the particulars of the transaction given in evidence by the defendant to sustain the plea of self-defense should be sufficient to satisfy the minds of the jury. It is sufficient if they raise a reasonable doubt in the minds of the jurors as to the guilt of the defendant, and, if they do raise such reasonable doubt, then the defendant is entitled to an acquittal." While the language used, to which objection is thus made, is not so clear as it might have been, we do not think it prejudicial error, in view of the last clause thereof, which contains a statement of the rule that to find the defendant guilty the jury must have no reasonable doubt as to the sufficiency of the facts offered in evidence to establish the defendant's guilt. It is further assigned as error that the court, over the defendant's objection, permitted this question to be put to the witness Ah Mow: "Did any one speak to you about a dismissal of the case?" The answer was that two persons other than the defendant had approached the witness, and offered him a bribe not to prosecute the defendant. The answer made to the question was in response to it, because the question was one which called for the acts of "any one" in relation to speaking about "the dismissal of the case." The evidence brought out in the answer was irrelevant, because it did not connect the defendant, or any one authorized to act for him, with the alleged attempt to bribe the witness to have the prosecution dismissed. The court should have required the prosecution to state whether they proposed to connect the defendant with it, and the question to be so framed as that it would have directed the witness to state if he knew what the defendant, or an authorized agent, had done in the matter, and not have allowed it to be put in such a way as that the acts of any person whatsoever, even an unauthorized one, could be given in evidence. The ruling of the court was right in afterwards excluding similar evidence as to what the cousin of Ah Mow, the prosecuting witness, had done and said with a view to getting money from Toy Sing Ang, a witness for the defense, and settle the case. For the reasons here-

tofore stated we advise that the judgment and order be reversed.

GIBSON, C., concurring.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

Fox, J., dissenting.

84 Cal. 107

In re GRIFFITH'S ESTATE. (No. 13,528.)

(Supreme Court of California. May 9, 1890.)

ADMINISTRATOR—APPOINTMENT—REMOVAL.

1. An order granting letters of administration is an adjudication that all facts existed that were necessary to give the court jurisdiction of the decedent's estate, and that all steps had been taken that were necessary to the issuance of such letters.

2. Code Civil Proc. Cal. § 1373, provides that upon the filing of a petition for letters of administration the clerk must post notices thereof in certain public places 10 days before the hearing. *Held* that, on an application to remove an administrator, the plaintiff, in the absence of averments that such notices were not posted, will not be permitted to deny that he had notice of the application.

3. In a proceeding to remove an administrator, six affidavits that the deceased was not a resident of the county where the appointment was made were filed with the petition, but were not refuted with the amended petition. Four affidavits to the contrary were filed upon the amended petition, and the fact was found for the defendant. *Held*, that there is no ground for disturbing the finding.

4. The fact that an applicant for letters of administration "offered" to divide commissions with a relative of the deceased if the latter would allow him to procure the appointment, and that he knew deceased was not a resident of the county in which the application was made, and failed to so inform the court, is not sufficient to maintain an action to set aside the appointment on the ground of fraud.

5. Where the deceased had property in two counties, a valid appointment of an administrator in one rendered void a subsequent appointment in the other.

BEATTY, C. J., dissenting.

On rehearing. For former report, see 23 Pac. Rep. 528.

PER CURIAM. Upon the argument of this case in bank, we are satisfied with the decision heretofore rendered as correct, and the same will stand as the decision of the court. Order affirmed. So ordered.

I dissent: BEATTY, C. J.

84 Cal. 511

FALLON V. BRITTAN et al. (No. 13,846.)

(Supreme Court of California. June 12, 1890.)

PARTITION—APPEAL—STAY OF PROCEEDINGS.

In a suit for partition of lands the supreme court will not order a stay of proceedings pending the hearing of an appeal from the action of the lower court in correcting the description, as set out in the complaint and the decrees, by changing "Terrine" and "Theresa" street to "Terraine" street, the proper spelling, and from an order appointing referees to conduct the sale to succeed others, who resigned.

In bank. On application for order to stay proceedings in partition in the superior court of the city and county of San Francisco; F. W. LAWLER, Judge.

James L. Crittenden, for petitioner.
Daniel Titus, for respondents.

Fox, J. Action for the partition of five several parcels of land held by the parties as tenants in common,—two situate in the city and county of San Francisco, two situate in the city of San José, and one situate in the county of Santa Cruz. Interlocutory decree entered January 5, 1888, determining the interests of the respective parties, adjudging that as to two of said parcels,—one situate in San Francisco, and one in San José,—partition could not be made without material injury to the interests of the parties, and directing that, as to these two lots, they be sold for purposes of partition, and that, as to the remaining lots, they be partitioned in due course, and appointing three referees to make sale of the two lots, and the partition of the others. From this decree appeal was taken, January 6, 1888, to this court. On the appeal this decree was affirmed, and the appeal dismissed February 6, 1890.¹ Upon the going down of the *remittitur*, the referees originally appointed to make the partition and conduct the sale resigned, and the court by order appointed other referees in their stead. It was also then discovered that, in describing one of the lots in the city of San José, there was a clerical error in the complaint, which spelled the name of an abutting street on the west as "Terrine," when it should have been spelled "Terraine." The court ordered the complaint amended so as to correct this clerical error, and properly spell the name of the street, "Terraine." It was also discovered that, as to the same lot and the same boundary, a clerical error had crept into both the findings and decree, and in each the street abutting on the west was described as "Theresa Street." The court ordered this mistake corrected by amending both the findings and decree by striking out the word "Theresa" wherever it occurred, and inserting in lieu thereof the word "Terraine." From these orders, and from this decree "as amended," one of the defendants again appealed to this court, May 7, 1890. Subsequently, the appellant finding that, notwithstanding the perfection of her appeal, the referees had advertised for sale the lots which by the decree were ordered to be sold for purposes of partition,—of which, however, the one affected by these so-called amendments is not one,—she applied to this court for a *supersedeas*, or order staying all proceedings in said case pending the hearing of her appeal. An order to show cause was issued May 13, 1890, and meantime proceedings were stayed. Upon the hearing of such order, the facts as above stated are made to appear by affidavit; and on the facts appellant insists that the amendments made make this a new decree, from which she has a right of appeal, and pending appeal to have all proceedings stayed.

These amendments, other than the appointment of new referees in the place of those who had resigned, are the mere correction of clerical errors patent upon the

¹No opinion.

face of the record. The lot affected by them was amply described in divers ways, to fix its identity, giving abutting streets on all sides, giving distances on each line, and winding up by declaring that it is the property known as the "Fallon Homestead." It is also shown upon this hearing that there is no street in San José, the name of which is spelled "Terrine," but there is one spelled "Terraine," and that it is situate at the point called for by the other portions of the description given. It is also, in like manner, shown that there is no street in San José named "Theresa Street." There is a street called "Santa Teresa Street," but it is some 500 feet west of Terraine street. To extend the lines to that street, Terraine street must be crossed, and several hundred feet added to the lines given in the description. While it is true that monuments control distances, they must not be fictitious monuments, nor monuments not called for; and a monument which will conform to distances must not be ignored simply because a single letter has been omitted in spelling its name. The court had the right at any time, in furtherance of justice, to authorize the correction of this mistake in the complaint,—a mistake which was merely clerical, and did not go to the merits of the cause. See Code Civil Proc. § 473, and cases cited in the note to the section in Deering's edition. And it had the right to correct clerical errors in its judgment, where it could be done from the record. *Dreyfuss v. Tompkins*, 67 Cal. 340, 7 Pac. Rep. 732; *Swain v. Naglee*, 19 Cal. 127; *Freem. Judgm.* § 71 et seq. And this might be done even after an appeal, and affirmance of the judgment. *Rousset v. Boyle*, 45 Cal. 64. And such correction did not operate to extend the time for taking an appeal from the decree. *Society v. Horton*, 63 Cal. 310.

The appointment of new referees in place of those who had resigned was the mere designation of proper and competent persons to carry into effect the decree of the court already entered. Their proceedings would be subject to review by the court upon the coming in of their report, and the action of the court thereon might be reviewed in this court upon an appeal from the final judgment of partition; but we cannot conceive that it is the right of a party, every time the court, by reason of death, resignation, or other disability, finds it necessary to appoint a new referee to carry its interlocutory decree into effect, to stay all proceedings by appeal from such an order. Such a course might lead to interminable litigation, and utterly defeat the execution of the judgment of the court. Even where referees have acted and reported, if the court does not approve their report, it may appoint new referees (Code Civil Proc. § 766;) and the order appointing referees does not, of itself, seem to be an order from which appeal may be taken. The motion for *superseas* or stay of proceedings is denied, and the order heretofore made, staying proceedings, is discharged.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

EVERSDON V. MAYHEW. (No. 12,517.)
(Supreme Court of California. July 8, 1890.)

TRUSTS—PLEADING—NOTICE—EVIDENCE.

1. Plaintiff's mother, a widow, purchased town lots from one in possession, taking the title in an assumed name, entered into possession, and lived upon the property until her second marriage, when her husband lived with her. The mother died intestate, leaving as her heirs her husband and plaintiff. Prior to her second marriage the United States issued a patent to the townsite to the county judge, in trust for the several use and benefit of the occupants, according to the respective interests. After her death the husband applied for and obtained a certificate of title to the whole of the property in his own name, which title by conveyances became vested in defendant. Plaintiff commenced ejectment, claiming the entire property; the complaint alleging that the husband had obtained the title by fraud. On the first appeal the court held that the complaint stated a cause of action in ejectment. On the second appeal the husband was held to have taken the title in trust for plaintiff to the extent of her interest, by virtue of the relationship between them as co-heirs, and decreed to plaintiff a half interest therein. *Held*, that the sufficiency of the complaint, as stating a case of action for the enforcement of a trust, was established by that appeal, and, no specific objection having been raised as to misjoinder of causes or variance, the objection will not be considered on the third appeal.

2. On the second appeal the defendant was held to have had constructive notice of plaintiff's rights, but that the answer failed to present the defense. On the third trial the answer was amended, and, while the record introduced failed to show the husband's application, it contained the certificate of title, which recited that the husband duly made claim and application in writing. *Held*, that the defendant had notice that an application had been filed, and that it would be presumed that it was on file when defendant purchased, and that it set forth the only title the husband had, which was a claim through the wife.

BEATTY, C. J., dissenting.

3. It is not error to admit in evidence a copy of a deed without producing the original, where only a general objection is made to its admissibility.

In bank. On rehearing. For statement of facts, see former opinion, 21 Pac. Rep. 431.

John F. Ellison and *J. Chadbourne*, for appellant. *Chipman & Garter*, for respondent.

WORKS, J. This case was affirmed in department 1, and a rehearing granted. We have again given it our careful attention, and are satisfied that the correct conclusion was reached on the former hearing, for the reasons stated in the opinion of Commissioner HAYNE. It was claimed in the petition for a rehearing that the statute of 1868, (St. 1867-68, p. 489,) referred to and relied upon in the opinion of the learned commissioner as affording notice to the defendant of the plaintiff's title, was not the one under which the deed of the county judge to Wesson was made. We think counsel are right in this contention, and that the wrong statute was referred to by mistake. But in our opinion this does not materially affect the question of notice. There was a deed of record from one Stafford to Mrs. Wasson, by the name of Ann Watson, before her marriage. This deed showed the conveyance of the property to another than the defendant's grantor, Wasson, and was suffi-

cient to put him upon inquiry as to the true condition of his title. And the evidence clearly shows that a very slight degree of inquiry and diligence would have apprised him of the fact that the plaintiff was the equitable owner of one-half of the property in controversy. In all other respects the opinion of Commissioner HAYNE is approved. Judgment affirmed.

We concur: PATERSON, J.; Fox, J.; SHARPSTEIN, J.; MCFARLAND, J.

(84 Cal. 226)

ABEEL *et al.* v. CLARK. (No. 13,511.)

(Supreme Court of California. May 31, 1890.)

CONSTITUTIONAL LAW—TITLES OF LAWS—POLICE POWER.

1. The subject of an act, providing for the vaccination of children before they shall be admitted to any of the public schools, is sufficiently expressed in the title, "An act to encourage and provide for a general vaccination in the state of California," (St. Cal. 1889, p. 32,) within the meaning of Const. Cal. art. 4, § 24, declaring that every act shall embrace but one subject, which shall be expressed in its title.

2. The act operating uniformly on all who attend the public schools of the state is general in its scope, though it does not include all classes of individuals in the state.

3. Vaccination being the most effective method known of preventing the spread of a deadly and highly contagious disease, the legislature can, under Const. Cal. art. 19, § 1, giving it power to protect the state from persons suffering from contagious diseases, enact that the scholars of the public schools, constituting a general class, shall be subjected to it.

Commissioners' decision. In bank. Appeal from superior court, Santa Cruz county. F. J. McCANN, Judge.

E. E. Bacon, for appellant. Wm. T. Jeter, Dist. Atty., for respondent.

GIBSON, C. This was a proceeding for a writ of *mandamus* to compel the defendant, who is the principal of a public school in the city of Santa Cruz, to admit James Abeel as a scholar. The trial court gave judgment for the defendant, and the plaintiffs appeal. The only ground upon which admission to the school was refused was that said James Abeel had not complied with the provisions of what is known as the "Vaccination Act." This act provides, in substance, that the trustees of the several common-school districts and boards of common-school government of the cities and towns in this state shall "exclude from the benefits of the common schools therein any child or any person who has not been vaccinated, until such time when said child or person shall be successfully vaccinated: provided, that any practicing and licensed physician may certify that the child or person has used due diligence, and cannot be vaccinated so as to produce a successful vaccination, whereupon such child or person shall be excepted from the operation of this act." It is further provided that the trustees, etc., shall provide vaccine virus for children whose parents are not able to have them vaccinated, and that the expenses thereof shall be defrayed out of the school fund; and if there is not sufficient money in such fund to meet such expenses, a tax

shall be levied for that purpose. St. Cal. 1889, p. 32. The appellants contend here that the act is unconstitutional, for two reasons: (1) The subject of the act is not expressed in its title; and (2) it is special, and not general, in its scope.

1. The constitution declares: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title such act shall be void only as to so much thereof as shall not be expressed in its title." Article 4, § 24. The main object of this provision is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. Kurtz v. People, 33 Mich. 282; Boyd v. State, 53 Ala. 605; Hannibal v. Marion Co., 69 Mo. 575; Robinson v. Skipworth, 23 Ind. 317; Commissioners of Marion Co. v. Commissioners of Harvey Co., 26 Kan. 197; Howell v. State, 71 Ga. 227. And it must receive a reasonable, and not a narrow or technical, construction. See Stone v. Brown, 54 Tex. 342; Breen v. Railroad Co., 44 Tex. 305; State v. Ranson, 73 Mo. 86; In re Public Parks, 86 N. Y. 439, 440; Larned v. Tiernan, 110 Ill. 177; Mills v. Charleton, 29 Wis. 410; McAunich v. Railroad Co., 20 Iowa, 342; Cooley, Const. Lim. 146. The title of the act in question here is as follows: "An act to encourage and provide for a general vaccination in the state of California." Now, what is the subject expressed in it? Clearly vaccination, and that only. This is also the subject of the act itself. It is true that the term "vaccination" in the title is qualified by the adjective "general," which makes it broad enough to include all the people of the state; while the body of the act relate to only a certain general class in the state, viz., scholars of the public schools, and those who desire to become such. But we think that under the rules of construction above stated, that the term "general" in the title applies to that general class specified in the act; and that neither the legislators nor the public could be misled by the manner in which the subject of the act is expressed in the title. It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents. See Montclair v. Ramsdell, 107 U. S. 155, 2 Sup. Ct. Rep. 391; People v. Hazelwood, 116 Ill. 327, 6 N. E. Rep. 480; Hope v. Gainesville, 72 Ga. 250; Allegheny Co. Home's Case, 77 Pa. St. 80; Lockhart v. Troy, 48 Ala. 584; State v. Barrett, 27 Kan. 218; Brewster v. Syracuse, 19 N. Y. 117.

2. The legislature shall not pass local or special laws in certain enumerated cases, among which the act in question does not come, nor in other cases where a general law can apply. Const. art. 4, § 25. The act here is not obnoxious to this provision. It embraces, and is designed to act uniformly upon, all who do or may attend the public schools of the state. Such schools are, by article 9, § 6, of the constitution, defined as follows: "The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and tech-

nical schools as may be established by the legislature, or by municipal or district authority." The class that does or may attend such schools is certainly a large and general one, and we cannot conceive how it could be more general in its nature. An act, to be general in its scope, need not include all classes of individuals in the state. It answers the constitutional requirement if it relates to and operates uniformly upon the whole of any single class, as we are satisfied the act before us does.

It is suggested that the subject of the vaccination act is not within the scope of a police regulation. The legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects. See article 19, § 1. The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly contagious and much-dreaded disease. While vaccination may not be the best and safest preventive possible, experience and observation, the test of the value of such discoveries, dating from the year 1796, when Jenner disclosed it to the world, have proved it to be the best method known to medical science to lessen the liability to infection with the disease. This being so, it seems highly proper that the spread of small-pox through the public schools should be prevented or lessened by vaccination, thus affording protection both to the scholars and the community. Vaccination, then, being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether the scholars of the public schools should be subjected to it, and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class. The remarks of Judge Cooley in his work on Constitutional Limitations, page 155, are applicable here, where he says: "What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful." We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C., and FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(84 Cal. 598)

PEOPLE v. THOMPSON. (No. 20,633.)

Supreme Court of California. June 23, 1890.)

CRIMINAL LAW—PRELIMINARY HEARING—DEFECTIVE COMMITMENT—CONFESSION.

1. Where a magistrate before whom defendant, charged with robbery, had his preliminary exam-

ination, does not indorse a proper order of commitment on the complaint, the superior court acquires no jurisdiction over defendant, and the papers sent up by the magistrate have no place in that court. The complaint may therefore be sent back to the magistrate to be indorsed as required by Pen. Code Cal. § 872, which provides that the order shall recite that the preliminary examination showed a public offense to have been committed, and that there is probable cause to believe defendant guilty thereof; the magistrate's docket showing that these were the facts.

2. Where an information is filed in the superior court, based on a defective order of commitment, there is no action pending before that court; and a deposition of the complaining witness, taken by a judge of that court before the order of commitment was corrected, is not admissible on the trial under a second valid information; Pen. Code Cal. §§ 879, 882, providing that a judge of the court in which an "action is pending" may take the deposition of a material witness for the people where there is ground to believe that he will not be present at the trial, and that he is unable to procure sureties for his appearance.

3. Neglect by the magistrate to comply with Pen. Code Cal. § 875, which provides that in bailable offenses the order of commitment shall recite the amount of defendant's bail, will not defeat the jurisdiction of the superior court over an information based on such order, which shows that the magistrate has properly conducted the preliminary examination, and has adjudged that defendant should be tried for the offense and be committed to the proper officer for that purpose.

4. Advice by the sheriff to defendant, an 18-year-old boy, that it would be better for him to confess, will exclude a confession made in reliance thereon.

Commissioners' decision. Department

1. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Information against John Thompson for robbery. He was convicted of grand larceny, and appeals. Pen. Code Cal. § 872, provides: "If * * * it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the deposition an order, signed by him, to the following effect: 'It appearing to me that the offense in the within deposition mentioned * * * has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same, and committed to the sheriff of ———.' " Section 875 provides: "If the offense is bailable, and the defendant is admitted to bail, the following words must be added to the order: 'And that he be admitted to bail in the sum of ——— dollars, and is committed to the sheriff of the county of ———, until he gives such bail.' " Section 879 provides: "When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any [material] witness [for the people] will not appear and testify, unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance." Section 882 provides: "When, however, it satisfactorily appears by examination, on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people."

S. V. Hitchcock and *R. E. Ragland*, for appellant. *A. M. McCoy*, Dist. Atty., and *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of grand larceny upon an information charging him with robbery. He appeals from the judgment therein rendered, and from an order denying a new trial. His first point is that the court erred in refusing to set aside an information filed on the 23d of October, 1889. An information for the same offense had been filed on the 7th of September, 1889, and was set aside, on motion, on the 31st of October, 1889, after the second information had been filed. The reasons assigned why the court should have set aside the last information are that the magistrate who examined the defendant made a defective commitment, and that, therefore, the information had no proper basis on which to rest, and the district attorney no authority to file it. It is true that the indorsement upon the deposition or complaint, as first made on the 13th of August, 1889, and returned to the superior court, was not in accordance with the statute, and that the information based on it was properly set aside. There being no proper commitment nor information before the superior court, that tribunal could not try the defendant, and the papers thus sent up by the magistrate had no place in such court. We see no reason why they could not be sent back to the magistrate, as they were by order of the superior court of the 29th of October, 1889, and indorsed under section 872, Pen. Code, if the docket of such magistrate showed, as it did, that he had conducted the examination of the defendant, and had determined upon the evidence adduced that it was sufficient, and that the defendant ought to be tried in the superior court, which had jurisdiction of the offense with which he was charged. The matter stood just as if the magistrate, after an examination which had satisfied him of the defendant's probable guilt, had decided and entered such determination on his docket, that the defendant should be tried, and had sent up the deposition, complaint, and other papers without any indorsement whatever. In such an event the matter would be in the same condition as if he had retained the papers in his own office, and had there, after a time, discovered his own laches in not indorsing and sending them up to the proper court, indorsed a proper order of commitment on the complaint, no evidence having been reduced to writing, and then sent it up to the trial court. If the papers from the magistrate's court were not legally filed, and had no place in the superior court, they were still in the magistrate's court, and he could make a proper commitment, being guided by his docket, to show what he had actually done at the preliminary examination. If the commitment as last made by the magistrate is good under sections 872 and 875, Pen. Code, then there is no merit in the point raised by the defendant. So far as section 872 is concerned, the commitment of 29th of October, 1889, is sufficient to satisfy its terms; and it is

shown by such commitment that the magistrate examined into the merits of the charge against the defendant, was satisfied that he was guilty, and committed him for trial in the proper court. There is no doubt, therefore, that as to the preliminary examination and determination of the magistrate that the defendant should be held for trial before the superior court, and committed to the hands of the sheriff for that purpose, the commitment plainly shows these necessary facts.

But the defendant argues that, conceding such to be the facts, yet the magistrate neglected to add to the commitment, as the offense was bailable, the words, "and that he be admitted to bail in the sum of ——— dollars, and is committed to the sheriff of the county until he gives such bail." It does not appear to us that the magistrate's neglect to state that the defendant is admitted to bail in a certain sum, in default of giving which he is committed to the hands of the sheriff, goes to defeat the jurisdiction of the trial court to entertain an information filed by the district attorney, based upon a commitment which shows that the magistrate has properly conducted a defendant's preliminary examination, adjudged that he should be tried for his alleged offense in the proper court, and committed to the proper officer for that purpose. It is true that the magistrate, in order properly to perform his whole duty in the premises, ought, under section 875, to have advised the defendant, the superior court, the sheriff, and all others concerned, of the fact that the defendant's bail-bond had been fixed, and that, on giving it, he might be discharged from custody; but the neglect to do this does not vitiate the commitment to the extent that we can say it does not show that, as an examining magistrate, he has heard the evidence for and against the defendant charged with a certain offense, adjudged that there is probable cause to believe him guilty as charged, ordered that he be tried before the proper court, and committed him to the hands of the sheriff that he may be thus tried. If the commitment, as it does, shows the performance by the magistrate of all his duties, up to the end of the preliminary examination into the defendant's case, the judgment of the officer that the evidence warrants that he, defendant, should be put on trial for the offense charged, before the proper tribunal, and that he is ordered into the custody of the sheriff for that purpose, the omission to indorse that he is admitted to bail in a certain sum, otherwise to remain in custody, is not such an omission of duty as vitiates the other jurisdictional performances of duty. We therefore conclude that the court did not err in refusing to set aside the information of the 23d of October, 1889, based on the commitment of that date, on which the defendant was tried.

But the further point is made that the defendant's rights were prejudiced by the admission of the conditional deposition of one Floyd, the prosecuting witness, taken on the 10th of October, 1889, over the defendant's objection. This deposition was taken in the presence of the judge of

the superior court, before the filing of the second information. In other words, it was taken at a time when there was nothing before the superior court which gave it jurisdiction to try the defendant. For, as we have seen, the first information of the 7th of September, 1889, was set aside for the reason that it appeared the defendant had never been legally committed for trial. Was there, then, any case pending against the defendant in the superior court at the time the deposition of Floyd, of October 10, 1889, was taken? When the defendant was tried it was by virtue of a commitment made after the first information was filed, but before the second one was filed. The deposition was, therefore, not taken at a time when the case in which the defendant was tried was pending. If the first information had been demurred to, the demurrer sustained, and the information dismissed, there would be no case pending against the defendant until another proper information was filed against him. So, in this case, the first information being set aside, there was no case pending against the defendant until the second information, based upon a proper order of commitment, was filed. If there was no case against the defendant pending in the superior court at the time the deposition was taken, could a deposition, taken under section 882 of the Penal Code, be read against him on the trial, upon the second information? It appears that when a magistrate or a judge of the court in which an action is pending is satisfied by proof on oath that there is reason to believe that a material witness (whether an undertaking for his appearance has been taken by the committing magistrate or not, under section 878 of the Penal Code) will not appear and testify at the trial court, to which the depositions and statements taken in the committing court are sent, the committing magistrate, or the judge of the court in which the action is pending, may order such witness to enter into a written undertaking, with sureties in any sum that such officer requiring the bond may deem proper, for his appearance, as specified in section 878, supra. By section 882, Pen. Code, it is provided that where such action has been taken by either of the officials mentioned in section 879, that in the event "it satisfactorily appears by examination on oath of the witness or any other person that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people," etc. In the present instance it appears that no undertaking had been taken from Floyd, a material witness, according to the provisions of section 878, Id. He was subject then to the provisions of section 879, supra. Under them the judge of the superior court, where it was supposed the action against the defendant was pending, proceeded to require an undertaking of the material witness with sureties. The witness having satisfied the judge of that tribunal that he was "unable to procure sureties," that official proceeded to have the deposition taken before himself. It is clear, as we have seen, that when the deposition was taken the action

in which the defendant was tried was not pending before the court over which that judge presided. The committing magistrate had not acted in the matter of ordering a bond with sureties to be given by the witness under section 879, supra. The witness was under no obligation to enter into the undertaking and give sureties, because neither the committing magistrate nor a judge of the court where the action in which he was a material witness was pending had required him to give such a bond. The conditions, then, under which the deposition could be taken were not met, and the deposition of Floyd, not taken while the case in which it was read was pending, was not admissible against the defendant on his trial.

The defendant further assigns for error that the court erred in admitting his alleged confessions made to the sheriff, Vestal. It is clear, from all the evidence as to the inducement which occasioned this confession, that it was brought about by the defendant believing what the sheriff told him would come to pass,—that is, that it would be better for him to confess. The effort is made to have it appear that such was not the case; that the defendant did it of his own accord, and not influenced by what the sheriff said. The defendant was about 18 years of age, and had evidently heard of some persons accused of crime who had gotten off by confessing, and, imbued with this notion, he sought an interview with the officer, and after ascertaining that his impression, to a certain extent, was true, inquired of the sheriff whether it would be better for him to make a statement of the facts, and the sheriff replied: "I told him that I didn't think the truth would hurt anybody. It would be better for him to come out and tell all he knew about it if he felt that way." Again, the sheriff was asked this question, concerning the defendant and his proposed confession: "Well, now, his purpose evidently in sending for you, from what was said, and what he said to you, was to find out whether it would be better for him to tell what he knew, or keep it to himself? Answer. I think that was it, probably. Q. But you left with him the impression that if the statement was made that it would be better for him than to keep it to himself,—left him with that impression on his mind? A. Well, I think I did. Q. And you, in that conversation, in a general way, rather encouraged the idea that it would be better to tell the truth than to keep it, didn't you? A. Yes, sir." It is evident that the defendant sought to find out if a confession would be better for him, and that the sheriff induced him to think it would be better, and that thus induced he made it. Such a confession comes clearly within the rule laid down in *People v. Barric*, 49 Cal. 345, and was not voluntary, but induced by the advice of the sheriff to the effect, "It will be better for you to make a full disclosure;" concerning which the rule is without exception "that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons.

It may be true, even in such cases—owing to the variety in character and circumstances—that the promise may not, in fact, induce the confession. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule of law applicable to them all. We cannot too strongly urge on the district attorneys never to offer evidence of confessions, except it has first been made to appear that they were made voluntarily."

It further appears that the court did not admonish the jury under section 1122 of the Penal Code on their separations, occurring at adjournments and recess during the course of the trial. In the present case no injury appears to have resulted, and there may have been no prejudicial error, yet the section should have been and always ought to be strictly complied with. For the reasons stated we advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

84 Cal. 617

DAVIS *et al.* v. CALIFORNIA POWDER WORKS.
(No. 12,295.)

(Supreme Court of California. June 24, 1890.)

MEXICAN LAND GRANTS—CROSS-EXAMINATION—
IMPEACHING WITNESSES.

1. Defendant claimed title to lands under a grant made by the Mexican governor of California in 1838. Plaintiff alleged that such pretended grant was really made in 1848, after California had become subject to the United States. The only written evidence of the grant was the original petition therefor, having upon its margin a grant of the lands asked for, signed by the governor. The Mexican ex-governor himself testified to a positive recollection that he wrote the grant on the day of its date, and another Mexican swore that he wrote the petition on the same date. But there was no record of the grant in the archives of California for the time it was part of Mexico, and it was not recorded until 1848. The ex-governor was unable to recollect the dates of the most important events of his life, and the dates of many other grants. *Held*, a finding that such pretended grant was not made until 1848 was supported by some evidence, and will not be disturbed.

2. It was proper on cross-examination to ask the ex-governor as to another grant, to show that he had no special recollection of it, when no effort was made to contradict him, or to show that the making of such grant was a wrongful act.

3. It appearing that a change had taken place in his signature, it was proper to prove the date of another grant purporting to have been made shortly after the date of the grant in question, in order to determine by a comparison of the signatures whether the latter was made at the time of its date, or many years later as claimed by plaintiff.

4. For the purpose of testing his recollection the witness was asked as to a number of other grants made by him. There are decisions of the United States supreme court tending to show that he was guilty of turpitude in making these grants. *Held*, the fact that the court is presumed to have knowledge of such decisions will raise no presumption that it was influenced thereby in considering the evidence.

5. A witness for defendant having said that he had received a certain grant, and stated some particulars in regard to it, it was proper, for the purpose of impeachment, although this was a col-

lateral matter, to cross-examine him as to such grant, and then to show by another witness that there was no trace of it in the proper archives.

6. One who was formerly a Mexican alcalde's assistant stated that in 1841 or 1842 he had seen in the archives the title-papers of the grantee under whom defendant claims, and to give probability to the statement testified as to several matters tending to show his knowledge of the archives. On cross-examination as to the extent of his familiarity, he mentioned that he had seen a certain grant therein in 1836 or 1837. *Held* proper to show that such grant was not made until 1841.

7. The scribe who testified as to a positive recollection that he wrote the petition for the grant in question on the day of its date, February 3, 1838, said on cross-examination that, while on his way to his brother's Rancho El Refugio, he had met the grantee, and that this was before he wrote the petition. *Held* proper to show by another witness that El Refugio was not granted to witness' brother until 1846.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

McAllister & Bergin and Garber, Bishop & Boalt, for appellant. *Wilson & Wilson*, (*Samuel M. Wilson*, of counsel,) for respondents.

FOOTE, C. This action was brought by the plaintiffs, Davis and Cowell, the first of whom is now dead, and the cause revived in the name of his administrator, against the defendant, the California Powder Works, with the object in view to quiet title to a certain tract of land lying on the east side of the San Lorenzo river, in Santa Cruz county. The plaintiffs had judgment as prayed for. From that no appeal is prosecuted, but the one in hand is taken from an order denying the defendant a new trial. Both parties claim under patents issued by the government of the United States upon confirmed Mexican grants. The patent under which the defendant claims was issued after the commencement of the action, and was pleaded by supplemental answer. The plaintiffs claim title under their patent, and also by estoppel and adverse possession for the statutory length of time. The court below found for the plaintiffs upon the issues presented for decision, and judgment was thereupon entered on the findings.

From the view which we take of the case, as presented in a most voluminous transcript, and as argued at great length and with great ability by counsel on both sides, it seems only necessary to determine whether the trial court was justified by the evidence presented in finding that the grant purporting to have been made by Juan B. Alvarado, the governor of California, then a part of the Mexican republic, and to one William Bocle, was never in fact made, as its face imports, during the term of such governor as a Mexican official, but was made long after his functions as such official had ceased. In other words, that the pretended grant to William Bocle on the 3d day of February, 1838, under which the defendant claims, was not made at that time, but in the year 1848, after California had ceased to be under Mexican authority, and had become a part of the territory of the United States of America. *Second*. Whether the evidence in support of such findings was, any of it,

improperly admitted by the trial court. The grant to Bocle, if made as its date imports, was earlier in date than that of Sainsevain, under which the plaintiffs claim, and the land in dispute is included in both patents. If the evidence sustains the court in its view that the Bocle grant was not made by Alvarado on the 3d of February, 1838, but was made by him in 1848, after his functions as a Mexican official had ceased, then, of course, the Bocle grant was fraudulently antedated, and a patent based upon it should never have been granted by the authorities of the United States. Both sides to this controversy concede that they are, as to the patents adverse to their interests, "third parties," within the meaning of that language as used in section 15 of the act of congress of March 3, 1851. *Rodriguez v. U. S.*, 1 Wall. 588. And that the question of the genuineness of each original grant from the Mexican officials is a legitimate subject of inquiry in this action, provided such inquiry is admissible under the pleadings; the counsel for the plaintiffs claiming that this inquiry is, under the pleadings, admissible as to the Bocle grant, but not as to the Sainsevain grant, and counsel for the defendant claiming that both grants are, under the pleadings, equally subject to be attacked as not being sufficient to carry the land in controversy.

We entertain no doubt but that the grant made to Sainsevain, and under which the plaintiffs claim, is valid and genuine, and that the patent to the same issued by the United States government includes the land in dispute. The evidence as to the Bocle grant, under which the defendant claims, is, in the main, to the effect that there is no official paper appertaining to this grant which appears anywhere in the archives of California, when a part of Mexican territory; that there is no trace of any petition, map, or any other of the necessary title papers for such a grant, to be found anywhere in those archives; that so far as the paper title, or any record of it, is concerned, it depends solely upon a petition prepared by Bocle in 1838 to Bolcoff, the alcalde of the town of Branciforte, where Bocle then lived, for such a grant as that official could make, itself of no value as a muniment of title, and a petition to Alvarado, as the governor of California, to grant the land in dispute, that petition having a marginal writing by Alvarado granting the land as asked for. But no record appears ever to have been made of these papers until the year 1848, when they were recorded in an alcalde book at Santa Cruz, after California had ceased to be Mexican territory. This grant is striven to be upheld by parol testimony going to show that the petition was written by a then youth named Joaquin Escamilla, the marginal grant by Alvarado himself, each of whom swears that they wrote what defendant claims they wrote, and that it was done at the time which the paper expresses, viz., the 3d of February, 1838. The question, then, is whether the evidence of Alvarado and Escamilla, supplemented as it is by certain other witnesses, to the effect that they saw this petition and grant in the hands of

Bocle some years before 1848, is uncontradicted in any way, so that the court below had no legal right to disregard it.

If it be true that, as a legal proposition, the trial court was authorized to disbelieve Alvarado and Escamilla, and to believe that the grant was not made, as they declare, in 1838, but was made in 1848, then the finding that the grant was a fraud, and antedated to deceive the United States authorities, is to be sustained. The force to be attached to evidence of this kind, that in the case of an alleged grant, where the Mexican archives for California show no existence of any of the papers on which the grant is based, and parol evidence is introduced to prove the genuineness of a grant which has always been in the possession of the grantee, without any record of it until the time has passed when the Mexican officials had any power to make a grant, has been frequently discussed, and rules applied, by the supreme court of the United States for the guidance of its courts in their action determining the validity of such grants. The authority of a Mexican official, such as Alvarado claimed to be, in making grants of land such as are here involved, was derived from the colonization act of Mexico of 1824, and the regulations made thereunder in 1828.

They are to be found in Rockwell's Spanish & Mexican Law, 452, 453; Wheeler's Land Titles, 7, 8. "They are, and were also considered to be, directions to petitioners for land before they could get titles. Where [as here] the petition, and the other requirements following it, have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course, nor should slight testimony be allowed to remove the presumption. Both the kind and quantum of evidence must be regarded." *Fuentes v. U. S.*, 22 How. 454. "The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed, particularly in a case where the archives do not show any record of such a grant." *Id.* 453. "The Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs." *White v. U. S.*, 1 Wall. 680. And where it was attempted to be shown that the book which might probably have contained a grant, had it existed, was lost, the supreme appellate tribunal said: "Evidence was also introduced by the claimant tending to prove that a book of records appertaining to land titles in California for the year 1846 was lost, but no attempt was made to show that the grant in question was ever recorded in that book. All we think it necessary to say upon that subject at the present time is that proof of such a loss cannot avail a party in a case like the present unless it also be shown, at least by circumstances which will justify the court in finding the fact, that the grant was duly and proper-

ly entered in the lost record." U. S. v. Knight's Adm'r, 1 Black, 252.

But it could hardly be true, from the evidence of Alvarado in this case, that any of the steps necessary to have a record made of the grant were taken; for, as he says, the whole affair occupied but about 20 minutes, when he had no organized official staff, and was just about to set out on a military expedition against his rival, his uncle Carrillo, and that he made no record or memorandum of the grant, and no report of it to the departmental assembly, as it was his official duty to do, and had no organized office or secretary at that time. The transaction of the presentation of this petition by an obscure Englishman, as Bocle was, to Alvarado, the then political and military chieftain, and his writing the grant on its margin, as related by that gentleman, causes us to be reminded much of a hasty dispatch or order written by a general just on the eve of a march to a battle,—an affair apparently so trivial that he did not report it to the departmental assembly, or appear to take any steps at all to perpetuate it as an official act. In speaking as to the memory of those, like Alvarado, former officials of the Mexican government, it is said in *Luco v. U. S.*, 23 How. 543: "Owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives."

In addition to these elements casting suspicion and doubt upon the validity of Bocle's grant, it appears by the evidence of Alvarado that to his knowledge there never was any paper in existence which had any connection with such grant other than the one adverted to. It stands, therefore, based upon the petition and marginal indorsement alone,—a paper which never left the possession of the grantee during Mexican ownership of California, and never was recorded at all, in any way so that it could be inspected by those desiring to do so, until 1848, when Mexican authority had ceased to exist. Thus condemned, as evidence entitled to weight, by the highest tribunal in the land, it is supplemented before the trial court by the evidence of persons, assuming that they ever saw such a paper, who had not seen it for about 40 years until shortly before the trial of the cause. Yet Alvarado could remember, and swear most pertinaciously and positively, as a matter about which there could be no mistake, that he made the marginal grant on the day it purports to have been written, and that, without ever having seen the paper shown him for about 30 years, he could, 10 years before his examination, have told one asking him the date of it. Nevertheless, this same witness, when questioned as to the most stirring and remarkable events of his life as a soldier and politician, could remember no date as to when any of them occurred. He seemed to remember nothing except that the date of the Bocle grant was the 3d of February, 1838.

Said Mr. Justice FIELD, in *Pico v. U. S.*, 2 Wall. 282: "When, therefore, a claim to land in California is asserted under an alleged grant from the Mexican government, reference must, in the first instance, be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject, a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises." Again, it is said in *U. S. v. Teschmaker*, 22 How. 406: "At least, satisfactory evidence should be required, under the circumstances in which most of these Mexican grants were made, as to make the antedating of any given grant irreconcilable with the proof; otherwise, there can be no protection against imposition and fraud in these cases." With reference to the tests of the truth of parol testimony of witnesses such as are relied on here to supply the want of record evidence, the same distinguished court says: "There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and, when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other with the answer that he 'does not recollect.'" *Luco v. U. S.* 23 How. 535, 536.

The insignificant marginal order or grant, where there are no papers except a petition on which such order is written, made at a time when Alvarado was doubtless absorbed in reflection over one of the most daring and dangerous acts of his eventful life,—his expedition against Carrillo, his rival,—and made, too, for a small and almost valueless piece of land, to a man in no way prominent or related to him, in whose behalf there appears no reason for such informal action, is remembered by Alvarado after many years, during which time he has never seen the grant, or had his interest or attention attracted to it in any way, with so much particularity that he cannot be mistaken, he says, as to its date, when, to all other inquiries as to the date of the most eventful occurrences of his somewhat remarkable career, he answers he "does not recollect." The evidence of Escamillo is also far from convincing that he wrote the grant in 1838. We think the trial court cannot be said to have made findings unsupported by evidence upon the question as to the antedating of this grant, and its fraudulent

effect upon the board of land commissioners, and the procurement of the dismissal of the appeal therefrom to the United States district court. It then becomes necessary to determine whether or not any evidence was allowed to be introduced erroneously, which tends to support such findings.

There are a large number of exceptions taken to the introduction of evidence on cross-examination, upon which it is claimed the findings in question are necessarily, in part at least, based. The main grounds upon which it is urged that the action of the trial court in the premises was without legal sanction are that some of the evidence thus introduced was as to collateral facts, and was intended and in the direction of the impeachment of certain witnesses introduced by the defendant, and that some of it was as to particular wrongful acts committed by Alvarado in making other grants, which evidence was to show him as a man unworthy of belief. The general rule with reference to this method of impeaching or weakening the evidence of a witness on cross-examination is thus stated by the appellate court of this state: "As we have said above, a witness cannot be impeached, on cross-examination or otherwise, by proof of specific wrongful acts. The matter about which she was questioned was entirely foreign to the case, and was wholly immaterial, except to discredit the witness, and thereby break the force of her testimony." *Sharon v. Sharon*, 79 Cal. 674, 22 Pac. Rep. 26, 131. In *People v. Dye*, 75 Cal. 108, 16 Pac. Rep. 537, it was said: "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters." If this collateral matter showed the witness to be guilty of particular wrongful acts, it would certainly go very far to discredit his evidence, as being "a low specimen of humanity," and to permit it would be to proceed in a manner contrary to the first principles of justice. "Any other rule would destroy the law of evidence, and make trials interminable." *Id.*

The first exception to which our attention is directed by the appellant is to be found at folio 2953 of the transcript. The question put to the witness Alvarado was: "Will you look at the document, which I have before referred you to, concerning the Milpitas grant, and state whether that document does not purport to be executed by you as constitutional governor of the department of the Californias?" The question was objected to on the ground that it sought to introduce a collateral matter with a view to impeach the witness. Counsel for the plaintiffs insisted at folio 2958 that he had the right to introduce the evidence to show that, as to important events of his life, Alvarado had no recollection at all, and that the Bocle grant was antedated. It had been brought out in the examination in chief that Alvarado was acting govern-

or and political chief in 1838, and that in 1839, about July, he became constitutional governor. He had shown great positiveness of recollection that he had actually signed the Bocle grant at the time in 1838 it purported on its face to have been signed. Thus the accuracy of his recollection as to the material point in issue, viz., the date of the actual signing of the Bocle grant, became a matter of importance; and to test that it was shown that, as to the Milpitas grant, a larger and more important grant, which was made in May, 1839, before he became constitutional governor, he had no specially accurate remembrance. This was proper, especially in view of the fact that his signing it, as constitutional governor, a short time before he actually became such, was no proof that he acted wrongfully in so signing it, inasmuch as he had a right to make the grant as acting governor and political chief; and no effort was afterwards made to contradict his statement as to when he made it. So that it came under neither of the alleged exceptions to the latitude of a proper cross-examination, either as proof of the commission of a special wrongful act, or as collateral matter brought out on cross-examination, and then contradicted. And it was also competent to show the date of that signature, with a view to its comparison with the signature to the Bocle grant, and thus, perhaps, to show the likeness or unlikeness of the two, made within about a year of each other.

Regarding the evidence objected to with reference to the Feliz grant, Alvarado's signature thereto was already in evidence, and unobjected to. It then became important to show, if possible, there appearing to have been some change in his signature, what difference existed between the signature to that, made some years after the Bocle grant, and the one of Alvarado affixed to this grant, in order to determine by comparison whether the Bocle grant was actually signed in 1838 or later, in 1848. The evidence, we think, was competent, too, in another point of view, and that was to test the accuracy of the memory of the witness, and to show, if possible, that he was mistaken as to the true date of the Bocle grant; and further, the explanation which Alvarado made as to the probable time when he made it as being in 1842, rather than in 1843, as it purports to be, tended to divest the transaction of any appearance of wrongfulness and no effort was afterwards made to contradict his statements on that point.

The witness was further asked with reference to his making other grants, and answered that he made them, and that they were not antedated, but made at the time they were purported to have been made. This evidence was objected to as being collateral matter. In the language of the objection, it was "perfectly foreign to the case." The court overruled the objection, and the witness stated that he had made certain grants to "the Sobrante" and to "Yerba Buena Island," in the bay in front of San Francisco; the Ortega grant being withdrawn. There was no effort made to show that, at the time these grants pur-

port to have been made, Alvarado, if he made them at that time, was not authorized to do so, so that no particular wrongful act is shown. Nor was there any effort made to discredit him by showing that he did not make them at that date. So far as the record shows, as to these particular matters, there is nothing brought out which tends to impeach Alvarado. But it is argued that there are certain decisions of the United States supreme court, of which the trial court had knowledge, which tended to show that Alvarado, in making these grants, was guilty of turpitude. Be this as it may, it is not to be supposed that the trial court would have been influenced to disbelieve Alvarado through its knowledge of matters not in evidence in the particular case it was then trying. Since nothing was shown which tended to impeach the witness, the defendant was not prejudiced.

The fourteenth assignment of error, upon which the defendant seems to rely, is that the court, against its objection, permitted R. C. Hopkins, a witness for the plaintiffs, "to testify in rebuttal of the case made by the defendant, and for the purpose of impeaching the testimony of James Weeks, a witness for the defendant, that he (Hopkins) had examined the records and papers and Spanish archives in the office of the United States surveyor general, whether he could find any grant of land ever made to James Weeks, and that upon such examination he found no grant of land to James Weeks." The ground of the objection, is, as stated, that "the whole question of a grant of land to James Weeks was a collateral matter brought out by plaintiffs' counsel on his cross-examination of James Weeks, and Weeks' answers as to such collateral matter were not contradictable by plaintiffs in their rebutting evidence." The record shows that Weeks was asked on his examination in chief if he had ever had any land granted to him. He stated that he had, in Santa Clara and Santa Cruz counties. He was then asked the name of his grant. His answer was: "I lived on the Potrero in Santa Cruz." Afterwards, he was asked: "Did you get your grant of the Potrero previous to your building the mill on the Zayante creek, or subsequently?" He answered, "Afterwards." Again he was asked "Whom did you sell that Potrero land of yours to? Answer. To Don Pedro Richards." It does not appear that it was inquired of him what sort of a grant this was; but, as it seems to us, since he declared that he had a grant of this land, and sold it, that it was permissible to cross-examine him as to the matter, and then to show by another witness, as a circumstance tending at least to contradict him, that there was no trace of any such grant in the Mexican archives. And, further, Weeks was put upon the stand by defendant to show, among other things, his familiarity with Mexican land grants, so as to strengthen the testimony he gave as to having seen, and being capable of recognizing, the title papers of the Bocle grant in 1841 or 1842, thus tending to negative the idea that it was made in 1848. Therefore, any circumstances in rebuttal

or cross-examination which went to show the improbability of such knowledge on his part was competent; and the evidence of Hopkins that no such grant as Weeks claimed to have had appeared in the Mexican archives tended to throw light upon the matter, and was material and competent.

By the fifteenth assignment of error, it is claimed that it was improper to allow the evidence given by Mr. Hopkins in rebuttal of the testimony of Weeks, and for the purpose of impeaching him, to the effect that the grant made to one Coppinger of a ranch called the "Canada del Raymondo" was in the year 1841, and that Coppinger's petition for said grant was really dated in 1839. The ground of error relied on is that the matter of the grant of land to Coppinger was collateral in its nature, and brought out on the cross-examination of Weeks, and that what he then stated was not subject to be contradicted by Hopkins. The examination in chief of Weeks was evidently for the purpose of showing that he, as a Mexican alcalde's assistant, sometimes acting as constable, and at others as clerk and interpreter, and himself the beneficiary of several grants of land, had special knowledge of such matters, and was likely to know and recognize the proper title papers appertaining thereto. Upon his cross-examination, this matter was gone into extensively, in rebuttal of the claim of his special knowledge of such matters, as above stated, set up in the examination in chief; and the witness finally remembered that before he came to Santa Cruz to live, and consequently before he could have seen the Bocle grant, he had seen one given to Coppinger by Alvarado, and that it was in 1836 or 1837. Afterwards, as we have seen, Mr. Hopkins was called by the plaintiffs, and stated that the Coppinger grant was not made in 1836 or 1837, but in 1841. It was competent, as it seems to us, on cross-examination, to determine, if possible, how much, if any, of such knowledge Weeks did actually possess, as a circumstance tending to throw light upon the question as to whether or not he knew what Bocle's title papers amounted to, which papers he claims to have seen in 1841 or 1842; for, if he had seen them signed by Alvarado in 1841 or 1842, then they could not have been antedated in 1848. But, if he had no such special knowledge as was attempted to be shown on his examination in chief, then he probably was mistaken as to what Bocle's title papers were, if he saw them at all in 1841 or 1842. They may have been the alcalde grant, which is admitted to have been made in 1838. Thus the cross-examination was in rebuttal of that in chief, and the whole of the testimony was that of the defendants, and the plaintiffs could contradict it.

The sixteenth assignment of error is to the effect that it was improper for the court to allow Mr. Hopkins, as a witness in rebuttal, and to impeach the testimony of Joaquin Escamillo, the scribe who testified that he wrote the Bocle petition at Monterey on the 3d of February, 1838, to testify as to the date of a certain grant made to his brother, Blas Escamillo, on

the 6th of June, 1846; and the same ground of objection was made as that just discussed. The witness, when examined in chief, had stated very positively the date of the Bocle grant to have been in 1838, and to show that his recollection of other matters occurring at about or after this was not so accurate would tend to determine whether his memory of the true date of the Bocle grant was reliable or not; and therefore it was competent to show on cross-examination that he had seen Bocle at Santa Cruz at a time when he (the witness) was on his way to visit his brother, Blas Escamillo, at the Rancho El Refugio, concerning the date of the grant to which Hopkins testified, as also the fact that such a grant had been made to his brother, and that the witness had gone there to see him. It was also proper, in this same view, to bring out the fact on cross-examination that the witness remembered he had gone there before he had written the Bocle petition. And then, if the plaintiffs could contradict these matters of recollection by showing that the grant to Blas Escamillo was not made until 1846, it would tend to show the inaccuracy of the recollection of the witness as to the true date of the Bocle grant; for, if it was probable that the witness would not visit his brother until after the making of the grant, in 1846, then the witness would be mistaken in his recollection that he met Bocle before 1838, and hence that evidence would tend to show that this meeting could not have been before 1838, but after 1846, and about 1848, when the plaintiffs claimed the true date to be. So that, the cross-examination being proper, the whole evidence was that of the defendant; and the plaintiffs had a right to contradict it if it could be done.

It follows that the evidence objected to was proper; that it tends to support the finding that the Bocle grant was antedated; and we advise that the judgment and order denying a new trial be affirmed.

We concur: GIBSON, .; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

84 Cal. 131

TAFT V. PRESIDIO & F. R. CO. (No. 11,988.)
(Supreme Court of California. May 12, 1890.)

POWER OF ATTORNEY—TRANSFER OF STOCKS—
CONVERSION.

A power of attorney conferred authority to invest money in securities, and "to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate," etc.; also "to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, * * * choses in action." Civil Code Cal. § 324, provides that the shares of capital stock of a corporation "may be transferred by indorsement by the signature of the proprietor, or his legal representative, and delivery of the certificate." Held, that the attorney in fact had no power to have certain shares of defendant company's capital stock belonging to his principal transferred to himself upon the books of defendant, without indorsement of her name upon the certificate either by her, or by himself as her attorney, and such transfer was a conversion by the company, for which it is liable.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

Jarboe & Harrison and Lloyd & Wood, for appellant. *Wilson & Wilson*, for respondent.

SHARPSTEIN, J. On the 22d day of October, 1874, the plaintiff executed to Arthur W. Bowman, a power of attorney, authorizing him to transact her business generally and particularly, "to invest all and singular such sums of money as may be in his hands belonging to me in such securities and upon such terms as he may think fit, and for my interest; to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate or politic, and to represent me and vote for me at any and all meetings of stockholders of any and all corporations in which I now, or may hereafter hold or own shares of capital stock; and represent me and my shares of stock aforesaid in all matters and things touching the said shares, and the acts and doings of the said corporations; also, to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, goods, wares, and merchandise, choses in action and other property in possession or in action; and to make, do, and transact all and every kind of business of whatever nature and kind soever; * * * giving and granting unto my said attorney full power and authority to do and perform all and every act and thing, whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present." This power of attorney continued in force until October 18, 1884, when it was revoked.

On and prior to the 23d day of May, 1882, the plaintiff was the owner of 200 shares of the capital stock of the defendant corporation, which stood in her name on the books of the corporation, and for which a certificate, numbered 31, had been issued to her. The defendant corporation was organized under the laws of this state for profit. Its by-laws, regulating transfers of stock, so far as relevant to this case, are as follows: "Sec. 2. Every transfer of

stock, or of the certificates, above provided to be issued, shall be entered in the transfer books, to be kept by the secretary, by an entry showing to and by whom transferred, the numbers and designations of the shares, and the date of the transfer, and duly attested by the secretary. No transfer shall be valid except as between the parties, unless made as in this section provided. Sec. 3. The stock shall be transferable as in the last preceding section specified, and upon the books of the corporation, upon proper assignment and delivery to the assignee of the certificates above provided for. * * *

Sec. 4. The surrendered certificate shall in all cases be canceled by the secretary, before issuing a new one in lieu thereof." On the 19th day of August, 1882, A. W. Bowman presented to the secretary of defendant the certificate of stock No. 31 issued to the plaintiff as aforesaid, but not indorsed by her or by any other person for her; and at the same time presented to the secretary said power of attorney from the plaintiff, and demanded a transfer to himself, in his own name, of the 200 shares of stock represented by certificate No. 31, then standing in her name on the books of the company. The secretary then received from Bowman the certificate No. 31 without indorsement, canceled it, made the transfer on the books as requested, and, in lieu of certificate No. 31, issued to Bowman, in his own name, two certificates of 100 shares each, numbered respectively 211 and 212. At the time of this transfer the plaintiff was absent from this state, and actually knew nothing of it, and had authorized it in no other way than by said power of attorney. On said 19th day of August, 1882, Bowman was largely indebted to divers persons in this state, and was then, and ever since has been, insolvent. Thereafter, for a valuable consideration, Bowman assigned and transferred said certificates numbered 211 and 212 to the California State Deposit & Trust Company, a corporation which took the assignment and transfer thereof in good faith, without notice of the rights of the plaintiff. Plaintiff had no notice of this transfer and assignment of certificates Nos. 211 and 212, until after they were made, and did not authorize the same, otherwise than by said power of attorney. Bowman was a director of the defendant corporation from January, 1882, until October, 1884. The defendant corporation never had any actual or presumptive notice that Bowman procured the transfer of said stock to himself for his own use, or that he intended to convert it to his own use, or to use it in any way prejudicial to the rights of the plaintiff, unless such notice may be presumed from the fact that he was one of the directors of the defendant corporation, as above stated. The action was brought by the plaintiff to recover from the defendant damages for an alleged conversion of said 200 shares of stock, and the court found: "Eighth. That said defendant did, prior to the commencement of this action, convert and appropriate said 200 shares of stock of the defendant, so belonging to plaintiff, and has wholly refused to return the same, or

any part thereof, to plaintiff; and that, at the time of such conversion, the same was of the value of \$10,000." Judgment was accordingly rendered in favor of plaintiff for \$10,000 and costs. Defendant moved for a new trial, on the ground, among others, of insufficiency of the evidence to justify the decision. From the order denying the new trial, and also from the judgment, the defendant appeals.

The decision turns upon the construction of the power of attorney held by Bowman. If it conferred on him the power to transfer to himself the stock of his principal, then the court below erred in finding that appellant converted respondent's stock, otherwise not. The authority conferred by the power of attorney is very general, but does not authorize the attorney to do anything except for and in the name of his principal. The exchange of her shares for an equal number of shares to be issued to himself is not directly, nor, in our opinion, indirectly, authorized by anything contained in the power of attorney; and it was not done for and in the name of the principal, nor in accordance with the by-laws of appellant, or the provision of the Code that such shares of stock may be transferred by indorsement, by the signature of the proprietor, or his attorney, or legal representative. Civil Code, § 324. Here the transfer in controversy was made without indorsement by the signature of the proprietor, or her attorney, or her legal representative. In *Stackpole v. Arnold*, 11 Mass. 27, *PARKER, C. J.*, said: "No person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature." In this case there was no indorsement by signature such as the law requires to effect a valid transfer, and, if there had been, the agent's signature, without stating the name of the principal on whose behalf he gave his signature, would not have authorized the cancellation of the principal's certificate, and the obliteration of all evidence of her ownership of stock. Appellant is certainly in no better position now than it would be if the agent had indorsed the certificate by his own signature, without stating the name of his principal. Respondent had a right to rely on the observance by appellant of its own by-laws, and the laws of the state, in the transaction of its business. Appellant was under no obligation to permit a transfer until the requirements of its by-laws, and of the laws of the state, were fully complied with. "A purchaser of stock does not receive the certificate of his vendor, but a new one, made out in his own name, and reciting nothing contained in the former. He is therefore protected in the enjoyment of his purchase, even though there was no right to make the transfer to him. For this reason an

unauthorized transfer is a wrong done to the owner of stock, for which, not only the person who makes it, but any one knowingly assisting in the wrong, is responsible. That a bank or other corporation, and also these defendants, are trustees to a certain extent for stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property, and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they may rightfully demand evidence of authority to make a transfer before they permit it to be made. Their own safety requires that they be satisfied of the right of the person proposing to make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal title to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and the transfer may be a gross wrong to such an equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done." *Bayard v. Bank*, 52 Pa. St. 232. In *Selover v. Commercial Co.*, 7 Cal. 266, it is held that "where a *feme sole* becomes the owner of shares of stock in a company, and afterwards marries, and after marriage the husband and wife execute an indorsement on the certificate of stock, purporting to sell the same to A., without any privy examination of the wife, and there being at the time no inventory of the separate property of the wife on record, such a sale was void as against a subsequent purchaser, under an instrument duly signed and acknowledged." No indorsement is not better than a defective indorsement, which was held in that case to be wholly ineffectual. If an indorsement had not been considered necessary in that case the court would not have written an elaborate opinion to prove that the indorsement was not such as the law required. It would have disposed of the case by holding that, as no indorsement was required, it was immaterial whether the attempt to indorse had been successful or otherwise.

After a careful inspection of the power of attorney we are unable to discover any clause which even constructively authorized Bowman to convert the shares of his principal into shares of his own. And that is precisely what he did by the assistance of the appellant, without which he could not have converted them. Appellant invokes the familiar rule, "that where one of two innocent persons must suffer, the loss shall fall on him who has afforded the opportunity for the same." But it was the appellant, in this case, who afforded the agent an opportunity to inflict loss upon his principal, and also aided him in inflicting it. As was said in *Bayard v. Bank*, supra: "With them [the corporation] was the registry, and transfers could be made only with their consent, by the surrender of the certificates and the issue

of new ones." We think it clear that a transfer not made by the party transferring, or some agent duly authorized, can have no effect. And we think in this case the transfer was not made by the owner of the stock, or by an agent duly authorized to make it as it was made, and, as respondent was divested of her property by the unauthorized act of appellant, it must be held responsible to her for the damage she has suffered in consequence of such wrongful act. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.
WORKS, J.

85 Cal. 71

DEMARTIN v. DEMARTIN *et al.* (No. 12,514.)

(Supreme Court of California. July 30, 1890.)

HOMESTEAD—VALUE—BURDEN OF PROOF.

1. Under Insolvent Act Cal. § 60, which makes it the duty of the insolvency court to exempt and set apart a homestead for the benefit of the insolvent, the value of which is limited to \$5,000 by Civil Code, § 1260, the burden of proof is on the creditors to show that the value of the homestead which the insolvent petitions to have set apart to him exceeds that amount.

2. A party having the burden of proof and offering no evidence is not prejudiced by the court's failure to make findings of fact.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

Petition by Louis Demartin, an insolvent, to have a homestead set apart to him. The petition was granted, and Josephine Demartin and another, two of his creditors, appeal.

Sawyer & Burnett and *L. F. Cooper*, for appellants. *Lucas & Miller*, for respondent.

BELCHER, C. C. This is an appeal from an order setting apart a homestead to an insolvent debtor. The facts are these: On the 22d day of October, 1887, Louis Demartin filed his petition in insolvency, and on the same day he was adjudged to be an insolvent debtor, and a time was appointed for his creditors to meet and prove their debts, and choose an assignee of his estate. Annexed to the petition were the requisite schedules and inventory, in which a portion of the real property was described as petitioner's homestead, and the value thereof was placed at \$5,000. On

the 5th of November following, he presented to the court another petition asking to have the property described as a homestead set apart as such for his use and benefit. This petition stated that the petitioner had executed, acknowledged, and filed for record a declaration of homestead, in proper form, on the premises which he asked to have set apart, and that at the time of so doing he was and ever since had been residing thereon with his family, and that the same did not exceed in value the sum of \$5,000. On the 7th of November the attorney for two of the creditors of the insolvent filed his affidavit (giving the reasons why it was made by him) setting forth that Demartin filed his declaration of homestead on the 29th day of September, 1887; that he filed his petition in insolvency on the 23d day of October; that he petitioned the court to have said homestead set apart to him on the 5th day of November; and that, as affiant was informed and believed, the value of the premises selected as a homestead was from \$8,000 to \$10,000; and praying the court, before setting the same apart, to appoint three persons to appraise the value thereof, and return their appraisement to the court. On the 10th of November the court set the matter for hearing on the next day at 10 o'clock A. M. At the time set for the hearing the attorney for the objecting creditors did not appear, and thereupon, on motion of counsel for the petitioner, no evidence being offered by him, and there being nothing before the court except the papers before mentioned, an order was made and entered setting apart for the use and benefit of the petitioner as a homestead all of the premises described in his petition.

1. It is claimed for appellants that the order was erroneous, and should be reversed, because no evidence was offered on behalf of respondent showing that he had ever filed a declaration of homestead on the premises claimed, or was ever residing thereon, or that the value thereof did not exceed \$5,000; and it is said that the burden was upon him to establish by competent proof all these facts before an order could properly be made setting apart to him the premises as a homestead. But there was no denial that he had filed a properly executed declaration, and was residing with his family on the premises at the time of doing so. These facts were, therefore, admitted, and it was not necessary to introduce in evidence the declaration or any proof of residence. The question then only remains, where was the burden of proof as to value? The Civil Code provides that homesteads may be selected and claimed of not exceeding \$5,000 in value by any head of a family, (section 1260,) and that from and after the time the declaration is filed for record the premises therein described constitute a homestead. Section 1265. A homestead may be selected of greater value than \$5,000, and the excess in value does not invalidate the selection. *Ham v. Bank*, 62 Cal. 125; *Lubbock v. McMann*, 82 Cal. 230, 22 Pac. Rep. 1145. The excess in value, if there be any, is subject to the claims of creditors, but it can be taken only in the manner provided by

statute for its admeasurement and application. Civil Code, §§ 1245, 1246; *Waggie v. Worthy*, 74 Cal. 268, 15 Pac. Rep. 831. When an execution creditor claims that the value of the homestead exceeds the sum of \$5,000, and seeks to subject the excess to the payment of his debt, the burden is upon him to prove, among other things, that there is an excess, before the court can take any action. Civil Code, § 1249; *Stone v. McCann*, 79 Cal. 460, 21 Pac. Rep. 863. The insolvent act (section 60) makes it the duty of the court having jurisdiction of the insolvency proceedings to exempt and set apart for the use and benefit of the insolvent a homestead in the manner provided in section 1465 of the Code of Civil Procedure. By the section referred to it is provided that the court "may," on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife the homestead selected, designated, and recorded, provided such homestead was selected from the common property or from the separate property of the persons selecting or joining in the selection of the same. And it has been held that whenever a proper application is made for the setting apart of a homestead, the word "may" is to be construed as "shall," and the court has no discretion to refuse the application. *Estate of Ballentine*, 45 Cal. 696; *Tyrrell v. Baldwin*, 78 Cal. 476, 21 Pac. Rep. 116. Under the circumstances appearing here, we think the burden was upon the objecting creditors to show that the value of the premises asked to be set apart as a homestead exceeded the limit of exemption, and that in the absence of any such proof the court was justified in making the order complained of.

2. It appears from the bill of exceptions that no findings were made by the court, and that they were not waived by the appellants. And it is claimed that issues of fact were raised, upon which findings were necessary, and that for the want of them the order should be reversed. But, waiving the question as to whether findings are ever necessary in support of an order like that involved here, the rule is, as said in *Monterey Co. v. Cushing*, 83 Cal. 510, 23 Pac. Rep. 700: "If no direct evidence be introduced upon any issue, the finding should be against the party who had the burden of proof." And in *People v. Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481, it is said: "When the court fails to find on a material issue the judgment will not be reversed if the finding omitted must have been adverse to the appellant;" citing *Hutchings v. Castle*, 48 Cal. 152, and *McCourtney v. Fortune*, 57 Cal. 617. And this rule has been approved and followed in subsequent cases. See *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. Rep. 738; and *Senter v. Senter*, 70 Cal. 620, 11 Pac. Rep. 782.

As the burden of proof was on the appellants, and no proof was offered by them, it is evident that they were in no way prejudiced by the failure to find, and the order cannot be reversed on that ground. It follows that the order appealed from should be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

85 Cal. 76

DEMARTIN v. DEMARTIN et al. (No. 12,745.)
(*Supreme Court of California.* July 30, 1890.)

INSOLVENCY—DISCHARGE.

1. Insolvent Act Cal. § 49, which provides that no discharge shall be granted if the debtor shall have sworn falsely in relation to any material fact concerning his estate or his debts, imposes no penalty for an unintentional and innocent mistake; and the fact that in his verified schedule of liabilities a debtor in good faith understated the amount due one of his creditors, and likewise omitted a small item from his verified inventory of assets, by neither of which errors were his creditors prejudiced, will not prevent his discharge.

2. The pendency of an appeal in the supreme court from an order setting off the insolvent's homestead does not prevent his discharge, as this is not one of the grounds enumerated by the insolvent act on which the creditors may oppose such discharge.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; **JAMES E. MURPHY**, Judge.

Application by Louis Demartin, an insolvent debtor, for a discharge. The application was granted, and Josephine Demartin and another, two of his creditors, appeal.

Sawyer & Burnett and *L. F. Cooper*, for appellants. *Lucas & Miller*, for respondent.

BELCHER, C. C. This is an appeal from an order granting an insolvent debtor discharge from his debts. On the 22d day of October, 1887, the respondent, Louis Demartin, commenced proceedings in voluntary insolvency, and was adjudged to be an insolvent debtor. On the 4th of February following he applied to the court for a discharge from his debts, and the proper notice was given to his creditors to appear and show cause why a discharge should not be granted. The appellants, two of the creditors, appeared and opposed a discharge. As grounds of opposition they specified—*First*, that the respondent had sworn falsely in the affidavit annexed to his petition, schedule, and inventory, in this: that he stated, in the schedule of his debts and liabilities, his indebtedness to the appellants to be \$4,588.40, when in fact it was \$5,588.40; and in this: that he wholly omitted from the inventory of his assets an indebtedness of \$172.23 then due him from certain parties in the city of San Francisco; *second*, that respondent had been guilty of fraud, contrary to the true intent of the insolvent act, in this: that on the 29th day of September, 1887, he filed and caused to be recorded a declaration of homestead on a tract of land then owned by him, which was of the value of \$15,000, and on the 11th day of November, 1887, the court, against the objections of appellants, and without hearing any evidence, set the whole tract apart to him as a homestead; from which order an appeal had been taken to, and was still pending in, the supreme court. See ante, 594. The respondent filed an answer to the specifications of objection admitting

the errors set up in the first specification, and averring that they arose from mistake and inadvertence, and denying that the property selected by him as a homestead and set apart as such by the court, as stated in the second specification, was of any greater value at the time of the selection than \$5,000. He also interposed a general demurrer to the second specification, and the appellants interposed a like demurrer to the answer. The court sustained the demurrer of respondent, and overruled that of appellants. The case was then tried, and as a result the court found that respondent was indebted to appellants in the sum of \$5,588.40, instead of \$4,588.40, as set forth in his schedule, but "that such discrepancy occurred by mistake, and was not made with intent to defraud any of the creditors of the said insolvent." The court also found that at the time of filing the petition and inventory there was owing to the insolvent the sum of \$172.23, which was not included in the inventory, but "that the same was omitted therefrom through inadvertence and mistake, and not with any intent to defraud any of the creditors of the said insolvent," and that the insolvent had since received and paid the same to the assignee. As a conclusion of law it was held that the petitioner was entitled to a discharge from his debts, and a discharge was accordingly granted to him in the form prescribed by the statute.

1. It is not claimed that the findings of fact were not justified by the evidence, and it must therefore be conclusively assumed that the omissions complained of were mere mistakes made without any fraudulent intent or purpose. It is, however, argued that the court erred as matter of law, under the provisions of section 49 of the insolvent act, in granting the discharge. We do not think the argument sound. The section referred to provides: "No discharge shall be granted, or if granted shall be valid, if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or inventory * * * in relation to any material fact concerning his estate or his debts, * * * or has been guilty of fraud contrary to the true intent of this act," etc. It could not have been intended by this language to impose the penalty declared for an unintentional and innocent mistake. The words "have sworn falsely" necessarily import a willful act done with a fraudulent intent, and from which the element of fraud cannot be eliminated. *Dean v. Grimes*, 72 Cal. 446, 14 Pac. Rep. 178. Besides, under the circumstances shown, how can it be said that the false swearing was in relation to any material fact? The appellants presented and proved their debt without any objection, and it was allowed for the full amount claimed by them. And the omitted \$172.23, when received by the insolvent, was promptly paid over by him to the assignee. See *Smith v. His Creditors*, 59 Cal. 267.

2. It is urged that the court erred in sustaining the demurrer to the second ground of opposition; and in support of this position it is said "the 'second ground' alleged, besides fraud in procuring the homestead

set aside, that an appeal from the order was pending," and counsel "submit that so much of the second ground of opposition as sets up the pendency of the appeal from the order setting apart the homestead is a good ground against a general demurrer." We fail to see any merit in this argument. The statute provides that at any time after the expiration of three months from the adjudication of insolvency the debtor may apply to the court for a discharge from his debts, and the grounds upon which a discharge may be opposed are enumerated. Insolvent Act, §§ 48, 49. It also makes it the duty of the court to set apart for the use and benefit of the insolvent a homestead, and if for any reason the order is claimed to be erroneous an appeal therefrom is allowed. Sections 60, 67. But the order setting apart a homestead, and the appeal therefrom, are not among the enumerated grounds of opposition. Nor do we see any reason why they should be so treated. The discharge of an insolvent in no way jeopardizes the rights of creditors to appropriate the excess in value of the homestead, if there be an excess, since, if the appeal is sustained and the order reversed, the matter goes back for further adjudication. In our opinion the rulings of the court were proper, and we therefore advise that the order appealed from be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(84 Cal. 646)

MAYER v. SALAZAR. (No. 12,722.)

(Supreme Court of California. July 8, 1890.)

FALSE REPRESENTATIONS.

Under Civil Code Cal. § 1572, subd. 2, defining actual fraud committed by one party to a contract, with intent to induce another party to enter into the contract, as "the positive assertion, in a manner not warranted by the information of the party making it, of that which is not true, though he believed it to be true," a finding that defendant, by false and fraudulent representations as to soundness, induced plaintiff to purchase a horse from him, is supported by evidence that the representations were in fact not true, and that defendant made them without reasonable grounds for believing them to be true.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Sidney V. Smith, for appellant. F. W. Reynegom and Jarboe, Harrison & Goodfellow, for appellee.

BELCHER, C. C. The plaintiff and defendant exchanged horses, and this action was brought to recover damages for the false and fraudulent representations alleged to have been made by the defendant as to the soundness of his horse, whereby the plaintiff was induced to make the exchange. The court below gave judgment for the plaintiff, from which, and from an order denying a new trial, the defendant appeals.

The court, after finding that the horse of the defendant was unsound at the time

of the exchange, further found as follows: "(2) That defendant, knowing his said horse was unsound, caused the animal to appear sound, and concealed and suppressed the true condition of the horse, and represented to plaintiff that said horse was sound, and thereby * * * induced the plaintiff to exchange his said mare for said horse. (3) That defendant, with intent to deceive and defraud the plaintiff, and with full knowledge that said horse was unsound, and unfit for any use by the plaintiff, did represent at the time of making said exchange that said horse was sound; and that plaintiff, relying on defendant's said representations, did then exchange and deliver his said mare for said horse." It is claimed for the appellant that these findings were not justified by the evidence, because there was no sufficient proof that he knew his horse was unsound at the time of the trade; and it is said that, in such an action, it is necessary for the plaintiff to prove "not only the falsity of the representations in point of fact, but that the defendant, at the time the representations were made, had knowledge of their falsity, or made them without reasonable grounds for believing their truth."

The testimony was conflicting upon most of the issues raised, but it was proved for the plaintiff that the horse was spavined and unsound. Dr. Jacobson, a veterinary surgeon, testified that he saw the horse shortly after the exchange, and that "he then had a bone spavin. A horse couldn't throw out such a spavin in less than three to five or six months. A horse goes lame from the time he gets the hurt that causes the spavin." And again, in rebuttal, the same witness testified: "I should judge that it would take about three to six months to develop,—for such a spavin as was on this horse to develop. The horse must have been lame from the time of getting the injury which caused the spavin to form. The horse might travel during this time without any lameness, but a drive of thirty-five miles would be liable to make him very lame after standing still for a little time." And on cross-examination he was asked, "Do all horses go lame that have spavins?" and answered, "Yes, sir." The plaintiff testified that defendant came to him one day, and said "he had a very fine horse he would like to trade." That subsequently defendant asked him to go to the stable where the horse was kept, and see him. That he went to the stable, and, when the horse was brought out of the stall, he remarked: "Well, the horse is a little lame. What is the matter with him?" and defendant replied that the horse was all right, and perfectly sound, but that he had been out to grass, and was rather soft,—had been driven 50 miles from the Mission San Jose the day before, and was a little stiff, but would be over his stiffness in a day or two. That the witness saw the horse again, when he was still lame, and said: "The horse is lame. What will be done?" And the defendant replied: "He will get over it in a day or two," and "you can take my word the horse is sound." That, when the written contract of exchange was

brought to him to be signed, he said, "I like to have title and soundness guaranteed;" and defendant said: "What is the good of it? My lawyer made it out, and you can take my word, as a gentleman, that the horse is sound." That the witness took the defendant's word, and made the trade, but that the horse continued so lame that he could not be driven, and was never of any use to him. If this testimony was true,—and most of it was confirmed by other witnesses,—then it is evident that, when the defendant made the representations complained of, he had knowledge of their falsity, or made them without reasonable grounds for believing their truth. This being so, the findings cannot be disturbed for want of evidence to support them. One of the Code definitions of actual fraud committed by a party to a contract, with intent to induce another party to enter into the contract, is as follows: "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Civil Code, § 1572, subd. 2.

A case very similar to this was presented in *Litchfield v. Hutchinson*, 117 Mass. 195. There the plaintiff had purchased a horse from the defendant, and at the trial he introduced evidence tending to show that he was induced to make the purchase by false representations made by the defendant as to the soundness of the horse. The defendant testified that he made no representations whatever, and that he had worked the horse almost every day for three or four weeks, and did not observe any lameness, or know that he was unsound. The appellate court, by MORTON, J., said: "This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was in fact unsound and lame, all of which the defendant well knew. To sustain such an action, it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true; and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge. * * * If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge; and a representation by the defendant, made as of his own knowledge, that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him." The law thus declared is evidently in harmony with the provisions of the Code above

cited, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(84 Cal. 655)

Ex parte ARMSTRONG. (No. 20,720.)

(*Supreme Court of California*. July 8, 1890.)

JUSTICES OF THE PEACE—NUMBER.

Code Civil Proc. Cal. § 103, which provides, among other things, that there shall be one justice of the peace in every city having 10,000, and not more than 20,000, inhabitants, does not by implication repeal a provision for two justices in the town of Berkeley, made by its charter, which was granted by special act before the adoption of the present constitution, although said town has a population of less than 10,000.

Habeas corpus.

Application for the release of one imprisoned by process issued by WILLIAM J. WALKER, a justice of the peace in the town of Berkeley, Alameda county.

A. M. Armstrong and D. E. Alexander, for petitioner.

PER CURIAM. The charter of the town of Berkeley was granted by special act of the legislature, before the adoption of the present constitution. It provided for the election of two justices of the peace for the municipality. The only question in this case is whether or not this provision of the charter has been repealed by the adoption of the constitution, and the general legislation had under it. It is conceded that there is no such repeal in express terms. We think there is none by necessary implication. Justices' courts in municipalities are inferior courts, which may be created by act of the legislature; and the fact that the legislature, in the general judiciary article of the Code of Civil Procedure, has provided for the number of justices in cities of over 10,000 inhabitants, but said nothing about the number in municipalities of a less population, shows that it was not the intention of the legislature to interfere, by that act, with existing charters of municipalities of the latter class. The provisions of the general law for the incorporation of municipalities on this subject differ for the different classes of such corporations, and apply to them only when they have surrendered or abandoned their old charters, and elected to incorporate under such general law. Writ discharged, and prisoner remanded.

(84 Cal. 585)

VAN BIBBER v. HILTON *et al.* (No. 13,358.)

(*Supreme Court of California*. July 13, 1890.)

RIPIARIAN RIGHTS—CROSS-COMPLAINT.

In an action by a riparian owner to enjoin riparian owners above him from diverting the waters of a stream, defendants may file a cross-complaint to enjoin plaintiff from drawing off the water so as to prevent it from irrigating their land, as it would do in its natural flow, under Code Civil Proc. Cal. § 442, giving a defendant seeking affirmative relief affecting the property to which the action relates the right to file a cross-

complaint. Overruling *Heilbron v. Canal Co.*, 17 Pac. Rep. 933.

In bank.

On rehearing. For decision in department, see ante, 308. Code Civil Proc. Cal. § 442, provides: "Whenever the defendant seeks affirmative relief against any party relating to or defending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time—or, by permission of the court, subsequently—a cross-complaint," etc.

Spencer & Raker, for appellants. *Goodwin & Jenks*, for respondent.

PER CURIAM. Rehearing denied. The decision of the department is in conflict with an expression used by the court in bank, in *Heilbron v. Canal Co.*, 76 Cal. 15, 17 Pac. Rep. 933, where it says "the action is one in tort, and no affirmative relief could be granted." But the expression so used in the case cited is in conflict with the express provisions of section 442, Code Civil Proc., if construed as meaning that in no case of an action for tort a cross-complaint would be proper, or affirmative relief be granted. There are many cases of that kind, where a cross-complaint might be proper, and affirmative relief be granted. The expression so used in *Heilbron v. Canal Co.* stands alone, and is not supported by any of the other cases cited, and, our attention now being called to it, it is overruled. This expression was not necessary to the decision in that case.

85 Cal. 36

Ex parte CASEY. (No. 20,721.)

(*Supreme Court of California*. July 21, 1890.)

CRIMINAL LAW—TRIAL—SENTENCE.

Under Pen. Code Cal. § 19, making a misdemeanor punishable by imprisonment not exceeding six months, or by a fine not exceeding \$500, or by both, and section 1205, providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine, the court may impose a fine of \$500, with the alternative that in default of payment defendant be imprisoned at the rate of one day for each dollar of the fine.

In chambers. On *habeas corpus*.
Carroll Cook, for petitioner.

Fox, J. The prisoner was convicted of misdemeanor in the police court of the city and county of San Francisco, and fined \$500, "and in default of payment of said fine to be imprisoned in the county jail of the city and county of San Francisco, state of California, at the rate of one day for each \$1 of such fine until said fine is satisfied." It is conceded that the offense of which the prisoner was convicted is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$500, or by both. Pen. Code, § 19. In this case the court imposed the fine only, with the alternative of imprisonment in case of default in pay-

ment of the fine, not exceeding one day for each dollar of such fine, unless the same was satisfied. Under this judgment the prisoner has been in jail six months, and it is claimed that he is now entitled to be discharged; it being insisted on his behalf that the court had no jurisdiction to impose such a fine, or make such an apportionment thereof as would extend the period of imprisonment for non-payment thereof beyond the period of six months,—the maximum term of imprisonment which the court could have imposed if it had selected that mode of punishment. *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. Rep. 190, and *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. Rep. 372, are relied upon in support of this contention. All that was determined in *Ex parte Wadleigh* was that a prisoner is entitled to his discharge from the state-prison when he has served out the term prescribed by the judgment of imprisonment, less the credits which have been allowed him under the law, and that a judgment imposing imprisonment in the state-prison in default of the payment of a fine is void, affirming in the latter regard the decision in *Ex parte Arras*, 78 Cal. 304, 20 Pac. Rep. 683. In *Ex parte Rosenheim* the court held that where the court by its judgment imposed both imprisonment and fine it could not add a further imprisonment in default of the payment of the fine, holding that the intention of the legislature to make imprisonment for the collection of fine, or in default of payment of fine, applicable to such cases, "is not clearly, and with certainty, expressed in the language used" in section 1205 of the Penal Code. But it is clearly expressed in that section that where the judgment is for fine only it may also direct that the defendant be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine. There is nothing here or elsewhere in the statute to limit the extent of such imprisonment to the maximum of the period which might have been imposed if imprisonment alone had been adopted as the means of punishment; and properly so, for so far as the law is concerned the defendant may avoid imprisonment entirely, or secure his discharge at any time, by payment of the fine, or such part of it as remains due after deducting the specified *per diem* for the number of days he may have remained in prison. *Ex parte Kelly*, 28 Cal. 414. Again, it being conceded, and that being the express provision of the statute, that the court had jurisdiction to impose a fine of \$500, it had full power to apportion the imprisonment for non-payment at the rate of one day for each dollar of such fine, under section 1446, Pen. Code, in relation to proceedings in justices' and police courts. In *Ex parte Wadleigh* the prisoner was discharged because the legislature had not in terms authorized the imprisonment in default of payment of the fine. In this case it has, in express terms, in at least two separate sections, made such provision. Writ discharged and prisoner remanded.

(87 Cal. 40)

SPAULDING v. NORTH SAN FRANCISCO HOMESTEAD & RAILROAD ASSOCIATION. (No. 12,685.)*(Supreme Court of California. July 8, 1890.)***PETITION FOR STREET GRADING—PRESUMPTION OF REGULARITY.**

1. St. Cal. 1871-72, p. 804, provides that certain street grading cannot be ordered by the supervisors unless a majority of the frontage of lots petition therefor. Certain grading was done upon a petition from which it did not certainly appear whether the petitioner owned a majority of the frontage or not. *Held* that, since the board must necessarily have passed upon the sufficiency of the petition before ordering the work done, it was properly presumed to be sufficient, and testimony to the contrary was rightly excluded.

2. The act further provides that the board shall publish notice of its intention to order the work done, and that lot-owners who feel aggrieved by the proposed improvement shall file a remonstrance, which shall be passed upon by the board, and its decision shall be conclusive. *Held*, that one who failed to file such remonstrance was concluded by the decision, and could not attack it by way of defense to a suit to collect the assessment for the improvement.

3. Where a contract was made for doing the work for 50 cents per yard, but afterwards, without the contractor's request, the board published a new notice of intention, which resulted in a new contract with him to do the same work at 60 cents per yard, for which action no reason appears, it must be presumed that the board acted regularly, and that for some defect in the proceedings the new contract was necessary.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco. **WALTER H. LEVY, Judge.**

Action by N. W. Spaulding against the North San Francisco Homestead & Railroad Association.

E. J. Pringle and D. H. Whittemore, for appellant. W. H. H. Hart, (J. M. Wood, of counsel,) for respondent.

GIBSON, C. Defendant appeals from a judgment rendered in an action brought by plaintiff as the assignee of one J. S. Dyer, a street contractor, to recover an assessment for \$323.91 for grading Lombard street from Broderick street to the west line of Lyon street, in San Francisco, which had been levied upon a lot designated as No. 10 on the diagram attached to and made part of the assessment, and also from an order denying a new trial.

By section 4 of the act of April 1, 1872, (St. 1871-72, p. 804,) pursuant to which the street was graded, it is provided that no work of the character mentioned can be ordered by the board of supervisors, "unless the majority of the frontage of the lots and land fronting on the work proposed to be done and described in said resolution, or which is to be made liable for such grading, except public property, shall have been represented by the owners thereof, or by their agents, in a petition to the said board of supervisors, stating that they are the owners and in possession or agents of the lots named in the petition, and also requesting that such improvement or street work shall be done." At the trial, after plaintiff had rested his case, defendant introduced the petition of F. Weisenborn, upon which the board of supervisors had ordered the grading, and

upon which the contract therefor had been made with plaintiff's assignor, and then called the petitioner as a witness, and offered to prove by him that he was not the owner nor in the possession of more than one-half of the land fronting on Lombard street at the time he signed the petition and presented it to the board of supervisors. This offer the court ruled out, and the appellant claims that the court committed error in so doing. The petition on its face shows that the petitioner is the owner of the entire frontage on each side of Lombard street, between Baker and Lyons streets, and 137½ feet on the latter street south from its junction with Lombard street, and the same distance north on the same street from the junction of the last-mentioned streets; that there are six 50-*vara* lots fronting on Lombard street, between Baker and Broderick streets, and that the crossing formed by Baker and Lombard streets had been graded. The frontage of petitioner on Lombard street is not shown in feet, nor is it shown that one of the 50-*vara* lots is public property (a school lot) that should for that reason be excluded from the computation of frontage. Now, while the failure to show these two facts makes the petition uncertain, on its face, as to whether the petitioner is the owner of a majority of the frontage to be affected or not, it does not make it appear that the petitioner is not the owner of more than one-half of the frontage to be affected by the proposed improvement, for if it did the petition would be fatally defective. The statement that he is the owner of two lots, being the entire frontage on both sides of one of the two blocks he seeks to have graded, and 137½ feet north and the same distance south on Lyon street from its junction with Lombard street, is not inconsistent with the fact that he is the owner of a majority of the whole frontage, but, on the contrary, is consistent with it. Hence the petition was sufficient for the board of supervisors to act upon and ascertain whether it should be granted or not. In exercising the jurisdiction thus obtained, and in granting the petition, the board of supervisors must necessarily have found that the petitioner was the owner of a majority of the frontage to be affected by the proposed improvement. Even if, as seemingly suggested by counsel for appellant, the act referred to does not provide in express terms for any determination of the matter of a petition, clearly, where a board is empowered to receive a petition and is invested with discretion in regard to the subject-matter, it has the implied power to determine whether it shall be granted or not. The law makes it the duty of the board, upon receiving a proper petition for the grading of a street, to publish a resolution of its intention to perform the work, and thereafter make an order that it shall be done. Can it be reasonably contended that, if a petition sufficient upon its face should pray for the grading of a street already graded, the board would have to perform the idle ceremony of publishing a resolution of intention to perform the work and order the same to be done, regardless of

the falsity of the apparent necessity of the grading shown by the petition? Assuredly not. To determine the necessity for the work requires the exercise of judgment on the part of the board, and, in order to properly reach the consideration of this fact, it would first have to determine whether the petition were sufficient or not.

The amount of frontage owned or possessed by the petitioner being, then, one of the jurisdictional facts that the board had to pass upon, its determination of the same in favor of the petitioner is and was conclusive against the collateral attack of appellant at the trial. *People v. Hagar*, 52 Cal. 171. And by the terms of the act itself it was intended to be conclusive, unless objected to in the manner provided for in section 4 of the act, which is as follows: "All owners of lands or lots, or portions of lots, who may feel aggrieved or have objection to the ordering of the work described in said notice, * * * shall file with the clerk of the board of supervisors a petition or remonstrance, wherein they shall set forth in what respect they feel aggrieved; * * * which petition or remonstrance shall be passed upon by said board of supervisors, and their decision thereon shall be final and conclusive." This provision is intended to enable parties in interest to reach any irregularity or defect in the petition itself, or matter connected with the granting of it, and to be their only remedy. There is no evidence here that appellant ever availed itself of the opportunity thus given to be heard. It therefore waived all objections to the form of and the granting of the petition. In *Jennings v. Le Breton*, 80 Cal. 9, 21 Pac. Rep. 1127, in applying a similar provision in section 12 of the same act, providing for an appeal to the board of supervisors respecting the acts of the superintendent of streets, it was held that an appeal to the board was the only remedy for any grievance caused by the official acts of the superintendent of streets, and that a failure to appeal was a waiver of all objections thereto. See cases there cited. The statute under consideration provides for the publication of a notice of intention, in the form of a resolution, to make the proposed improvement, after receiving a sufficient petition therefor, and for a hearing upon the same at the instance of any person in interest who may feel himself aggrieved. This, we are convinced, presents a different case from that of *Mulligan v. Smith*, 59 Cal. 206, affirmed in *Kahn v. Board*, 79 Cal. 388, 21 Pac. Rep. 849. There it was held that the petition presented to the mayor of San Francisco for the opening of Montgomery avenue in said city, under the special act of April 1, 1872, (St. 1871-72, p. 911,) was invalid, and the mayor had no authority, under the act, to pass upon it; and that the approval by the county court of the report of the board of public works based upon the petition was of no effect, because the petition was insufficient, and the act did not provide for notice of a hearing to the parties in interest, in relation to it, at the

time the report was to be considered, nor at any prior or other time. The appellant also urges that, as that portion of Lombard street sought to be improved was divided into two separate portions by the crossing of Baker street, which had previously been graded, the board of supervisors could not, under section 3 of the statute, order two separate and distinct portions of a street thus divided to be done as one piece of work. By that section the board of supervisors are authorized to order the whole or any portion of a street graded. It is obvious that two blocks on a street may embrace the whole, or only a portion of it; and we do not think that because the Baker-Street crossing had been previously graded, which it is conceded could be done separately, the two blocks divided by such work could not be included in one petition, resolution of intention, order, contract, and assessment.

Dyer, the assignor of plaintiff, entered into his first contract, based upon regular proceedings, to do the grading for 50 cents per cubic yard, but before the expiration of the time within which he was required to commence the work under this contract pursuant to section 6, and within two days after the contract had been entered into, and without any request on the part of Dyer to be relieved from the contract, the board of supervisors passed and published another resolution of intention, which resulted in a second contract with the same Dyer, to perform the work at 60 cents per cubic yard, under which contract he performed the work. On these facts the appellant bases his remaining objection, viz.: That while the first contract remained in force the board of supervisors had no power to let the second contract. Consequently no recovery can be had for work performed under it. The reason why the board of supervisors saw fit to consider the first contract of no effect, and to let the second one, does not appear. It was treated by both the board of supervisors and Dyer as having been extinguished. Nothing was done under it. The contents of the first contract are not before us, and although assuming the proceedings which led up to it to have been regular, still, for some substantial defect or other in the contract itself, the board of supervisors may properly have deemed it necessary to renew the proceedings and obtain bids over again, which resulted in another contract with the same person, who was a competitive bidder for the work. This being probable, we must presume that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for such action. Code Civil Proc. § 1963, subd. 15.

For these reasons, we think the judgment and order should be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion, the judgment and order are affirmed.

87 Cal. 78

Ex parte WILLIAMS. (No. 20,724.)

(Supreme Court of California. July 24, 1890.)

COLLATERAL PROCEEDING—JURISDICTION—SENTENCE.

1. Where the judgment that the prisoner be confined in the house of correction shows on its face that the court found the prisoner to be under 25 years old, or is silent on the subject, neither the finding nor the presumption that she was under 25 years old (the court having no authority to commit one older than that) can be questioned on *habeas corpus*.

2. Under St. Cal. 1877-78, p. 953, authorizing the city criminal court or the municipal criminal court of the city and county of San Francisco, in any case where a prisoner might be sentenced to the county jail or the state-prison, instead thereof to commit the prisoner to the house of correction, such person not being over 25 years old, and Const. Cal. art. 22, § 3, abolishing said courts, and article 6, § 5, vesting jurisdiction in cases amounting to felony in the superior court, the latter court has authority to commit to the house of correction in felony cases.

In bank. On *habeas corpus*.

N. S. Wirt, for petitioner. James D. Page, for respondent.

Fox, J. Lizzie Williams, on whose behalf this proceeding was taken, was convicted in the superior court of the city and county of San Francisco of grand larceny, and on the 18th day of October, 1889, was by the court committed to the house of correction for the period of two years, where she has ever since been and now is confined in pursuance of said judgment and commitment.

1. The first point made on this hearing is that the prisoner was over 25 years of age at the time of the pronouncing of the judgment, by reason whereof the court had no jurisdiction to sentence her to confinement in the house of correction. Whether a prisoner is or is not over 25 years of age is a question of fact to be determined by the court giving the judgment, at or before the time of pronouncing the same. If it should appear affirmatively from the record that the court found the prisoner to be over 25 years of age, then we should be compelled to hold, on the face of the record, that a judgment of confinement in the house of correction was void. What we should deem it our duty to do with the prisoner in such case, there being a valid conviction but no judgment, it will be sufficient to determine when the question arises; it does not arise in this case. If the record was silent on the subject of age, it being a case where written findings are not required, the presumption would be that the court had done its duty, and found the fact to be such as to warrant the judgment given. In this case a certified copy of the judgment is brought up and offered in evidence, and it appears upon the face thereof that the court found the prisoner to be under the age of 25 years. Whether the finding be evidenced by the record or by the presumption of law, its correctness cannot be inquired into in this court upon *habeas corpus*. If the court erred in its finding, the error can only be reviewed upon appeal, the evidence and the rulings of the court being brought up on bill of exceptions.

2. The next point insisted upon is that

no court, except the police court, has jurisdiction to sentence any person to confinement in the house of correction. This point is not well taken. Before the adoption of the present constitution by the act entitled "An act in relation to the house of correction of the city and county of San Francisco," (St. 1877-78, p. 953,) the city criminal court, or the municipal criminal court of the city and county, was authorized in any case, where a prisoner upon conviction might be sentenced to imprisonment in the county jail or in the state-prison, instead thereof to sentence such person to imprisonment in the house of correction; provided that no person should be so sent to the house of correction who was over 25 years of age. Upon the adoption of the constitution, by section 3, art. 22, thereof, all the courts of the state theretofore existing, except justices' and police courts, were abolished, but the power of the state, through the judicial department of its government, to punish for public offenses, was not thereby lost. All the laws of the state as to the measure and mode of punishment not inconsistent with the constitution, and as to what should constitute public offenses, remained in full force; jurisdiction to administer them being by proper constitutional and legislative enactment transferred to the new courts established by or under the constitution. By article 6, § 5, jurisdiction in all cases amounting to felony (of which this is one) was vested in the superior court. By operation of the constitution itself, therefore, the superior court became vested with jurisdiction in all cases of felony, and succeeded to all other courts which theretofore had possessed jurisdiction in such cases. As the laws prescribing the mode and measure of punishment of felonies were not changed by the constitution, it was the duty and within the power of the superior court to administer those laws in the same manner and to the same extent as other courts theretofore had jurisdiction to do. For cases pending, in order that there should be no abatement or loss of jurisdiction, it was deemed necessary to provide for the transfer of the causes, and the records thereof, from the old courts to the new, and this was done by section 3, art. 22, supra, and subsequently, and more in detail, by an act of the legislature passed for that special purpose, approved February 4, 1880. St. 1880, p. 2. By section 2 of that act it is expressly provided that the superior court shall for all purposes be the successor of (among others) the municipal criminal court and the city criminal court. It is claimed that this act, if construed as for any other purpose than to provide for the transfer of the records of and giving jurisdiction in pending cases, is void, because such other purpose is not expressed in the title of the act. It is unnecessary to discuss that contention here, for the reason, as we have already shown, that the constitution itself conferred the jurisdiction in all cases of felony, and it became the duty of the court upon which such jurisdiction was conferred to administer the laws as it found them until they were changed. See also *Shay v. Superior Court*,

57 Cal. 542, where it was expressly held that the superior court had succeeded "to all the powers and jurisdiction of the * * * municipal criminal court."

3. It is further contended that even if the superior court once had power to sentence a defendant convicted of felony to confinement in the house of correction, it no longer has such power by reason of the provisions of the act of March 9, 1885, entitled "An act to provide for the commitment of persons convicted of crime to the house of correction." St. 1885, p. 34. A careful examination of that act, however, will show that it does not in any manner affect the question of the power of the court to commit to the house of correction upon conviction for felony. It relates only to cases of minor offenses, where the punishment may be imprisonment in the county jail, and its effect is, in such cases, to take off the limitation of age, and allow the court to send persons convicted of such offenses to the house of correction, without regard to age. Writ discharged, and prisoner remanded.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

(85 Cal. 333)

PEOPLE v. TOAL. (No. 20,610.)

(Supreme Court of California. Aug. 4, 1890.)

INFERIOR COURTS—ESTABLISHMENT—JUDGMENTS—
COLLATERAL ATTACK.

1. Const. Cal. art. 6, § 1, provides that the legislature may establish inferior courts, whose jurisdiction and powers, under section 13, must be regulated "by law;" and sections 15 and 16 of article 4 provide that no law can be passed except by bill concurred in by both houses, and signed by the governor. Held, that Const. Cal. art. 11, § 8, which provides for the adoption of city charters by mere resolution of the legislature, without the approval of the governor, was not intended to supersede the above provisions of article 6 in relation to the establishment of inferior courts, and that the provisions of the charter of the city of Los Angeles, so adopted, establishing a police court, and defining its jurisdiction, are void. BEATTY, C. J., and PATERSON, J., dissenting.

2. Where the bill of exceptions on appeal from a judgment of the police court of the city of Los Angeles recites that the court was established, and that the judge was elected and acted, under the city charter, it will not be assumed that the court may have been established by a general law.

3. One convicted of a crime may collaterally attack the existence of the court which assumed to try him.

In bank. On rehearing. See 23 Pac. Rep. 203.

Wm. T. Williams, Horace Bell, and Stephen M. White, for appellant. Geo. A. Johnson, Atty. Gen., and M. T. Owens, for the People.

WORKS, J. The appellant was convicted in the court below of an assault to commit murder. From the judgment, and an order denying him a new trial, he appeals. The judgment was reversed by this court, (23 Pac. Rep. 203,) and a rehearing granted. It was urged upon us in the petition for a rehearing that the effect of the decision was to oust the police judges of the city of Los Angeles from office without a hearing. Upon the second hearing the police

judges, as well as the attorneys in the case, and at least one *amicus curiæ*, were allowed to be heard, orally, and by printed briefs, and the subject seems to have been thoroughly exhausted. There are but two questions presented for our consideration by this second presentation of the case, viz.: (1) Was the police court of the city of Los Angeles attempted to be established by the new freeholders' charter of said city, a valid and existing court at the time the judge, or pretended judge, thereof committed the appellant for trial? (2) Can the question of the validity of said court be presented by the appellant in this way, or must the same be raised by a direct proceeding for that purpose? The point is made by the respondent that this court has already determined the first of these questions in the affirmative in the two cases of Brooks v. Fischer, 79 Cal. 173, 21 Pac. Rep. 653, and In re Strand, 21 Pac. Rep. 654. But the question now before us was neither presented nor considered in either of those cases. Brooks v. Fischer was brought to determine the general question whether or not the charter of the city was legally adopted. There was some doubt in the minds of counsel having that matter in charge whether the course taken in Brooks v. Fischer was the proper one to raise the question, and for that reason the application in Re Strand was made for the sole purpose of raising the same question, and none other was presented. This court regarded the remedy pursued in the former of these cases as the proper one, and decided the question raised in that case. Therefore, In re Strand was decided as presenting the same point, and the writ in that case was denied on the authority of the former one, and without further consideration. And in Brooks v. Fischer we were careful to say, in effect, that we were simply passing upon the general question as to the proper manner of adopting the charter, and not upon the question as to the validity of any of its provisions. Thus it was said: "It is contended by the petitioner that certain provisions of the charter are inconsistent with existing general laws, and particularly that it is in conflict with the general law with reference to the improvement of streets. It may be that certain of its provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws; but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force." It must be seen, therefore, that nothing was decided in either of the cases referred to which precludes us, as an authority in point, or otherwise, from determining the question now before us, which is whether one of the provisions of the charter is invalid as in conflict with existing laws. These cases decided that the charter of Los Angeles, as a whole, was adopted in the proper manner, and nothing more.

1. The question now before us is whether an inferior court can be established by a mere resolution of the legislature not acted

upon by the governor because such court has been provided for in a charter adopted as provided by section 8, art. 11, of the constitution. Section 1, art. 6, of the constitution relates exclusively to the establishment of courts, and provides: "The judicial power of this state shall be vested in the senate sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county." There may be "such inferior courts as the legislature may establish." The material question here is, how may the legislature establish these courts? Counsel for the appellant contend that it must be by a law regularly passed through the various stages required by the constitution, and approved by the governor, or passed as the law requires without his approval. On the other hand, it is contended by the respondent that the section of the constitution referred to does not provide how the legislature shall establish such courts, and therefore they may be established by the adoption of a charter of a city as provided by article 11, § 8, of the constitution. There are other sections of the constitution which throw some light upon this question, if it needs illumination. Section 13 of article 6 provides: "The legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof." In this section the legislature is authorized to fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 above quoted. There is no authority given to fix the jurisdiction, powers, duties, and responsibilities of inferior courts established in any other manner, and this must be done by law. Section 15 of article 4 provides how all laws shall be passed: "No law shall be passed except by bill. Nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members. Nor shall any bill become a law unless the same be read on three several days in each house, unless, in case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of ayes and noes, dispense with this provision. Any bill may originate in either house, but may be amended or rejected by the other; and on the final passage of all bills they shall be read at length, and the vote shall be by ayes and noes upon each bill separately, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house." And section 16 of the same article provides what shall be done after its passage before it shall become a law. It is too clear for argument that so far as the jurisdiction, powers, duties, and responsibilities of these inferior courts are concerned, they must, by the express terms of the constitution, be provided for and fixed by a bill regularly passed through the stages necessary to constitute it a law, as provided in sections 15, 16, art. 4, of the con-

stitution. If so, can it be said, with any degree of reason, that it was the intention of the framers of the constitution that such courts might be established by any less formal means, as, for example, by a resolution adopted by the two houses of the legislature after but one reading, and without any action on the part of the governor? We cannot think so. When it was provided that courts should be established by the legislature, it was undoubtedly meant that they should be established by the law-making power, including the governor, and by laws passed and approved as provided by other sections of the constitution. That such courts are properly established in this way has been decided by this court. *Ex parte Jordan*, 62 Cal. 464; *Ex parte Lloyd*, 78 Cal. 421, 20 Pac. Rep. 872. Section 8, art. 11, of the constitution, does not, and was not intended to, change or in any way alter the specific provisions relating to courts. The provision in that section that the charters authorized thereby to be framed and adopted must be "consistent with and subject to the constitution and laws of this state," makes it clear that nothing of the kind was intended. A provision in a charter adopted by mere resolution of approval, and not by law, establishing inferior courts, and giving them jurisdiction, is clearly in conflict with the constitutional provisions above referred to providing how courts shall be established and given jurisdiction. But it is urged upon us by one of the gentlemen who claims to be a police judge under this charter that dire consequences will result from a decision by us that this court was not legally established. The city of Los Angeles will be deprived of its police court, criminals will escape justice, and the gentlemen claiming to be judges of said court will be responsible for acts done by them as such judges without legal authority. We are too firmly convinced of the conclusion we have reached to be affected or influenced by the fear of consequences. Besides, in our judgment, the consequences likely to result from this decision cannot be so serious as to allow that courts of justice, however inferior, may be established in the informal and loose way contended for by the respondent. The city of Los Angeles is amply provided with inferior courts without its police court, and to be relieved of the unnecessary expense of maintaining it should not be seriously complained of. The criminals that will escape justice by the conclusion we have reached must be few in number, and the emoluments of the office to which they were not entitled will probably compensate the judges for all liabilities incurred by them by reason of having acted without authority of law.

2. But, conceding that the police court of Los Angeles was not legally established, it is further contended that the fact cannot avail the appellant in this case; that whether it was or not the pretended judge thereof was a *de facto* judge, and his right to the office, or his power and jurisdiction, cannot be questioned in this collateral way, but must be raised by a direct action for that purpose. We think

this point would be well taken if this were an attempt to test the right of some one to hold an existing office. *Hull v. Superior Court*, 63 Cal. 174-179; *Buckner v. Veuve*, Id. 304; *Fraser v. Freelon*, 53 Cal. 647. But the question presented here is not as to the right of a particular person to hold an existing office. There cannot be a *de facto* judge of a court that has no existence. We are very clear, therefore, that the appellant has the right to present the question on this appeal, and that it is our duty to determine it. And if such results are likely to follow as the respondent claims, it is better that it should be determined speedily. It cannot be claimed that the pretended judge who committed the appellant was elected to or claims to be holding any other office than the one attempted to be established by the resolution approving the charter of Los Angeles. The grounds upon which the appellant moved to set aside the information were as follows: "(1) That before the filing thereof the defendant had not been legally committed by a magistrate; (2) that the information herein purports to be filed upon a pretended examination of one L. Stanton, who falsely and illegally pretended to be a judge of a pretended police court of the city of Los Angeles; (3) that the said pretended police court of Los Angeles has no legal existence under the constitution and laws of this state; (4) that said L. Stanton is not, and was not at the time of said pretended examination of the defendant, a magistrate who had power or authority to examine the defendant in respect to the matter charged in this information." These objections raised not only the question as to the right of Stanton to hold the office, but as to the existence of the office, and the bill of exceptions shows his only claim to hold office was by virtue of the resolution referred to. It recites: "That theretofore, to-wit, on the 21st day of May, 1889, the said information was filed in department No. 1 of said court upon the defendant having been examined and held to answer by L. Stanton, Esq., judge of the police court of Los Angeles city, the said police court having been authorized by the legislature of said state, to-wit, senate resolution No. 2, approving the charter of the said city of Los Angeles, adopted January 31, 1889, and the said L. Stanton having been elected judge of said court under and by virtue of said charter, and was so acting by virtue of his said election." As against this statement in the bill of exceptions the claim of the respondent that he may have been judge of a police court established by a general law cannot be maintained. We cannot disregard the plain recitals in the bill of exceptions, and evade the real question in the case in the way suggested by counsel. Judgment and order reversed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

FOX, J., (*concurring*.) In view of the recital from the bill of exceptions, above quoted by Mr. Justice WORKS, I am constrained to concur in the judgment. This Cal. Rep. 23-25 P.—36

is not a mere assertion or stipulation of counsel as to what the law is; but here it is certified by the court, as a fact in the cause, that the police court in which the defendant had his only preliminary examination is the police court authorized (established) "by senate resolution No. 2, approving the charter of the said city of Los Angeles," and that said Stanton was elected judge of said court, and was acting by virtue of such election. On facts so certified this court cannot do otherwise than hold that the police court of which said Stanton was acting as judge had no legal existence, and consequently that there could be no judge thereof, either *de jure* or *de facto*. While a municipal charter, framed, adopted, and approved as provided in article 11, § 8, of the constitution, is a law of the highest order,—one established by the people direct, and, by the authority of the constitution, "the organic law" of the municipality, superseding "any existing charter, and any amendments thereof, and all special laws inconsistent with such charter,—and is by the constitution itself protected from the encroachment of legislative enactment, it is valid law only so far as its provisions are kept within the limitations prescribed by the constitution. It is invalid whenever and in so far as it undertakes to establish courts of justice; for the same constitution which authorizes its adoption has prescribed that the judicial power of the state shall be vested in certain courts named in that instrument, "and in such inferior courts as the legislature may establish in any incorporated city or town, or city and county." Article 6, § 1. Thus it will be seen that it is not appointed for the people of municipalities to establish courts. These, where not established by the people through the constitution, can be established by the legislature only. It can establish them only by the passage of appropriate laws; and it can pass no law except by bill, and in the manner prescribed by article 4, §§ 15, 16, of the constitution.

BEATTY, C. J. I dissent. It would serve no useful purpose to enter upon an elaborate presentation of the views which have led me to a conclusion opposed to that of the court, but the point decided is so important that the occasion seems to justify a brief statement of the grounds upon which, in my opinion, that portion of the charter of Los Angeles establishing a police court should be held valid and operative. I think that the framers of the constitution, in adopting the provisions of section 8 of article 11, intended to confer upon cities the power to frame and adopt charters which should be whole and complete. A municipal court of some sort was generally, and I believe universally, a part of all city charters in California before, and has been since, the adoption of the new constitution. A municipal charter containing no provision for a municipal court would be very unusual, to say the least. And so firmly is this idea implanted in the popular and professional mind that of the seven or eight freeholders' charters that have been framed since the adoption of the new

constitution not one, I believe, has omitted to provide for a police court. When it is remembered that the boards of freeholders by whom these charters have been framed were largely composed of lawyers of recognized standing and ability, and when it is considered further that in all the litigation which has ensued concerning the rights and jurisdiction of the courts so established the point has been raised for the first time in this case that it is not competent by a freeholders' charter to create a police court, or endow it with any jurisdiction, it would certainly seem that the proposition ought not to be treated as too plain for argument. The objection to establishing an inferior court by means of a freeholders' charter is that such courts must be established by the legislature, (Const. art. 6, § 1,) and their jurisdiction and powers must be regulated by law, (Id. § 13,) and no law can be passed except by bill, (Id. art. 4, § 15.) If the constitution were perfectly consistent in the use of words, this argument would be infallible; but the constitution is not so consistent. At the same time that it says in the section last cited that no law shall be passed except by bill, it expressly provides in another section for the enactment of a particular kind of law by another method. Article 11, § 8. To make the constitution consistent and harmonious as a whole, verbal discrepancies must be disregarded. Section 15 of article 4 must be regarded as the rule for enacting statutes in general, and section 8 of article 11 as the exceptional method of enacting special city charters. Such charters are laws. Since they repeal laws, *i. e.*, pre-existing charters and all special laws inconsistent with them, it cannot be denied that they have the substance, force, and effect of law, and in the constitution itself they are given the name of laws. Can it not be said, then, that every requirement of the constitution is satisfied in the creation of a municipal court by such a charter? The legislature must approve the charter. Therefore, what the charter establishes the legislature establishes. The charter is a law. Therefore, the jurisdiction conferred by it is conferred by law. It is not suggested that any inconvenience has been occasioned or could arise from this view. It can scarcely be doubted that it accords with the actual intention of the framers of the constitution. It is certain that it comports with the general understanding hitherto prevailing, and, if I am not mistaken, it has been shown not to be in conflict with a fair construction of the terms of those provisions which are supposed to condemn it.

PATERSON, J. I concur in the views of the chief justice.

85 Cal. 55

HEARN v. KENNEDY *et al.* (No. 13,499.)
(*Supreme Court of California.* July 28, 1890.)

NOTE SECURED ON HOMESTEAD—CLAIM AGAINST DECEDENT.

Under Code Civil Proc. Cal. § 1475, requiring all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as other claims against the estate, a complaint, in an action on a note given by

defendant and her deceased husband, and secured on their homestead, which asks for a personal judgment and a sale of the mortgaged property, is bad on general demurrer, where it fails to allege that the claim had been presented for allowance. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, Tehama county; PHIL W. KEYSER, Judge.

Code Civil Proc. § 1475, requires all claims secured by liens or incumbrances on the homestead of a person deceased to be presented and allowed as prescribed for other claims against the estate.

John F. Ellison, for appellant. Wm. Nagle, for respondent.

SHARPSTEIN, J. Appeal from a judgment. The only question to be considered here is, was the demurrer to the complaint properly sustained? The complaint alleges that in 1875 the defendant Mary E. Kennedy and one Michael Kennedy were husband and wife. That in 1875 they filed a declaration of homestead upon certain lots in Red Bluff, Cal. The homestead was a valid one. That Michael Kennedy died in 1886, and the defendant Mary E. Kennedy was appointed the administratrix of his estate. That on the 13th day of February, 1888, the superior court of Tehama county, on the petition of the said Mary E. Kennedy, made an order setting aside the lots above referred to as a homestead to the defendant Mary E. Kennedy. That on the 12th day of October, 1882, said Mary E. Kennedy and her husband, Michael Kennedy, executed a joint and several note to the plaintiff for \$500, due five years after date, bearing interest at the rate of 10 per cent. per annum. That, to secure this note, the defendant Mary E. Kennedy and her husband, Michael Kennedy, executed and delivered to the plaintiff a mortgage covering the lots above described. The complaint does not allege that the claim of indebtedness upon which this suit was brought was ever presented to the administratrix for allowance. The complaint prays for a personal judgment against the defendant Mary E. Kennedy, and for a sale of the lots described in the mortgage. The defendant C. P. Braynard is made a defendant, because, it is alleged, he has or claims some interest in the mortgaged premises. Defendant demurred to the complaint on three grounds: (1) that there is a defect of parties plaintiff, in that the personal representative of the Kennedy estate should have been made a party defendant; (2) that several causes of action have been improperly united; and (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint does not state that the claim secured by the mortgage was ever presented to the administratrix for allowance. In *Camp v. Grider*, 62 Cal. 20, where a husband died leaving a homestead incumbered by mortgage, which was executed by himself and wife, it was held that the mortgage could not be foreclosed unless the claim was presented for allowance against the estate of the decedent. In that case the note was not signed by the

wife. In *Association v. King*, 23 Pac. Rep. 376, both the note and mortgage were executed by the husband and wife jointly, and it was held that the mortgage could not be foreclosed without presenting the claim for allowance against the estate of the decedent. On the authority of these cases, the demurrer was properly sustained. The demurrer to the complaint was sustained on the 16th of July, 1889, and on the 27th of September, 1889, the plaintiff having failed to amend her complaint, judgment was rendered and entered in favor of defendant. Judgment affirmed.

We concur: FOX, J.; McFARLAND, J.; THORNTON, J.

BEATTY, C. J., (*dissenting*.) On the authority of the cases cited, it seems to be settled that the plaintiff cannot foreclose her mortgage, but the facts alleged seem to be sufficient to entitle her to a personal judgment for the amount of the note. If so, the complaint was good against a general demurrer for want of facts.

(85 Cal. 50)

PAGE *et al.* v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY. (No. 13,254.)

(*Supreme Court of California*. July 28, 1890.)

MUNICIPAL CORPORATIONS—INCORPORATION.

Pol. Code Cal. p. 737, § 2, providing the steps to be taken for the incorporation of municipalities containing not less than 500 inhabitants, requires a petition to the board of supervisors signed "by at least 100 qualified electors of the county, residents within the limits of such proposed corporation," and that an election shall be ordered to decide on the matter of incorporation. Section 3 provides for canvassing the returns, and declaring the result. *Held*, that where, after the election, the board learned that only part of the 100 petitioners were *bona fide* residents, it could not be compelled to canvass the returns.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Action by S. L. Page and others against the board of supervisors of Los Angeles county. Pol. Code, p. 737, § 2, providing the steps to be taken for the incorporation of municipalities containing not less than 500 inhabitants, requires that "a petition shall first be presented to the board of supervisors of such county, signed by at least 100 qualified electors of the county, residents within the limits of such proposed corporation." It also provides that an election shall be ordered to decide on the matter of incorporation. Section 3 provides that on the Monday after election the board shall canvass the returns, and declare the result.

Frank P. Kelly and Smith, Howard & Smith, (George H. Smith, of counsel,) for appellant. H. C. Carr, for respondents.

Fox, J. On the 2d day of July, 1888, a petition was presented to the board of supervisors of Los Angeles county, asking that certain territory be incorporated into a municipality, to be known as the "City of Alhambra," in pursuance to the provisions of the municipal incorporation act. St. 1883, p. 93; Pol. Code, p. 737. The petition described the proposed boundaries of the corporation, stated that the

population within those boundaries was about 850, and was signed by 106 persons claiming to be residents and electors within said territory. It was accompanied with proper proof of publication thereof, with the names of the signers, and of intention to present it at that time. The matter came on for hearing on the 7th of July, when a protest was filed regarding the establishment of the boundaries as described in the petition, and after some general discussion as to the boundaries, and the examination of witnesses as to population, the board having ascertained that the population of the district, as they seem to have agreed to bound it, was in excess of 500, a resolution was adopted giving notice of an election, submitting to the qualified voters within certain boundaries described in the resolution, but differing somewhat from those given in the petition, the question of whether or not they should become incorporated, and for the election of the officers thereof. The notice was in due and proper form, fixing the day of election for the 27th of July, and was duly published. Nothing was put upon the minutes of the board showing the result of its deliberations, the judgment or conclusion at which it had arrived on the question of the sufficiency of the petition or the notice, of the sufficiency of the number of its signers, or of their residence and competency to sign, or of its determination as to the boundaries, except the recitals as found in the resolution or order calling the election; and these make no reference to the petition, or the sufficiency thereof, the notice given of the application, the number, residence, or competency of the signers. In fact, so far as the minutes of the board show, there was no investigation as to whether the signers, or any of them, were residents or electors within the boundaries of the proposed municipality, as described in the notice of election. Notice of the election was duly published, and at the appointed time the election was held, and the returns thereof duly certified and returned to the board as required by law. The board met at the time fixed by law for the canvassing of such returns, but then, and ever since, refused to canvass said returns or take any further proceedings in the matter. The petition is by the parties claiming to have been elected trustees at that election, for a writ of mandate, to compel the board of supervisors to canvass the returns of that election, and declare the result. The board, by their answer, admit the allegations of the complaint, and then, for further answer, allege that on the 13th of August, 1888, upon information given to and protest filed with the board by divers good citizens of the town or locality of Alhambra against the counting or canvassing of said vote, that a great fraud had been perpetrated on the board, and that a large number of those persons who had petitioned for the incorporation of said Alhambra were not residents in or electors residing within the boundaries proposed to be incorporated under the name of Alhambra, and that as many as 26 of the 106 signers of said petition were not such residents or electors;

that the board then, for the first time, was informed of or discovered such fact, and proceeded to inquire concerning the same, and upon full investigation and the examination of sundry witnesses it ascertained that less than 100 in number of those who had signed the petition which was presented to the board resided within the boundaries of the territory proposed to be incorporated, or were electors within the same, and thereupon dismissed the entire proceedings with reference to said incorporation, without prejudice, and refused to canvass said vote. At the hearing it was stipulated as a fact that less than 100 of the signers of the petition were residents or electors within the territory proposed to be incorporated. The court below found the facts as alleged in the pleadings and conceded in said stipulation, and then found, as conclusions of law, that the act remaining to be done by the board of supervisors, after the coming in of the returns, was purely ministerial; and that the law neither requires nor authorizes any inquiry on the part of the board of supervisors, other than as to the apparent regularity of the returns they are to canvass, sufficient to assure them that the documents presented have been properly transmitted, and came from authorized election officers. And on such findings and conclusions of law the court gave judgment in favor of the plaintiffs, commanding that the writ issue requiring the board to canvass the returns and declare the result as the statute requires. From this judgment the defendant appeals.

We cannot accede to the conclusions of law reached by the court below. If the board of supervisors should find these returns regular on their face, and proceed to canvass the same and declare the result, as required by the judgment rendered herein, and that result was found in favor of the proposed incorporation, we should have the anomaly of a small community exercising the franchise of a municipal corporation, with all the expenses and obligations incident thereto, under the apparent license of the authorized agent of the state in that behalf, but in fact without any authority of law, for the want of jurisdiction in the agent to grant such license. Under the admitted facts in this case, and the decision of this court in *People v. City of Riverside*, 66 Cal. 288, 5 Pac. Rep. 350, the organization of the corporation would be absolutely void for the want of the proper number of signers qualified in the premises to the petition upon which the jurisdiction of the supervisors to act must be based. This jurisdiction is a matter without which every step of the board of supervisors is void, and into which the board not only has the right, but it is its duty, to inquire at every stage of its proceedings, to the end that its final action shall be valid and binding. The inquiry in this case was made late in the proceedings, but not too late for the board to avail itself of the result and prevent it from doing a void act,—that of declaring Alhambra to be a municipal corporation,—or to save the people of Alhambra from other and greater complications

and evils. There is nothing in the proposition that a favorable vote of the people will cure all preceding defects, and itself confer jurisdiction to issue the necessary certificate to exercise the municipal franchise. An election held without authority of law gives no title to office, (*People v. Church*, 6 Cal. 76; *People v. Mathewson*, 47 Cal. 442; *Kenfield v. Irwin*, 52 Cal. 164; *People v. Harvey*, 58 Cal. 337,) and in like manner such an election can give no title to a franchise. *Mandamus* will not lie to compel the secretary of state (the proper officer in such case) to certify the election of members of congress of which no notice was given to the voters. *People v. Thompson*, 67 Cal. 627, 9 Pac. Rep. 833. So *mandamus* will not lie to compel the board of supervisors to issue the certificate of municipal incorporation, when no notice was given of an election to determine whether the people would incorporate or not; and a notice given without authority of law is no notice. A notice given without jurisdiction is one given without authority of law. It follows from these conclusions that the judgment appealed from must be reversed, and the cause remanded, with instructions to the court below to dismiss the writ. So ordered.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; THORNTON, J.

89 Cal. 89

GESSNER v. PALMATEER. (No. 13,468.)

(Supreme Court of California. July 28, 1890.)

ATTACHMENT—VENDOR'S LIEN.

Where one sells land conditioned that the deed shall not be given until full payment of price, and takes a note in part payment, the assignee of the note, in an action against the maker, is not, by reason of the vendor's lien which the payee had, prevented from attaching defendant's property, under Code Civil Proc. Cal. § 537, providing that an attachment may issue where the debt sued on is not secured by mortgage or lien.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action by J. M. Gessner against Aaron Palmateer. Code Civil Proc. § 537, provides that, in an action on a contract for the payment of money, plaintiff may have the property of defendant attached, where the debt is not secured by mortgage or lien.

Winslow P. Hyatt, for appellant. *Del Valle & Munday*, for respondent.

MCFARLAND, J. This is an appeal from an order denying a motion to dissolve an attachment. The action is upon a negotiable promissory note given by defendant to one E. C. Webster, and by the latter assigned to plaintiff. The ground of the motion is that the note sued on was given to Webster in part payment for certain land purchased from him by defendant; that Webster had a vendor's lien as security for the payment of the note; that the lien passed to plaintiff by the assignment of the note; that the payment of the note was thus secured by a lien on real property, and that consequently a writ of attachment could not rightfully be issued. But a vendor's lien is a mere personal, unassignable privilege, and could not be

transferred to another person by a direct attempt to expressly assign the lien itself, and in the case at bar the lien certainly did not pass by the mere assignment of the promissory note. *Baum v. Grigsby*, 21 Cal. 173; *Porter v. Brooks*, 35 Cal. 199. The affidavit of defendant on motion to dissolve the attachment was no doubt intended to show (and we will assume that it does show) that on the purchase of the land no deed of conveyance passed, but that Webster was not to make such deed until the full payment of the purchase price; the character of the vendor's lien, therefore, being like the one involved in *Sparks v. Hess*, 15 Cal. 186. And appellant contends that there is a distinction between a vendor's lien before the legal title has passed and the one that exists after title has passed. There is some such distinction, but none that affects the question involved in the case at bar. Where title has not passed, the vendor has a more certain and valuable lien than where it has passed; because in the latter event the lien may be defeated by the vendee conveying to an innocent third person. He also has a variety of remedies. See discussion of the subject in *Sparks v. Hess*, supra. In *Porter v. Brooks*, supra, where the title had passed, and it appeared that the vendee had conveyed to a third party, it was held that the vendor's lien did not bar a writ of attachment, even though it did not appear that the third party was an innocent purchaser without notice. And Justice SAWYER, in an elaborate and learned concurring opinion, reaches the conclusion that the right of a vendor after title has been passed is too shadowy and inchoate to be recognized at all as a "lien" within the meaning of the attachment law. But the discussions on the subject will be found to relate to the right as between vendors and vendees, or the successors of vendees. We have been referred to no case in this state where a vendor's lien has been held to be of any value in the hands of any person other than the vendor himself. Order affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

85 Cal. 277

SCHURTZ v. KERKOW. (No. 13,543.)

(Supreme Court of California. Aug. 4, 1890.)

EVIDENCE—BOOKS OF ACCOUNT.

In an action by the manager of a saloon against the proprietor on a contract that plaintiff should receive half the profits for his services, the books are not the only evidence of the profits, and it is error to exclude the testimony of defendant as to his knowledge thereof.

In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Gottschalk & Luckel, for appellant. *Wells, Guthrie & Lee*, for respondent.

McFARLAND, J. This is an action to recover for services rendered by plaintiff to defendant as manager of a certain restaurant and saloon, called the "Vienna Buffet," under a contract by which plaintiff was to have one-half of the net profits, to be computed monthly. The issue was as to

the amount of the profits between June 1 and September 1, 1888. Such amount was found to be \$2,550.55, for one-half of which, less certain payments, plaintiff had judgment. Defendant appeals from the judgment, and from an order denying a new trial.

1. The principal evidence for plaintiff, aside from parts of a cash-book, consisted of the testimony of one Blackman. He testified that he was an expert accountant; that he made an examination of the books of the Vienna Buffet; and that the examination showed the net profits of the business from June 1st to August 11th to be \$2,262.90. Upon cross-examination he said that, with the exception of some of the items in the cash-book, he did not personally examine the books; that his partner made the detailed examination of the books, and furnished the figures from which he (the witness) made the calculations; and that he had full confidence in the ability and honesty of his partner to furnish the figures from the books correctly. His partner was not examined as a witness, and defendant contends that the evidence does not justify the judgment, because the partner was not called to prove that the figures which he gave Blackman were correctly taken from the books. But defendant did not make any objection to the testimony of Blackman. He did not say that it was hearsay or inadmissible upon any other ground, and he did not move to strike it out. Moreover, the examination was made by Blackman at the request of defendant, and without the knowledge of plaintiff; and Blackman testifies that his statement was shown to defendant and plaintiff and "assented to," although in another part of his testimony he says that defendant disputed it "by saying those could not be the profits," by which we suppose he means that defendant did not deny that the figures were correctly taken from the books, but thought that the calculation must be wrong. Under these circumstances, no objection having been made to the testimony of Blackman, the court had the right to assume that the figures given to Blackman by his partner were correct. This point, therefore, furnishes no ground for a reversal of the judgment.

2. But the court erred, we think, materially in ruling out certain evidence offered by defendant. The court seems to have tried the case upon the erroneous theory that the books were the only evidence as to the profits of the business, and that none other should be received. One or two questions were asked defendant when on the witness stand which were, perhaps, properly objected to on the ground that they called for a conclusion of the witness; but to many questions that objection was not made, and could not have been properly made. For instance, the following questions were asked: "What were the daily expenses of the saloon? What were the profits in the saloon business, and what in the restaurant business, during that time? In what articles are the biggest profits in that business? Are you able, from your knowledge of this business of the Vienna Buffet, and your experience in

the saloon and restaurant business, to state what profits were on the restaurant business as carried on there, and the saloon business as carried on there, from June 2d to September 1st?" To all of these questions the objections were made that they were irrelevant, incompetent, and immaterial, and that the books were the best evidence; and the objections were sustained, except to the question last above stated, which was "taken subject to the objection," and to which the witness answered, "I am." (It does not appear that any ruling was made as to said last question.) Exceptions were taken to the rulings of the court on the questions, and to other similar rulings. While the books were admissible evidence on the issue of profits, they did not exclude other evidence. If the defendant or any other witness knew anything about those profits, he should have been allowed to tell it. Of course mere conclusions or opinions should be excluded. Judgment and order reversed, and cause remanded for a new trial.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.

85 Cal. 329

METZ v. CALIFORNIA SOUTH. R. CO. (No. 13,182.)

(Supreme Court of California. Aug. 4, 1890.)

LOSS OF BAGGAGE BY PASSENGER.

A man traveling alone, and carrying in his trunk for transportation a quantity of ladies' jewelry, cannot recover for the loss thereof against a common carrier.

In bank. Appeal from superior court, San Bernardino county; GIBSON, Judge.

C. W. C. Rowell, Chas. R. Redick, and A. Brunson, for appellant. A. W. Blair, for respondent.

SHARPSTEIN, J. This appeal is from a judgment rendered in favor of plaintiff and against defendant for the sum of \$357, and costs. The only question presented by the record is, do the findings support the judgment? The court finds that, at Kansas City, Mo., in January, 1888, the plaintiff engaged passage on the defendant's railroad to Colton in this state, bought a ticket, paid his fare, and checked his trunk, containing, among other things, one ladies' gold watch and chain of the value of \$150; one ladies' breastpin and ear-rings of the value of \$15; five ladies' gold rings of the value of \$25; one set ladies' small gold ear-rings of the value of \$5; two ladies' silver rings of the value of \$2; one ladies' gold bracelet of the value of \$25,—which the court found to be "proper articles of luggage and baggage for the plaintiff to carry as such." Defendant had no knowledge of said contents when it received and checked said trunk, and assumed no other obligation in relation thereto than such as was imposed by law under the facts above stated; that is, there was no special contract between the parties relating to said trunk and contents. When the trunk was delivered to plaintiff by defendant at Colton the articles above-named, together with other articles, the right to recover the value of

which is conceded by appellant, were missing, and were not, and never have been, delivered to plaintiff. The court further finds that all the articles so lost were carried in said trunk, not for trade, gift, or speculation, but for transportation. The value of these articles is included in the judgment recovered by plaintiff against defendant, and appellant insists that the judgment should be modified by deducting from it the value of said above-enumerated articles. And his contention is that said articles, or none of them, constituted what in law is defined to be "luggage," or "baggage."

Common carriers are required to receive and carry a reasonable amount of luggage for each passenger without charge. Civil Code, § 2180. "Luggage may consist of any article intended for the use of a passenger while traveling or for his personal equipment." Id. § 2181. Before the enactment of this Code courts acknowledged the difficulty of defining with accuracy what should be deemed luggage within the rule of the carrier's liability, and we think this provision of the Code has disincumbered the subject little, if any, of the difficulty which previously surrounded it. If we define the word "equipment" as Webster defines it, viz., "the act of equipping or being equipped, as for a voyage or expedition," it adds nothing to what had long before been understood as comprehended in the term "luggage." In *Railroad Co. v. Swift*, 12 Wall. 272, the court, speaking through Mr. Justice FIELD, said that the contract to carry "only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the queen's bench in *Macrow v. Railway Co.*, L. R. 6 Q. B. 621, where Chief Justice COCKBURN announced the true rule to be "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." It is not found that the plaintiff carried those articles for his personal wear or convenience with reference to his immediate necessities or to the ultimate purpose of his journey, but it is found that he was carrying them for transportation; and it is found that they were proper articles of luggage and baggage for the plaintiff to carry as such. We are not prepared to hold that a gentleman traveling without a wife or other female companion would ordinarily, no matter what his rank or station in life might be, carry as baggage for his personal use or convenience a quantity of ladies' jewelry, or that if he did carry it, and it was lost, he could recover the value of it of a common carrier who had no knowledge of its being among the contents of a trunk which was being carried as luggage. In one case, *McGill v. Rowand*, 3 Pa. St. 451, the supreme court of Pennsylvania

held that where a man was traveling with his wife, whose jewelry was in a trunk which was being transported as baggage, and was lost, the husband was entitled to recover of the common carrier its value. In that case it might well have been held that the jewelry "was intended for the use of a passenger while traveling." The supreme court of the United States, in *Railroad Co. v. Fraloff*, 100 U. S. 24, says: "Whether articles of wearing apparel in any particular case constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling." "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads, and steam-boats, to carry in safety the baggage of passengers, is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveler usually carries with him for his personal convenience." Ang. Carr. § 115. In *Pfister v. Railroad Co.*, 70 Cal. 169, 11 Pac. Rep. 686, this court had occasion to consider the provisions of the Code above cited, but the question in that case was whether a passenger was entitled to carry a large sum of money as baggage. It was held that he was not. But that decision in no way aids us in the solution of the question involved in this case. We are satisfied, however, in this case, that the findings do not support the judgment for more than \$135, the value of the articles lost other than those which we have enumerated above. It is therefore ordered that the judgment be modified by deducting therefrom all over \$135, and the plaintiff have judgment for that sum only, and that appellant recover the costs of its appeal.

We concur: MCFARLAND, J.; WORKS, J.; PATERSON, J.

85 Cal. 58

LATTIN *et al.* v. HAZARD. (No. 13,285.)
(Supreme Court of California. July 28, 1890.)

A complaint for specific performance alleged that, in consideration of benefits to accrue from a steam dummy railroad which plaintiff's assignor agreed to build, defendant made a written contract to execute to him certain notes, and also a deed to five acres of land on the line of the proposed road, and deliver them to a certain bank in escrow, to be delivered to him if he completed the road in a time specified, otherwise to be returned; that said assignor built the road as agreed within the time limited; that afterwards he conveyed to plaintiff all his right to a deed of the land; and that plaintiff had demanded a deed therefor, which defendant refused to make. *Held*, a demurrer to the complaint was properly sustained, since it did not appear therefrom that defendant had not performed his contract by delivering the notes and deed to the bank, or to plaintiff's assignor.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Action by Emma G. Lattin and B. C. Lattin against Henry T. Hazard.

P. W. Dooner and Dooner & Burdett, for appellants. O'Melveny & Henning, for respondent.

GIBSON, C. This is an appeal from a judgment entered upon plaintiffs' failure to amend their complaint after a general demurrer thereto had been sustained. It is alleged in the complaint that plaintiffs are husband and wife; that on March 9, 1887, at Los Angeles, the defendant and sundry other persons, as parties of the first part, and James McLaughlin, as the party of the second part, made and entered into a written agreement whereby the defendant Hazard and others, as parties of the first part, in consideration of the benefits to accrue to them, and desiring to have a steam dummy railroad extended westerly beyond the city limits of Los Angeles into and through the section of country in which their lands were located, and, to secure such an extension of said road, agreed to pay, transfer, and set over unto the party of the second part the sums of money and land aligning the road-way of said road by each subscribed; that H. T. Hazard on his part agreed to convey five acres of land, the same "to be in a compact, nearly square form, * * * situated anywhere in the E. ½ of the N. E. ¼ of section 24, township 1 S., range 14 W., San Bernardino meridian;" that the several amounts of money subscribed were to be evidenced by the several promissory notes of the parties who subscribed money, the notes to bear even date with the contract, and to be payable to the said McLaughlin, or order, at Los Angeles, six months after date, and bear interest at the rate of 10 per cent. per annum from maturity; and the subscriptions of the defendant and others of land were to be by their several grants of land contiguous to the line of said road-way, conveying a clear title in every case to said McLaughlin of the date of the contract, or 20 days thereafter, provided that the notes and deeds should remain in trust and escrow with the Farmers' & Merchants' Bank of the city of Los Angeles, as trustee, and should not be delivered to the said McLaughlin until the completion and operation of the said extension of the said railway, but upon the completion of said work they were to be delivered to the said second party absolutely; that the parties of the first part severally agreed that McLaughlin should have the right to locate the route of his road westerly from the intersection of Diamond street with the city boundary over certain described lands of the said first parties; that they, and each of them, over whose land the route extended, would by deed convey to McLaughlin a right of way not exceeding 30 feet in width, allowing any necessary additional space for curves, they reserving the right to dedicate the land along which the railway should be located for the purpose of a public street; that McLaughlin on his part agreed to extend and construct the road as desired, and commence such construction within 30 days from the date of the contract, and have the same ready for operation within six months from said date; and that, in the event of

his failure to do so, then the notes and deeds in escrow should be returned to the respective makers and grantors absolutely, provided, however, that in case insuperable obstacles should intervene during said six months, of which the bank holding the notes and deeds should be notified, said McLaughlin was to have the additional period of 60 days within which to complete the road; and that the said McLaughlin further agreed that the road should be well and substantially built and operated by a steam dummy for a period of not less than 10 years, and should have a carrying capacity and speed equal to the requirements of the section traversed and the business thereof; and that the rates of fare for a certain specified distance should not exceed 15 cents, and should not be raised for 10 years. It is further alleged upon information and belief that McLaughlin, within the time and in the manner required of him, fully performed said contract upon his part, and on January 10, 1888, and long prior thereto, became and was entitled to a conveyance from defendant of five acres of land aligning the railroad at such place as McLaughlin might select; that on the 10th day of January, 1888, McLaughlin, by his deed of conveyance, sold and conveyed to plaintiff Emma G. Lattin, as her separate property, all his right, title, and interest in and to the land agreed to be conveyed to him by Hazard; that thereafter the said plaintiff demanded of the defendant a good and sufficient conveyance of five acres of land adjoining the road-way of the railroad on defendant's said larger tract, viz., E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, section 24, township 1 S., range 14 W., San Bernardino meridian, but the defendant refused such conveyance; that after such refusal, she, the plaintiff, as she was entitled to do by said contract, selected by metes and bounds a certain tract of five acres within defendant's said larger tract, and aligning the road-way of said railroad, and thereupon demanded of defendant a sufficient conveyance of the same, which land he also refused to convey, or any other land whatever. Then follows a prayer for the conveyance of the five-acre tract selected by the plaintiff Emma G. Lattin; or, if that cannot be had, then for five acres aligning the railroad out of the same larger tract.

The demurrer was properly sustained. There is no allegation that Hazard failed or refused to place in escrow for McLaughlin a properly executed deed to five acres of land within the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 24. The contract provided that the notes and deeds should be placed in escrow with the bank for McLaughlin on the date of the contract, or within 20 days thereafter, and were to be delivered to him upon the completion of the contract on his part. Now, in accordance with the presumption that private transactions have been fair and regular, (Code Civil Proc. § 1963, subd. 19,) we must presume that Hazard made his subscription available by placing his deed to five acres of land in escrow with the bank within the proper time. If he did this, then he was not in default when plaintiff Emma G. Lattin made her several demands upon

him for a deed; and he was justified in refusing to execute a deed to her to what might be an additional five acres of land. By the terms of the contract McLaughlin was required to commence the construction of the road within 30 days from March 9, 1887, the date of the contract, and complete such construction within six months thereafter, unless certain obstacles should intervene, in which case he was to have 60 days' additional time. It is alleged that he completed the construction within the time required. Therefore, assuming that he occupied all the time he was entitled to under the contract, he must have completed the construction on December 7, 1887, more than one month prior to the time he transferred his interest in the land in question to plaintiff Emma G. Lattin. And, for aught that appears to the contrary, McLaughlin may have obtained the deed from the bank before he transferred his interest to said plaintiff. If he did, then by his deed to her she acquired all that she was entitled to. If, however, the deed was placed in escrow, and McLaughlin did not obtain it before he conveyed to plaintiff, his conveyance to her would operate as an assignment of his right to the delivery of the deed as well as a transfer of his interest in the land, and she could have demanded the deed of the bank in order to make the transfer of the land to her effective. If, on the other hand, it had not been placed in the bank, it should have been so alleged in the complaint to show the necessity of demanding a deed of the defendant. Furthermore, the alleged refusals of the defendant are not inconsistent with the presumption that he complied with the contract by placing a deed to five acres in escrow. Consequently it cannot be inferred from the allegations respecting such refusals that the defendant is in default, so as to make the complaint good as against defendant's general demurrer, which could not reach facts defectively stated by way of inference or argument, but only the entire absence of the statement of an essential fact. We therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; VANCLIFF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

85 Cal. 148

PRIETT *et al.* v. DE LA MONTANIA *et al.*
(No. 11,531.)

(Supreme Court of California. July 31, 1890.)

CITY TREASURER—ILLEGAL WARRANTS—LIABILITY ON BOND.

Where the treasurer of a city pays an illegal warrant, knowing it to be illegal, out of money set apart for the payment of the warrant substituted for it, whereby the fund out of which the latter is payable is exhausted, this is a misappropriation of funds for which the sureties on his official bond will be liable. Reversing 22 Pac. Rep. 171.

On rehearing. For former opinion, see 22 Pac. Rep. 171.

Mastick, Belcher & Mactic, for appellants. D. H. Whittemore, for respondents.

Fox, J. After a careful re-examination of this case in bank we are satisfied that, inasmuch as this court did decide in *Priett v. Hubert*, 62 Cal. 17, that the treasurer paid to Tibbey, on warrant No. 92, in "violation of his official duty, and with full knowledge that 92 represented the amount of damages allowed for the property to which the present plaintiff asserted a claim, and that he paid 92 with the money which he himself had set apart for the payment of 114, then on deposit with the county clerk to await the determination of this action," and that such payment was "no more a payment to Hunter than would have been a payment of the sum to a stranger, or an appropriation of it by the treasurer himself," which decision is *res adjudicata*, and has become the law of the case as to that payment, and, inasmuch as such payment was a misappropriation of the fund for which the sureties would be liable if the amount was not made good by the treasurer himself, and there is no proof that he ever did make it good, nor any proof or allegation that there was any misappropriation of the funds of the treasury during Hubert's second term in the office of treasurer,—there is no ground for disturbing the judgment of the court below in this case. It is therefore ordered that the judgment and order appealed from be affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.

85 Cal. 110

BURKS v. DAVIES. (No. 13,513.)

(Supreme Court of California. July 30, 1890.)

VENDOR AND VENDEE—OPTIONS—FAILURE OF TITLE—RESCISSION.

Where one purchases an option on real estate for a sum which is to be forfeited in case the purchase of the land is not closed by a certain date, and the seller is not the owner of the whole title he contracts to convey, the purchaser, on learning of the defect, may rescind the contract and recover the amount paid, though the seller offers after notice of rescission to perfect his title, but fails to do so in time.

Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Haynes & Mitchell, for appellant. Smith, Winder & Smith, for respondent.

PATERSON, J. On August 8, 1887, the defendant executed and delivered to the plaintiff a contract, the material portions of which, so far as this case is concerned, are as follows: "Received of J. H. Burks, one thousand dollars, in purchase of option to buy the undivided one-third of [certain lands particularly described,] * * * said option to be from this date to the 1st day of September next. * * * In case said purchase is made during the time above mentioned, the amount this day received is to be deducted from first payment; but, in case the said purchase is not made in said time, then the amount this day received shall be forfeited, and no part of said option money is to be returned. Time is the essence of this contract." The court found that at the time of the transaction the plaintiff understood

that the defendant was the owner of an undivided one-third of the lands referred to in the agreement, and that the remaining two-thirds were owned by others, and, being desirous of purchasing the whole of the lands, had concluded an agreement with the other parties respecting their interest substantially the same as the one above referred to, of all of which defendant had actual notice; but, as a matter of fact, the defendant and the other parties referred to were not the owners of the entire tract of land. Five acres thereof were owned by George H. Smith. The court found that the defendant had notice at the time of the execution of the contract that Smith was the owner of the five acres, but neglected to communicate the fact to plaintiff, although he knew plaintiff was relying on his ability to purchase the whole of the land, and would not have entered into the contract had he known of the defect in the title. Prior to the 1st day of September plaintiff was notified by Smith of the latter's claim to the land, and, having satisfied himself that Smith's claim was well founded, he promptly rescinded the contract, and demanded repayment of the \$1,000 paid by him to the defendant. The plaintiff had judgment in the court below for \$1,000, and costs of suit, and defendant appealed.

It is said by Sugden, in his treatise on Vendors, that "where a person sells an interest, and it appears that the interest which he pretends to sell was not the true one, * * * the purchaser may consider the contract at an end, and bring action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for sale." It is admitted by counsel for appellant that it is the duty of one who has made an unconditional agreement to sell land to perfect his title at once if he desires to hold the vendee to his bargain, but they claim "no such imperative duty rests upon one who has merely sold an option. His obligation to convey does not arise until the other party has notified him that he intends to purchase. * * * A party need not own property in order to sell an option to purchase it. * * * The plaintiff never could recover the \$1,000 unless he alleged and proved either that the defendant failed to convey after demand and tender of the purchase money, or else some facts which excused such demand and tender on his part." In *Goetz v. Walters*, 25 N. W. Rep. 404, the plaintiff had paid the defendant \$300 as earnest money and a portion of the purchase price, under a contract for the sale to him of a certain piece of property. It was agreed between the parties that if the title to the premises was good, and the property should not be taken on the terms named in the contract, the \$300 should be forfeited. The court said it made no difference whether the words "and it is agreed that if the title to said premises is not good" referred to the date of the contract or to the time for the execution of the conveyance. The court further said: "Assume that the words refer to the time for executing the conveyance.

Clearly that was to be executed whenever, within the time specified, to-wit, thirty days, the plaintiff should pay the \$300, and deliver the horse and buggy. Within that time it was for the plaintiff, and not the defendant, to determine when performance should be required. She could have called for a conveyance within an hour after the contract was executed, her right to do so being subject only to the condition that she make the payments. Upon such a call he would have been entitled to no more time than was reasonably necessary for the execution of the papers. He was bound to be prepared at all times within the thirty days to convey a good title, and, whenever within that time she should ascertain that he had no title, so that it was impossible for him to make a conveyance, she could at once avoid the contract without going to the useless trouble of tendering payment and calling on him to convey. The answer admits that she did so on May 15th. Thereupon it was the duty of defendant to repay to her the \$300." It has been held in England that "where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor is it in his power by the ordinary course of law or equity to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take, for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate." *Tending v. London*, 2 Eq. Cas. Abr. 680. It is a general rule in cases of failure of title, even where the vendor is not at fault, that the purchaser may rescind the contract, and recover any money paid by him as part of the purchase price. *Sanders v. Lansing*, 70 Cal. 429, 11 Pac. Rep. 702; *Marshall v. Caldwell*, 41 Cal. 614. In this case the vendor knew of the defect in his title at the time the contract was made, and made no attempt whatever to secure the title of Smith until after plaintiff had given him notice of rescission.

Under a contract for the sale of real estate the vendee is regarded as the equitable owner, and the vendor a trustee of the legal title for him. If the vendor has no title to the property the vendee is entitled to a rescission. Of course, there are cases in which the vendor is permitted to perfect his title, although he is unable strictly to comply with the terms of his contract. If, though he be not the absolute owner, it is in his power by the ordinary course of law or equity to make himself such owner, he will be permitted within a reasonable time to do so. *Pipkin v. James*, 1 Humph. 325. The defendant received plaintiff's notice of rescission on September 1st, and immediately informed him that he would procure Smith's title if he, the plaintiff, desired to purchase under his option, and thereupon the plaintiff said he would give him 24 hours to procure the title. Defendant, through O'Dea and Stillson, procured from Smith the following written offer: "Los Angeles, September 2, 1887. The Allen tract in lots 1 and 8, block 32, Hancock survey, containing a fraction less than five acres, * * * \$1,500 per acre had

cash, balance interest at 9 per cent. on contract, 12 per cent. on deed and mortgage. Will sell on above terms, unless option heretofore given is taken. GEORGE H. SMITH." On the following day, September 2d, plaintiff again called on defendant, and defendant notified him that if he desired to purchase under his option, he could have the whole of the land, and showed him the above offer, to which the plaintiff replied: "That only shows that you have not got the title." Defendant told plaintiff that if he elected to purchase he would give him a bond, with satisfactory securities, that he should have a good title to the whole of the property. At the request of the plaintiff, defendant produced a later communication from Smith to Stillson, dated also September 2d, in the following words: "Los Angeles, September 2, 1887. C. A. Stillson, Esq.—Dear Sir: With regard to my written proposition to sell the Allen tract, I wish to say that if you have a purchaser ready to close at once I will sell upon the terms proposed; otherwise, please consider the proposition withdrawn. Yours, truly, GEORGE H. SMITH." It thus appears that no attempt was made by the defendant to get title to the five acres until the expiration of the option, and after the plaintiff had rescinded the contract, and, as a matter of fact, the defendant never did succeed in getting title to the property held by Smith, and could not have conveyed it before the expiration of the time given for the exercise of the option. The offer given by Smith to O'Dea and Stillson, seems to have been one subject to an option which had already been given to another party, and it was withdrawn on the day it was made. Under the rule laid down in *Goetz v. Walters*, supra, of the soundness of which we have no doubt, the plaintiff, we think, is entitled to recover the \$1,000. This case is not in any material respect different from the case referred to. It involves the same principles, and it was not necessary for the court to find whether the plaintiff was willing or anxious to take the property. Judgment and order affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

85 Cal. 231

PEOPLE v. ADAMS. (No. 26,646.)

(Supreme Court of California. Aug. 4, 1890.)

HOMICIDE—SELF-DEFENSE—ARREST—EVIDENCE—
INSTRUCTIONS.

1. On the trial of a constable for murder it appeared that deceased had had a quarrel in a saloon; that he went out, returned with a pistol, fired at the other party, without injuring him,

and was immediately disarmed. Defendant testified that he heard the noise, saw deceased go out, and return with the pistol, heard the shot, hurried to the saloon to arrest him, found all the parties talking, and when deceased soon after started out he followed, took hold of him, and told him he was under arrest; that deceased was defiant, threatening, and resisting arrest, and when defendant fired deceased had his hand where he could have drawn his pistol, and defendant thought that if he did not disable deceased the latter would kill him. *Held* that, there being a conflict of evidence as to defendant's knowing that deceased was disarmed, an instruction that "any person making an arrest may take from the person arrested all offensive weapons which he may have about his person" was proper.

2. When a killing is claimed to have been necessary for self-defense, it is proper to instruct that defendant "must have acted under the influence of such fears alone."

3. There was no error in refusing to instruct that it was immaterial whether deceased was armed or not, if defendant believed he was armed; as the circumstances must have been such as to reasonably warrant the belief.

4. Evidence of deceased's quarrel and fight with the other party was properly admitted, as bearing on the question of whether deceased had committed a felony, and whether defendant had a right to arrest him without a warrant, and to kill him if necessary to effect the arrest.

5. It was error to admit evidence that deceased and the other party had made up their quarrel before the arrest was attempted, as it was on this account none the less defendant's duty to make the arrest.

Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Hargrave & Bledsoe and Harris & Gregg, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BEATTY, C. J. The defendant was charged with murder, and convicted of manslaughter. In support of his appeal he assigns error upon various rulings of the court in the admission of testimony and in the giving and refusing of instructions to the jury. To a proper understanding of these exceptions a brief statement of the case is necessary:

The defendant, at the date of the homicide, was a constable. The deceased, John Collins, and one Clarke had been engaged in a quarrel and fight in which Collins was worsted. Collins left the saloon where the fight occurred, went to his home, armed himself with a pistol, and returning to the saloon approached Clarke from behind, and fired one shot at him. The shot failed to take effect, owing to the interference of one Boyle, who struck the pistol aside at the moment of firing, and who immediately disarmed Collins. The defendant testified that his attention was attracted by the noise in the saloon; that he saw Collins go to his house and return to the saloon with his pistol, and that he heard the shot; that he took his own pistol and hurried to the saloon under the impression that Collins had shot some one, and for the purpose of arresting him. In the saloon he found Clarke, Collins, and others, who, after some talk, took a drink together, whereupon Collins started to leave. Defendant followed him outside, took hold of him, and told him he was his prisoner. There is a conflict of evidence as to what ensued. According

to the testimony of the prosecution the defendant shot Collins without excuse or provocation. But the defendant introduced evidence which, if true, showed that Collins was a quarrelsome and dangerous man when drinking; that he had been drinking on this occasion; that on previous occasions he (defendant) had been compelled to threaten Collins with arrest for disturbing the peace; that Collins had declared he never should arrest him alive, and had made other threats which had been communicated to him. And the defendant testified that he did not know that Collins had been disarmed, but believed that he still had the pistol with which he had just assaulted Clarke, and would use it if he had the opportunity. To quote his own words: "His right hand, when I shot, was in a position where he could have drawn his pistol. I thought at the time of firing that if I did not kill Collins or disable him he would kill me. I had no grudge against him." According to the testimony for the defense, the manner, bearing, and words of Collins, at the time defendant attempted to arrest him, were defiant and threatening, and he was resisting the attempt to arrest him. According to the testimony for the prosecution defendant did not distinctly inform Collins of his intention to arrest him, and Collins neither resisted arrest nor threatened violence to defendant. This being the case it is claimed that the court erred in instructing the jury that "any person making an arrest may take from the person arrested all offensive weapons which he may have about his person." The argument in support of this assignment of error is that it must have produced the impression upon the minds of the jury that the failure of defendant to search Collins for arms was a neglect of duty, and that an inference of guilt must be drawn therefrom. We do not think that it could have been so understood, and we can see that the right of defendant to search and disarm the deceased when he first encountered him in the saloon had its bearing upon a very material question in the case. There was a conflict of evidence as to whether defendant knew that Collins had been disarmed, and the jury was entitled to consider the failure to search him when defendant had the right and opportunity to do so as bearing upon the probability of his statement that he had not been informed that Collins' pistol had been taken away.

It is next claimed that the court erred in giving the instruction numbered 12. In this instruction the jury are told that if certain things are proved beyond a reasonable doubt they should find the defendant guilty. Among other facts enumerated in the instruction is this: That the defendant, at the time of the homicide, was constable, and in the exercise of his official duty. It is contended that this fact was matter of defense, and that the court virtually instructed the jury that it must be proved beyond a reasonable doubt. But certainly the instruction does not say so, nor does it necessarily imply it. It tells the jury that if this and

other facts are proved beyond a reasonable doubt they should find the defendant guilty; but it neither says, nor of necessity implies, that he must be found guilty if this fact is not proved by that degree of evidence. Nor do we think that the jury could have understood that, as a matter of defense, it must be so proved.

There was no error in the instructions of the court laying down the law of self-defense. The whole theory of the defense was that the killing was necessary, not for the purpose of making the arrest, but to prevent Collins from killing the defendant. The defendant himself confines his justification to that ground. And, even if he had also made a serious claim that the killing was necessary in order to effect the arrest, it would have been proper and necessary to give the law of self-defense complete, and in doing so to use the expression complained of, viz., that the defendant "must have acted under the influence of such fears alone," confining its application, of course, to this ground of defense. And we think the collocation of the instructions in this case was such, especially in view of the defendant's testimony, that the jury could not have failed to apply the expression complained of exclusively to the plea of self-defense. It is true the court refused to give one instruction asked by defendant, to the effect that a homicide is justifiable when necessarily committed in a lawful attempt to arrest a person who has committed a felony, and this might have prejudiced the defendant but for the fact that another instruction, also drawn by his counsel, in slightly different terms, but in substance the same, had already been given. The instruction so given was in the following terms, and we think covers the whole ground: "The court charges the jury that an officer in making an arrest has the right to use all the force which from the surrounding circumstances seems to him, as a reasonable man, necessary; that he has a right to arm himself and to go armed, and, where the offense charged is a felony, he has a right, if apparently necessary to a reasonable man, to kill the person whom he is seeking to arrest; and he has a right, and it is his duty, to arrest a man who has committed a felony, with or without a warrant."

The court did not err in refusing to instruct the jury that it was immaterial whether Collins was armed or not if defendant himself believed he was armed. The defendant's belief that Collins was armed would not justify him in acting upon such assumption unless the circumstances were such as reasonably to warrant the belief. With this necessary qualification, the instruction was substantially included in the charge of the court. Nor did the court err in admitting evidence as to the quarrel and fight between Clarke and Collins. This had a necessary bearing upon the question whether Collins had committed a felony, and whether defendant had a right to arrest him without a warrant, and to kill him if necessary to effect his arrest. The effect of the testimony could only have been favorable to the defendant.

The testimony of the justice of the peace that he had issued no warrant for the arrest of Collins was perhaps immaterial, but its admission cannot have been at all prejudicial to the defendant. But the testimony which was admitted, over the objection of defendant, for the purpose of showing that Collins and Clarke had made up their quarrel and become reconciled before defendant attempted to make the arrest, was immaterial, and, since the only use that could be made of it was to argue that no arrest was necessary, it must have been prejudicial. If Collins had committed a felony it was the duty of the defendant to arrest him, no matter how complete the reconciliation between him and the man he had assaulted. It was a vital point to the defense to show that the defendant was doing his duty at the time of the homicide, and any incompetent evidence submitted to the jury for the purpose of showing that he was transcending his duty or exceeding his rights as an officer was prejudicial error. In this instance the error might perhaps have been cured if the court had given the instruction asked by the defendant to the effect that it is the duty of an officer to arrest a person who has committed a felony, even though the parties concerned may have attempted to settle it. But this instruction was refused.

It was also error to refuse the instruction that if the testimony of Boyle and Clarke was true Collins had committed a felony. According to their testimony, he had undoubtedly committed felony, and if so it was the undoubted duty of defendant to arrest him and to use sufficient force for that purpose. This, as we have said, was a vital point in the defense, and the defendant was entitled to have the law affecting it given to the jury. For the error of the court in refusing these instructions, the judgment must be reversed, and the cause remanded for a new trial. It is accordingly so ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.

85 Cal. 39

PEOPLE v. LEVINE. (No. 20,572.)

(Supreme Court of California. July 21, 1890.)

CRIMINAL LAW—ALIBI—EXPERIMENTS IN COURT.

1. On a trial for arson, where the judge charged that it was for the jury to decide as to the truth of an *alibi*, interposed as a defense, "giving the defendant the benefit of every reasonable doubt," and has further fully charged on the burden of proof, and the subject of reasonable doubt, a verdict of guilty will not be set aside because he also charged that the proof offered to sustain the *alibi* should be subjected to a rigid scrutiny. PATERSON and WORKS, JJ., dissenting.

2. The trial judge is not bound to stop proceedings in order to try an experiment in open court as to the length of time it would take a candle to burn down to the point of some discovered after the fire on the premises attempted to be burnt; but, in his discretion, he may admit proof of such an experiment.

In bank. Appeal from superior court, Los Angeles county; J. W. MCKINLEY, Judge.

On rehearing. For the facts, see opinion in department, 22 Pac. Rep. 969.

Payton & Grant, (Max Loewenthal, of counsel,) for appellant. G. A. Johnson, Atty. Gen., and Frank P. Kelly, Dist. Atty., for the People.

Fox, J. In the petition for and in the argument upon rehearing, it is suggested that in department we fell into error in relation to the evidence in regard to the pieces of candle left at the saloon by the plumber. We stated that he left three half candles there, and that three pieces of candle were found at the time of the fire. Our attention is now called to the fact that, according to the testimony of the plumber himself, he left one whole candle, a half candle, and a piece of another half candle; and that, according to the other evidence, only two pieces of candle were found at the time of the fire, one burning, and the other extinguished. We accept the correction of an error into which we were led by a statement found in one of the briefs examined after we had read the evidence, but we are unable to perceive that the error was prejudicial to defendant. To our minds, the evidence as corrected rather strengthens than weakens the case of the prosecution. More candle remains unaccounted for than we at first supposed, and if the candle which was found burning half or three-quarters of an hour after the fire was discovered was whole when lighted, that fact will account for its having lasted so much longer than the other pieces, without resorting to any chemical considerations whatever. As requested, we have carefully re-examined the evidence, and after such examination we still fail to see how we can disturb the verdict on the ground of insufficiency of the evidence. Upon the decision in department, we were not free from doubt as to the correctness of instruction 10%, and we readily acquiesced in the prayer for a rehearing that the case might be further considered upon that point. That instruction reads as follows, —the portion of it which we place in italics being the portion to which exception is taken: "*One of the defenses in this case is called an 'alibi,'—that is, that the accused was elsewhere at the time the offense is alleged to have been committed. If this is true, it being impossible that the accused should be in two places at the same time, it is a fact inconsistent with the charge sought to be proved, and excludes its possibility. This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny; because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive as of circumstantial evidence.* In considering the strength of the evidence necessary to sustain this defense, it is obvious that all evidence tending to show that the accused was in another place at the time of the offense is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and act-

ually committed it. In this conflict of evidence whatever tends to support the one tends in some degree to rebut and overthrow the other, and it is for the jury to decide where the truth lies, giving the defendant the benefit of every reasonable doubt."

It is claimed that this charge is in direct conflict with, and overrules, the decision of this court in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549. We are unable to discover in the whole or any part of this charge any such conflict, or to see how it can work any such result. There is certainly nothing in the language adopted by the court below tending towards advising the jury that the defense of *alibi* must be made out by a preponderance of evidence, or to change the rule laid down in the *Bushton* Case that, "if upon the whole case they entertained a reasonable doubt from the evidence, as to his guilt, he should be acquitted." So far from this, the charge concludes with the express direction that "it is for the jury to decide where the truth lies, giving the defendant the benefit of every reasonable doubt." Stripped of their context the words which we have italicized in our quotation of the charge as a whole, though not new in such a place, would be objectionable. They have been both approved and condemned by able jurists at different times, and in different states. If they had been given in this case free from all their context, and the case was one where we could conceive it possible that the verdict turned upon the question of the truth or falsity of the evidence given in support of the defense of *alibi*, we should be inclined to hold that the instruction was erroneous to a degree that entitled the defendant to a reversal of the judgment; for the defense of *alibi* is, in our judgment, not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause. But the remaining portions of the charge are such that when given as a whole, as it was, it is hardly possible that an intelligent jury could have been misled by it. This is particularly so when we read, as we do, in charge No. 20: "The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty. If upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal." And in 21 and 22: "In the decision of a criminal case there must be more than a preponderance of evidence. It would not be sufficient to justify a conviction if the jury should be satisfied of the guilt of the defendant to such a moral certainty as would influence their minds in the important affairs of life. But the evidence must entirely satisfy the jury of the guilt of the defendant before they can convict. If the jury are not entirely satisfied, they should acquit." With such a context as these instructions afford, followed by 13 instructions carefully prepared by, and requested by, the defendant, which included all that he asked, it is hardly possible that the

words objected to in, and forming only a small part of, instruction 10% could have misled the jury. This is the more particularly so since there is no conflict in, or contradiction of, the evidence offered by the defendant tending to prove an *alibi*. The prosecution made no attempt to impeach the truth of that evidence, but accepting it as true relied upon the proposition that the train was laid, and the candles lit, before he closed the saloon for the night. The question for the jury to determine was whether the evidence was sufficient to support this theory beyond a reasonable doubt. It is in view of this theory of the case that appellant insists that it was error to admit the evidence of what is termed the "candle experiment." We held in department that the admission of this evidence was entirely in the discretion of the court; that the court was not bound to suspend the trial to try the experiment over again in the presence of the jury, as the court would undoubtedly have received evidence of other experiments made for the same purpose, if any such had been offered.

The proof of the result of experiments was equally as open to the defendant as the prosecution, and if other experiments would have shown a different result from that shown by the experiment proved by the prosecution, the defendant had ample opportunity to show the fact. The books are full of authorities sustaining the court in admitting evidence of the result of experiments in chemistry, in toxicology, and particularly in the use of fire-arms, for purposes similar to that for which this evidence was admitted. It has been quite a common thing in cases of homicide to make experiments with fire-arms to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by fire-arms of certain pattern and caliber, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused. The experiment in this case was one of a similar character and for a similar purpose. Its result was not conclusive, but a mere circumstance to be considered in connection with the other evidence in the cause. It was both competent and admissible; its weight was for the jury to determine. We cannot agree with counsel that it was the "material and effective" evidence in the cause. The material and effective evidence on that branch of the case was the substantive fact of the candles themselves, and the condition in which they were found. They and the coal oil with their surroundings were tangible things, rendering it certain that the fire was incendiary, and the proof in relation to them, independent of any proof of the result of experiment, was "the material and effective" proof in the case. We are also reminded of the age and of the reputation of the defendant, and of the severity of his punishment. His age and reputation were matters addressed to, and undoubtedly considered by, the jury. Notwithstanding them the jury have found against him, and on evidence of such a character that we are not at liberty to disturb their verdict. In view of his age

and reputation, the severity of his punishment may excite our sympathies, but it cannot control our judgment. The penalty imposed by the court below was not in excess of that prescribed by law; and upon the assumption of his guilt, upon which alone any penalty could be imposed, no mild punishment would have been commensurate with the offense; for it was no light offense to attempt, at midnight, to burn a hotel, in which more than 100 people were sleeping. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPESTEIN, J.; MCFARLAND, J.; THORNTON, J.

We dissent on the ground that the court erred in giving instruction 10%. PATERSON, J.; WORKS, J.

85 Cal. 119

In re BELL'S ESTATE. (No. 13,113.)

(*Supreme Court of California.* July 30, 1890.)

LEASE—INSOLVENT—RENT.

The lessee under a lease for a term of months, providing for the payment of certain rent on a certain day in each month, and that in case of default for five days the lessor might enter and terminate the lease, left the premises, and repudiated the lease, being half a month in default. He soon afterwards became insolvent. The lessor immediately entered and tried, without success, to relet the premises, but did not consent to the abandonment, or in any way release the lessee from the lease. *Held*, that the lessor's claim was not for damages, the obligation to pay which was mature before the insolvency, but for rent due, or to become due, within Insolvent Act Cal. 1880, § 42, providing that where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

J. E. Deakin, for appellant. Hendricks & Younkin, for respondent.

VANCLIEF, C. This is an appeal from an order rejecting in part the claim of T. J. E. Scoones against the estate of the insolvent under the following circumstances: Scoones executed to Bell a lease of a certain room in San Diego for the term of 27 months, from January 15, 1888, at the monthly rent of \$225, payable monthly, in advance, on the 15th day of each month during the term, the lessee covenanting to pay the rent and to quit and surrender possession at the expiration of the term, or any sooner determination of the lease, and also that in case of default in payment of rent for five days the lessor, at his option, may re-enter and terminate the lease. Bell entered into possession under the lease and paid the rent until July 15, 1888; but on July 29, 1888, he left and vacated the premises, declaring his intention to abandon the premises and to repudiate the lease, and to pay no further rent. Upon the vacation of the premises by Bell the lessor (Scoones) re-entered, and endeavored to relet the premises without delay, for the residue of the term, for the benefit of Bell, "but in so doing did not in

any way release or discharge the said Bell or his estate from any liability under the covenants of said lease." Scoones did not relet the premises, however, but states in his affidavit that they are now of no greater rental value than \$75 per month, and that he will not be able to let the same during the remainder of the term for more than \$75 per month, "whereby he is damaged in the sum of \$3,675." His claims, which he asks the court to allow against the estate of the insolvent, are \$112.50 for rent due under the lease from July 15th, until August 1, 1888, and \$3,675 for "damages sustained by him by reason of the said insolvent's repudiation of the said lease and breach of covenants of the same."

The court allowed the claims of \$112.50 for rent, but rejected the claim of \$3,675 for damages. In this I think the court did right. Section 37 of the insolvent act of 1880, provides: "All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing, but not payable until a future time, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the debtor." Section 42 of the same act is as follows: "Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods." These are the only sections of the act having any direct bearing on the question under consideration. It is admitted by counsel for appellant that if Bell had not abandoned the lease and vacated the premises before the adjudication of his insolvency Scoones could not have been allowed to prove, as a debt against the insolvent's estate, anything more than the proportionate part of the rent up to the adjudication of insolvency, as provided in section 42 of the insolvent act, which amounted to \$112.50, and which was allowed by the court; but counsel insists that the lessor's claim of \$3,675 is not for rent due or to become due, under the terms of the lease, but that it is for unliquidated damages for a breach of covenants of the lease before the adjudication of insolvency, the obligation to pay which was mature before the adjudication of insolvency; and therefore that the claim was provable as a "debt due" in the sense of section 37 of the insolvent act. This attempted distinction cannot be maintained. The lessee was not discharged from the obligation of his covenant to pay rent by an abandonment of the lease without lawful cause or consent of the lessor; and it appears that there was no justifiable cause for the abandonment, and that the lessor did not consent thereto, or "in any way release or discharge the said Bell or his estate from any liability under the covenant of said lease." Therefore the lease still subsisted in full force, though no rent had been paid for the month commencing July 15, 1888. For this default in payment of rent the lessor was only entitled to the ordinary remedies on the

covenants of the lease. The abandonment of the premises and declaration of intention not to pay any more rent by the lessee without the consent, express or implied, of the lessor, did not change the relation of lessor and lessee, nor add anything to the ordinary remedies for breach of the covenants of the lease; although, in such case, the lessor might have relet the premises for the benefit of the original tenant. See cases cited to sections 128, 176, Gear, Land. & Ten.

The record discloses nothing to relieve this case from the full operation and effect of section 42 of the insolvent act, with which the court strictly complied by allowing the claim for rent up to the time of the insolvency. I think the orders should be affirmed.

WE CONCUR: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

85 Cal. 93

In re ESCHRICH'S ESTATE. (No. 13,485.)

(Supreme Court of California. July 30, 1890.)

GUARDIAN AND WARD—ACCOUNTING—ALLOWANCE FOR BOARD.

A guardian collected the money of his wards, used it, and did not attempt to account for it until compelled to do so, 10 years later. When the guardian was appointed the wards were living with their elder brother, and continued to live with him thereafter. As soon as the guardian was cited to account, he, without any demand being made, proposed to pay the brother for the wards' board, and gave him his note for a certain amount therefor. There was no evidence that there was any agreement for any board to be paid, or that the elder brother claimed anything, or that their keeping was worth anything above what their work was worth to him. *Held*, that the court properly disallowed the claim for board, and charged the guardian with compound interest on the money received by him.

In bank. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Wells, Guthrie & Lee, for appellant.
Dupuy & Bentley and *Antonio Orfila*, for respondents.

WORKS, J. William Moore was appointed the guardian of Albert C. and Charles Eschrich, and as such guardian received from the sale of certain lands belonging to them the sum of \$1,000, one-half of which belonged to each. He allowed several years to pass without taking any steps in the matter of his trust, and used this money for his own purposes. On the petition of his wards he was cited to appear and render an accounting. He filed his account, in which he charged himself with \$1,000, and gave himself credit for \$312 alleged to have been paid for two years' board for Charles, and \$468 alleged to have been paid or three years' board for Albert. He also gave himself credit for \$75 for two cows furnished to Charles. These items were disputed, and the court disallowed the claims for board, and allowed only \$50 for the cows. The court also charged the guardian with 7 per cent. interest on the money received by him, with annual rests. The guardian appeals from and complains of these rulings.

The evidence shows that at the time of Moore's appointment as guardian his wards were living with their elder brother, Fred Eschrich, and that they continued to live with him afterwards. The evidence of Moore tends slightly to show that he stated to Eschrich that the keeping of the boys would be paid for, but his recollection of any such promise seems to be very uncertain. And, whether he agreed to pay for their keeping or not, he did not do so before this proceeding was instituted, and, according to Moore's own testimony, Eschrich made no demand upon him for any such payment, nor did he claim that he was entitled to compensation for their keeping. Moore was appointed guardian February 14, 1877, and during the same year received the amount of money above mentioned. This proceeding was commenced December 1, 1888, more than 10 years later. As soon as the petition was filed Moore, without any demand having been made upon him by Eschrich, or any claim being made by him against his wards, hunted Eschrich up and proposed to settle with him for his brothers' board, and upon settlement gave Eschrich his note for \$780. There was no evidence that any fixed amount was agreed upon to be paid to Eschrich in the beginning, nor is there any evidence as to what their keeping was worth, or that it was worth anything over and above what their work was worth to him. Under these circumstances the court below was clearly right in disallowing these claims.

As to the amount allowed for the cows, the evidence was conflicting as to their value, and we cannot disturb the finding on that issue. The evidence shows that Moore had converted the money of his wards to his own use, and had used it for a number of years without accounting for it in any way. Under such circumstances he was properly charged with the interest compounded annually. *Estate of Stott*, 52 Cal. 403; *Estate of Clark*, 53 Cal. 355; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. Rep. 1176. The cases cited relate to executors and administrators, but the rule must be the same as to guardians, under the circumstances of this case.

It is further contended by the appellant that the court below erred in excluding certain evidence offered. Fred Eschrich was called as a witness for the appellant, and testified that he had presented his account to the guardian "a winter or so ago." The court remarked that the claim had been "outlawed." The counsel for appellant then asked: "Would the court hear evidence with regard to his keeping those boys?" And the court said that he did not care to hear any evidence on that point. There was no formal offer to prove any fact, or any question asked and not allowed upon which an exception could have been reserved. There did not seem to be any dispute about the witness having kept the boys, and no further evidence was needed on the point. We cannot say, therefore, that there was any error committed in this ruling for which the judgment should be reversed. The conclusion reached by the court below seems to us to have been just and right. The guardian

had collected the moneys of his wards, used it, and did not attempt to account for it until forced to do so by the court, 10 years later. Such having been his conduct, he is not entitled to anything more than the strict letter of the law allows him. Judgment affirmed.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

3 Cal. Unrep. 282

BUCKLEY v. ALTHOFF. (No. 13,824.)

(*Supreme Court of California*. July 28, 1890.)

APPEAL—PRACTICE—STATEMENT ON APPEAL.

A motion on the minutes for a new trial having been overruled the only statement that could then be pending is a statement on appeal, and the time for that having expired, and no transcript having been filed in the time limited, the appeal will be dismissed.

In bank. Appeal from superior court, city and county of San Francisco.

Hassett & Tevlin, for appellant. *Gunnison & Booth*, (Chas. J. Heggerty, of counsel,) for respondent.

PER CURIAM. When the notice to dismiss the appeal in this case was given, no transcript had been filed, and the time within which the party was required to file the same had fully expired. It had not been extended by any stipulation or order of court, nor was there pending for settlement any statement on appeal or bill of exceptions, and the time for presenting such statement or bill of exceptions had passed. Appellant attempts to show that there was pending for settlement a statement on motion for a new trial, but that motion had already been heard and determined on the minutes of the court, and the only statement which could then be pending, if in time, was a statement on appeal. But no statement, either on motion for new trial or on appeal was presented until after the notice of this motion, and the time for the presentation, even of statement on appeal, had already expired. The appeal must, therefore, be dismissed, and it is so ordered.

85 Cal. 86

PEOPLE v. AYHENS. (No. 20,657.)

(*Supreme Court of California*. July 30, 1890.)

CRIMINAL LAW—LIMITATIONS—DEMURRER.

1. Pen. Code Cal. § 801, providing that an information for a misdemeanor must be filed within a year, bars prosecution of an accused taken before a magistrate who, at his request, continued the hearing from time to time until the year expired, when he was bound over, and an information filed.

2. Under Pen. Code Cal. § 1004, providing that the accused may demur when the information discloses a legal bar to the prosecution, a demurrer lies if it charges the commission of a misdemeanor more than a year before its filing.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

J. M. Wilcoxon, for appellant. Wm. Shipsey, Graves, Turner & Graves, and Geo. A. Johnson, Atty. Gen., for respondent.

BEICHER, C. C. The defendant was charged with the crime of obtaining prop-

erty by false pretenses. The information against him was filed in the superior court on the 17th day of October, 1889, and it alleged that the crime was committed on the 26th day of June, 1888. The defendant demurred to the information upon the ground, among others, that the prosecution was barred by the provisions of section 801 of the Penal Code. The court sustained the demurrer, and dismissed the case, and the people appeal.

1. The Penal Code made the offense charged, at the time of its alleged commission, a misdemeanor, (sections 17, 533,) and it provided that an information for any misdemeanor must be filed within one year after its commission, (section 801.) It is, however, argued for appellant that the "information" referred to in the above section is the complaint made before a committing magistrate for the issuance of a warrant of arrest, and that as the complaint in this case was filed within a year the prosecution was not barred. The constitution provides as follows: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law." Article 1, § 8. And the Penal Code contains the following provisions: "The complaint is the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense." Section 806. "When a defendant has been examined and convicted, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense." Section 809. "All public offenses triable in the superior courts must be prosecuted by indictment or information," etc. Section 888. "The first pleading on the part of the people is the indictment or information." Section 949. From these provisions it very clearly appears, we think, that the information spoken of in section 801 is the paper required to be filed in the superior court, and not the one filed before the magistrate.

2. It appears from the bill of exceptions that the complaint was filed on February 11, 1889; that a warrant was issued, and the defendant was arrested and brought before the magistrate on the 25th of the same month, and that thereafter the examination was proceeded with, and continued from time to time, at the request of defendant, until September 30, 1889, when it was concluded, and the defendant held to answer. It is claimed that as the continuances were granted at the request of the defendant he thereby waived the filing of the information within the time limited by the statute, and therefore cannot now raise the objection. But the statute is imperative that the information must be filed within a year after the commission of the offense, unless the defendant has been absent from the state. Section 802. As well might it be claimed that the bar of the statute could not be invoked if

the defendant had persuaded the district attorney to delay filing the information until after the year had expired, or had concealed himself within the state, and thus prevented his arrest and prosecution within the year.

3. It is further contended that the question could not be raised on demurrer. But the Code provides that "the defendant may demur to the indictment or information when it appears upon the face thereof * * * (5) that it contains any matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution." Section 1004. We see no error in the rulings of the court, and therefore advise that the order and judgment be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment are affirmed.

(85 Cal. 322)

McLAUGHLIN v. CLAUSEN. (No. 13,298.)
(*Supreme Court of California*. Aug. 4, 1890.)

ACTION ON NOTE—ESCROW.

In an action on a note, an answer alleging that the note was executed in consideration of the extension of a street railroad by the payee, and deposited with a bank, with the stipulation that it was not to be delivered until the condition was fulfilled, but that the road has not been so extended, is not demurrable. *PATERSON, J.*, dissenting.

In bank. Appeal from superior court, Los Angeles county; *WALTER VAN DYKE*, Judge.

Gage & Robarts, for appellant. *Dooner & Burnett*, for respondent.

WORKS, J. This is an action upon a promissory note for \$400, dated December 27, 1887, and payable four months after date with interest from maturity. The answer admits the making of the note, and that plaintiff is the owner thereof, and that no part of it has been paid, and then, by way of avoidance, alleges that on the day of its date "the plaintiff and defendant made and entered into the following contract." A copy of the contract is then set out, and in it 20 persons, the defendant being one of them, are named as parties of the first part, and the plaintiff is named as party of the second part. The substance of the contract is that the parties of the first part, in consideration of the advantages to be derived by them from the extension and operation of a certain steam-dummy railroad, from a point named to another point named, agree to pay to the party of the second part the sum of money subscribed by them, set opposite their names. Each of the sums is to be evidenced by two promissory notes of the subscriber, one payable two months after the date thereof, and when the grading is done and the iron is on the ground, and the other payable four months after its date, and on completion of the road. The road is to be extended from its present terminus to the other point named "within four months, weather permit-

ting." The notes, when executed, are to be deposited with George H. Bonebrake, at the Los Angeles National Bank, to be held in trust until the conditions specified in the contract shall be performed by McLaughlin, and the certificate of the constructing engineer of the road that the conditions have been performed shall be served upon the said trustee. Upon the delivery to the trustee of the engineer's certificate that the grading is done and the rails are on the ground the two-months notes are to be given to McLaughlin, and upon a like certificate that the road is completed and in running order the four-months notes are to be given to him. The contract is signed by three of the parties named therein, as parties of the first part, and by McLaughlin, but not by the defendant. After setting out the contract *in hæc verba*, the answer proceeds to allege that the note in suit "was made and given by this defendant to the plaintiff, in pursuance of, and on the conditions set forth and expressed in, said contract, and not otherwise, and for no other or different considerations in said contract than those by the plaintiff covenanted to be by him carried out on his part." It is then further alleged that the plaintiff did not carry out the contract nor comply with the conditions thereof in this: that he did not have the railroad mentioned therein extended to the point designated within four months after the signing of the contract and note, nor until the 1st day of August, 1888, and that he was not prevented by stress of weather, or otherwise unavoidably prevented from so doing; that, as defendant is informed and believes, the constructing engineer of the road did not certify to the trustee named in the contract that the grading provided for in the contract, and to be performed by the plaintiff, had been done, and the rails placed on the ground, or that the road or any part thereof had been completed or was in running order; that the said note, in contravention of the terms of the contract, was delivered by the trustee of the plaintiff before the road or any part thereof was completed or in running order; that, if the plaintiff had completed the road and operated the same as in the contract provided, "the defendant would have been able to have sold his property, then and now held by him, and through which said railroad was planned and laid out, at a greatly enhanced price over what it was then worth without said railroad, and over what it is now worth with said railroad extended over, upon, and through said land; that this defendant could, during the month of December, 1887, and before signing said contract and note, have sold his said land at a greater price than he could at the time of the alleged completion of said road or at any time since;" and, "that the defendant has never received any adequate or any consideration from the plaintiff for the making or giving of the said promissory note." The prayer was that the plaintiff take nothing by his action. A general demurrer to the answer was interposed and sustained, and, the defendant declining to

amend, judgment was entered against him. From that judgment he appeals.

It is argued for appellant that the note and contract must be read together, as parts of one transaction, and that when so read it appears that the promise on the part of the defendant to pay his subscription, and the promise on the part of the plaintiff to complete the road within four months, were mutual and dependent promises; and that the averments of the answer are admitted by the demurrer to be true, and from them it appears—*First*, that the note was executed without any sufficient consideration therefor; and, *second*, that the consideration for its execution, if any, had failed, because the road was not completed within the time agreed upon. The demurrer to the defendant's answer should have been overruled. The contract set out in the answer provided in express and unequivocal terms, not only that the notes should not be paid until the completion of the road, as therein provided, but that they should be held by Bonebrake, trustee, and not delivered until such condition was complied with. Therefore, if the allegations of the answer be true, and the demurrer admits them, these notes never became binding upon the defendant. They were delivered in violation of the terms of his contract, and, as against him, never became fully executed. It does not present the mere question whether the stipulation that the road should be completed and running within a certain time was of the essence of the contract, and therefore the case of *Railroad Co. v. Butler*, 50 Cal. 574, is not directly in point. The completion of the road was by the terms of the contract made an absolute condition precedent, and until such completion, the note could not be delivered or take effect, nor could its payment be enforced when delivered. But, if the case above referred to can be construed as against the view here taken, we are satisfied that it should be overruled. Judgment reversed, with instructions to the court below to overrule the demurrer to the answer.

We concur: BEATTY, C. J.; FOX, J.; THORNTON, J.

PATERSON, J., (*dissenting*.) I think the judgment should be affirmed. The note imports a consideration, (Civil Code, §§ 1614, 1615,) and the contract shows that the consideration for which it was given was "the advantages to be derived from the extension and operation of said railroad." Time was not expressly declared to be of the essence of the contract, and I do not think it can be fairly said that it was intended to be so. The note itself is an absolute promise to pay, and there is nothing in the contract to indicate that payment was to be made only on condition of strict performance. The road was completed in about three months after the time named for its completion, "weather permitting." The cause of the delay is not shown, but certainly the delay was not long. I am unable to distinguish this case from the case in 50 Cal. 575. That was an action brought to recover a sum of money, subscribed by the

defendant therein, to aid in the building of a street railroad, under a contract which provided that the road should be completed in six months. It was nearly three months after the time stipulated in the contract before the road was completed. It was held on appeal that, where property holders contract with a railroad company to pay it certain sums of money, if within a certain time it constructs a railroad, the fact that the road is not built within the time named in the contract is not an excuse for the non-payment of the money, if the road is actually built, but the subscribers will recoup the damage they sustain by the failure to complete the work in time; that courts should not construe stipulations in a contract as conditions precedent unless the language thereof clearly shows them to be such, because such a construction prevents the court from dealing out justice to the parties according to the equities of the case. In the case before us we have an instance of the injustice of departing from the rule of construction applied in that case. The defendant herein believed that the extension of the road would be to his advantage, and he therefore made his subscription, and executed his note for the sum subscribed. The road has been built, and he has received the benefit thereof. The delay may have prevented him from securing all of the benefit which he would have received if the road had been built promptly on time. It may have been occasioned by fortuitous circumstances beyond the control of the plaintiff. The rights of the parties would be protected, and justice dealt out according to the equities of the case, by holding, as it was held in the case referred to, that, if the defendant "has sustained damages by the delay, he is entitled to recoup to that extent against the claim of the plaintiff."

85 Cal. 137

WALKERLY V. BACON *et al.* (No. 13,018.)
(Supreme Court of California. July 31, 1890.)

ADMINISTRATION—ALLOWANCE OF PART OF CLAIM
—ESTOPPEL—TRUST.

Decedent received an estate subject to a trust to pay plaintiff \$10,000. The executors allowed and the probate judge approved the claim for \$5,000 only. Plaintiff filed his claim for \$5,000, under Code Civil Proc. Cal. § 1497, providing that where a claim is allowed and approved it shall be filed within 30 days thereafter. *Held* that, though the claim allowed and filed had the force of a judgment, plaintiff, not having accepted the \$5,000 in full satisfaction of his claim, was not estopped from maintaining his bill to enforce the trust as to the other \$5,000.

PATERSON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

R. B. Wallace and B. B. Newman, (*Kellogg & King*, of counsel,) for appellant. Mastic, Belcher & Mastic, for respondents.

PER CURIAM. This is a bill in equity against the executors of the last will and testament of William Walkerly, deceased. Decedent was the sole devisee of Martin Walkerly, deceased, and as such received on distribution the entire estate left by

said Martin, amounting to about \$200,000. It is alleged and the court finds that he accepted and received this estate subject to a parol trust to pay out of said estate to the plaintiff in this cause the sum of \$10,000. William Walkerly died without having executed the trust by paying the said \$10,000 or any part thereof, and his estate passed to his executors, subject to the trust. In this state of the case the plaintiff presented a formal claim against the estate for said \$10,000 to the executors for allowance. They allowed it for \$5,000 only, when it was presented to the judge of the proper court, and by him approved for the same amount, and it now stands as an allowed claim for \$5,000 against the estate, having the force and effect of a judgment payable in due course of administration. This bill is filed to enforce the trust against the estate and the executors as to the remaining \$5,000. The court finds all the facts in favor of the plaintiff, and specially finds that the plaintiff did not intend to waive his claim to the balance of \$5,000 of his \$10,000 claim, by any of the acts alleged in the complaint and answer herein, and has never received any money whatever from the defendants, or the estate of William Walkerly. It also finds that the claim is not barred by the statute of limitations, and is not stale. It then finds "as conclusion of law from the foregoing facts, in connection with the admissions of the pleadings herein, that the acceptance by the plaintiff herein of the partial allowance of the claim presented to the defendants prevents his recovery in this action, and that defendants are entitled to judgment for costs herein." The case comes up on the judgment roll. Under the admissions of the pleadings and the facts found we see no good reason for this conclusion of law. The plaintiff might have filed his bill to declare and enforce the entire trust for the full sum of \$10,000, no part of the same having yet been paid, but the executors having acknowledged it, and, in conjunction with the judge of the court sitting in probate, given it the force and effect of a judgment payable in due course of administration of a perfectly solvent estate, to the extent of one-half of the amount, he seeks in this action only to have it declared and enforced as to the remaining half. Under the facts found he seems entitled to that relief. Until demand of the executors he could not have maintained his action. If upon making such demand they allow, or even pay over, a part of the trust fund, that fact will not estop him from claiming the balance, unless he accepts the same in full satisfaction of the demand, and the findings do not support any such theory. The demand having been allowed in part it was the duty of the claimant to file it in the court within 30 days, to be paid in due course of administration. Code Civil Proc. § 1497. But we know of no statute which estops even a single creditor from bringing his action for that which was disallowed him simply because he has performed a duty required of him by law, in filing with the records of the estate the allowance which was made in his favor. If he would not be thus estopped in an action at law, why

should he be upon a claim which, if resisted, can be enforced only in equity? "Equity is not bound to the strict legal rights of the parties, but will take into consideration all the circumstances, in order to arrive at the justice of the case." *Johnston v. Savings Union*, 75 Cal. 134, 16 Pac. Rep. 753. In this case the executors might, with propriety, have disallowed the entire claim on the ground that it was one to be established in equity, if at all. If they had done so the action would not have been at law, as in the case of a simple creditor, but, as now, in equity to enforce the trust for the full amount. They having, however, allowed a part of the claim it is sought to enforce all that it remains necessary to enforce to protect the rights of the plaintiff in the only place where it could be done—a court of equity. We think he has the same right to relief as to this part that he would have had as to the whole, if his claim had been rejected *in toto*, and in such case there can be no question that under these findings he would have been entitled to judgment and decree in his favor. Judgment reversed, and cause remanded with instructions to enter judgment on the findings in favor of the plaintiff as prayed.

PATERSON, J. I dissent. An entire demand cannot be thus split up into several causes of action. The claim allowed and filed for \$5,000 has the force of a judgment, (*Estate of Glenn*, 74 Cal. 567, 16 Pac. Rep. 396,) and is a bar to this action for the balance, (*Zirker v. Hughes*, 77 Cal. 235, 19 Pac. Rep. 423; section 1503, Code Civil Proc.)

85 Cal. 304

STORCH v. McCAIN *et al.* (No. 13,501.)

(Supreme Court of California. August 4, 1890.)

AGENCY—POWER TO SATISFY MORTGAGE—ADMISSION OF EVIDENCE.

1. In an action to foreclose a mortgage it appeared that the note was indorsed in blank by plaintiff, and sent to a bank for collection, with instruction to turn it over to one B. in case it was not paid promptly; that the bank gave the note to B., and the latter agreed to and did take a conveyance of land from defendant to plaintiff, and in consideration thereof surrendered the note to defendant, and satisfied the mortgage of record, as plaintiff's attorney in fact; that, though B. had a power of attorney from plaintiff, it did not authorize him to satisfy the mortgage. Defendant testified that, at the time the mortgage was given, plaintiff told him that the money for which it was given belonged to B.; and that plaintiff wrote him that he had sent the note to the bank for collection, that B. was there, and anything defendant did with B. plaintiff would stand by; that he stood by anything B. did for him. *Held*, that the evidence justified a finding that B. had authority to satisfy the mortgage as he did.

2. The admission of defendant's testimony over plaintiff's objection of "irrelevant and immaterial" that, at the time B. took the land in payment, real estate at that point was very active, was material error. *McFarland and Thornton, JJ.*, dissenting.

In bank. Appeal from superior court, Los Angeles county; *WALTER VAN DYKE*, Judge.

Sargent & Harpham and *John F. Ellison*, for appellant. *Robert Hardie*, for respondents.

SHARPSTEIN, J. Action to foreclose a mortgage, given to secure the payment of a promissory note of \$8,000. The central question in the case is whether the note had been paid, and the mortgage discharged, before the commencement of this action. The court so found, and that finding is attacked by appellant on the ground of the insufficiency of the evidence to justify it. The evidence shows that one John Belz had possession of the note and mortgage by authority of plaintiff, who testifies as follows: "Shortly before maturity I sent the note to the First National Bank of Los Angeles, Cal., for collection. I stated to them if it was not paid promptly to turn it over to John Belz, who would see to the collection of it." The note was indorsed by plaintiff generally or in blank, and was turned over by the bank to Belz. On December 22, 1889, Belz and defendant McCain negotiated for the exchange of said note and mortgage for an absolute conveyance to plaintiff by defendant McCain of an undivided one-fourth part of the mortgaged premises and a note for \$1,485.35 secured by a mortgage on another fourth of said premises. Belz, in consideration of said absolute conveyance, and last-mentioned note and mortgage, delivered to defendant McCain said note of \$8,000, canceled and executed the following indorsement on the record of the mortgage given to secure the payment of said note: "Received full and entire satisfaction on the within mtg. this 22d day of Dec., 1887. *GEORGE STORCH*. By *JOHN BELZ*, his Attorney in Fact." If John Belz had authority to bind the plaintiff, there can be no doubt of the satisfaction of the mortgage which this action is brought to foreclose. It is not shown that Belz was authorized, by any formal power of attorney, to execute a release of said mortgage. He held plaintiff's power of attorney at the time, but it did not authorize him to enter the satisfaction of said mortgage, and the court finds that Belz had authority from plaintiff other than that contained in said power of attorney for executing the satisfaction of the mortgage, which plaintiff is seeking to foreclose in this action. The defendant McCain testified that plaintiff told him, at the time the loan was made for which said note of \$8,000 and mortgage were executed, that the money loaned belonged to Belz, and that plaintiff wrote him, defendant McCain, that he, plaintiff, had sent the note to the First National Bank for collection; that Belz was there, and anything that defendant McCain did with Belz, he, plaintiff, stood by it; he stood by anything that Mr. Belz did for him. That testimony, and the turning over to Belz of the note indorsed by plaintiff, together with the mortgage, constitute the evidence of the authority of Belz to receive anything other than money in satisfaction of the note and mortgage. And we think that is sufficient to justify the finding that Belz had such authority. The indorsement and delivery of the note by plaintiff to Belz was strong evidence of it. A note indorsed in blank is payable to bearer, and may be negotiated by delivery alone. *Curtis v. Sprague*, 51 Cal. 239; *Peacock v.*

Rhodes, 2 Doug. 635; *Swan v. Australasian Co.*, 2 Hurl. & C. 175; *Morris v. Preston*, 93 Ill. 215. The mortgage was a mere incident of the debt which it secured, and followed the transfer of the note with the full effect of a regular assignment. *Ord v. McKee*, 5 Cal. 515.

Conceding that parol evidence was admissible to show that the transaction was not what the law, in the absence of such evidence, would presume it to be, we have here the evidence of defendant McCain that it was intended to operate as an assignment of the note and mortgage to Belz. There is evidence tending to show that the indorsement was intended to be special for the purpose of authorizing Belz to collect the amount of the debt secured in money. But we cannot interfere with the finding where the evidence upon the issue found is conflicting. It is exclusively for the court below to determine the weight of evidence.

The court did not err in permitting the defendants to amend their answers, nor in refusing to postpone the trial on the ground of absence of evidence to meet the issues raised by such amendment. The record does not disclose that the motion was made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence had been made to obtain it; and it is only upon such an affidavit that a motion to postpone a trial on the ground of absence of evidence can be made. Code Civil Proc. 595.

While the defendant was on the witness stand testifying in his own behalf, his counsel asked him: "What was the condition of the real-estate market in this city and county [Los Angeles city and county] about the time of this transaction, December 22, 1887?" Plaintiff's counsel objected to the question on the ground that it was irrelevant and immaterial.

"The Court. I think it would go to show why action might be brought."

Counsel for plaintiff excepted, and witness answered: "It was very active. What was called a boom, especially in this section. This land was located at what was known as Santa Fé Springs, and runs up and adjoins the town site." This was followed by other questions and answers of similar import, which were objected to, objections overruled, and exceptions reserved. That this evidence was wholly irrelevant and immaterial we have no doubt. It is entirely outside of any issue in the case, and ought not to have influenced the decision in any degree, whatever. But we are not at liberty to hold that the admitting of it was a harmless error. The overruling of the objection to admitting it, on the ground that it was irrelevant and immaterial, indicates that in the opinion of the court it was relevant and material. And counsel for respondent defends the action of the court on the ground that it was relevant and material. In his brief he says: "The materiality of the evidence of defendant McCain, as to the value of real estate on December 22, 1887, when the settlement was effected, and its value about the time suit was commenced, is well shown by the quota-

tion from the opinion of Judge VAN DYKE, in which he says: 'I cannot resist the conclusion that the rapid decline in the price of land between the date of settlement and the commencement of this action accounts for the proceeding.' The evidence was material to show why suit was brought." But the motive for bringing suit was in no way material, and could not properly be inquired into. That the court attached some importance to this evidence we are bound to presume from his admitting it against the objection made to it. We, therefore, cannot see from the record that this evidence did not prejudice the plaintiff, and the error in admitting it entitles appellant to a new trial. *Rice v. Heath*, 39 Cal. 609; *Spanagel v. Dellinger*, 38 Cal. 278; *Sweeney v. Reilly*, 42 Cal. 402; *Ponce v. McElvy*, 51 Cal. 222.

Judgment and order reversed and cause remanded for a new trial.

WE CONCUR: PATERSON, J.; FOX, J.; WORKS, J.

McFARLAND, J. I dissent. I think that the case was properly decided in the court below, and that the error, if any, in admitting certain evidence was not of sufficient importance to change the result.

THORNTON, J. I concur with Justice McFARLAND.

85 Cal. 214

CROW v. MINOR, Judge. (No. 13,292.)

(*Supreme Court of California*: Aug. 2, 1890.)

EXCEPTIONS—ALLOWANCE—DISPUTED FACTS.

On petition for leave to prove an exception to the refusal to give an instruction made after judgment, under Code Civil Proc. Cal. § 652, where an order is made requiring the trial judge to show cause why the exception should not be allowed, and he denies that any such instruction was asked or refused, which denial is supported by a preponderance of the evidence before the referee to determine the question, the petition will be denied.

In bank. Petition to prove exceptions from Stanislaus county; WILLIAM O. MINOR, Judge.

Stonesifer & Minor, for petitioner. *Hatton & Fulkerth*, for respondent.

WORKS, J. This is an application by the petitioner for leave to prove an exception under section 652 of the Code of Civil Procedure. An order was made requiring the respondent to appear and show cause why the exception should not be allowed. The petition alleged that in the trial of a certain cause had before the respondent, in which the petitioner was a defendant, the petitioner requested the court to give a certain instruction, which was refused, to which the petitioner excepted, and that, in the settlement of the statement, the respondent refused to allow such exception. The respondent appeared, and, by way of answer, denied that such an instruction was asked or refused, and alleged that another instruction, different in form and substance, was the one asked and refused. Therefore the whole controversy between the parties was as to which of these instructions should be the basis of the peti-

tioner's exception. This question of fact was referred to Hon. JOSEPH H. BUDD, judge of the superior court of San Joaquin county, to take the evidence and report the same to this court, which has been done. We have examined this evidence, and find that it fails to establish the allegations of the petition; the preponderance of the evidence being in favor of the respondent. Petition denied.

We concur: PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.

85 Cal. 151

In re ESTATE OF ARGUELLO. (No. 13,595.)

(*Supreme Court of California.* July 31, 1890.)

ADMINISTRATOR'S SALE TO PAY DEBTS—FINDINGS—LACHES.

1. The defect in a petition to sell land to pay debts, in not showing whether it was separate or community property, is cured by stating the fact in the order of sale.

2. Under Code Civil Proc. Cal. § 634, requiring findings of fact when they have not been waived, their absence will not be noticed on appeal, unless it affirmatively appear that there was no waiver.

3. While the administration is pending, the statute of limitations does not run against a petition to sell land to pay debts which have been allowed.

4. An administrator was appointed in 1869. In 1872, a creditor asked a sale of land to pay debts, but the court delayed action because the interest of the deceased was an undivided one, subject to the debts of another estate. This lasted to 1886, when a new petition was prepared, but it was burned with the attorney's office. The present one was filed in 1889. There had been a change of administrators, and other causes for delay. *Held* not barred by laches.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Collier, Hammack & Mulford, for appellants. *Hendrick & Younkin*, for respondent.

MCFARLAND, J. This is an appeal from an order directing the sale of certain real property of the estate, upon the petition of E. W. Morse, a creditor.

1. Appellants contend that the petition is fatally defective, because it does not contain the matters required to be stated therein by section 1537, Code Civil Proc. It has been settled here that a substantial compliance with that section is sufficient. *Stuart v. Allen*, 16 Cal. 501; *Richardson v. Butler*, 82 Cal. 174, 23 Pac. Rep. 9. But it would not be necessary for respondent to invoke that rule in the case at bar, because the petition here is very full, and seems to cover every particular mentioned in the Code, except one. It neglects to state whether the real property was separate or community; but that defect is remedied by the fact that it is stated in the order directing the sale that the property was separate property. The point originally made in appellants' brief, that the petition was not verified, has since been met by a stipulation mending the record.

2. It is contended that the order cannot stand, because there were no findings. It has never been definitely determined here that findings were necessary in pro-

bate orders like the one involved in this case. In *Re Sanderson's Estate*, 74 Cal. 201, 15 Pac. Rep. 753, some doubt on the subject was intimated. In *Re Crosby's Estate*, 55 Cal. 574, where there were findings, the point was made by counsel that findings on an order in probate for the sale of property were not authorized by the Code; and this court merely said that findings were "proper." But assuming that the rule about findings applies to probate orders in like manner, as to an ordinary civil action tried without a jury, still appellants are in no position to make the point, because the record does not show that findings were not waived, and therefore does not show any error,—a thing which an appellant must always do, affirmatively, before he can expect to have a judgment reversed. The Code does not unconditionally require findings. It requires them only when they have not been waived by one or more of the several methods therein mentioned. Code Civil Proc. § 634. And as was said in *Mulcahy v. Glazier*, 51 Cal. 627: "A party, therefore, who comes here to say that the court below committed an error in failing to find the facts, must, by bill of exceptions, or some other similar and appropriate method, make it affirmatively appear by the record that no waiver of findings had in fact occurred in the court below; otherwise the intendment here must go to the support of, and not to overthrow, the judgment therein." This rule has since been approved and reasserted. See *Reynolds v. Brumagim*, 54 Cal. 258; *In re Sanderson's Estate*, supra; *Campbell v. Coburn*, 77 Cal. 37, 18 Pac. Rep. 860. We think that it sufficiently appears that the respondent, as creditor, had the right to petition for the sale; but it is not necessary to discuss that point, because the administrator joins in the petition.

3. The statute of limitations does not run while the administration is pending and unsettled, as to a claim against the estate which has been allowed. In *re Schroeder's Estate*, 46 Cal. 312. As to the contention that the petition should fail on account of the delay in asking for the order of sale, it may be said that laches will, no doubt, in some cases, defeat a creditor's application for the sale of property of the estate. The rule, however, goes only to this extent: that a probate court has a discretionary power to deny a petition for the sale of real property when there has been unreasonable delay without circumstances to excuse it. In *re Crosby's Estate*, 55 Cal. 580, and cases there cited. In the case at bar the petition shows that an administrator was first appointed in November, 1869; that respondent's claim against the estate was allowed in June, 1870; that in 1869 the administrator filed a petition for the sale of the real property to pay charges, expenses, and claims; that no order of sale having been made, the respondent on July 1, 1872, filed his petition for such sale, and that the same is still pending; that the court postponed action on said petition, on the ground that the interest of the deceased in the lands sought to be sold was too un-

certain to justify a sale under the circumstances then existing; that said interest was undivided, and held in common with other heirs of one Santiago Arguello, deceased, which still belonged to the estate of the latter; that the lands had never been surveyed or set off in partition, and were subject to the debts, expenses, and charges of said estate of Santiago; that this condition of affairs continued until 1886; that shortly after the latter date the administrator had a petition for sale prepared by his attorneys, which was destroyed by the burning of their office; that there had been a change of administrators; and that these and other considerations caused the delay. The present petition was filed in June, 1889. Under these circumstances we cannot say that the court below abused its discretion in holding that the delay was excusable.

The order appealed from is affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.; PATERSON, J.

85 Cal. 122

KELLY *et al.* v. MATLOCK. (No. 13,590.)
(Supreme Court of California. July 30, 1890.)

SATISFACTION OF MORTGAGE ASSIGNED AS COLLATERAL—RIGHTS OF DEBTOR.

Where a creditor, after bringing suit to foreclose a mortgage assigned to him by his debtor as collateral security, dismisses the suit, accepts a conveyance of the property from the mortgagor, and releases the mortgage, the debtor may charge him with the amount of such mortgage, have it applied in satisfaction of his debt, and recover the balance, though the mortgage was without consideration as between him and the mortgagor, and the note secured by it, and also assigned as collateral, was not negotiable.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Wells, Guthrie & Lee, for appellants.
Davis & Taylor and *W. F. Henning*, for respondent.

WORKS, J. The appellants and one Ausmus, for the accommodation of the respondent, executed to him their two promissory notes for \$1,000 and \$1,500, respectively, which notes were negotiated by the respondent, and upon his failure to meet them they were paid and taken up by the appellants. The respondent and his wife, to secure the appellants and Ausmus from loss on these accommodation notes, executed to them a mortgage on an undivided interest in certain real estate, in the state of Oregon, owned by the respondent. He also assigned and delivered to them, as further collateral security, a note of his brother to him for \$2,500, and a mortgage on a part of the same real estate given to secure said note. Upon the payment of the accommodation notes by them the appellants secured an assignment from Ausmus of his interest in the securities above mentioned, brought an action against the respondent and his wife to foreclose the mortgage given by them, recovered a decree of foreclosure thereof, sold the land, realizing less than their claim, and procured the entry of a deficiency judgment for the balance. They also brought an action against respondent's

brother to foreclose the mortgage given by him and assigned to them as collateral security. The respondent was made a party to this proceeding, but was not served with process. Instead of proceeding to a judgment in this case, the appellants took a deed from the mortgagor in satisfaction of their claim against him, and agreed to and did dismiss the action, and deliver up and satisfy the mortgage of record. This action was brought by the appellants to recover the amount of the deficiency judgment above mentioned. The respondent answered alleging payment in full, and set up a counter-claim alleging the facts with reference to the collateral mortgage, and praying that the plaintiffs be charged with the amount thereof on account of their acceptance of a conveyance of the land and satisfaction of the mortgage, that enough thereof to satisfy the deficiency judgment sued on be applied to the payment thereof, and that he have judgment for the balance. The court found in favor of the defendant, and decreed the satisfaction of the judgment, and rendered judgment in his favor for \$1,397.09. From this judgment the plaintiffs appeal.

It is contended by the appellants, and conceded by the respondent, that the transfer and delivery of the mortgage as collateral security was a pledge of personal property. The appellants further claim that, being a simple pledge of personal property, the appellants had no power to accept a conveyance of the property and release the mortgage; that such release was a nullity so far as the respondent was concerned; and that, therefore, they could do nothing but ignore that transaction, and sue upon the deficiency judgment as if no such transaction had taken place. It may well be conceded, for the purposes of this case, that without the respondent's consent the appellants had no right to release his mortgage, held by them as collateral, and that, if he had elected to do so he might have repudiated the transaction, and had the release or satisfaction canceled, or held the appellants as trustees of the land for his benefit, subject as collateral security for the amount due them. *Chester v. Hill*, 66 Cal. 480, 6 Pac. Rep. 132; *Ponce v. McElvy*, 47 Cal. 159. But if the respondent might have consented to the conveyance before it was made, and thereby have authorized the appellants to receive the same and hold the title as their own, we see no reason why he may not subsequently ratify their act and hold them liable for at least the value of the property received by them, if not for the full face of the note secured by the mortgage. The appellants certainly cannot complain of such a result. They have, as they conceded, acted in violation of the respondent's rights, and should be held to answer to him for the value of the property actually received by them. The case of *Smith v. Bunting*, 86 Pa. St. 116, so much relied upon by the appellants, is not in point. There the holder of the collateral securities proceeded to collect his debt by foreclosing the same, recovered a decree, caused the property to be sold on execution, himself became the purchaser,

and gave his debtor credit for the amount of his bid. The attempt on the part of the debtor was to hold the creditor liable for the full value of the property, instead of the amount at which he bid it in. It was held that this could not be done. It was further held, however, that conceding the right of the debtor to show that the property was worth more than the bid, and that by purchasing the property the creditor became a trustee thereof for him, then the creditor was not bound to give credit on his claim for the amount of his bid or any other sum, but could recover his whole debt, and that in either event the plaintiff was entitled to judgment. It was not held in the case referred to that the creditor did hold the property as a trustee for his debtor, but that, conceding that he did, as claimed by the debtor, he was still entitled to judgment.

In our judgment, under our Code, the holder of a mortgage as collateral security who causes the property to be sold on execution, and himself becomes the purchaser, does not hold the title as a trustee for his debtor unless it is shown that he obtained the title by some fraudulent means. He cannot sell an evidence of debt of this kind, but may collect the same when due. Civil Code, § 3006. And to that end he may foreclose the lien and himself become the purchaser. Id. § 3011. If so, and no fraud is shown, he takes the absolute title to the property, and must account to the debtor for the proceeds. Instead of taking this course the appellants saw proper to take a conveyance without a judicial sale, and they were properly held for the value of the property received by them. The respondent might have held them as trustees, for the reason that they had taken title to the property without his consent, and in violation of his rights, but he was not bound to do so, but had the right to treat them as having wrongfully converted the same, hold them for the value of the property, have his debt satisfied, and recover the balance. It is claimed by the appellants that this could not be done in this case, because it was shown by the evidence that the note and mortgage were given to the respondent by his brother without consideration. Conceding that the note and mortgage were given without consideration, we do not see how this can affect the question before us. The mortgage was held by the appellants on a sufficient consideration. The mortgagor could not have pleaded want of consideration against them. Had they forced the property to a judicial sale and become the purchasers, or if some one else had become the purchaser, could they have set up a want of consideration against the respondent, and thereby avoided liability to him for the amount realized by the sale? Clearly not. Then why could they do so where they have voluntarily abandoned their right to a judicial sale, and taken a conveyance from the mortgagor instead? No reason is apparent to us. The question of want of consideration is one to be determined between the respondent and the mortgagor, and in which the appellants are not interested. Again, it is contended that the

note secured by the mortgage was not negotiable because it provided for the payment of an attorney's fee. But whether it was negotiable or not is wholly immaterial in this case. The appellants have realized upon it, and cannot, in justice, be allowed to withhold what they have got by pleading its non-negotiability. It is contended that the findings of the court are not sustained by the evidence in various particulars specified, and that the decision of the court is against law. We have examined the evidence, and are satisfied that it is such that the findings cannot be disturbed by this court. The decision of the court is claimed to be against law on the grounds above noticed, and ruled against the appellants. Judgment affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

85 Cal. 105

GILBERT v. JUDSON. (No. 13,563.)

(Supreme Court of California. July 30, 1890.)

REAL-ESTATE AGENT—COMPENSATION.

Under a contract to make one sole agent to sell lots at a commission, "which shall be in full for any service he may render in surveying and laying out the land," the agent cannot, when he has made no sales, recover on a *quantum meruit* for the service, the owner having put prices on the lots, and given him the agency.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

R. K. Wood, for appellant. *Brousseau & Hatch* and W. S. Knott, for respondent.

GIBSON, C. This was an action brought by A. C. Gilbert to recover of A. H. Judson the value of certain services rendered to Judson, under a written contract, in assisting and advising him in relation to the surveying and laying out of a portion of a tract of land in Los Angeles county known as "Highland Park Tract," for the purpose of placing the same upon the market for sale; also, damages for the breach of said contract caused by Judson refusing to permit him to proceed with the erection of two houses on a portion of the tract, upon the cost of which he was to receive a certain percentage, in consideration of furnishing plans and specifications, and purchasing material therefor, and in superintending the construction thereof. The court found that the plaintiff did, under the contract, superintend the survey and subdivision of a portion of the defendant's tract of land, and that such services were reasonably worth \$100; but found against him and in favor of the defendant as to the other matter. Judgment for the amount so found to be due him passed for plaintiff, from which defendant brings this appeal.

The only question presented here is whether the plaintiff, under the terms of the contract, is entitled to compensation for the services found by the court to have been rendered, and depends upon a construction of the contract. The portion of it material to this question is as follows: "I hereby appoint A. C. Gilbert sole agent for the sale of such property as I may de-

sire to sell in the Highland Park tract, at a commission of 10 per cent. on all sales that may be effected by him, which shall be in full for any services he may render me in assisting and advising in the surveying and laying out of the lands ready for market. * * * I hereby authorize him to at once proceed and have the lots known as my 'Home Tract,' to be surveyed and mapped ready for beginning operations. * * * Prices and items to be hereafter agreed upon." From the language of this contract we think it clear that the commissions plaintiff was to receive for selling the lots, were intended to compensate him, and be his only compensation, for services rendered in surveying and laying them out ready for the market. This is the construction placed upon it by the plaintiff in his complaint, who seems to have realized that in order to recover the reasonable value of his services, instead of the sum expressly provided for in the contract, it would be necessary for him to show a breach of the contract on the part of the defendant, whereby he was prevented from selling such lots. With this end in view he alleged that he had often insisted upon defendant placing a price upon lands in the home tract, a portion of the Highland Park tract, but he always refused to do so, and that plaintiff, who had shown the lands to customers, was prevented from selling any of such lands because of the defendant's refusal to fix any price thereon. The defendant, in his answer, denied these allegations, and averred that he did fix prices on all lands in the home tract he desired to sell, and that plaintiff failed to procure a purchaser for said lands or any part thereof. On the issue thus tendered the court found: "That defendant gave plaintiff prices on his (defendant's) lots in the tract surveyed and subdivided, but that the plaintiff did not sell any of said lots." This finding must be regarded as conclusive, as the evidence is not before us. And as it shows that the defendant complied with the terms of the contract upon his part in fixing prices upon all the surveyed lots he desired to sell, and that plaintiff failed to sell any of such lots, upon the sale of which his compensation depended, it follows that the trial court erred in concluding that he was entitled to recover the reasonable value of the services he rendered in connection with the laying out of the lots. We, therefore, advise that the judgment be reversed, and the cause remanded, with instructions to the trial court to enter judgment for the defendant upon the findings.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with instructions to the court below to enter judgment for the defendant upon the findings.

85 Cal. 116

BUELL v. EMERICH. (No. 13,530.)

(*Supreme Court of California*, July 30, 1890.)

SETTING ASIDE DEFAULT—DISCRETION.

It is not an abuse of discretion to set aside a judgment taken in the absence of the defendant

on an affidavit of merits, and a showing that he and his counsel resided at a distance, and had not been notified that the case was set for trial, and were absent for that reason only.

Commissioners' decision. In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

W. C. Stratton, for appellant. Howard A. Broughton and W. P. Butcher, for respondent.

BELCHER, C. C. This action was brought to recover the value of certain personal property alleged to have been owned by the plaintiff, and to have been unlawfully converted by the defendant to his own use. The answer denied each and every allegation of the complaint. On the 8th day of July, 1889, the case was set for trial on the 15th day of August following. On the last-named day the case was tried, neither the defendant nor his attorney being present in court, and judgment was given for the plaintiff. On the 26th day of the same month the defendant served and filed notice of motion to set aside and vacate the judgment on the grounds that the defendant was not present at the trial; that his absence was not caused by any fault or neglect on his part; that he had no notice that the action was set for trial upon the 15th of August; and that he was taken by surprise and greatly prejudiced by the trial and judgment. The motion was heard by the court upon affidavits, and granted on condition that defendant pay to plaintiff the full amount of his costs to date. The appeal is by the plaintiff from this order. The motion was made under section 473 of the Code of Civil Procedure, which provides that the court may, "upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It is a settled law that applications like that made here are addressed to the sound legal discretion of the trial court, and that orders granting such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion. In *Roland v. Kreyenhagen*, 18 Cal. 455, where a similar question was presented, the court said: "It would require a very clear case of abuse of discretion in the judge below to induce us to interfere with his action upon such applications." And after quoting section 68 of the old practice act, which is substantially the same as section 473, *supra*, it is further said: "The power of the court should be freely and liberally exercised under this and other sections of the act to mould and direct its proceedings so as to dispose of cases upon their substantial merits." And in *Howe v. Independence Co.*, 29 Cal. 75, it is said: "Orders of the court below upon applications made under the sixty-eighth section of the practice act will not be disturbed by this court except in cases of gross abuse, where the power of the court has been exercised in a manner which is calculated to defeat rather than advance the ends of justice." See, also, *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. Rep. 45, and *Dougherty v. Bank*, 63

Cal. 275, 9 Pac. Rep. 112. The question, then, is: Does it clearly appear that the court below abused its discretion in making the order complained of? We do not think it does. The affidavits presented in support of the motion stated in substance that both the defendant and his attorney resided at a great distance from the county-seat, and that neither of them was present when the case was set for trial, or when it was tried; that they were never notified of the setting of the case, and never heard that it had been set until just before the trial, and then, owing to their distance from the county-seat, the time was too short to enable them to be present; that the only reason they were not present at the trial was the lack of notice that a time for the trial had been set; and that defendant had a good and substantial defense to the action on its merits. The facts set forth in the affidavits were not controverted by the other side, and they were sufficient, we think, to make out at least a *prima facie* case of excusable neglect. The court evidently so thought, and made its order accordingly. As we can see no abuse of discretion in the action of the court, we advise that the order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

85 Cal. 219

ALTA LAND & WATER CO. v. HANCOCK *et al.* (No. 13,533.)

(Supreme Court of California. Aug. 4, 1890.)

RIPIARIAN RIGHTS—ADVERSE USE OF WATER—LIMITATION.

1. A "squatter" who enters upon, occupies, and cultivates part of the riparian land of another, claiming adversely in the belief that it is government land, can gain no title to the use of the waters of the stream by diverting and using them for purposes of irrigating such land, since such use inures to the benefit of the true owner, and is not adverse to him. And it can make no difference that the land irrigated does not border on the stream, since such land is not segregated in title by the occupancy, but remains part of the entire riparian tract.

2. Where a "squatter" entered upon part of the riparian land of another, claiming adversely, and diverted and used the waters of the stream for the irrigation thereof, such use was "interrupted," so as to prevent the running of limitation in the squatter's favor, by the bringing of ejectment for the lands.

In bank. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Byron Waters, Charles J. Perkins, Wicks & Ward, and E. A. Meserve, for appellant. *Barelay, Wilson & Carpenter and E. E. Rowell*, for respondents.

FOX, J. This is an action to quiet title to the claim of plaintiff, a corporation, to the right to use seven-eighths of the waters of East Twin creek, in San Bernardino county. Judgment went for the defendants, from which plaintiff appeals, the case coming up on the judgment-roll. Plaintiff claims by prescription in favor of its grantors, and under grant of such alleged prescriptive right to itself. Defend-

ants are riparian proprietors on both sides of the stream below the point where plaintiff claims the right of diversion. It was alleged and shown that in April, 1875, the defendant Hancock, who was then the owner of a tract of 1,250 acres, part of the Muscupiabe rancho, lying on both sides of this creek, and below the point at which plaintiff claims the right to divert seven-eighths of its waters, (and under whom the other defendants now claim as grantees,) took the preliminary steps to acquire by appropriation 500 inches of this water, but this right of appropriation was never perfected, and its consideration is of no moment in this case, as it is conceded by both parties that defendants take nothing by that proceeding. Nor is it necessary in this case to discuss the character or extent of the right of Hancock or his grantees to the use of the waters of the creek by virtue of his riparian proprietorship. That they had some right in the flow and to the use of said waters as such riparian proprietors is conceded on both sides. To the extent that it existed, it was an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or by condemnation, or extinguished by prescription, but could not be defeated by simple appropriation. The term "appropriation," as applied to the acquirement of the right to the use of water, has in this state a statutory technical meaning; and the simple act of appropriation under the statute will not of itself defeat or extinguish any prior right. Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of the riparian proprietor. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire a right by prescription this advantage, that it gives to prior claimants notice that his user is adverse, and under claim of right, and sets the statute in motion against such prior claimant. In this case the claim of plaintiff is based upon prescription, pure and simple. If it is valid it has, to the extent of seven-eighths of the waters of that creek, extinguished the rights of defendants. If under the facts, however, plaintiff's claim has not merged into title by prescription, then plaintiff has no right which can be quieted in this action, and it is not in position to question the right or the extent of the right of defendants. The court finds that in April, 1875, the defendant Hancock was the sole owner of the 1,250-acre tract of land hereinabove mentioned; that in May, 1887, he conveyed the same, with the water-rights appurtenant thereto, to the other defendants herein, reserving to himself 17 acres thereof, with a certain quantity of the water for the use of said 17 acres, and that at the time of the filing of the complaint herein the defendants were the owners in fee of the whole of said tract; that in the spring of 1876 one Burton entered upon 80 acres of land, part of said 1,250-acre tract,

situate from a half to three-quarters of a mile from the channel of the creek, claiming the same as a squatter, and believing the same to be government land; and at the time of such entry diverted from the channel of said creek, at a point beyond and outside of the rancho, all the waters of said creek, and conducted the same through an artificial channel made by him to the said 80-acre tract so entered upon by him, and there used all of said water for the irrigation of said 80-acre tract until some time in 1877, when one Stones in like manner entered upon a 40-acre tract, part of said 1,280-acre tract, adjoining that so entered upon by Burton, and thereafter, by some arrangement between Burton and Stones, the latter commenced to use one-fourth of the water so diverted by Burton for the irrigation of his 40-acre tract; that Stones also entered as a squatter, and he and Burton both claimed adversely to Hancock; that they so continued to use all the said water for said purpose and upon the said lands, and not elsewhere, until August, 1887; that the said use was continuous, open, notorious, peaceable, and adverse to all the world; that while so using and claiming the said water they also used and claimed the land upon which the same was used, by the same character of holding and title, namely, adverse to Hancock, but never set up any special or distinctive right in the water different from their right in the land, but claimed both land and water; that in July, 1881, Hancock, being then the owner of the whole of the said 1,280 acres, commenced an action in ejectment against Burton, Stones, and others for the recovery of the possession thereof, which culminated in a judgment in favor of Hancock in August, 1885, appealed to this court, where the judgment was affirmed, (14 Pac. Rep. 392,) and the *remittitur* therein filed in the court below August 4, 1878, when a writ of possession was issued under which Burton and Stones were put out, and possession restored to Hancock; that five years did not intervene between the time when the water was so diverted by Burton, and the time when such action was commenced by Hancock; that it is not shown that said Burton or Stones ever paid any taxes on said water-right, or on the right to divert the same, or that any were ever levied thereon, but it is shown that Hancock has paid taxes, and taxes have been levied upon the whole of said 1,280 acres of land every year since and including the said year 1876. The court then finds that during the year 1887, and prior to the execution of the writ of possession, all the right which Burton and Stones, or either of them, acquired in and to the said waters, or to use and divert the same, came down by certain mesne conveyances, to and became vested in, this plaintiff, who acquired and took the same with full notice of the pendency of said ejectment suit, and that plaintiff still holds the same. And as conclusion of law, the court finds that the plaintiff at the time of the commencement of this action had no estate, right, title, or interest in or to the waters of said creek, or any of the tributaries thereof, and thereupon ordered

judgment for defendants, which was entered accordingly.

It will thus be seen that the whole question is whether these facts gave to plaintiff's grantors a prescriptive right to the diversion and use of that water. This right becomes fixed only after five years' adverse enjoyment. *Crandall v. Woods*, 8 Cal. 136; *Water Co. v. Crary*, 25 Cal. 504. And to have been adverse it must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. *American Co. v. Bradford*, 27 Cal. 360. "In order to constitute a right by prescription there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185. To be adverse it must be accompanied by all the elements required to make out an adverse possession. The possession must be by actual occupation, open, notorious, and not clandestine. It must be hostile to the other's title. It must be held under claim of title, exclusive of any other right, as one's own. It must be continuous and uninterrupted for the period of five years. *Thomas v. England*, 71 Cal. 458, 12 Pac. Rep. 491. Can it be said that the use made of this water was adverse to Hancock's riparian right when it was used upon his own land riparian to the stream, and under no pretense or claim of right to divert or use it elsewhere? We think not. The use of the land may have been adverse, and against his will, but the bringing of the water to and use of it upon his land was an improvement of his land, and an advantage to him, not an act which of itself gave him an independent cause of action for its diversion, and required him to bring such action or lose his right in the water. If, while as trespassers occupying a portion of his land, Burton and Stones had undertaken to divert the waters of the stream, and carry them away from the land, this would have been an act so hostile to his right as to have given him an independent cause of action for the diversion. If, after notice of such an act, he had suffered them to divert the water away from his land for the period of five years, without interruption, they might have acquired a right in the water which would have extinguished his own; but, as his right in the water, or the use thereof, was a corporeal hereditament appurtenant to his land, we cannot conceive that such right would be lost by user upon his land, under no claim of right to divert or use it elsewhere. Nor was the use "uninterrupted" for the period of five years. The court has apparently *ex industria* refrained from the use of that word in the findings. And yet the use must be not only adverse, under claim of right, open, and notorious, but it must be "uninterrupted" for the period of five years to ripen into a right by prescription. The court has found that the use was "continuously" from 1876 to 1887, but not that it was "uninterruptedly." Counsel insists that the words are synonymous,—that the one means the same as the other.

They are very nearly, but not in law exactly, synonymous. This case furnishes a fair illustration of the distinction between them. Burton and Stones used this appurtenant to the land "continuously" for the period of 11 years. They used the land itself, and this appurtenant to it on the land, during the whole of the same period, "continuously." The use of the land was unquestionably adverse to the claim and right of Hancock, and yet its continuous use for the period of 11 years did not give to those using it a right to the land by prescription, though the rule of law as to acquiring right to land and right to water by prescription is the same. Then why did it not give the right? Because just before the expiration of the five years the use was "interrupted" by the bringing of the action in ejectment, and this interruption, though it did not break the continuity of use until final judgment and writ of possession, six years afterwards, stopped the running of the statute, and no right could be acquired by use after that during the pendency of that suit. As this in law so interrupted the use of that land as to prevent the acquiring of a prescriptive right to the land itself, so it also, and by the same act, so interrupted the use of every appurtenant to the land which was being used on it, as to prevent the acquiring a prescriptive right to that appurtenant, to use it there or elsewhere. The recovery of the land in ejectment carried with it the recovery of every appurtenant thereto. Burton and Stones, according to the findings, had never attempted to acquire, or asserted any right in, the water, independent of or segregated from the land, or under other right, title, or claim than that which they asserted to the land. They therefore, when ejected, had nothing to convey to plaintiff, and the plaintiff acquired nothing under them.

We fully concede the proposition contended for by appellant, based upon *Smith v. Logan*, 18 Nev. 149, 1 Pac. Rep. 678, that the use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used. But it does not follow from this that the use of water upon land to which it is already appurtenant by one who is a trespasser thereon will give him such a right in the water as that he may thereafter divert it from the land, or, upon being ejected therefrom, convey to a stranger a legal title in the water or in the use thereof. We do not mean to be understood as holding, and indeed it is not claimed, that anything has been added to the rights of defendants by the acts of Burton and Stones; but simply that nothing has been taken from those rights. It is probable that there are those as against whom these defendants could not successfully claim the right to the use of all the water which Burton and Stones carried upon their lands; but the measure of their rights is not here involved. The judgment in this case does not determine them. It simply determines that the plaintiff has no right which it is entitled to have quieted as against the defendants. Beyond the proposition above stated, the case of

Smith v. Logan is not in point. Nor is there anything which militates against the view here taken in the further proposition insisted upon by appellant, that the 120 acres upon which Burton and Stones used this water were not riparian to the stream. Situate as this tract was, a half-mile or more away from the stream, if it had been held by a title separate from and independent of the 1,280-acre tract, it would not have been riparian, and no portion of the waters of the stream would have been appurtenant to it; but the 120 acres was a part of, and never segregated from, the 1,280 acres, all of which was riparian to the stream. We do not understand *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674, as holding, as claimed by appellant, that only that portion of a larger tract bordering upon a stream is riparian thereto which is actually washed by the waters of the stream; or only so much thereof as the waters of the stream are sufficient to irrigate. Such a rule, while it would limit the area of riparian lands to a comparatively infinitesimal quantity, would extend the rights of a riparian proprietor to whom the water might first come far beyond anything heretofore recognized or claimed for them. It would recognize the right of such proprietor to consume, if he could, on his riparian lands, all the waters of the stream for purposes of irrigation, without regard to the rights of other proprietors below him, either for their natural wants or for irrigation. So far the right of a riparian proprietor to the use of water for purposes of irrigation at all has been assumed, rather than determined, and has been properly regarded as among the last, though not perhaps the least important, of his riparian rights; one that must be always held in subordination to the rights of all other riparian proprietors to the use of water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract held as an entirety, bordering upon the stream, whatever its extent. These natural wants supplied and protected, the right to a reasonable use of the surplus water by the riparian proprietor in common with others in like situation, for purposes of irrigation, has been acknowledged and recognized, but it cannot be extended even by implication. Nor can the area of the lands to which riparian rights are appurtenant be diminished by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of title. Nor can the use of all the waters of a stream upon 120 acres of land change the law, and establish it as a fact that there can be but 120 acres riparian to that stream as claimed by appellant.

We do not deem it necessary to follow the counsel for appellant in their discussion of the question of the payment of taxes as one having any effect upon this case; nor do we find anything in any of the authorities cited in conflict with the views here expressed. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.; WORKS, J.

85 Cal. 80

KERCKHOFF-CUZNER M. & L. CO. v. OLMSTEAD *et al.* (No. 13,147.)

(Supreme Court of California. July 30, 1890.)

MECHANIC'S LIEN—STATEMENT—RETROACTIVE LAW.

1. Code Civil Proc. Cal. § 1187, provides that every one save the contractor must, within 30 days after completion, file his statement for a lien. That section was amended in 1887 by adding that cessation from labor for 30 days on any unfinished building shall be deemed equivalent to completion." A contractor having, after the amendment, refused to finish the building, and no work having been done thereon for 30 days, of which the material-man had knowledge, *held*, that the time in which his statement must be filed runs from the end of the 30 days, though part of the materials were furnished before the amendment. THORNTON and WORKS, JJ. dissent.

2. This application of the amendment does not make it retroactive within Code Civil Proc. § 8, providing that "no part of it is retroactive unless expressly so declared."

Commissioners' decision. Department 1 Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Williams & McKinley, for appellant. *Graves, O'Melveny & Shankland*, for respondent.

BELCHER, C. C. Action to foreclose the lien of a material-man. The facts of the case, as shown by the findings are, in substance, as follows: The defendant Olmstead owned a lot of land in the city of Los Angeles, and on the 16th day of November, 1886, entered into a contract in writing with the defendants H. N. and D. F. Sheldon, whereby they agreed to construct for him on his said lot a two-story frame dwelling-house under the supervision, and to the satisfaction, of John C. Pelton, an architect. The contract price was \$3,600, and was made payable as follows: \$1,200 when the frame was up, the building inclosed, and the roof shingled, \$1,200 when brown mortar was on, windows glazed, and outside finish complete; and the balance when the whole of said material and work shall have been certified to have been completed according to the said plans, specifications, conditions, and stipulations, to the satisfaction of the said architect. The contract was filed for record in the recorder's office of the county on the 3d day of January, 1887, but no specifications were filed therewith. On or about the 20th day of November, 1886, the contractors entered into an agreement with the plaintiff, a corporation, by which it was to furnish lumber, and other building material, to be used in the construction of the said house, from time to time, as required, such material to be paid for at the current market rates as the same was delivered. In pursuance of this agreement the plaintiff, between the 20th of November, 1886, and the 6th of April, 1887, furnished building material for the construction of the said house, and which was actually used in the construction thereof between the dates named, of the value of \$763.60, no part of which sum has been paid. On the 9th day of April, 1887, the contractors quit work upon the building, and refused to finish it, and no work or labor was done thereon for more than 30 days thereafter. The plaintiff had

notice of this cessation of labor upon the building for 30 days at the time thereof. On or about the 23d day of November, 1887, the building was finished, and it was then accepted by Olmstead, and thereafter occupied by him. On the 20th day of December, 1887, the plaintiff duly filed its claim of lien for the value of the materials furnished, and this action was commenced within 90 days from that date. Upon the facts found the court rendered a personal judgment against the defendants Sheldon for the amount found due the plaintiff, with costs and attorney's fee, and decreed that plaintiff had a lien for these sums upon the lot of defendant Olmstead, and that the premises should be sold in payment thereof. Olmstead appealed from the judgment against him, and has brought the case here on the judgment roll.

In support of the appeal it is claimed, among other things, that the plaintiff's claim of lien was not filed in time, and therefore that it cannot be enforced. This claim is based upon the amendment to section 1187 of the Code of Civil Procedure, which was passed March 15, 1887, and was made to take effect immediately. By this section, as it stood before the amendment, it was provided that "every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure," file for record with the county recorder a claim containing a statement of his demand, etc. And it was held if the claim of a material-man, who was not an original contractor, was filed before the completion of the building, that the filing was premature, and the lien could not be enforced. *Perry v. Brainard*, 8 Pac. Rep. 882; *Roylance v. Hotel Co.*, 74 Cal. 273, 20 Pac. Rep. 573; *Schwartz v. Knight*, 74 Cal. 432, 16 Pac. Rep. 235. The amendment consisted of additions to the section which read as follows: "Any trivial imperfection in the said work or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in case of contracts the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner, or his agent, of said building, improvement, or structure, shall be deemed conclusive evidence of completion; and cessation from labor for thirty days upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." It is argued for respondent that it was intended by the amendment only to make it possible for a material-man or laborer to file his claim of lien before the actual completion of the building, and not to make it necessary for him to do so. But, as we construe the last clause of the amendment, its operation cannot thus be restricted. The words, "shall be deemed equivalent to a completion," mean, "shall be equal in legal effect to a completion;"

that is, shall be treated, for the purpose of filing a lien, as an actual completion. And, this being so, it is clear that whenever there has been a cessation from labor for 30 days upon any unfinished building the time within which a material-man or laborer must file his claim of lien at once begins to run.

It is also argued that the amendment cannot apply to or affect the respondent's claim, for the reason that as a portion of the materials were furnished before the amendment was passed, to hold it applicable would be giving it a retroactive effect, and that this is forbidden by the Code, which says: "No part of it is retroactive unless expressly so declared." Section 3, Code Civil Proc. We do not think that the amendment, when applied to the case in hand, is retroactive in effect. It is true it shortened the time which the respondent would otherwise have had to file its claim, and thus seek its remedy. But the authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left. Thus it has been held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of an action before the bar takes effect. *Terry v. Anderson*, 95 U. S. 628. In that case the court, by WAITE, C. J., said: "The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." And see *Scarborough v. Dugan*, 10 Cal. 305; *Society v. Hayes*, 56 Cal. 297; *People v. Campbell*, 59 Cal. 243. When the amendment in question was passed the materials had not all been furnished, and work on the building had not been suspended. Afterwards, when the work was suspended the respondent had notice of it, and when the suspension had continued for 30 days it still had 30 days within which to file its claim. This seems to us to have been a reasonably sufficient time, and, if so, it follows that the claim was filed too late.

In our opinion the court erred in entering a judgment of foreclosure against the defendant Olmstead, and we therefore advise that the judgment appealed from be reversed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

WORKS, J. I dissent. The amendment of section 1187 of the Code of Civil Procedure was evidently intended for the benefit

of the material-man, and extended the time within which he may file his notice of lien when work has been suspended for 30 days. As the section now stands he is not bound to wait until the building is completed before filing his notice. But in my judgment he may do so. The statute should not be so construed as to compel the owner to submit to a forced sale of an uncompleted building because a faithless contractor has failed to comply with his contract, and left the building unfinished. I think, therefore, that it is not enough to show that the contractor has failed to carry out his contract, but that it must be shown that the owner, who alone is affected by the filing of the lien, has himself abandoned the work on the building. If he has not abandoned the completion of the building, but is only delayed in its completion by no act of his own, but by the failure of the contractor to comply with his contract, he should not, for that reason be subjected to the filing and enforcement of the lien until the building has been completed. This construction of the statute seems to me to be the only reasonable and just one. The construction given the section referred to in the foregoing opinion overlooks the true intent and meaning of the statute, and the real parties to be affected by the enforcement of its provisions, looks only to the strict letter of the statute, and must necessarily work injustice.

THORNTON, J. I concur with Justice WORKS in his dissenting opinion. It presents the just and proper construction of the statute.

85 Cal. 251

WALDRON v. WALDRON. (No. 13,503.)

(*Supreme Court of California*. Aug. 4, 1890.)

DIVORCE—CRUELTY—MENTAL ANGUISH.

Though Civil Code Cal. § 94, defines "extreme cruelty" as "the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage," a divorce should not be granted the wife on the ground of extreme cruelty because the husband, when intoxicated, and in the presence of others, called her a "whore," and other vile names, where the evidence shows that she was not uniformly kind to him, and that the mental suffering endured by her did not injure her health. *McFarland and Paterson, JJ.*, dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Smith, Winder & Smith, for appellant. *Wells, Guthrie & Lee*, for respondent.

VANCLIEF, C. This is an action for divorce on the ground of extreme cruelty, by the use of vile and offensive language without any physical force or violence applied to the person of the plaintiff. The answer of the defendant denies the cruelty and the use of the language alleged. The court found for the plaintiff, and decreed a divorce and permanent alimony of \$100 per month while she shall remain unmarried, and \$1,000 for her attorneys' fees; and defendant appeals from the judgment and from an order denying his motion for a new trial.

The material substance of the findings

as to extreme cruelty is as follows: That, upon occasions when the defendant was intoxicated, he wrongfully and unjustly, and without sufficient provocation to justify him in so doing, called the plaintiff vile names, once called her a "whore," and on several different occasions called her a "damned bitch," and a "damned witch from hell," in the presence and hearing of other people, thereby inflicting upon her grievous mental suffering, but without injury to her health; that when he called her such vile names she was not without fault, and that she was not uniformly kind to him; that there is reasonable apprehension to believe that such cruel treatment will be continued if a divorce is not granted. The defendant contends—*First*, that these findings as to cruelty do not support the judgment; and, *second*, that they are not justified by the evidence.

1. As to the sufficiency of the finding, it is to be observed that the degree of cruelty which the law recognizes as a cause of divorce never has been exactly defined. Perhaps as near an approach to an exact definition as is practicable is made by Mr. Bishop, who, admitting the great difficulty of formulating such a definition, thinks the task not impossible, and gives as his definition the following: "Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe, to a degree justifying a withdrawal therefrom." 1 Bish. Mar. & Div. (6th Ed.) § 717. Yet this expression of the degree of cruelty which may justify a withdrawal from cohabitation seems to leave it quite as indefinite as was the degree which will justify a divorce, without aid from this definition; and the learned author seems to admit as much further on, (section 740,) where, referring to this definition, he says: "By our definition of cruelty, the apprehension of physical danger to the complaining party must, to justify a divorce, have proceeded 'to a degree justifying a withdrawal from cohabitation.' Now, if this seems indefinite, so is the law. There is no possibility of measuring the depth of woe or danger thus required except by the understandings of the men who occupy the bench and the jury-box, enlightened and strengthened by what has been heretofore deemed or adjudged." Certainly, where the fact upon which the law is to operate is indefinite, the law is necessarily indefinite and uncertain to the same degree; and generally uncertainty of the law proceeds from uncertainty as to the ultimate matter of fact which forms a part of, and a term in, every proposition of law. True, it is sometimes uncertain whether a law is mandatory or merely directory or permissive; but much oftener the "uncertainties of the law" arise from uncertainties as to the facts or things commanded, permitted, or prohibited; and so it is with the fact of cruelty prohibited by the law governing the marriage relation. Since all degrees of cruelty are not prohibited, and the requisite degree to bring it within the prohibition being uncertain, the law prohibiting it must be correspondingly uncertain.

But, although the degree of cruelty constituting a ground for divorce may not have been exactly defined, it has been so described by the decisions of courts that it may be sufficiently identified for practical purposes; and although the judicial descriptions of what is and what is not a sufficient degree of cruelty do not reduce the distinction to a line clearly separating the sufficient from the insufficient degrees of cruelty in all possible cases, they reduce it to a very narrow zone, within which the true line of distinction is to be judicially ascertained or sufficiently approximated by means of the peculiar circumstances of each case, viewed in the light of "what has been heretofore deemed or adjudged." A great majority of the cases, however, will be found to fall within the authoritative descriptions of either the requisite or the insufficient degree of cruelty. It is contended, however, by counsel for respondent, that extreme cruelty is defined by section 94 of the Civil Code, and that the finding in this case, being in the language of that section, must be sufficient. That section is as follows: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." If this section is to be considered a proper legal definition of the words "extreme cruelty," as used in section 92 of the same Code, it certainly deprives those words of an essential part of their meaning as used in the books to express a cause of divorce, since it entirely omits the attribute of wrong or injustice. "The infliction of grievous bodily injury or grievous mental suffering" does not imply wrong or injustice, and it may be justifiable; whereas the word "cruelty" alone, is always understood as implying wrong or injustice; and the "extreme cruelty" which is a cause of divorce is necessarily wrong, and never justifiable. Therefore, to say that section 94 of the Civil Code was intended as a complete definition of the words "extreme cruelty," as used in section 92, would be to affirm that the mere "infliction of grievous mental suffering," though excusable or justifiable, is a cause of divorce,—an absurdity not to be attributed to the legislature. The probable object of the legislature in enacting section 94 of the Civil Code was to affirm the previous decisions of the supreme court of this state in the cases of *Morris v. Morris*, 14 Cal. 78, and *Powelson v. Powelson*, 22 Cal. 360, to the effect that extreme cruelty may be effected without, as well as with, physical violence, and thus to settle the law on a point as to which there was thought to be some contrariety of judicial opinion in other states and in England. Surely it was not intended to disturb those decisions; for, although they limit the rule that extreme cruelty may be the result of treatment other than that of physical violence to such treatment and conduct as produce bodily harm or ill health, or furnish reasonable apprehension that further cohabitation would endanger the life or physical health of the complaining party, yet they extend the rule quite as far as it has gone elsewhere in the United States or in England. Although the character of the ill

treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party. 1 Bish. Mar. & Div. (6th Ed.) §§ 732, 733*b*; *Morris v. Morris*, 14 Cal. 80; *Powelson v. Powelson*, 22 Cal. 362. This is the only practically safe rule. The grave remedy of divorce is disproportioned to the petty marital wrongs and annoyances whose injurious effect upon the body or health cannot be shown and sensibly appreciated, and is not to be administered on the ground of cruelty, except in conservation of life or health. Many of such wrongs and annoyances productive of more or less unhappiness must be borne, if they cannot be justly remedied or avoided by the parties themselves. The following passage from Lord STOWELL's opinion in *Evans v. Evans*, 4 Eng. Ecc. R. 310, delivered 100 years ago, has ever since been regarded and cited as sound law both in England and the United States: "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties—for it may exist on one side as well as on the other—the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation, and if this cannot be done both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings, arising from particular rank and situation; for the court has no scale of sensibilities by which it can gauge the *quantum* of injury done and felt, and, therefore, though the court will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed." Speaking of this passage, and of cruelty inflicted by other means than physical violence, Mr. Bishop says, (section 725:) "And though the court may not, as Lord STOWELL said, have 'any scale of sensibilities by which it can gauge the *quantum* of injury done and felt,' it may sometimes perceive that it is greater

than can be practically endured, as well when falling on the mind as on the body. Equally, whether of the one sort or the other, the court must be made affirmatively to perceive that cruelty exists in fact, and is sufficient in degree, before it can grant the remedy." Yet the practical view of the law is that a degree of cruelty which cannot be perceived to injure the body or the health of the body "can be practically endured," and must be endured, if there is no other remedy than by divorce, because no "scale" by which to gauge the purely mental susceptibilities and sufferings has yet been invented or discovered, except such as indicate the degrees thereof by their perceptible effects upon the physical organization of the body.

From the foregoing considerations it follows that the findings of fact are not sufficient to sustain the judgment. "Extreme cruelty" is not expressly found in any sense; nor does it, in the legal sense above described, follow as a necessary inference from the facts found. The finding of "grievous mental suffering" is, and purports to be, only an inference or conclusion from the opprobrious language found to have been used by the defendant. In the case of *Smith v. Smith*, 62 Cal. 466, in which the only issue was as to the fact of extreme cruelty, it appeared that the trial court, after finding the acts claimed to have constituted extreme cruelty, concluded as follows: "That the repeated acts of cruelty, as established by the evidence, upon the part of said defendant towards her said husband and children during the last several years, have inflicted upon the plaintiff grievous mental suffering." Held, that this finding "is but a conclusion of law, and does not find any fact in issue in the case." Now, whether this finding is a conclusion of law or a conclusion of fact, the decision that it is not a finding of any fact in issue is correct, though the fact of extreme cruelty was in issue; because, as we have seen, the infliction of grievous mental suffering is not the equivalent of extreme cruelty in a legal sense, nor is extreme cruelty a necessary inference from the infliction of grievous mental suffering, since the latter may be excusable, and even justifiable, while the former never is so. Although the evidence is conflicting as to the finding that the defendant, when intoxicated, unjustly, and without sufficient provocation, once called the plaintiff a whore, and several times a bitch, and a witch from hell, in the presence of other people, yet this finding is justifiable by the rule applicable to findings upon conflicting evidence; but, qualified as it is by the further findings that the plaintiff was not uniformly kind to the defendant, that at the times when he called her those vile names she was not without fault, and that her health was not injured thereby, it does not stand the final test of its sufficiency, as it does not affirmatively show any actual or reasonably apprehended injurious effect of the language used upon the body or health of the plaintiff, and therefore it could not have been affirmatively perceived by the court that the cruelty was sufficient in degree. Upon the findings of fact, I think the judgment should have been for the de-

fendant; and as the case appears to have been thoroughly tried as to the facts, it appears very improbable that a new trial would result more favorably to the plaintiff. *Ford v. Chambers*, 28 Cal. 13.

A careful examination of the evidence will show that it is barely sufficient to justify even the insufficient findings, and that there are many circumstances tending to qualify the facts found in favor of the defendant, and to mitigate their effect upon the plaintiff's mind. Both parties had been married before. The plaintiff had three children by her former marriage, aged, respectively, seven, nine, and eleven years, but the defendant had no children by his former marriage. The plaintiff had about \$2,500, and defendant had property worth about \$100,000, at the time of their marriage. The intemperate habits of the defendant, such as they were after marriage, were known to plaintiff before marriage, and she testified that she once broke off her engagement to marry him on that account; and, as a condition of renewing it, she required him to sign a written pledge to her, not that he would not drink, but only that he would not drink to excess, and that his hand trembled from the effect of drink at the time he signed the pledge. Soon after the marriage plaintiff's niece, then a young unmarried lady, came to live with them and remained until she was married, on July 25, 1888, nearly three months after the commencement of this suit; for it appears that the plaintiff continued to reside in defendant's house up to the time of trial, as before, except that he occupied a separate room from hers. The defendant kept his pledge until about two months after marriage. The niece, Mrs. Albee, testified as to the first time he became intoxicated after marriage, as follows: "When I first came down I was very much pleased with my aunt's choice. He was apparently a gentleman, and acted the gentleman for quite a while, until probably six weeks afterward. We came home and found him in a state of intoxication in the hall, and my aunt remonstrated with him after he got into the room, and he became very angry and swore a great deal. * * * She remonstrated with him, and said to him: 'Do you remember the promise you made to me?' He said: 'My promise outside of a business transaction does not amount to anything.'" As to how often after this first scene he became intoxicated, or called her vile names, the evidence is indefinite. The plaintiff testified that it may have been two or three times a month, but probably oftener. She could not tell how often, but that the first time he called her a whore or bitch was during the holidays, when he came home intoxicated late at night, upon which occasion the principal quarrel seems to have occurred, and as to which the plaintiff in part testified as follows: "I would not let him in the room at night. * * * That was the first occasion that happened, and he was going to kick in the door. * * * I never have seen him quiteso mad as that before. Then I was nervous. I did not know. I was all alone in the house. My little girl

was in the room with me. My niece was at the theater with Mr. Albee. My little girl heard a noise in the house, and asked me if she could come in my room. I told her she could come until Mr. Waldron came. I says: 'If he comes home sober, you will have to go to your own room. If he comes home drunk, you can stay.' * * * We heard something in the hall, as if somebody fell. He came to my door, and demanded to come in. I told him he could not come in. * * * He said he wanted some quilts. I said I had no quilts only what was on my bed. I told him if he had come home sober he could have come in. He says, 'Open this door,' and went on damning and cursing and swearing, and I thought I would scare him, and call a policeman. I raised the window. There was no policeman around there. When I called the policeman he says, 'You damn bitch, you damn whore, you damn tramp,' or something like tramp. I says: 'I will not stand that in the world.' I was paralyzed. I never thought Mr. Waldron would call me any such names as that. When he called me these names first it almost paralyzed me. Then the colored girl heard him down stairs, and she came up, and tried to get him down stairs. He went down and sat in the parlor by the fire. * * * It was about the holidays, either the last part of December or a little after New Year's. I cannot exactly tell when the next time was. Of course I did not feel very kindly toward him after he called me those names, and when I got him sober I gave him a piece of my mind about it. He was sitting at the head of the table, and I says to him: 'You have called me the very worst kind of names the other night, and remember I will never stand that.' I says: 'I have not done anything to deserve any such names as that, and you can't do that.' I says: 'Probably you are calling me after the women that you have been used to associate with all your life. It comes natural; but remember you cannot call me any such names as that.' He spoke of his property at Washington Gardens, and says: 'Look at the wealth ahead of you.' I says: 'The wealth ahead of me don't license you to call me any such names.' He says: 'If you leave me you will go to the poor-house.' It was no use for me to talk to him at all about it. He behaved himself for a little while. About a week or so he behaved himself; kind of stayed sober; did not drink much. He kind of thought I would do something, I guess. Then I guess he thought I would not. I don't know what it was. In the hall upstairs, anyhow, he says: 'You are a damn whore, anyhow.' Just then I leaned over the banister, and saw my niece on the stairs, and I says: 'Jennie, did you hear what he called me?' She says, 'Yes, I did.' He says: 'Oh, well, I will take it back.' * * * When he thought she heard him, he says: 'I will take it back.' I says: 'You better take it back.'" It appears that there was no spare bed in the house at the time she barred him out of her room, their spare bed-room not being fully furnished at that time. On cross-examination plaintiff said: "The time

there was a fuss about the quilts was the first time he called me names. * * * When I told him he could not come in he says: 'I want some quilts.' I says: 'I have none in here only what is on my bed, and if you had come home sober, sir, you could come in, and have quilts where you belong.' " Being asked by her counsel if she ever did anything to provoke him or seek quarrels with him, she answered: "He would come home drunk, you know. I would say: 'Now, Dave Waldron, now you are drunk again.' I would go on, and I said: 'Now you know very well the promise you made me, and the condition upon which I married you, and you have broken that promise, and you know you took an oath to me, and you kept sober before you married me for months.' * * * If he would come home drunk, and fall in the door-way, and lay in the hall, so we could not get him up, when my niece invited company, we had to send over to Mansfield to take him off of the floor. He has fallen in the front door so the whole house shook. When he would come home so, I was a little bit provoked, you know. Then I would think it was my time to talk to him, and tell him what he was doing. He could not enjoy his money, and when he would get to drinking he would kill himself. I would tell him about his soul, and the hereafter. Then he would answer me in the most terrible blasphemous remarks when I would begin anything about religious subjects. * * * At one time I don't know as he had much liquor. * * * I made the most solemn appeal to him in the dining room. When I got through he knew I was right. * * * When I made this eloquent appeal to him, he picked up his head, and said: 'You are a d—— fool.' My appeal was all right, but it was foolish to apply it to him. * * * All I would do I would talk to him, you know, and sometimes I would scold him. * * * I says: 'Didn't your first wife ever scold you about your actions generally, and try to make you do what was right? Didn't she scold like I do?' He said: 'She scolded louder and faster than you do, but she did not spread it on quite so thick,' meaning it was not to the point, as mine was." Mrs. Albee, the niece, testified: "I think it was after Christmas that his language and conduct was most vile,—well, almost up to the time, and after, she applied for a divorce." So it seems that the plaintiff and her niece remained in the house with him, and that the quarreling was kept up after the suit for divorce had been commenced; the niece remaining until she was married, nearly three months after the suit was commenced. Being asked how often she heard him call plaintiff vile names before the divorce suit was commenced, Mrs. Albee answered: "I never heard him call her out of her name except this once. I heard him call her a whore but once. I never heard him call her a bitch. * * * I remonstrated with him. I was very indignant, and I spoke to him about his conduct."

Plaintiff admitted that the defendant was an honest man in all his business transactions, and that he liberally sup-

plied her and her children and niece. She complained of no unkindness when he was sober, and feared no physical violence from him when he was drunk. In their quarrels she appears to have been more than his match, though she could not descend to answer his profanity and obscenity in kind. While drunkenness was no excuse for calling her vile names under any circumstances, yet the injurious effect thereof upon her mind should not have been, and probably was not, so bad as if he had deliberately called her by those names when he was sober. No mental suffering produced by his drunkenness merely can be considered, because not complained of. *Haskell v. Haskell*, 54 Cal. 262. The mental suffering caused by his words alone can be considered in this case.

The finding that defendant called the plaintiff a whore and a bitch in the presence and hearing of other people should be qualified by the admitted facts that none but the niece and her caller and the colored servant heard him call her out of her name; and that he was not aware that even they heard what he said, or that the caller upon the niece was in the house at the time. This seems material, as tending both to modify the otherwise apparent motive of the defendant, and to mitigate the alleged painful effect upon the mind of the plaintiff; as without this qualification it would appear that the defendant intended to defame the plaintiff in public estimation, which would indicate a worse motive on his part, and produce a more painful effect upon her mind, than would the mere intention privately to annoy her, or to revenge himself for the fancied wrongs of having been barred out of her room and threatened with the police. While the defamatory, obscene, and profane language of the defendant was wholly unjustified, inexcusable and unmanly, it may be said that the conduct of the plaintiff was at least unkind and censorious, and tended to provoke anger and harsh language on the part of the defendant. It probably resulted from her ill temper, bad judgment, and a mistaken view of the duty of a wife under the circumstances. She probably deemed it her duty, by means of censure, reproach, and scolding, to make her husband "do what was right," and it seems that she faithfully, in season and out of season, applied such means. In this I think she was mistaken. Intemperate husbands are seldom, if ever, reformed by such treatment, whereas uniform kindness may often prove effectual, and never harmful; but should kindness fail, and the intemperance of the husband become habitual, the wife will be entitled to a divorce on that ground alone. I think the judgment should be reversed, and the court below directed to render judgment for the defendant on the findings, without costs, and that the appellant pay his own costs of the appeal.

WE CONCUR: BELCHER, C. C.; FOOTE, C.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to render judgment for the defendant on the

findings, without costs, and that the appellant pay his own costs of the appeal.

I dissent: PATERSON, J.

McFARLAND, J., (*dissenting*.) I dissent. It is possible that the judgment in this case might be reversed for want of sufficient proof of facts, but I dissent *in toto* from the views expressed in the opinion adopted by the majority of the court on the subject of extreme cruelty. The opinion goes back to the old cases of *Morris v. Morris*, 14 Cal. 80, and *Powelson v. Powelson* 22 Cal. 362, and adopts their doctrine that no conduct of a husband towards a wife constitutes extreme cruelty unless it injures bodily health or endangers physical safety. It treats a woman as having only a bodily structure and physical organs like one of the lower animals, and utterly ignores her mental, moral, and emotional nature. Those cases, following musty decisions in the past, when women had few civil immunities which man was bound to respect, were determined before the present statutory law of California upon the subject, and at a time when human rights, as human rights, were but dimly recognized, even in these free United States, and when extreme, and in some cases wholesale, violation of personal liberty was common against all except one class, viz., white male citizens. The theory of those cases is that a husband may heap all sorts of wrongs upon a wife short of beating or threats of personal violence; that his conduct towards her may be a continuous series of acts of insult and contumely; that he may continuously call her vile names, and unjustly and falsely charge her in the presence of others with indecent acts and base practices, so that she is ashamed to look her neighbors in the face, and unable to find aught in life but misery,—so that the common voice of mankind would call him cruel beyond all patience; and yet, as long as her physical constitution can bear up under the strain, she can get no redress. She must be a wreck before she can be rescued. This doctrine makes legal cruelty depend, not on the misconduct of the husband, but on the endurance of the wife; not on the guilt of the wrong-doer, but on the vitality of the victim. The anguish of the mind must have eaten through the flesh, and exhibited itself in bodily disease, before there can be any legal evidence of cruelty. But some women, like some men, have inherited from sturdy ancestors physical constitutions so robust, with bone and blood, and muscle and nerve, and heart and lungs so charged with vitality that the woes of a Lear would not wear out the machinery or obstruct the currents of healthy physical life. Must such a woman suffer on forever, and only the weak, who faint at a gentle reproach, be relieved? There is not, in my opinion, any necessity whatever to follow *Morris v. Morris* and *Powelson v. Powelson* as authorities; for since they were decided the statute law has been changed, and changed, I think, for the express purpose of obliterating those decisions. At that

time the statute merely made "extreme cruelty in either party" a cause of divorce, without any attempt to define or describe it. *Hit. Gen. Laws*, par. 2416. But the Code has added the following: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage." Civil Code, § 94. Here "bodily injury" and "mental suffering" are mentioned as two entirely distinct things, and each by itself as constituting extreme cruelty. If the legislature had merely meant bodily injury caused by mental suffering, there would have been no occasion for the legislation at all, because that was included clearly in the decisions in the *Morris* and *Powelson* cases. It is entirely evident, therefore, to my mind, that both in a philologic and historical view the language of section 94 means that the infliction of grievous mental anguish alone constitutes legal cruelty. It is said that the definition of extreme cruelty in section 94 is defective. Of course there cannot be a perfect definition of such a thing. The qualities of human actions cannot be designated by accurate lines, as fields can be by fences. Can grievous bodily injury be accurately defined? It is said that the infliction of grievous suffering does not imply wrong or injustice. But section 94 is dealing with extreme cruelty, and uses that phrase. And does not "extreme cruelty" itself imply wrong and injustice? And while extreme cruelty of either kind cannot, in the very nature of things, be accurately defined, there is often misconduct so far outside of and beyond that produced by the ordinary weaknesses and passions of men that the common judgment of mankind pronounces it extremely cruel. Every case where a divorce is sought on this ground must depend upon its own particular facts; and a correct decision must depend, as most cases depend, upon the sound sense and judgment of juries and courts. Some divorces are no doubt obtained upon insufficient proof; but it must be remembered that one reason why more divorces are granted than formerly is because formerly wives had no remedy for many outrageous wrongs.

85 Cal. 300

PEOPLE v. LEE FOOK. (No. 20,664.)

(Supreme Court of California. Aug. 4, 1890.)

CRIMINAL LAW—INSANITY OF ACCUSED—QUESTION FOR JURY—INSTRUCTION.

1. Pen. Code Cal. § 1368, provides that "when an action is called for trial, or when the defendant is brought up for judgment on a conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury." The court allowed evidence, on the trial of defendant, as to his sanity after and before the time of the alleged offense, but refused to instruct that if the jury believed defendant insane at the time of the trial they should acquit him. *Held*, that it could not be said that the court had doubt as to the defendant's then sanity necessitating his ordering the submission of the question to the jury.

2. The fact that the jailer having charge of defendant testifies that he has observed defendant during his imprisonment, and believes him to be insane, is not sufficient to create such a doubt

as to require the court to order the question of defendant's sanity to be submitted to the jury.

PATERSON, J., dissenting.

Commissioners' decision. Inbank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Hugh J. and William Crawford, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

FOOTE, C. The defendant was convicted of assault with a deadly weapon, upon an information charging the crime of assault with intent to murder. The claim made for a reversal of the judgment rendered in the premises, and from an order denying a new trial, is that the court erred in not submitting the question of the sanity of the defendant to a jury, under the provisions of section 1368 of the Penal Code, and that it should have given, instead of refusing, an instruction asked for on behalf of the defendant. The section of the Penal Code with which it is alleged the trial court failed to comply is: "When an action is called for trial, or at any time during the trial, or when the defendant is brought up for judgment on a conviction, if a doubt arise as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury. * * *" In the present case the court, upon the trial of the defendant, allowed evidence as to his sanity after and before the commission of the offense charged, but would not give an instruction to the jury to the effect that if they believed the defendant insane at the time of trial they should acquit him. It was proper for the court to allow such testimony to go to the jury on the trial, with a view to enable them to determine whether the defendant was insane at the time of the trial. *People v. Farrell*, 31 Cal. 576. But it does not follow, because of this, that the court must have had a doubt of the defendant's then sanity; for, as we have seen, it refused to give an instruction that the defendant must be acquitted if he was then insane. Judge TEMPLE, in the case of *People v. Ah Ying*, 42 Cal. 21, says: "The fact that evidence upon the subject was allowed to go to the jury, and that they were instructed to find a verdict that the defendant was then insane, if they were satisfied from the evidence that he was so, implies a doubt on the part of the court as to his sanity." There the learned judge found two circumstances, which together implied a doubt by the court. In the present case the most important and persuasive circumstance showing doubt in the former case is absent; that is, the granting of the instruction to the jury. In the present case the court evidently had no doubt that the defendant was sane, and there being no request made by him to have the question of insanity submitted, as the section *supra* requires, as a separate and distinct issue from that of the defendant's guilt or innocence of the offense charged, it did its duty by allowing the evidence to go to the jury, as bearing upon the question of the sanity of the defendant at the time of the commission of the offense. Therefore, the case in 42 Cal. is not in

point here, as showing conclusively that the court must have had doubt as to the defendant's then sanity.

The evidence in the transcript is not of a kind from which we can say that the trial court either ignorantly or capriciously disregarded its force and effect, in not entertaining therefrom doubt as to the defendant's sanity. It is clear that no such doubt existed in the mind of the trial court, and we cannot say that it was its duty to have entertained such doubt from that evidence. The instruction refused is: "You are also instructed that if you believe from the evidence that the defendant is now insane you shall find him not guilty because of insanity." "There was no plea of insanity required." *People v. Ah Ying*, *supra*.

The proof upon the matter of insanity was not admitted under any such issue as present insanity, as we have seen. No such issue was before the jury, and no such instruction was proper. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PATERSON, J., (*dissenting*.) I think it was the duty of the court, when the deputy-sheriff testified he believed the defendant to be insane, to suspend the trial, and order the question of his sanity to be submitted to a jury. The deputy testified that he was the jailer, and had observed the actions and language of the defendant during the time of his imprisonment in the county jail, and believed him to be insane. This was sufficient to create the doubt provided for by the provisions of section 1368. I do not mean to say that in every case where a witness testifies that he believes the defendant to be insane the court must order the question of his insanity to be submitted to a jury. The defendant in nearly every case might be able to procure a witness who would testify to his insanity. Each case must depend upon its own peculiar circumstances. Here an officer of the state,—the defendant's keeper,—without any interest whatever in the result of the prosecution, and having had opportunity for two months to converse with and observe the actions of the defendant, testified that he believed the defendant to be insane. There was other evidence, uncontradicted, which tended to show that the defendant was insane prior to the time of the assault, and that the act of the defendant was that of a madman without provocation or motive. As was said by Judge TEMPLE in *People v. Ah Ying*, "common humanity requires that one should not be tried for his life while insane, and counsel for the defendant cannot waive such inquiry when the doubt exists." It was the duty of the court, of its own motion, to suspend the trial or further proceedings in the case, at whatever stage the doubt arose, until the question of sanity was determined.

85 Cal. 191

ARZAGA v. VILLALBA. (No. 13,471.)
(Supreme Court of California. Aug. 4, 1890.)

EXEMPLARY DAMAGES.

1. Civil Code Cal. § 3294, provides that "in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give punitive damages." Plaintiff lived with defendant, her father, who was angry with her because she would not contest her mother's will. While she with her little child was in town for medicine, defendant locked them out, and they were obliged to sleep in an outhouse, which had been used for a granary, but which had a bed. Plaintiff was very sick at the time, and unable to work. The next day defendant refused to give her clothes and furniture to her. *Held*, that plaintiff was entitled to exemplary damages, besides a judgment for the property.

2. The fact that plaintiff obtained possession of the property pending the proceedings does not affect the question of exemplary damages.

3. Exemplary damages may be awarded in an action for the conversion of personal property as well as in an action for the recovery of the property itself.

4. Civil Code Cal. § 3336, provides that "the detriment caused by the wrongful conversion of personal property is presumed to be * * * (2) a fair compensation for the time and money properly expended in pursuit of the property." *Held*, that expenses of pursuit could be recovered as well in an action to recover the property as in an action for conversion merely.

Commissioners' decision. In bank. Appeal from superior court, Santa Barbara county; B. T. WILLIAMS, Judge.

W. C. Stratton, for appellant. Fernald, Cope & Boyce, for respondent.

HAYNE, C. This was an action for the recovery of personal property and damages. The plaintiff obtained judgment for the possession of the property or its value in the sum of \$350, and for the sum of \$530 damages.

1. The defendant contends that there is no evidence that justifies the award of damages. And it is quite true that there is no evidence of actual damage (the property itself having been returned) beyond a small sum expended in pursuit of the property. But "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." Civil Code, § 3294. And we think that the circumstances of the case justified the award which the jury made. The plaintiff was the daughter of the defendant, and lived in his house with her two children, one of whom was about four years old, and the other a baby. The property consisted principally of her clothes and furniture. There is evidence tending to show that about 10 days after her mother's death the defendant became angry with the plaintiff because she refused to try to have her mother's will set aside; that on January 3, 1889, she went to a neighboring town to get some medicine, and on her return found that defendant had put new locks on the doors, so that she could not get in. She says: "I slept in an outhouse the night of January 3d. It is an unfinished house; a

little farm-house; an old house that they use to keep grain in." It appears that this house was not unoccupied, and that she did not have to sleep on the floor, but had a bed. But she "was very sick at the time and not able to work." And one of the neighbors to whom she applied says: "I saw her the next morning. The child was with her. The child was running at the nose and eyes, and he seemed to be all drawn up, like he was starved during the night. She looked miserable, and said she didn't sleep at all." The next day she asked her father for her things, but he refused to give them to her, and retained them until they were taken from him under the process of the court. There is evidence tending to contradict some of the foregoing; but wherever there is a conflict it must be presumed that the evidence tending to support the judgment is true. And assuming that it is true, we think that there was such oppression on the part of the defendant as justified the award of the jury. It makes no difference with respect to the exemplary damages that, pending the proceedings, the plaintiff obtained possession of the property under the process of the court. That could affect only the judgment for the value of the property. It does not affect the exemplary damages. Section 626 of the Code of Civil Procedure does not establish a different rule.

2. The defendant contends that the court erred in instructing the jury that the action was for the conversion of personal property, and that in such an action they could give exemplary damages if they believed that there was malice, etc. The argument is that this was not an action for the conversion of personal property, but was for the recovery of the property itself. But whatever may be the distinction between the two actions it is not important here, for the provision of the Civil Code above quoted does not confine the recovery of exemplary damages to actions for the conversion of the property. It says, "in an action for the breach of an obligation not arising from contract," which is certainly broad enough to include both the actions above referred to. The court, therefore, was right in telling the jury that if they believed that there was malice, etc., they could give exemplary damages. And if it called the action by a wrong name the mistake was immaterial.

3. It is urged that under the cases of *Kelly v. McKibben*, 54 Cal. 195, and *Redington v. Nunan*, 60 Cal. 632, the plaintiff cannot recover what she expended in pursuit of the property. These cases seem to lay down the rule that expenses in pursuit of the property can be recovered only in actions "for" the conversion, and not in actions to recover the property itself. Undoubtedly the property itself is a different thing from damages for its conversion. The pleader may unquestionably omit one of them. He may not allege any damages from the conversion, and if not he cannot recover any. In that sense it is true that in an action to recover the property itself, i. e., the property only, the plaintiff cannot recover damages for the conversion.

But it is perfectly clear that the party may have sustained damages from the conversion outside of the loss of the value of the property itself. The Code expressly provides that "the detriment caused by the wrongful conversion of personal property is presumed to be * * * (2) a fair compensation for the time and money properly expended in pursuit of the property." Civil Code, § 3336. If, therefore, he has made such expenditures, he is entitled to recover them as damages for the wrongful act of the defendant. He is also, undoubtedly, entitled to a recovery of the property itself if possession thereof can be had. Why should he be compelled to waive one or the other, or to bring separate actions for relief on account of the same wrong? To say that the expenses of pursuit can be recovered in an action for the conversion, but not in an action for the property itself, is to say that the expenses of pursuit can be recovered where the party abandons the pursuit, but not where he follows it up, and is successful. In other words, that the expenses of pursuit cannot be recovered when he pursues, but only when he ceases to do so. We can perceive no reason for such a result. There is nothing in the statute which points to it. The provision establishes the measure of damages for "the wrongful conversion of personal property." And we do not see any reason for saying that this means that the damages can be recovered only in the old rigid form of action in which a recovery therefor used to be allowed at common law. Under the Code, if a complaint states a cause of action of any kind, a recovery may be had accordingly. As above stated, a recovery of the expenses of pursuit is not inconsistent with a recovery in the same action of the property itself. And if it were, the misjoinder would have to be objected to in some appropriate way. That part of the case cannot be simply disregarded. The form of the judgment does not make this conclusion. The argument in this regard is that, in cases where the possession can be had, to apply the measure of damages established by section 3336 would be to give the plaintiff both the property and its value. But the judgment must always be in the alternative. Even where the possession not only can be, but has been, delivered, under provisional process, the judgment must, nevertheless, be for the recovery of the property or its value in a specified sum in case possession cannot be had. *Berson v. Nulan*, 63 Cal. 552; *Brichman v. Ross*, 67 Cal. 606, 8 Pac. Rep. 316. And it by no means follows that the plaintiff is to have both the property and its value. So far as this part of this judgment is concerned it is for one thing or the other, not both; and, if possession has already been delivered to the plaintiff, the court would not allow him to proceed with his execution for that part of the judgment. But that would not affect the other parts. As to the damages the judgment is not required to be in the alternative. The form of the judgment therefore does not show that the expenses of pursuit cannot be recovered in an action for the property itself. On the contrary it tends to support the conclu-

sion at which we have arrived; for it cannot ordinarily be known with certainty whether or not possession of the property itself can be had until the alternative judgment comes to be executed, and if the expenses of pursuit cannot be included in such a judgment, and it should turn out that possession cannot be had, then the plaintiff would obtain only the bare value of the property, although the statute expressly gives him the expenses of pursuit in addition. For these reasons we think that the doctrine of the decisions referred to must be limited to cases where the plaintiff has so framed his complaint as to seek only a recovery of the property, and has not alleged any damages; but that when he makes proper allegations of damage he may have judgment for it as well as for the property itself. In the present case the complaint alleges that the defendant took the plaintiff's property, and refused to return it on demand. This amounted to a conversion. *Wood v. McDonald*, 66 Cal. 548, 6 Pac. Rep. 452; *Doyle v. Callaghan*, 67 Cal. 155, 7 Pac. Rep. 418. The evidence sustained the allegation, and we think that the statutory measure of damages for a conversion applies.

4. The conversation between the plaintiff and her mother in regard to her remaining in the house, which must have occurred before the mother's death, and, consequently, some time before the occurrence in question, was clearly irrelevant, and the objection to it was properly sustained. As above stated the form of the judgment was proper. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

85 Cal. 362

In re WALPOLE. (No. 20,725.)

(Supreme Court of California. Aug. 13, 1890.)

CRIMINAL LAW—HABEAS CORPUS—COMMITMENT.

1. Where an information is set aside, and the prisoner is again examined by the court, acting as committing magistrate on the original complaint, and again held to answer, the error, if error there is, is reviewable on motion to set aside any new information that may be filed, and then on appeal, but not on *habeas corpus*.

2. An order of commitment to answer the charge of murder is not invalid by reason of its failure to give the name of deceased, this not being required by Pen. Code Cal. § 872.

In bank. On *habeas corpus*.

Clarence A. Raker, for petitioner.

Fox, J. The petitioner in this case, and one Washburn, were arrested upon a warrant based upon a complaint charging them with the crime of murder. They were regularly examined before a committing magistrate, and held to answer to the charge. In due time information was filed against them, and upon arraignment they pleaded guilty. Washburn was sentenced to the state-prison for life, but the petitioner was allowed to withdraw his plea; and, upon proceedings subsequently had, the information was set aside, and the court remanded the petitioner to

the custody of the sheriff. Thereupon the judge of the superior court, acting as committing magistrate, again held an examination of the petitioner, and on the evidence adduced he was again held to answer. To this proceeding the petitioner objected, on the ground that the judge, acting as a committing magistrate, had no jurisdiction to hold such examination, for the reason that no complaint had been filed charging the defendant with the crime of murder, or any crime. This objection was based upon the proposition that the original complaint filed in the case was *functus officio*, and that a new examination could not be had without a new complaint; also on the ground that the superior court had not in terms ordered the case resubmitted to a grand jury, or that a new information be filed. The court overruled these objections, and proceeded with the examination. We do not think that there was error in this ruling, but if there was it was subject to review first in the superior court, upon motion to set aside any information that might be filed, and then upon appeal; but it is not ground for discharging the prisoner on *habeas corpus*. Following this examination an information was filed which upon motion was again set aside, and the court again ordered "that the said Paul Walpole be held for further examination, and that he be examined by the judge of the superior court acting as magistrate," etc. In pursuance of this order a further examination was had, at which the petitioner was represented by counsel, and the objection again taken that there was no complaint, etc., as before. The magistrate overruled the objection, and proceeded with the examination, resulting in an order of commitment for the crime of murder, committed on the 22d day of April, 1889, at Willow Ranch, in the county of Modoc, state of California. To this point our answer is the same as before: If error, it is reviewable on motion and appeal, but not on *habeas corpus*.

A point is also made that the order of commitment is invalid for that it fails to give the name of the person alleged to have been murdered. This is not a defect which entitles the prisoner to his discharge. The order for commitment is even more full than required by section 872 of the Penal Code, and the commitment is in the form prescribed by section 877 of the same Code. It is the complaint and depositions which furnish the information upon which future action is based, and they were duly filed with the clerk, although not until a subsequent day.

The point is also made that the commitment is without probable cause, and upon this point the petitioner asks his discharge, or if not discharged that he be admitted to bail. The transcript of the testimony given upon the examination and filed with the clerk has been presented in this court. It shows beyond all doubt that a deliberate, cold-blooded murder was committed. This fact seems to be conceded. It would be improper for us to express an opinion as to whether or not the evidence submitted, without further testimony, is sufficient to convict this pe-

titioner of having been a party to the commission of that offense; but the point having been here made, we are compelled to express an opinion as to whether or not it shows reasonable or probable ground to believe the defendant guilty, and are of opinion that it does. The petitioner is not, therefore, entitled to be discharged.

On the question of admission to bail: The offense charged is punishable with death, unless the jury fix it at imprisonment for life. The defendant, therefore, cannot be admitted to bail, if the proof of his guilt is evident, or the presumption thereof great. Pen. Code, § 1270. So much of the evidence on the part of the prosecution as has been made public was heard by the committing magistrate, a judge of one of the superior courts of the state. He saw and heard the witnesses, an advantage which we have not had. From the transcript of the evidence as brought here we cannot say that he was not correct in holding that it was not a bailable case. Writ discharged, and prisoner remanded.

We concur: BEATTY, C. J.; MCFARLAND, J.; WORKS, J; PATERSON, J.

85 Cal. 131

BARNARD v. LLOYD. (No. 13,467.)

(Supreme Court of California. July 30, 1890.)

WAY OF NECESSITY—PLEADING.

1. On a grant of land to which there is no access except by a private road laid out and used by the grantor over his other lands, a right to use the road passes as a way of necessity.

2. A complaint stating an agreement voidable unless in writing will be construed to mean a written contract.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

W. H. Wilde, (John D. Bicknell, of counsel,) for appellant. Blackstock & Shepherd and Barnes & Selby, for respondent.

HAYNE, C. As we construe this complaint the action is to abate obstructions in a private road or way, and for damages. The general features of the case are as follows: One Snodgrass, who was the owner of a large tract of land, conveyed a portion of it to the plaintiff. At the time of this conveyance a road was laid out on a strip belonging to the grantor along the south side of the land granted, and it was verbally agreed between the grantor and grantee that this should be and remain a road for the plaintiff's use, and he began using it as such. Subsequently Snodgrass conveyed to the defendant, who took with notice of the verbal agreement above mentioned. The defendant afterwards obstructed the road by placing a barn and a wire fence upon it. The action is against him alone. The trial court gave judgment for the plaintiff, and the defendant appeals.

It is contended that the demurrer should have been sustained because the complaint shows no right in the plaintiff to the road in question. But the complaint alleges that at the time the plaintiff bought the land it was expressly agreed

that the strip claimed as a road "should be permanently set apart, left open, and appurtenant to said land to be used as a road-way." This must be construed to mean that it was so agreed in writing. *Wakefield v. Greenhood*, 29 Cal. 597; *Miles v. Thorne*, 38 Cal. 337; *Brennan v. Ford*, 46 Cal. 14. In this view the complaint stated a cause of action, and the demurrer was properly overruled. It is somewhat doubtful whether the judgment ought not to be affirmed on this ground, for the findings state that the allegation above referred to is true, and we are not satisfied that there is any sufficient specification attacking it. But, waiving this, we think that there was a way of necessity without reference to any agreement. The complaint alleges that "the free and unobstructed use of said road-way is necessary to the convenience and enjoyment of the ten acres of said 20-acre tract now owned and in possession of this plaintiff; that he has no other means or way of ingress or egress to or from his said 10-acre tract except along or over said road-way." The finding is that this allegation is true. And there is evidence in support of the finding. In this regard the plaintiff testified as follows: "Question. You may state now, Mr. Lehman, whether the existence of this road-way is necessary to the convenient use, beneficial use, and enjoyment of that piece of property. Answer. It certainly is. Without it I could not get to it. * * * It has shut me up. I cannot get out, and I would have no front to my property; no frontage." The defendant contends, however, that the plaintiff had another means of access to his property, and relies upon a diagram attached to the complaint. But it certainly cannot be said from a mere inspection of this diagram that such means of access existed. And the evidence seems to be the other way. The plaintiff says in regard to it: "May be some wagons ran across there, which they often do, but there was no regular track; nothing of the kind that I ever knew of or had any idea of. * * * There was a road-way passed by my property, but I didn't know where or how it ran; but there was a road-way to go up to the cañon, the property that Mr. Lloyd has. There was no regular track; nothing of the kind that I ever knew of or had any idea of." And another witness testified as follows: "I have been familiar with this land for seventeen years. There has been a road-way going up the cañon simply for the convenience of parties going up the cañon. There has been no public road. I know of only one tract of land up in the cañon, and there was simply a track used for the purpose of going to this piece of land. I don't remember how plain it was. There was no public road." Upon the evidence we do not think that the finding referred to can be disturbed. And taking it to be true, we think that there was a way of necessity. *Taylor v. Warnaky*, 55 Cal. 350. The evidence as to the damages (\$100 was awarded) is not very strong; but there was no evidence to the contrary, and the only objection that seems to be taken to it is that the averment in the complaint is not suffi-

cient. We think that the complaint is sufficient. In the view we have taken the other matters discussed need not be noticed. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

85 Cal. 108

COHN v. COHN. (No. 13,564.)

(*Supreme Court of California*. July 30, 1890.)

DIVORCE—VACATING—DECREE—INSANITY.

A divorce on default for "inhuman cruelty" of a wife declared insane a month later, should be set aside on a showing by her guardian that the "cruelty" was the result of insanity existing when the process was served on her.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Barnes & Selby and Jos. Rothchild, for appellant. *Blackstock & Shepherd*, for respondent.

FOOTE, C. This is an action for divorce brought by a husband against a wife on the ground, among others, of acts of "inhuman cruelty." The defendant was served with process, and failing to answer a default was entered against her, and a decree of divorce based thereon. About a month after this she was judicially declared insane, and shortly thereafter placed in an insane asylum. Her guardian appeared for her, while she was in said asylum, and moved to set aside the judgment thus entered. It is plain that the acts of alleged cruelty were the result of a diseased mind on the part of the unfortunate woman, culminating in her insanity as above stated. We think she was also in the same condition at the date of the service of summons upon her. This being the state of facts, it seems to us that under the rule in divorce cases laid down in *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. Rep. 61, and *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. Rep. 648, the court below should have set the judgment aside, both upon grounds of public policy, and as an act of justice in relieving an unfortunate lunatic of the stigma of "inhuman cruelty" to her husband. For these reasons we advise that the judgment and order be reversed, with leave to file an answer on behalf of the defendant.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to file answer on behalf of the defendant.

85 Cal. 142

PENDLETON et al. v. CLINE et al. (No. 13,203.)

(*Supreme Court of California*. July 31, 1890.)

FIRM NAME—BURDEN OF PROOF—REMOTE DAMAGES.

1. A firm name showing the surnames only of the partners is not "a fictitious name," nor "a

designation not showing the names of the partners," within Civil Code Cal. § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of its members. *WORKS, J.*, dissenting.

2. On a *quantum meruit* for services the defendant has the burden of proving a special contract as to time and price under which he alleges the work was done. *Distinguishing Scott v. Wood*, 22 Pac. Rep. 871.

3. Loss of the increase in value of land for which one was negotiating, but did not buy for want of money he could have borrowed on other land had the abstract of title been done at the time agreed, is too remote.

In bank. Appeal from superior court, Los Angeles county; *H. K. S. O'MELVENY*, Judge.

W. T. Williams, for appellant. *C. C. Hamilton* and *Dupez & Bentley*, for respondents.

Fox, J. This was an action to recover \$302 for services in making an abstract of title. The defendants put in a counter-claim for \$6,000 damages, alleged to have been sustained by reason of the fact that the abstract was not made in time. The jury found a verdict in favor of the plaintiffs for \$250, and the defendants appeal.

1. The facts stated in the counter-claim are, in substance, that, if the plaintiffs had made the abstract in time, the defendants would have been able to borrow money on their property, and would have been able with such money to purchase other lands for which they had been negotiating, which latter land has subsequently increased in value in the sum of \$6,000 over and above what they could have purchased it for. The counter-claim is defective, both in form and substance. The damages claimed are too remote, and the court properly excluded all evidence relating thereto.

2. The plaintiffs, whose names are *C. W. Pendleton* and *W. J. Williams*, were partners, doing business under the firm name of *Pendleton & Williams*. They have never published any certificate of copartnership, and it is contended that this prevents their recovery in this action. Section 2466 of the Civil Code provides that "every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated a certificate stating the names in full of all the members of such partnership, and their places of residence, and publish the same," etc. We do not think that the case before us falls within this provision. The name of one partner was *Pendleton*, and that of the other *Williams*. The firm name of *Pendleton & Williams*, therefore, was certainly not fictitious. It was true as far as it went. The only thing that can be said is that it did not go far enough; that it was not a "designation showing the names of the persons interested as partners." But we think that if the legislature had meant so unusual a thing as a firm name showing the full names of all the partners it would have been more natural to have

said so explicitly, just as it did do in speaking of the names to be inserted in the certificate. The reason of the provision, doubtless, was to enable persons dealing with the firm to know whom to hold responsible,—whom to proceed against. And for all practical purposes this reason is satisfied by information as to the surnames of the partners. If, for example, a man desires to sue the members of a partnership whose firm name informs him that the partners are a man named *Williams* and a man named *Pendleton*, it would be a matter of little difficulty for him to ascertain what the initials of those persons are. No one would pay much attention to him if he should say that he might be led into error in such a case. The inquiry would be too easy. It was not intended to relieve persons dealing with a partnership of all possible exertion or fatigue. For all practical purposes the information mentioned would be sufficient. The reason of the provision, therefore, is satisfied by the construction which we give to it. The opposite construction is not required by the language, and would put an unnecessary clog upon business transactions. We have heard it suggested that the persons dealing with the partnership would not know that the names stated in the designation of the firm were the true names of the partners; that is to say, in the case before us it would not be known that *Williams* was the real name of the one, or *Pendleton* of the other. But this argument proves too much. It would apply no matter how fully the names of the partners were stated in the firm name. If, for instance, the real names of the partners here were *Charles William Pendleton* and *Walter James Williams*, and the firm name was "*Charles William Pendleton & Walter James Williams*," it might still be said that persons dealing with the firm would not know whether these were the real names of the partners. Yet if such were their real names no certificate would be required. This argument, therefore, does not change our conclusion. Nor is there any opposition or contrast between the phrase a "fictitious name" and the phrase "a designation not showing the names of the persons interested." The latter is supplementary to the former. For instance, if in the case before us *Pendleton* or *Williams* was not the real name of either partner, the firm name would be fictitious. But if such names were the true names of the partners, and the firm name was *Pendleton & Co.*, it would not be fictitious, but would be a designation not showing the names of all the persons interested as partners.

3. The action is upon a *quantum meruit*. The complaint alleged a request, the rendition of the services, their reasonable value, and their refusal to pay. The answer admitted the request and the service, but denied the reasonable value, and was silent on the subject of non-payment, thus admitting that allegation of the complaint. The only issue it tendered on the allegations of the complaint was as to the reasonable value. But the answer, also, affirmatively tendered another issue, by alleging that the work was done under

special contract, both as to time and as to price, the latter being alleged to be a sum less than the amount claimed by plaintiffs, or recovered in the action. The court instructed the jury that the burden was upon the defendant to prove by a preponderance of evidence that the plaintiff had done the work under an express contract, and that, if the evidence was equally balanced upon this point, they should find for the plaintiffs in such sum as they found the work to be reasonably worth. This instruction is assigned as error. Under the pleadings and the issues as they were framed in this case, we think the instruction was right. The case was unlike that of *Scott v. Wood*, 81 Cal. 404, 22 Pac. Rep. 871. In that case the plaintiff himself pleaded, and relied upon an express contract as to price, made before the inception of the work, and under which he alleged that all service was rendered. The defendant admitted the special contract as pleaded by plaintiff, and that the work commenced under that contract, and at the monthly salary therein agreed upon, but alleged that at a subsequent period a new contract was made, by which the monthly salary was reduced from and after the date thereof. A divided court held that the burden of proof in that case remained with the plaintiff to show that the service continued throughout the employment to be at the salary fixed by the original contract. In other words, to show that the service, which continued through many years, having commenced, and being alleged to have continued, under an express contract as to price, must be so proved. We are not disposed to carry the doctrine further than it was carried in that case. In this case the first and only issue tendered as to special or express contract in regard to price was tendered by the defendant, and we agree with the court below that the burden of proving it was on the defendant. Judgment and order affirmed.

We concur: BEATTY, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

WORKS, J. I dissent. The firm name of the plaintiffs was a "designation not showing the names of the persons interested as partners." Pendleton & Williams were not their names, but only a part of their names. The intent of the statute is that the true names of the members of a copartnership shall be given, so that parties contracting with them may know to whom they are giving credit. Such a statute should be so construed as to give it full effect. The requirement that notice shall be given showing their names when they are not shown by the firm name is reasonable and just. Besides, such a construction of the statute will, or may, lead to great abuse. Why may not Jones & Jones, or anybody else, do business under the firm name of Smith & Smith, if such a construction is to prevail, and thereby conceal their true names and identity as effectually as by using the firm name of Jones & Co. if there are a number of partners? If this were done, under the forego-

ing opinion, there would be no remedy for the unfortunate individual who might contract with irresponsible Jones & Jones, believing they were Smith & Smith, who are known to be responsible. On the other hand, if such a partnership is required to publish notice giving their true names, and in such notice give the names falsely, they may be held responsible. Again, suppose the firm name is correctly given as Smith & Smith. There may be a hundred Smiths in the same locality, some perfectly good and reliable pecuniarily, and others worthless. In such a case their names are necessary in order to contract with them intelligently. There is nothing burdensome in this statute, and its beneficial effects should not be frittered away by a narrow construction of its provisions.

85 Cal. 291

ORCUTT v. PACIFIC COAST RY. CO. (No. 13,607.)

(Supreme Court of California. Aug. 4, 1890.)

RAILROAD COMPANIES—KILLING STOCK—SIGNALS—CONTRIBUTORY NEGLIGENCE.

1. Civil Code Cal. § 486, provides that "a bell * * * must be placed on each locomotive engine, and be rung at a distance of at least 80 rods from the place where the railroad crosses any * * * road, * * * and be kept ringing until it has crossed such * * * road, or a steam-whistle must be attached and be sounded. * * * The corporation is also liable for all damages * * * caused by locomotives, train, or cars when the provisions of this section are not complied with." In an action for killing plaintiff's horse at a crossing the evidence was conflicting as to whether the required signals were given. *Held*, that it was proper to instruct that, if the signals were not given, defendant was *prima facie* liable for the damages, unless plaintiff's negligence contributed thereto.

2. The fact that on the morning of the day the accident occurred plaintiff saw the horse in a lane half a mile from defendant's track and turned towards the crossing, and left it there, does not, of itself, show that he was guilty of contributory negligence, as it is too remote to have been the proximate cause of the injury.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Venable & Goodchild, for respondent.

GIBSON, C. This action was brought by the plaintiff to recover damages for a mare killed and a colt injured by the locomotive and cars of the defendant corporation, which locomotive and cars, it is alleged in the complaint, were so negligently managed and run over that portion of defendant's railway which passes through the plaintiff's land, and were driven at such undue speed, and without ringing any bell or sounding any whistle or other alarm in approaching the crossing on said land, as to run against the mare and colt, then casually, and without any fault of plaintiff, passing across the track at said crossing. Judgment for the plaintiff was entered upon a verdict in his favor. From the judgment and an order denying a new trial, the defendant brings this appeal.

The lane which formed the crossing with defendant's railway where the engine ran against the animals is an open one used

by the public, and extends from plaintiff's house to a public highway just beyond the railway, and crosses the latter at right angles, and at about one-half of a mile from plaintiff's house. The railway is inclosed upon the sides with substantial fences, and at the crossing with cattle-guards. On the morning of the accident the plaintiff, while on the way to town, saw the mare and colt with other cattle unattended in the lane near his house, the mare and colt being then turned in the direction of the railway, but he passed on, and did not prevent them from straying thereon. The evidence is conflicting as to whether a bell was kept ringing or a whistle sounding at intervals in approaching the crossing, and also as to which side of the track the mare and colt came from in getting on the track. That of the plaintiff tended to show that no warning signals were given upon the engine in approaching the crossing or in passing over it, and that the mare and colt came from the east or right-hand side of the track, and could have been seen by the engineer upon the locomotive; while that of the defendant tended to prove that the whistle was blown at about one-half of a mile before reaching the crossing, and that at a point 80 rods from the crossing a bell was kept ringing and the whistle sounding at intervals until within 40 feet of the crossing where the collision occurred; that the animals approached from the west or left-hand side; that there is a sharp curve to the right in the track near the crossing, and a cut in the lane on the west or left-hand side, from which the animals came, of from two to four feet in depth, which prevented the engineer in his position on the engine from seeing them; and that he did not see them until within 40 feet of the crossing, when they came running upon the track; that immediately the engineer reversed his engine, applied the air-brakes, and did all he could to prevent colliding with them, but without effect. Upon this state of facts the court, in one of the instructions given at the request of plaintiff, declared the rule to be that where an injury at a railroad crossing is caused by a locomotive upon which a bell was not kept ringing, nor a whistle blown at intervals, for a distance of 80 rods before reaching the crossing, and also in passing over it, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence. The giving of this instruction the defendant claims was error, and it contends that the court should have charged the jury as requested by it, to the effect that the mere failure to ring the bell or blow the whistle in approaching the crossing would not render it (the defendant) liable unless it was proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury.

The question, then, is, and it is the principal one in this case, whether the failure of a railroad corporation to ring a bell continuously, or sound a whistle at intervals, for a certain distance in approaching a crossing, and in passing over it, will

render the corporation *prima facie* liable for any injury caused by the locomotive at such crossing, not contributed to by the person who sustains the injury. We think it will. By section 486 of the Civil Code it is provided: "A bell of at least twenty pounds weight must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway, or a steam-whistle must be attached and be sounded, except in cities at a like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of \$100 for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the district attorney of the proper county for the use of the state. The corporation is also liable for all damages sustained by any person and caused by the locomotives, train, or cars, when the provisions of this section are not complied with." This section is too plain to admit of construction. It means what it so clearly expressed in it. It is designed under the penalty of a fine, and a *prima facie* liability for injury caused by locomotives, trains, or cars at a street or road crossing, to compel railroad corporations to exact vigilance and diligence of those to whom they intrust the running of engines, trains, or cars across such places of danger to the public as streets and highways. As already stated, the evidence as to whether the bell was rung or the whistle blown upon the locomotive on approaching the crossing was conflicting, and seems to have been evenly balanced. In such a condition it was for the jury alone to determine the question, and in finding a general verdict for the plaintiff which covers all the material issues they determined it adversely to the defendant, and it cannot now be disturbed. In view of the meaning of the above section of the Code governing this case, the evidence as to whether the engineer, from his place on the engine, could see the animals near the track when the engine was approaching the crossing becomes immaterial, because whether he could see them or not, before they came running upon the track when the engine was but 40 feet from the crossing, and though he then did all he could to avoid injuring them, if he failed to give the required signals such omission amounted to presumptive negligence. Even if, as defendant contends, it was incumbent upon plaintiff to prove that the failure to give the required signals was the proximate cause of the injury before he could recover, in which case it would be material whether the engineer could have seen the animals in time to prevent any injury to them, though they might have been on the track through plaintiff's want of ordinary care, still, as the evidence on this point was strongly conflicting, we would upon the same principle, applicable to a finding by a jury upon conflicting evidence, be constrained to hold that the jury had in finding for the plaintiff impliedly passed upon it in his favor.

The remaining question is whether the plaintiff was guilty of contributory negligence. That the above section of the Code did not abrogate the doctrine of contributory negligence was determined in *Meeks v. Railroad Co.*, 52 Cal. 602, and *Glascok v. Railroad Co.*, 73 Cal. 137, 14 Pac. Rep. 518. This was recognized by the trial court, and stated to the jury in the instruction complained of, as well as in other appropriate instructions given. Ordinarily the question of contributory negligence, like that of negligence, is a question for the jury, but when the evidence tending to establish it is undisputed, as in the present case, it becomes a matter of law for the court to determine. *Glascok v. Railroad Co.*, supra. The only evidence here in support of it is that, on the morning of the day on which the collision occurred, the plaintiff, who was on his way to town, saw the mare and colt with other cattle in the open lane, near the house, which was a half mile from the railway, and passed on to town without endeavoring to prevent them from straying upon the track, towards which the mare and colt were turned at the time. Now, assuming that the act of March 7, 1878, (St. 1877-78, p. 176,) applicable to San Luis Obispo county, requires all cattle to be confined by their owners, to prevent trespass upon the land of others, and that plaintiff's mare and colt were running at large in the lane, where they might trespass upon defendant's right of way across the lane, contrary to the provisions of such act, the defendant upon its part could not rely on this fact alone, but would still have to show that it was the proximate cause of the injury complained of. See *Seigel v. Eisen*, 41 Cal. 109. The cattle when last seen by the plaintiff were nearly one-half a mile from the track, and the plaintiff had a right to assume that the required statutory signals would be given by defendant, so that, if his mare and colt should reach the track when any locomotive or train was about to pass over the crossing, they would thereby be driven off or from the track, as the only directions they could have run from the track was down the lane on the one side or to the highway on the other. *Higgins v. Deeney*, 78 Cal. 578, 21 Pac. Rep. 428; *Williams v. O'Keefe*, 9 Bosw. 536; *Jetter v. Railroad Co.*, 2 Abb. Dec. 458. Hence we think that, although the plaintiff may not have been entirely free from blame in leaving the mare and colt unattended with other animals in the lane near the house and nearly half a mile from the track, such fact is too remote to be regarded as the proximate cause of the injury, and therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J. I concur in the judgment and in the conclusions reached by the opinion, but I do not concur in the *dictum* that, when the facts are undisputed, negli-

gence is a question of law. The correct rule is laid down in *Fernandes v. Railroad Co.*, 52 Cal. 45, where the subject is fully discussed, and the conclusion there reached fortified and sustained by reason and authority. See, also, *Payne v. Railroad Co.*, 83 N. Y. 574, and cases there cited. If the rule as declared in the *dictum* above stated has ever been regarded as a law, it has long ago been rejected as unsound by jurists and courts. In the case under consideration the negligence was too remote, as is clearly shown in the opinion of the learned commissioner.

85 Cal. 313

ADAIR v. WHITE *et al.* (No. 13,475.)

(*Supreme Court of California*. Aug. 4, 1890.)

BOUNDARIES—EVIDENCE—NATURAL MONUMENTS.

In ejectment for land claimed by plaintiff under a patent from the United States the evidence showed that the land in controversy was a strip along the southern part of his grant; that the southern line, as located by a well-known natural monument, which was one of the calls of the survey, included this strip; but that if the southern line was run by course and distance it did not include the strip, which in that case belonged to defendant. *Held*, that the evidence was not sufficient to sustain a judgment for defendant, as the natural monument called for in the survey must prevail over the courses and distances when there is a discrepancy.

In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

W. H. Wilde, for appellant. *Blackstock & Shepherd*, for respondents.

THORNTON, J. Action of ejectment for a parcel of land in Ventura county, in which judgment passed for the defendants. Plaintiff moved for a new trial, which was denied, and he appeals from the judgment and the order denying his motion. The plaintiff claims under a patent of the United States, issued on a confirmed Mexican grant of the Rancho Santa Paula y Saticoy. The patent was issued by the United States on the 22d day of April, 1872. With the grantee of this patent the plaintiff connects himself by proper mesne conveyances executed before the commencement of this action.

The main point to be determined herein turns upon the location of the southern boundary line of the rancho abovenamed, which will be herein called the "Santa Paula." It is claimed by the plaintiff that the strip of land in controversy herein, lying along the southern boundary of the Santa Paula, of which the defendants were in possession when the action was brought, is within the lines of the patent above mentioned, issued in 1872, while the defendants contend that it is not included within such lines. On this point testimony was introduced by the parties, and this court is called on to determine whether, within the rules laid down in our decisions, there is an insufficiency of the evidence to justify the decision of the court below, which was adverse to the contention of plaintiff. We proceed to the consideration of this point. The patent herein, having been issued upon a confirmed Mexican grant, is conclusive upon the United States government and all claiming under it. Such is the meaning of the

act of congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California." See fifteenth section of the act. This interpretation has always been given to the fifteenth section of the above-cited act. See *Waterman v. Smith*, 13 Cal. 373; *Moore v. Wilkinson*, Id. 478.

The question of the conclusiveness of the patent upon all, except third persons, should be regarded as conclusively settled by the cases above cited, which have been approved and followed in many cases decided by this court and the supreme court of the United States. There is no case to the contrary. The defendants claimed under a homestead entry made under an act of congress. They certainly can only be regarded as claiming under the United States, and as the patent is conclusive on the United States, and was so from the date of its issue, it must be held to be conclusive on the defendants. The southern line of the patent of the Santa Paula is thus described in the field-notes of the patent (both patent and field-notes were offered in evidence, and are set forth in the transcript) as commencing at the station mentioned, S. P. 13, and running "thence S., $42\frac{1}{4}$ E., at 30 links enters bed of Santa Clara river, course S. W.; at 4 chains, intersects offset of township line in township 3 N., range 21 W., 39.50 chains E. of corner of sections 10, 11, 14, and 15; at 4 chains and 50 links crosses river and ascends; thence along westerly slope of abrupt hill called 'Lomas de Santa Paula,' 492 chains, to stake marked 'S. P. 14,' station at the most southern point of above-named hills, known as the 'Punta de la Loma.'" It will be observed that this line terminates at the most southern point of the hills called the "Lomas de Santa Paula," which point is known as the "Punta de la Loma." This is a natural object or monument, and the station S. P. 14 was there fixed and established by the calls of the patent. If this point can be found, it is only necessary to run a line from S. P. 13 to S. P. 14 to fix the southern boundary line. It may be that the length of this line as stated in the field-notes is not accurate. It is stated in the notes to be 492 chains in length. If it should turn out to be actually longer or shorter than 492 chains, this is immaterial in fixing the line. The line must, according to the calls of the patent, run to this point, whatever be its length, whether the line exceed in length 492 chains or be less than 492 chains. The same may be said of the course. Any variation in the course should be disregarded. The variation, if any, as the testimony shows, can only be trifling. Whether varying in any wise or not, that course must be pursued which will bring the line to the natural object, the Punta de Loma. The above is in accord with the well-settled rule that, in applying a conveyance to the tract of land described in it, course and distance must yield to natural objects or monuments called for. Such monuments are more certain and less liable to mistake or error than course and distance, and therefore monuments, as more certain, prevail over course and distance, partaking more

or less of uncertainty. The plaintiff called a surveyor, one George C. Power, who was admitted by the counsel for defendants to be pre-eminently qualified as a surveyor. Power located the southern line of the patent of Santa Paula in conformity to its calls. A plat of the survey made by Power is contained in the record, as well as a topographical map of the Punta de la Loma. The southern line, according to the testimony of this witness, includes within the lines of the patent the land in possession of the defendants, sued for in this action. The witness first proceeded to fix the location of the Punta de Loma. He states it to be "A well-known, recognized landmark." The Punta de Loma was fixed by Power in accordance with the calls of the patent "as the most southern point of the hills" styled in the field-notes of the patent the "Lomas de Santa Paula." See extract from field-notes of patent given above. From the point Punta de Loma, so fixed, he (Power) ran other lines to test the accuracy of its location. In running these test lines, he used the data furnished by the field-notes contained in the patent of the Santa Paula. He ran a line in a north-easterly direction from the Punta de Loma, and, though he found some discrepancies in courses and distances from the courses and distances stated in the patent, still his southern line was substantially in accordance with the southerly line of the patent, or as near such south line (the witness said) as could be determined from the evidence given him. The plat and field-notes of the final survey of the Rancho Santa Clara del Norte, which adjoins the Santa Paula for some distance on the south, were offered in evidence. The final survey of the Santa Clara del Norte and the final survey of the Santa Paula were made by the same surveyor, J. E. Terrell, and in the same month, December, 1860. The above final surveys have a common line, which is described in the latter portion of the extract of the field-notes of the Santa Clara del Norte as follows: "Thence" (from Station S. C., No. 4, near old abode) "N., $37\frac{1}{4}$ E., 455.63 chains to large redwood post marked 'S. C. No. 3,' at foot of hill called Loma del Arroyo Colorado; thence running towards the Punta de Loma S. $77\frac{1}{2}$ W., along southern slope of abrupt hills 319 chains to stake marked 'S. P. 14,' a corner of Rancho Santa Paulay Saticoy, on point of hill known as the Punta del Loma, marked 'Stake S. C., N. 4,' and run along boundary of Rancho Santa Paulay, Saticoy through sandy bottom."

It will thus be seen that S. C. 4, in the final survey of the Santa Clara del Norte, and S. P. 14, in the patented survey of the Santa Paula, are the same. The corner of the survey of the Santa Clara del Norte No. 3, Power testifies, is positively located, and was in evidence when he gave his testimony. He states that he started from that point S. C. 3, and ran a transverse line around to the Punta de Loma, and calculated the course and distance, and it measured 324.30 chains; that it should measure by the patent 319 chains S., $77\frac{1}{2}$ W. He further says that by following the

course and distance of the patent it would bring the point a trifle north of the point he had located at the south point of the Punta de Loma, but it would be on the same ridge a little further north of the point he had located, which is at the most southerly point of the hill. The same observations made above as to the prevalence of natural objects over course and distance apply here. The line should be run to the natural object or monument, regardless of the discrepancies of course and distance and for the reason above stated. So run the line should be run to S. P. 14, or the Punta del Loma, it being apparent from the field-notes of the Santa Clara del Norte, that S. P. 14 and S. C. 4 are identical as regards location. The same witness further testifies that he next went up into the Santa Paula Cañon, some three miles to a well-defined point then existing there, and acknowledged as the common corner of the Ex-Mission, and the Santa Paula y Saticoy ranchos, and ran down, according to the patent, to S. P. 13 of the Santa Paula patented survey, which was thus located as on the plat made by witness of the land in dispute. The south line of the plat is shaded blue. This blue line, the witness testifies, is the patent line by course and distance, as measured from the Punta del Loma. This blue line, Power states, is the southern line of the survey of the Santa Paula, which went into the patent, and within this patented line is included the land sued for in this action. Another and independent survey was made of this southern line of the Santa Paula by one J. A. Barry, a surveyor. He was called as a witness. In his testimony he agrees with the witness (Power) as to the location of the Punta de Loma, and says it is a well-known, visible landmark. He ran this southern line in accordance with the calls of the patent, and states that, as so run, it includes the lands in possession of the defendants and in controversy in this action. The principal witness on the point of the location of the southern line of the Santa Paula called by defendants was a surveyor named Stow. He had been county surveyor of Ventura county for 26 years. He testified that he had occasion to attempt to retrace the south line of the Santa Paula rancho; that this line is one of the Terrell surveys, and it is in the same condition that all the rest of them are, generally, all wrong. He then proceeded to explain, and said that a good many years ago there was some disagreement about the location of a line running from what is known as "Punta de la Loma;" that "we went there, and endeavored to locate, from the data that we had and other ways, the corner of the Punta de la Loma, which we found, but we could not locate, at least satisfactorily, at the time, by running the various lines running into it in different directions according as they were on the Terrell survey. Starting at other known corners and running to the Punta de la Loma, there are no two lines that would come out in the same place." He further said that, as to the patent survey of the Rancho Santa Paula y Saticoy, to endeavor to follow the exact field-notes of

the patent is radically wrong and it cannot be done. It is evident from the testimony of Stow that he attempted to ascertain the southern line of the Rancho Santa Paula by course and distance, as called for in the field-notes of the patent. It is not surprising that he could not so locate this line. It rarely happens that the lines of one survey, run by course and distance, are found to coincide with the lines so run of a subsequent survey. It is easily accounted for by inequalities of the ground on which the lines are run, by minute difference in the length of the chain used, and sometimes by trifling changes in course. This is more apt to occur where the lines are long. In the case before us the southern line is 492 chains in length. In consequence of the frequent occurrence of such discrepancies between different surveys the rule that course and distance must yield to monuments is established. Stow states in his testimony that he was reasonably familiar with the Santa Paula Hills terminating at the Punta de la Loma; that he had been over it at different times as a surveyor; that the topographical map of it made by Power shows about the topography of what is known as the Punta de la Loma; that it (the Punta) is a permanent natural landmark, and that it is the most southerly point of the Punta de la Loma. This Punta de la Loma or Punta del Loma (for it is called by both of these names) is a controlling call in the southern line of the Santa Paula, as set forth in the patent and field-notes of the ranch, is a permanent natural monument, and fixes the location of the line in dispute. By Stow's statement as to the Punta he shows that Power's location of the line is correct, or so nearly correct as to clearly demonstrate that the court erred in fixing the southern line of the Santa Paula so as to exclude the land herein sued for. It may be conceded that the southern line as fixed by Power is not identical with the southern line of the patent, but it suffices to show that the court below went wrong in coming to the conclusion that the land sued for was entirely outside of the patented southern line. At any rate it shows that the greater part of the land in suit lies within the lines of the patent, which part plaintiff is entitled to recover. As to Norway's survey, made about 18 years after the patent of Santa Paula was issued, it is entitled to but little consideration. Norway was sent to survey the land remaining as public land after the survey of the granted lands had been made, and it would be highly unjust to allow such a survey to disturb or damage the lines of the lands which had gone into the patent. A holder of land under a patented Mexican grant would never be safe in his holding if his survey, which had gone into a patent declared to be conclusive between him and the United States government, could thus be disturbed. We are of opinion that the evidence was not sufficient to justify the decision of the court in this case, and therefore the judgment and order should be reversed, and the cause remanded for a new trial. We find no error in the record for which a reversal should be ordered, but for the error

pointed out above the judgment must be reversed, and the cause remanded for a new trial in conformity with the views expressed in this opinion. So ordered.

We concur: FOX, J.; SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

85 Cal. 350

PEOPLE v. MURRAY. (No. 20,634.)

(Supreme Court of California. Aug. 11, 1890.)

CRIMINAL LAW—DISCHARGE OF JURY—IMPEACHING WITNESS—NEW TRIAL.

1. An order of the court to the sheriff recited that whereas the business of the court required a jury for the trial of criminal cases, it was ordered that he summon 40 men eligible for jurors. Before defendant's case was reached they were discharged, and a new jury summoned, by which he was tried. *Held*, that the first jury having been summoned for no fixed term, and for the trial of no particular case, the court could discharge it any time without cause.

2. On cross-examination of defendant's witness, he was asked if he had not made statements to the effect that he was friendly to defendant, and would say nothing to hurt him; and on his denying this a witness was called who testified to such statements. *Held*, that if the testimony of defendant's witness was material and favorably to him, the impeaching testimony was properly admitted, and if the former testimony was immaterial defendant could not have been injured by the latter.

3. On a motion for a new trial in a murder case defendant should have been allowed to show that during the trial the jury read a local newspaper containing a savage attack on the juries of that county for several years previous, especially in criminal cases, alleging that certain persons frequently appeared on the juries in criminal cases, and that murders were declared to be manslaughters, etc.; and it would then have been for the prosecution to have shown, if possible, that the article was not read by the jury, or, if read, that they were in no wise influenced thereby.

Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Hunsaker, Britt & Goodrich, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

WORKS, J. The defendant was charged, tried, and convicted of the crime of murder, and sentenced to be hanged. He moved for a new trial, his motion was denied, and he appeals. The first error complained of relates to the selection of a jury. On the 30th day of September, 1889, the court below made the following order: "To the sheriff of said county—Greeting: Whereas the business of the superior court requires the attendance of a trial jury for the trial of criminal cases, and no jury is in attendance, it is the order of the court that you are hereby directed to summon forty (40) men having qualifications of jurors from the body of this San Diego county, state of California, to be and appear in department No. 3 of the superior court, at the court-room in the Express block, on the north-east corner of Sixth and F streets, in the city of San Diego, county of San Diego, state of California, on Monday, October 7th, A. D. 1889, at the hour of 9 o'clock A. M. of said day, and of this writ make legal service and due return." The clerk issued a *venire* in accordance with this order, and the same was

placed in the hands of the sheriff, who made return that he had duly summoned the number of jurors required, giving the names of those summoned. Afterwards, on the 7th day of October, 1889, the case of *People v. Frank C. Tower*, charged with the crime of an assault with a deadly weapon, came on for trial, and the jurors, selected as above, were called, and a jury of their number impaneled, who tried the cause and returned a verdict of guilty of a simple assault. Again, on the 14th day of October, 1889, the case of *People v. Chapo* was called for trial. The jurors above mentioned appeared for duty in said cause, whereupon the district attorney moved the court to discharge from further duty as jurors the persons who had served as jurors in the case of *People v. Tower*. The bill of exceptions shows that the motion of the district attorney was based on the ground that the verdict of these jurors in the *Tower* Case was so palpably in opposition to the evidence given in the case, and in violation of their duties as such jurors, that they were unworthy to sit in other causes. The judge of the court below seems, from his remarks in passing on the motion, to have agreed with the district attorney, and an order was made discharging the jurors, which does not, however, state upon what ground, except that it was for ample and sufficient reasons. On the 17th day of October, 1889, this cause was called for trial, and the following proceedings were had, as recited in the bill of exceptions: "The defendant, by his counsel, moved the court to vacate and set aside the order of said court, made by the court on the 14th day of October, 1889, discharging from further service or attendance, as jurors, J. R. Scranton, Robert Steadman, J. H. Tyler, W. W. Collier, W. H. Crawford, Andrew Casady, F. M. Green, Sam Deeble, Henry Cook, A. D. Starkweather, Thomas Tighe, and Jacob Vanderwaite, on the ground that said order was made without authority of law or power on the part of the court to make the same; and in support of said motion called and examined W. W. Whitson, who testified as follows, to-wit: 'I am the official short-hand reporter of department No. 3 of the superior court of this county. I was acting as such reporter of said court on the 14th day of the present month, when the order referred to was made by the court. I don't know that I took all the proceedings at that time, but I think I did. Here is a sheet with some notes on it. I don't know that it has all the proceedings had at that time, but it has all that was said by the court and Mr. Daney. Mr. Daney said at that time: "I have a motion which I desire to make this morning, before any juror is selected in this case, [*People v. Ignatio Chapo*.] My motion is this: Last Friday the jury in the *Tower* Case rendered a verdict that it seems to me must have been arrived at only after a total disregard of the instructions of the court and the evidence in the case. It seems to me that it must have required a great stretch of the imagination to have brought in such a verdict as was brought in in that case, and the jurymen must be very tired

after rendering that verdict, and, perhaps, a little vacation would not do them any harm. It is just such verdicts as this that bring the court and the law into contempt and disrespect by the community, and it seems to me that it is my duty, however unpleasant it may be, to state to the court that I do not feel that I could select the gentlemen that were on that jury on this jury this morning with any degree of safety. It seems to me that that verdict is so outrageously beyond and outside of the evidence, and beyond and outside the law of the case, that it makes one feel indignant to think that twelve men would bring in such a verdict, and I say, though unpleasant the duty may be, I think it is my duty, it is a duty I owe to the community, to make a motion that the twelve gentlemen that served on that jury be discharged from further attendance on this court." The court said: "It is the opinion of the court that the verdict of the jury in that case must have surprised even the most sanguine expectations of counsel for the defense. Mr. Hunsaker, I remember, said to the jury that he accepted the challenge of the district attorney, and that the jury in this case should bring in either a verdict of guilty, as charged in the indictment, or a verdict of acquittal. The jury might have brought in a verdict of acquittal in that case, and no discredit could have attached to their finding, because evidence was before them which tended to establish an *alibi*, and they had a right, if they desired, to believe that evidence, and to discard the evidence on the part of the prosecution tending to show that the defendant was at the place where the assault with intent to commit murder was effected; but when the jury brought in a verdict of simple assault in a case where the evidence showed, and the jury believed by their verdict, that an assault had been made, and the evidence showed that the assault was made with a loaded pistol, which was then and there rapidly fired, the jury, in order to bring in the verdict of simple assault, had to say that the loaded pistol being then and there fired was not a deadly weapon, being fired at a time when an assault was being committed. This court has no further use for the twelve gentlemen that were sitting upon that panel. They will be discharged." Whereupon said motion to set aside said order was submitted to the court for decision, and the court denied the same, to which ruling defendant then and there excepted. That thereafter, and before the impelling of the jury was begun, the defendant moved the court to direct the clerk to place in the jury-box the names of the twelve persons mentioned in the order of October 14th, and offered in support of said motion the evidence, heretofore set forth, which had been offered in support of the motion to vacate and set aside the order of October 14th, which motion was by the court denied, and to which ruling the defendant then and there duly excepted."

It must be conceded that this was a novel proceeding. Ordinarily a court would not be justified in discharging a jury because it had returned a verdict which did

not meet with the approval of the court. But the verdict might be such as to convince the court that the jury had purposely and willfully disregarded the evidence, and returned a verdict in violation of their sworn duty. Under such circumstances the court would not only be justified in discharging the jurors, but it would be its duty to do so. The judge of the court below seems to have been of the opinion that the verdict returned in the case referred to was such as to justify the action taken, and in the absence of any showing to the contrary we must presume in favor of the action of the court. But the jurors discharged were not selected to try the defendant's case, nor were they selected to serve for any fixed term, as is shown by the order above set out. This being the case, the court had the undoubted right to discharge them, or any of them, at any time, without giving any reason for such discharge, and without the existence of any reason. The only difficulty apparent in this case is that the jurors were discharged for what might, under some circumstances, be an insufficient reason. But as no reason was necessary, the fact that an insufficient one was assigned as the ground of the order can make no difference. Again, conceding that the discharge of the jury was unwarranted, it does not appear that any injury resulted or could have resulted to the defendant by reason of such discharge. As the jury was not selected for the trial of his case he had no vested right to a trial by such jury. Another jury by which he was tried was ordered to be summoned in precisely the same manner that the first one had been selected and summoned, viz., by the sheriff. It is not shown or claimed that the jurors thus selected were less favorable to the defendant than the jurors discharged would have been. As to these jurors all of his rights of challenge were preserved, and he has no just reason to complain. *People v. Arceo*, 32 Cal. 40. The case of *Hildreth v. City of Troy*, 101 N. Y. 234, 4 N. E. Rep. 559, relied upon by the defendant, differs materially from the one under consideration. There the jury had been selected under and in conformity to a statute of that state, which the court say made "elaborate provision for securing an impartial jury," and not by the sheriff, upon an open *venire*, as in this case, and the jury thus selected constituted the regular panel of jurors to try that particular case. Certain of the jurors were discharged by the court below on the erroneous ground that they were incompetent to sit as such jurors by reason of the fact that they were tax-payers of the city of Troy, the city being a party to the suit. There was sufficient ground in that case, we think, for reversing the case for the reason that the additional jurors were not selected as provided by the statute, but upon an open *venire* by the sheriff. By this means the party was deprived of the safeguards provided by the statute for procuring a fair and impartial trial. In this case, as we have seen, the defendant was deprived of no such right, and, therefore, the case is not in point.

It is further contended by the appellant

that the court erred in admitting certain testimony offered by the respondent. The defendant had examined a certain witness in chief, and on cross-examination he was asked whether he did not make certain statements tending to show that he was friendly to the defendant and one Hubbard, a friend of the defendant, and that he would not tell anything that would hurt the defendant. The witness denied having made the statements, and the person to whom he was claimed to have made them was called and allowed, over the defendant's objection, to contradict the former witness, and to testify to the statements made by him. It is insisted that the testimony was immaterial, and only tended to contradict the witness as to a collateral and immaterial matter. The evidence is not in the record, and for that reason we are unable to say whether the evidence was material or not. But if the witness had testified favorably to the defendant in his examination in chief it was competent to show that he had made statements out of court tending to show his friendly feeling towards the defendant, and that he had expressed an intention to suppress facts within his knowledge that would injure the defendant's case. If this were not so the evidence of the witness given in chief is not set out in the transcript, and we cannot know whether he had testified to any facts favorable to the defendant or not. If not, the testimony tending to impeach him was immaterial; but for the same reason that it was immaterial it must be held not to have been injurious to the defendant, because to impeach a witness who had testified to nothing favorable to him could work him no injury.

Certain instructions were asked by the defendant, and refused, and this is complained of. But the instructions given by the court were very full, fairly presented the case to the jury, and covered the matters included in those refused.

In support of the motion for a new trial it appeared that the jury upon being sworn to try the case were placed in charge of a bailiff, and not allowed to separate, and the defendant offered to prove by the bailiff that while the jury was so in his charge, and during the trial, the jurors were allowed to and did read certain issues of the San Diego Union, a newspaper printed and published in the city where the trial was in progress, and certain of the articles published in said issues of the paper were offered for the purpose of showing that they were calculated to influence the jury against the defendant. The evidence was excluded. We set out in this opinion some of the matter contained in the articles referred to:

"Are there any Flies on the Juries of San Diego County?—Some Ideas Suggested by the Records—A Suspicion that Things are not what they should be—Some of the Facts about the Subject.

"Incident to the recent outrageous verdict in the Tower Case, a correspondent of the Union called attention to the fact that within the past few years there have been numerous equally unaccountable

findings by juries in San Diego county, and it was suggested that if the list of jurors were gone over possibly there might be found a thread running through, which might be used as a clue to the cause of such verdicts. Certain it is that within the last eight years public sentiment has been strained and roused to indignation over the acquittal of more than one criminal around whom there had gathered evidence of guilt, until it seemed nothing short of a violation of a jurymen's duty could possibly render a verdict exculpating the offender from the consequences of his acts. Never, within the history of the county, has capital punishment been inflicted, and yet there have been committed crimes as infamous and cold-blooded as ever stained the annals of any municipality, and made a mockery of law. Public sentiment, time and again, aroused to indignant remonstrance, but helpless under the miscarriage of the established methods of administration of justice, has suffered under repeated acquittals or preposterously inadequate verdicts, until more recent suspiciously insane findings have called forth widespread and unanimously unfavorable comment. Have the juries who have sat in criminal and civil cases in San Diego county during the past few years been packed? Is it possible that in this vaunted county there has for years been practiced the most flagrant violation of the very first principles of the jury system, as it had been so long honored? There is the incontrovertible evidence of the records to show that juries of the past four years, at the very least, have been composed in part of the same individuals. Does anything follow? Let the people draw their own inferences. Since 1881 there have come into the courts of this county thirty or more murder cases, many of them as utterly wanton and cold-blooded as were ever perpetrated. In all this criminal record there have been only four convictions straight on the information. There was, indeed, one infliction of capital punishment in the case of a poor, friendless Indian. Upon one man the death sentence was pronounced, but never carried out, because he suicided. In seven straight out murder cases the verdict of manslaughter was rendered, which in the crime of murder is about as heavy as the verdict of simple assault where a man shoots several times into a house full of women. In two cases of murder the records show that there appears to have been no disposition of these cases. The verdict in eight of these murder cases was a straight out declaration 'not guilty.' What follows? The answer will be given to-morrow."

After stating that certain persons frequently appeared on juries, in criminal cases, it is further said: "In 1888, the names of most of these men appear from three to eight times. In a city of 30,000 people why were the same jurors used over and over again? The law says that jurors shall be drawn from different parts of the county. Men have performed jury service repeatedly whose known haunts are a certain saloon on Fifth street. A *venire* is called and rapidly exhausted. Directions

are issued to issue a special *venire*. Time is short; all parties in the suit are ready for trial. There is no time to search the country for jurors who have not before served. Certain men are known to be found in a certain resort, henchmen of a high official. They must be taken care of, and \$2.50 a day is good average pay. *Sabe!* Mr. Juror is taken, notwithstanding he has already served from one to six times. He knows that by rendering verdicts in accordance with the desires of a certain high official he will be provided with a \$2.50 per day job whenever opportunity offers, and that the opportunity will be created when possible. He becomes a professional juror, and his verdict sometimes causes his fellow-citizens to enter an indignant protest, but, secure in the protection of certain well-known attorneys and high officials, he renders his verdicts, and keeps his soft snap. These men appear mostly in murder cases and murderous assaults. Murders are declared to be manslaughter, assault and murderous assault, 'simple assaults,' until the people have come to be hopeless of seeing justice meted out, and the punishment is rarely made to fit the crime."

The refusal to admit this testimony was error. A judge or juror who is called upon to sit in the trial of a case, especially where the life of the defendant is involved, should act calmly, deliberately, dispassionately. He should be governed entirely by the law and the evidence, uninfluenced by his own feelings, prejudices, or passions, or the passions or prejudices of others. But we cannot shut our eyes to the fact that the man who acts as judge or juror is but human, and is not always up to the ideal or legal standard of fairness and impartiality, and that improper influences will sometimes bring about improper and unjust verdicts. Therefore, it is always competent for a defendant who has been convicted to show, if he can, that the verdict rendered against him is the result of such improper influence. *Farrer v. State*, 2 Ohio St. 54; 2 *Grah. & W. New Trials*, 484; *Walker v. State*, 37 Tex. 367. An attempt on the part of any person, whether through the medium of a newspaper or otherwise, to influence a jury by any improper means to bring in a verdict against a defendant is a palpable violation of his right to a fair and impartial trial, and if it appears to the court to have had such an effect a new trial should be granted. There can be no doubt as to the intention or palpable effect of the articles above set out. It was the clear intention of the publishers of this paper to intimidate the jury, and by abusing other jurors, who had returned verdicts of acquittal, to induce them to find the defendant guilty, and impose upon him the extreme penalty of the law. Whether they had that effect upon the jury or not was a question that the defendant had a right to have determined by the court on his motion for a new trial. The defendant should have been allowed to make the proof with leave to the people to show, if possible, that these particular articles were not read by the jury, or, if they were, that they were not

in any way influenced by them. *People v. Goldenson*, 76 Cal. 328, 353, 19 Pac. Rep. 161. The judgment is affirmed. The order denying the defendant a new trial is reversed, with instructions to the court below to vacate the same, and rehear the motion allowing the defendant to introduce the evidence excluded on the former hearing, and the people to rebut the same by other evidence, if it is desired.

We concur: FOX, J.; PATERSON, J.

85 Cal. 374

PEOPLE v. HANNON. (No. 20,674.)

(Supreme Court of California. Aug. 22, 1890.)

BURGLARY—POSSESSION OF STOLEN PROPERTY.

On an indictment for burglary it is not error to instruct the jury that, while the possession of stolen property alone is not sufficient proof of defendant's guilt, yet it is a circumstance which, if unexplained, tends to establish it, and which, in connection with other evidence, may be sufficient to satisfy the jury that defendant is guilty.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNOM, Judge.

Curso & Gibson, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

FOOTE, C. The defendant was convicted of burglary in the first degree. From the judgment rendered against him, and an order denying a new trial, he appeals. It is urged in his behalf that the evidence is insufficient to show that he or any one else broke and entered the premises mentioned in the information at the time charged with the intent to commit grand or petit larceny, or any felony, or that he ever entered them at all. We think the evidence, taken all together, direct and circumstantial, is sufficient to justify the verdict of the jury. It is also claimed that the court erroneously instructed the jury that "if the jury believe certain property to have been stolen, proof of its possession is not of itself alone sufficient to justify the conviction of the defendant, but is a circumstance which, if not satisfac-

torily explained, tends to establish guilt; and when taken in connection with other evidence, may be sufficient to satisfy the minds of the jurors of the guilt of the accused. But you cannot find a person guilty upon proof of possession of stolen property alone, without any other evidence to explain its possession." A similar charge was offered in *People v. Fagan*, 66 Cal. 534, 6 Pac. Rep. 394, where it is said: "We think the jury must have understood the court to mean that if the defendants were found in possession of any part of the property described in the indictment soon after such property was stolen, such possession, unless satisfactorily explained, was a circumstance to be considered in connection with other suspicious facts in determining their guilt or innocence. The charge, taken as a whole, would not, we think, carry to the jury the idea that the possession of the stolen goods, unexplained, would of itself be sufficient to justify a conviction." Perceiving no prejudicial error in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

85 Cal. 11

LOAIZA v. LEVY, Judge. (No. 13,768.)

(*Supreme Court of California*. July 14, 1890.)

EQUITY—JURISDICTION—NON-RESIDENTS—RESCISION—RECEIVERS.

1. The courts of this state have jurisdiction over an action between non-residents to rescind, on the ground of the vendor's fraud, a sale of mining property situated in a foreign country, where the contract of sale was entered into in this state, and where the consideration, consisting partly of money, and partly of notes executed by a citizen of this state secured by mortgages on land within the state, is in the hands of the vendor's agent, a resident of this state.

2. The real object of the action being to compel the restoration to the vendees of the money which they were fraudulently induced to give for the mining property, and the cancellation of the securities likewise procured by fraud, all of which are within the court's jurisdiction, the fact that they have offered, as they were equitably bound to do, to restore to the vendors the title to the mining property, will not deprive the court of jurisdiction on the ground that the action involves the title to land in a foreign country.

3. As the action is virtually *in rem* to compel the restoration of the consideration fraudulently obtained from the vendees, which is still within the state, the superior court has jurisdiction of the action, though the vendors were never personally served with process, and have not submitted themselves to the court's jurisdiction.

4. Under Code Civil Proc. Cal. § 564, subd. 1, which provides for the appointment of a receiver of a fund on the application of any party interested therein, where it is shown that the fund is in danger of being moved or lost, and under subdivision 6, which authorizes the appointment of receivers according to the usages of courts of equity, the superior court properly appointed a receiver of the moneys and securities to prevent their removal beyond its jurisdiction pending the proceedings to determine the rights of the parties.

In bank. Applications for writ of review by Wenceslao Loaiza to set aside a pro-

ceeding in the superior court, city and county of San Francisco; LEVY, Judge.

Code Civil Proc. Cal. § 564, provides: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof, (1) in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, * * * on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; * * * (6) in all other cases where receivers have heretofore been appointed by the usages of courts of equity."

Page & Eells, and P. G. Galpin, (Wilson & Wilson, E. W. McKinstry, and Stanly, Stoney & Hayes, of counsel,) for petitioner. *R. S. Mesick and Wm. F. Herrin*, for defendant.

Fox, J. This is a proceeding for a writ of review to set aside certain proceedings in the superior court of the city and county of San Francisco, LEVY, Judge, in an action there pending, wherein the Oro Grande Company, Limited, and the Globe Mining Syndicate, Limited, are plaintiffs, and Manuel Aguayo, Leocadio Aguayo, and W. Loaiza are defendants, and in which action such proceedings have been had as that orders for injunction *pendente lite*, and appointing a receiver, have been made; the plaintiff here claiming that in that case the court had no jurisdiction for such proceeding, and praying that the orders aforesaid be vacated and set aside.

In the action whereof the proceedings are sought here to be reviewed both the plaintiffs are foreign corporations organized under the laws of and resident in England, and the defendants Manuel and Leocadio Aguayo are both citizens and residents of the republic of Mexico, absent from this state, the defendant Loaiza (plaintiff herein) being the only one of all the parties residing in this state, and the complaint showing upon its face that he is a simple stakeholder in the premises. The relief sought is in favor of artificial persons resident in England, and against natural persons, citizens of and resident in Mexico. As between such parties, (it being conceded that personal service of process has not been made upon any of the defendants except Loaiza, and that he is a mere stakeholder,) it is claimed that the courts of this state have not, and can have no, jurisdiction. And the whole question to be resolved in this proceeding is that one of jurisdiction. If the court has jurisdiction, then the errors, if any, which have been or may be committed, are reviewable only on appeal. Looking into the record which has been sent up on return to the writ issued herein, the following facts, briefly stated, appear, it being understood that no answer has been made to the complaint filed in the court below, and that for the purposes of this proceeding the allegations of the complaint, affidavits, and deposition filed, are necessarily taken as true: In 1887-1889, the defendants Manuel and Leocadio Aguayo,

brothers, were partners, owners and in possession of certain mining properties, and other adjuncts thereto, situate in the state of Sonora, in Mexico, and bonded the same for sale; that during this period of time, and with a view to effecting sale thereof, certain mining experts were called upon to make, and did make, an extensive and critical examination of the mines and mining property, as a basis for and upon the basis of which they made reports as to the character and value of the properties; that they were engaged for several weeks in taking samples of earth, rock, and ores from the mines, and making assays thereof; that during all the time they were engaged in taking such samples the Aguayos, for the purpose of insuring high-grade returns from the assays, and thus securing a sale of the mines at a price largely in excess of their true value, persistently, willfully, secretly, and fraudulently, and without the knowledge of the experts, tampered with the samples taken, and mixed with them large quantities of fine gold, or, in the language of the miners, "salted the samples," or caused the same to be done, so that they fraudulently procured grossly exaggerated reports to be made as to the character and value of the mines, and that too without the knowledge of the experts who conducted the examinations and made the reports; that deceived and misled by the false and fraudulent reports so fraudulently procured and caused to be made, and relying upon the truth thereof, the plaintiffs (the corporations above named) in September, 1889, were induced to purchase, and did purchase, said mines and properties from said Aguayos at and for the price of \$1,575,000, depositing therefor in escrow, in San Francisco, \$710,000 in gold coin, and the promissory notes of Alvinza Hayward, a citizen of California, payable at future days, with interest at 6 per cent. per annum, and secured by mortgage upon real estate situate in San Francisco, to the amount of \$865,900, all of which was subsequently delivered in pursuance of the conditions of the deposit, and upon receipt of information that possession of the mining properties had been delivered to the defendant Loaiza, who received the same as the agent and representative of the defendants Aguayos; that these notes and mortgages, and nearly all the money, or its immediate representative in securities in which the same had been invested by Loaiza for account of the Aguayos, remained in the hands of said Loaiza, held for the benefit and account of the Aguayos, and within the jurisdiction of the courts of California, until the commencement of this suit in the superior court, when the transfer thereof pending suit, or the removal of the same beyond the jurisdiction of the court, was enjoined by order of the court, and a receiver was appointed to take possession thereof, and hold the same until the further order of the court. The plaintiffs in said suit, purchasers of the mining properties, did not discover the fraud which had been perpetrated upon them until within one month prior to the bringing of the suit. Promptly upon discovering these frauds they notified the Aguayos

in writing that they "did rescind said purchase and sale," and demanded of said Aguayos "a rescission of the said purchase and sale," and then offered to restore to said Aguayos all the properties which had been conveyed to them, and everything of value which they had received from them, and to surrender the possession of all said properties, and to do and perform all acts and things which might be necessary or proper in order to fully restore to said Aguayos all properties and things of value received from them, as fully and completely as if said purchase and sale had never been made, upon condition that said Aguayos should restore the moneys and things of value received as the consideration for said purchase and sale. This demand and offer being rejected, a bill in equity was promptly filed setting out the facts, renewing the offer, and praying a decree of rescission and of restoration of the moneys and things of value received by defendants from plaintiff as the consideration for such purchase and sale, an injunction pending the action to restrain the transfer of said moneys and securities, or the removal thereof beyond the jurisdiction of the court, and the appointment of a receiver pending the action to take charge of and hold said moneys and securities.

1. It is claimed in argument that this contract was made in Mexico, and can only be rescinded in and according to the laws of Mexico, and that no court has jurisdiction to adjudge a rescission thereof except the courts of Mexico. There is no move in the record to indicate that this contract was made in Mexico than there is that it was made in England, except that the mere act of delivering possession of the property sold was of necessity done in Mexico. The internal evidences furnished by the record all tend to show that the entire contract of purchase and sale was made in San Francisco. There the deposit in escrow was made of everything that was to be given in consideration of the purchase and sale pending actual delivery of possession. There the consideration was finally delivered to and received by the agent of the Aguayos, and there the consideration remained invested and seeking investment until impounded by the court at the suit of the parties defrauded into its delivery. The larger part of that consideration consisted of the promissory notes of a citizen of California, made and payable in California, and to a resident of the state, (for all the notes were payable to the defendant Loaiza,) and secured by mortgage of property in said state, made and executed by the maker of the notes, and recorded in said state. These were certainly executory contracts, and if they could be rescinded at all it could be done in and according to the laws of the state where made, and where they were to be executed.

2. It is also insisted that the court in which said proceeding in equity was instituted has no jurisdiction, because the aid of the courts of this state cannot be successfully invoked in favor of non-resident foreign corporations against non-resident foreigners in an action affecting in any

way title to lands in a foreign state. The unsoundness of this position grows out of the assumption that the object of the action is to compel the Aguayos to accept reconveyance and restoration of the properties in Mexico. Such is not the fact. The real object of the action is to compel the restoration to plaintiffs of so much of the consideration which they were fraudulently induced to give for these properties as may be within the reach of the compulsory power of the court, and for the rescission and cancellation of the executory contracts (the notes and mortgages) procured by the frauds aforesaid, they being confessedly within the jurisdiction of the court. This relief can only be given in equity, and will be given only upon the condition prescribed by the statute and offered by the plaintiffs,—that of restoration by the plaintiffs of the property for which the consideration was given. As to the lands the plaintiffs are to be the actors; the defendants are to be given the opportunity to receive. The plaintiffs have voluntarily submitted themselves to the court, offering to do equity, entitled to relief only as they do equity, and bound to obey the mandate of the court as a condition of receiving the relief which they seek. The non-residence of plaintiffs is not material to the maintenance of the action. They have submitted themselves to the jurisdiction of the court by becoming suitors before it. They are amenable to its process, and must obey its commands before they can obtain relief. If conditions are attached to the relief awarded them, then performance by them can be compelled. *Cleveland v. Burrill*, 25 Barb. 532. Such voluntary appearance and submission made through the officers of the court—the attorneys at law—would be sufficient to enable the court to enforce the performance of an act imposed as a condition of relief; but in this case the plaintiffs are not here by simple representation by counsel. The record shows that they seek the equitable interposition of the court, and in court make the offer of restoration on their part required by our statute¹ in person, through the person of one of their own directors, resident within the jurisdiction and by them made managing director, and their attorney in fact. Through him they not only make the offer, but through him they give all the securities that the court requires—and they are proportionate to the interests involved—for the protection of the defendants. This point, like the next one which will be noticed, is argued as if the object of the action was to compel a reconveyance of the lands in Mexico, and it is only by supposing that such is the object of the action that the cases cited in support of the argument can be held to be in point. But such is not the object of the action. If the parties were reversed, and the Aguayos were suing the English companies for reconveyance and redelivery of possession, on the ground of frauds committed by the English companies, resulting in a failure of consideration, then some of the authorities cited would sup-

port the proposition that the court here would have no jurisdiction to enforce its decree for a reconveyance and redelivery of property in Mexico, unless it first got jurisdiction over the persons of the defendants. The object of this action is to have the court use its compulsory process only to affect property within its jurisdiction, and then only upon the party seeking the aid of this process voluntarily, or in compliance with conditions which the court may impose personally, and in accordance with the laws of Mexico, doing whatever may be necessary to restore title and possession of the property there situate.

Counsel have cited numerous authorities in support of their argument in this behalf. We refer to a few of those upon which most reliance seems to be placed, by way of showing the distinction between the cases cited and the one here under consideration, and the reason why the rule there established does not apply to the present case. *Smith v. Insurance Co.*, 14 Allen, 336, was an action brought in Massachusetts by a citizen and resident of Alabama against a life insurance company of New York to compel the latter to restore to him certain rights under a policy of insurance upon his life, which the company claimed had been forfeited. This was an action *in personam*, pure and simple. There was neither person nor property in Massachusetts to be affected by the judgment. All the relief sought was to compel action of a certain kind on the part of a non-resident foreigner, and in a foreign country. The court properly held that it had no power to enforce such a judgment and consequently no jurisdiction to render one. The case bears no relation to the one here under consideration. Great stress is laid upon *Matthaei v. Galitzin*, L. R. 18 Eq. 340, in this connection. That case was brought by the plaintiff, a foreigner, against the Princess Galitzin, also a foreigner, for an accounting of profits made in the working of a mine in Russia, the mine being operated by an English company which was a mere stakeholder in the premises, and made a defendant solely for the purpose of preventing the payment of the profits over to the princess until the accounting was had, the plaintiff claiming that he was entitled to share in the profits by way of commission. The action was purely *in personam*, whether it involved the matter of accounting between plaintiff and the princess, or included the settlement as preliminary thereto of the question of whether or not the plaintiff was entitled to a commission as claimed. The contract relied upon was confessedly made in a foreign country, in relation to foreign property, between parties both of whom were foreigners, and all rights and liabilities under it were personal. We fail to perceive how the case has any bearing upon the questions involved in this case. The conclusion of the court was that "a foreign resident abroad cannot bring another foreigner into this court respecting property with which this court has nothing to do." That is not this case. Here the parties are brought into court to cancel a contract made and

¹ Civil Code Cal. § 1601.

to be executed in this jurisdiction,—the notes and mortgage,—and in relation to property which is subject to the jurisdiction of the court. It is not proposed that the judgment of the court shall make the defendants actors in the disposition of property beyond its jurisdiction, or appoint anybody to act for them in the disposition of such property. We are cited also to an opinion by an able jurist, Mr. Justice SHARSWOOD, in Coleman's Appeal, 75 Pa. St. 442. We have carefully examined that case, and as we read it only these points are decided having any bearing upon the questions here involved: (1) That what is called a "foreign attachment" in that state will not lie for a demand founded in tort; that was a matter purely of statutory regulation, as it is here. (2) That, in cases where attachment will lie against a non-resident foreign defendant, the judgment can only be enforced against the property of defendant found within the jurisdiction, unless the defendant has been personally served within the jurisdiction, or has voluntarily appeared; but upon such service or appearance the proceeding against him may end in a judgment which will bind him personally, and may follow and be enforced against him extraterritorially. (3) "Where the claim of plaintiff is for goods or land [within the jurisdiction] in the constructive possession of a non-resident, by his agents or tenants, he has his remedy by writ of ejectment for the land, or by writ of replevin for the goods in like manner, summoning the person in possession as defendant." (4) In equity, "in cases where persons interested are out of the jurisdiction of the court, it is sufficient to state the fact in the bill, and pray that process may issue on their return. * * * The power of the court to proceed to a decree in their absence will depend on the nature of their interest, and the mode in which it will be affected by the decree. * * * If they are to be active in performing the decree, or if they have rights wholly distinct from those of the other parties, the court, in their absence, cannot proceed to a determination against them." (5) That "though it is an undoubted principle that wherever a court of equity has jurisdiction it will go on to make a complete decree, so as to settle the entire controversy between the parties, * * * any subject of property within its reach will [not] give it jurisdiction of the person of a non-resident defendant, so as to authorize * * * a personal decree against him, if he does not appear, for the payment of money." And, after some further consideration, it concludes that branch of the discussion with the words: "We are of opinion that the bill must be confined, at least so far as the interest of the foreign defendant is concerned, to a prayer for a decree affecting only the property in question." There is nothing in these conclusions, or in the reasoning of the learned justice which leads up to them, tending to show that the court whose action is now under consideration has not jurisdiction to proceed in the action before it, and grant the relief prayed, so far at least as it affects the property within this jurisdiction. As

to that property, the defendants will not be called upon to be active in enforcing or carrying into effect the judgment of the court. It may be that no personal judgment can be entered against them on account of moneys which they have secured, which could be enforced against them in the country of their residence; but it can be adjudged, if the proofs shall warrant it, that the consideration paid for the property in Mexico was procured to be paid by fraud, and so much of the money and property as remains within this jurisdiction and has been impounded by the court can be delivered up, and the securities and executory contracts requiring further payment to be made be canceled, without any conflict with the principles laid down in the case cited. We are also cited to *Norris v. Chambres*, 29 Beav. 246, and *Cookney v. Anderson*, 31 Beav. 452. Neither of these cases are in point. In the former the English court sustained a demurrer on two grounds: (1) That there was no privity of contract between the parties plaintiff and defendant; (2) that the purpose of the bill was to decree a lien upon real property situate in Germany. In the other, the reason for holding that there was no jurisdiction was because the purpose of the action was to administer and wind up a trust created under a contract made in a foreign country by foreigners, to be executed wholly in that country, and in relation to property there situate. Neither of the cases are at all parallel to the one here under consideration. Nor is the case of *Moseby v. Burrow*, 52 Tex. 396, in point. No decree is sought in this case compelling the defendants to make conveyance of lands in Mexico. If any conveyance of that land is required it will be required of plaintiffs, who have submitted themselves to the jurisdiction of the court, and as a condition of granting the relief which they seek.

3. Dropping the element of non-residence of plaintiffs, the petitioner here still insists, and the argument, even under other heads, is mainly directed to this proposition, that the court has no jurisdiction by reason of the non-residence of the defendants Aguayos, and of the fact that personal service has not been, and cannot be, made on them within the state. The cases already considered are leading ones among those urged in support of this proposition. Added to them are many others, such as *Belcher v. Chambers*, 53 Cal. 635; *Anderson v. Goff*, 72 Cal. 73, 13 Pac. Rep. 73; *Pennoyer v. Neff*, 95 U. S. 714, and others of that class, all of which discuss the question of the power of the court to render judgment in actions purely *in personam*, without personal service, or appearance of the defendant; or others, like *Hart v. Sansom*, 110 U. S. 155, 3 Sup. Ct. Rep. 586, where the decree was to operate against the defendant *proprio vigore* to annul a deed or establish a title, or to compel the defendant personally to be an actor in the performance of some act prescribed by the decree, whether he desired to perform it or not. It is conceded that the court would have no power to render a decree in such cases, and of such a character, in the absence of the defendant, unless there had been per-

sonal service of process within the jurisdiction to which the court could send its process. But all this argument is based upon a misapprehension of the character and object of the action hereunder consideration, and of the relation of the parties to each other at the time of the commencement of the action. To a correct understanding of the object of the action, and of the question of the right to maintain it, we must first correctly understand the relation of the parties to each other. The record does not bear out the proposition insisted upon on behalf of the petitioners here, that they are simply persons who were parties to an executed contract which was made and executed in Mexico. The preponderance of the evidence furnished by the record is in favor of the proposition that the contract of purchase and sale was made in San Francisco, within the jurisdiction of the courts of California. One act in its performance was necessarily performed in Mexico,—that of the delivery of the property sold. But that was not the last act in the performance of that contract. The entire consideration of the sale was subsequently delivered, and that delivery took place in San Francisco. It consisted in the delivery of money and of new contracts, executory contracts to be performed in the future, which have not yet been performed, and performance of which is not yet due. These have always been, and still are, within the jurisdiction of our courts. These moneys and executory contracts were delivered in consideration of what is claimed to have been a contract of sale on the part of the Aguayos, now fully executed. But was that a contract at all? In this state—and, until the contrary appears, it will be presumed to be the same in Mexico—it is essential to the validity of a contract that there should be—*First*, parties capable of contracting; *second*, consent; *third*, a lawful object; and, *fourth*, a sufficient cause of consideration. Civil Code, § 1550. To be consent it must be free, mutual, and communicated by each to the other. Id. § 1565. It is not free when obtained through fraud, undue influence, or mistake. Id. § 1567. If not free it may be rescinded by the parties in the manner prescribed by the chapter on rescission. Id. § 1566. Consent is deemed to have been obtained by fraud, undue influence, or mistake, when it would not have been given had such cause not existed. Id. § 1568. The record shows that the consent of the purchasers to make this purchase, and deliver these moneys and securities in consideration thereof, was procured by fraud on the part of the Aguayos, and mistake on the part of the other parties, induced by such fraud, and that it would not have been given had not such cause existed. It therefore shows that there was no valid and binding contract between the parties, and that such as it was it might be rescinded by the parties. The acts of fraud are set out, and they show actual fraud within the meaning of section 1571, Civil Code. It was a misrepresentation of the value of property, knowingly made, and entitled the purchaser to a rescission. *Cruess v. Fessler*, 39 Cal. 336; *Bank v. Hiatt*,

58 Cal. 234. Having been induced to enter into this contract by fraud, and through mistake induced by such fraud, the parties could either ratify the same and sue for damages, or rescind. 1 Whart. Cont. § 282; 2 Add. Cont. *1218; *Alvarez v. Brannan*, 7 Cal. 503; *Pence v. Langdon*, 99 U. S. 578; Civil Code, § 1689; *Burkle v. Levy*, 70 Cal. 254, 11 Pac. Rep. 643; *Fish v. Benson*, 71 Cal. 440, 12 Pac. Rep. 454; *Colton v. Stanford*, 82 Cal. 398, 23 Pac. Rep. 16. If the suit were for damages it could not succeed and end in a judgment which could be enforced against the persons of defendants without personal service or appearance. But it is not for damages. It is upon and after rescission, and to enforce rescission, so far as the means of enforcing it are within the jurisdiction of the court. It does not require mutual consent of the parties to rescind. Under section 1689, either party may rescind when consent was given by mistake, or obtained by fraud. According to the record, the purchasers did actually rescind, and rescind promptly, before the action was brought, and did all that is required of them by section 1689, which gives them the right, and section 1691, which prescribes the mode, of rescission. They did not restore, because restoration was not accepted, but they offered to restore, and in the action they again offer to restore, everything of value received by them under the contract. This offer, with the prompt and proper notice, makes the rescission complete, and entitles them to the aid of a court of competent jurisdiction in securing to them the results and fruits of the rescission. To secure those results and fruits is the object of the action they have brought. Those results and fruits are the restoration of the moneys and things of value which they gave in consideration of the purchase. Most of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all ear-marked, so that they can be traced and identified, and were within the jurisdiction, and are now within the possession, of the court in which the action was brought. That the court has jurisdiction to afford the relief sought is supported by ample authority. See cases already cited, and *Fratt v. Fiske*, 17 Cal. 380; *Watts v. White*, 13 Cal. 321; *Morrison v. Lods*, 39 Cal. 381; *Barfield v. Price*, 40 Cal. 535; *Herman v. Haffenegger*, 54 Cal. 161; *Marston v. Simpson*, Id. 189; *Fitz v. Bynum*, 55 Cal. 459; *Henderson v. Hicks*, 58 Cal. 364; *Collins v. Townsend*, Id. 608; *Hart v. Kimball*, 72 Cal. 283, 13 Pac. Rep. 852; and *Dunn v. Daly*, 73 Cal. 640, 21 Pac. Rep. 377,—in all of which this right of rescission upon offer to restore is recognized. We concede, as claimed by petitioner and decided in *Bohall v. Diller*, 41 Cal. 532, that the rescission must be *in toto*, and in this case it seems to have been so. The offer was to restore everything of value on the one side, and the demand that everything be restored on the other. The offer must be made good whenever the demand is complied with.

Incidentally, some authorities have already been cited tending to sustain the jurisdiction of the court in cases of this

kind. The following may be referred to in addition: In *Rourke v. McLaughlin*, 38 Cal. 196, this court holds that specific performance in equity will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court, and cites the case of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, where specific performance of a contract for lands in America was decreed in England, and *Ward v. Arredondo*, Hopk. Ch. 213, a case in many respects parallel to the one here under consideration, and in which the jurisdiction of the court was sustained. In *Boswell's Lessee v. Otis*, 9 How. 348, the supreme court of the United States says: "Jurisdiction is acquired in one of two modes: *First*, as against the person of the defendant, by the service of process; or, *secondly*, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by attachment or by bill in chancery." In *Cooper v. Reynolds*, 10 Wall. 318, the same court held, in a case where there was no personal service and the defendant was not within the territorial jurisdiction of the court, that the seizure of the property or the levy of the writ of attachment on it was the one essential requisite to jurisdiction, and that it unquestionably made the proceeding purely *in rem*. In *Galpin v. Page*, 3 Sawy. 124, Mr. Justice FIELD held that proceedings which are in form personal suits, but which seek to subject property brought by existing lien, or by attachment, or by some collateral proceeding under the control of the court, and those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered, while not strictly proceedings *in rem* so far as they affect property in the state, are treated substantially as such proceedings. In *Pennoyer v. Neff*, 95 U. S. 727, which has become the leading case on the subject of jurisdiction acquired by publication, the supreme court of the United States says: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure, or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer

in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose." In *Windsor v. McVeigh*, 93 U. S. 279, where the same question was considered, the court says: "The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him." The same principle is sustained in *Heidritter v. Oilcloth Co.*, 112 U. S. 301, 5 Sup. Ct. Rep. 135, where the court adds to what had been said before that jurisdiction may be acquired by the mere bringing of the suit in which a claim is sought to be enforced against property situate within its territorial jurisdiction; that this may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit. Even in the case of *Arndt v. Griggs*, 10 Sup. Ct. Rep. 558, cited by petitioner, the court says: "It [the state court] cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice." If the state court has such power with reference to title to real estate held by a non-resident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civil Code, § 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust*. That the court has such jurisdiction as is here claimed for it is fully sustained in *Felch v. Hooper*, 119 Mass. 52, where the case is clearly distinguished from that of *Spurr v. Scoville*, 57 Mass. 579, cited by petitioner; in *Bank v. Stelling*, 9 S. E. Rep. 1028; *Quarl v. Abbett*, 102 Ind. 233, 1 N. E. Rep. 476; in *King v. Vance*, 46 Ind. 251, where the court says: "The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;" and in *Martin v. Pond*, 30 Fed. Rep. 15, where Mr. Justice BREWER says: "It may be conceded that notice to the defendant is necessary to divest him

of his rights and interest. But the publication is notice,—it is equivalent to the personal service of summons."

4. It is specially insisted on the part of petitioner that the court had no jurisdiction to appoint a receiver; but the argument in support of that contention is based almost entirely upon the proposition that the court has no jurisdiction generally. If it has general jurisdiction in the case, as we conclude that it has, then error in the exercise of that jurisdiction would be reviewable only on appeal. The appointment of a receiver, however, might in some cases be more than error, even when the court had general jurisdiction. The case might be one in which there was no authority to appoint a receiver. But we do not think that this is such a case. The authority to appoint a receiver in such a case is clearly given in both the first and sixth subdivisions of section 564 of the Code of Civil Procedure. See, also, *Ex parte Cohen*, 5 Cal. 496; *People v. Norton*, 1 Paige, 17; *Verplanck v. Insurance Co.*, 2 Paige, 440; *West v. Swan*, 3 Edw. Ch. 420; *Von Roun v. Superior Court*, 58 Cal. 358; *Railroad Co. v. Superior Court*, 55 Cal. 453. Such an appointment in no way affects the title of any party to the property involved, but simply preserves the property and keeps it within the jurisdiction until the rights of the parties can be determined. Satisfied, as we are, that the superior court, defendant here, has jurisdiction to proceed in the case before it and here brought under review, and that thus far it has not acted in excess of its jurisdiction, the writ must be dismissed. So ordered.

WE CONCUR: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

85 Cal. 102

CALIFORNIA BANK v. SAYRE *et al.* (No. 13,597.)

(*Supreme Court of California.* July 30, 1890.)

PROMISSORY NOTE—RATIFICATION.

Defendant, being informed by a third person that he had deposited her note with plaintiff as collateral, told such third person that she had signed no such note, but she did nothing more about it, and paid no attention to plaintiff's notice that the note was due. *Held*, that her silence did not amount to a ratification.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Dooner & Burdett, for appellant. *Wells, Guthrie & Lee*, for respondent.

HAYNE, C. This was an action upon a promissory note. The trial court gave judgment against one of the alleged makers, but not against the other, and the plaintiff appeals. The ground of the decision in favor of the defendant referred to "was that her name was signed to the note without her knowledge or authority." The appellant attacks the finding in this regard as not sustained by the evidence; but we think that there is sufficient evidence to sustain it. The only question that can be raised is whether she ratified the signature. With reference to this question there is evidence to the effect that she

first learned of the signature of her name to the note in an interview with the agent of the payee in February, 1889, which was about nine months after the execution of the note; that on that occasion she informed him that the signature was not hers; that he informed her that her note had been deposited with the plaintiff as collateral, and referred her to it; that she did nothing further in the matter, and paid no attention to the notice from the plaintiff that the note was due. There is evidence tending to contradict some of the testimony above referred to; but in view of the conflict it must be assumed that the evidence tending to support the judgment is true. It is argued, however, that the failure of the defendant to repudiate the signature, or to notify the plaintiff that she would not be bound by the note, amounted to a ratification. But, while such a rule might apply under certain circumstances, we think that where, as here, there is no element of estoppel, the mere silence of the party does not amount to a ratification. *Reubin v. Cohen*, 48 Cal. 545; *Hendrie v. Berkowitz*, 37 Cal. 113. The other points do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

WE CONCUR: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

85 Cal. 270

SHEERER v. CUDDY *et al.* (No. 13,592.)

(*Supreme Court of California.* Aug. 4, 1890.)

VENDOR AND VENDEE—BONA FIDE PURCHASER.

One who purchases real estate is bound to know who is in possession thereof, and is chargeable with notice of the occupant's title; and therefore a purchase of premises, occupied in part by third persons under an unrecorded lease, cannot be heard to say that he is an innocent purchaser, though he in fact was ignorant of the occupancy.

In bank. Appeal from superior court, Los Angeles county.

Bransseau & Hatch, for appellants. *Williams & McKinley, McComas & Fisher, L. F. Fisher, and W. T. Williams*, for respondent.

WORKS, J. John Bryson, being the owner of certain real estate, leased certain of the rooms in the building thereon to the appellant Los Angeles Lodge No. 42, F. and A. M., for the term of 10 years, by a written lease. The lodge took and held actual possession of these rooms, but the lease was not recorded. Subsequently, and while the lodge was in possession, Bryson sold and conveyed the property to the plaintiff, and his deed was duly recorded. Whether the plaintiff had actual notice of possession of the premises by the said appellant or not, is one of the controverted questions in the case, but it is a conceded fact that he knew of it soon after his purchase, and that he received and collected the rents for the premises from the lodge for six months thereafter, at the rate agreed to be paid in the lease, and that the lease was recorded during this time, and three months' rent was collected.

by the plaintiff after the lease was recorded and he had actual knowledge of its contents. After receiving the rents he commenced this action in ejectment against the appellants, the other defendants being officers of the lodge. The court below found that, as against the claim of the appellants, the respondent was a *bona fide* purchaser for value. Whether he was or not depends upon whether the circumstances were such as to put him upon such inquiry as would have disclosed the rights of the defendant Los Angeles Lodge, as between it and Bryson. As between Bryson and the lodge, the lease was binding without being recorded. Civil Code, § 1217. As against the plaintiff it was void if not recorded, unless he had notice of its existence, or such notice as should put him upon such inquiry as would disclose its existence. Civil Code, §§ 1214, 1217. That the lodge was in the actual possession of the property at the time of the plaintiff's purchase is an undisputed fact in the case, but the plaintiff testifies that he did not know it was in possession, and that when he looked at the house before purchasing it the doors of these rooms were locked, and he did not know that they were occupied. We think the finding of the court below that under these circumstances, admitting the truth of the plaintiff's testimony, he was a *bona fide* purchaser, was not sustained by the evidence. The actual possession of the premises by the appellant was sufficient to put the respondent upon inquiry as to the nature and extent of its claim. *Pell v. McElroy*, 36 Cal. 268; *O'Rourke v. O'Connor*, 39 Cal. 446; *Moss v. Atkinson*, 44 Cal. 3, 17; *Hunter v. Watson*, 12 Cal. 363; *Lestrade v. Barth*, 19 Cal. 660, 675; *Dutton v. Warschauer*, 21 Cal. 610. The effect of such possession, and the diligence required of the vendee to ascertain the extent of the claim of the party in possession, is thus clearly stated in *Pell v. McElroy*, supra: "The fact of open, notorious, and exclusive possession and occupation of lands by a stranger to a vendor's title, as of record, at the time of a purchase from and conveyance by such a vendor out of possession, is sufficient to put such purchaser upon inquiry as to the legal and equitable rights of the party so in possession, and such vendee is presumed to have purchased and taken a conveyance from the vendor with full notice of all the legal and equitable rights in the premises of such party in possession and in subordination to these rights, and this presumption is only to be overcome or rebutted by clear and explicit proof on the part of such purchaser, or those claiming under him, of diligent, unavailing effort by the vendee to discover or obtain actual notice of any legal or equitable rights in behalf of the party in possession. And, when the location of the lands is such as to render personal application to and inquiry of the occupant practicable, a purchaser failing to make such application and inquiry is no more entitled to be regarded a purchaser in good faith than if he had so acquired and ascertained the real facts of the case." Whether the respondent knew of the appellant's possession or not is immaterial. It was

his duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that, by failing to acquaint himself with the fact of possession on the part of another than the vendor, the vendee could avoid the effect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely. There are other questions of minor importance presented by the record, but as the determination of this one is decisive of the case they need not be considered. Judgment reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.; THORNTON, J.

88 Cal. 36; 3 Cal. Unrep. 283

BOOTH *et al.* v. PENDOLA *et al.* (No. 13,267.)
(Supreme Court of California. Aug. 1, 1890.)

MECHANICS' LIENS—ENFORCEMENT—PLEADING—JUDGMENT.

1. In an action by subcontractors to enforce a lien for materials furnished in the erection of a building, the contract for which, between the owner and contractor, was never filed for record, a judgment for plaintiffs cannot be supported where the complaint does not allege the reasonable value of the materials, and there is no finding as to such value, though the complaint does allege the amount agreed to be paid by the contractor.

2. Where the materials were furnished at the same time for two buildings of the same owner, while it is not necessary to file separate claims on each building, the subcontractors are not entitled to a joint lien on both buildings for the entire amount claimed.

In bank. On rehearing. For former report, see 23 Pac. Rep. 200.

Cope & Boyce, for appellants. *Thomas, Butcher & Putnam*, for respondents.

PATERSON, J. This is an action brought by plaintiffs, having several liens of mechanics and material-men, against property owned by Pendola, deceased, in his life-time. The findings show that Pendola entered into a written agreement with one Hamilton, on March 29, 1887, for the construction of the Western Hotel in the city of Santa Barbara, and on the 15th of June entered into another contract with said Hamilton to build a cottage near said hotel, and on the same lot. Neither of these contracts was recorded. Belt & Co. furnished materials for both buildings, for which Hamilton agreed to pay a reasonable price. The court finds that the reasonable value of the materials furnished by them was \$363.99. On May 2, 1887, Hamilton entered into an agreement with Backus & Heyl, by the terms of which the latter were to paint the hotel for the sum of \$365, and the cottage for the sum of \$135. The court finds that of these sums \$131.71 remain unpaid. Lightner & Buckingham furnished materials for, and performed certain work on, the cottage, for which Hamilton was to pay the sum

of \$335, and performed certain work on and furnished material for the hotel, for which they were to receive the sum of \$975, of which the sum of \$535.35 remains due and unpaid.

1. The complaint alleges that Hamilton agreed to pay Backus & Heyl the sums of \$365 and \$135, above referred to, and that he agreed to pay Buckingham & Lightner the sum of \$975 for work done on and materials furnished for the hotel, and \$335 on account of the cottage, but it is nowhere alleged, nor does the court find, what was the value of any of the materials furnished, or of any of the work performed. Such allegations and findings were necessary, and the judgment cannot be supported without them. The contract between the owner and Hamilton was never filed for record. It was void, and while it is doubtless true that the contract price agreed upon between Hamilton, the agent of the owner, and the material-men and laborers, is *prima facie* evidence of the value of the materials furnished and labor performed, and would support a finding of value, we think that an allegation and a finding on the subject are essential to support a judgment in actions of this character.

2. The claims of lien filed by Backus & Heyl and Lightner & Buckingham both segregate and specify the particular amounts claimed to be due on each building. We do not think it was necessary for the claimants to make and file separate claims on each building; it was proper to state the amount of the claim on each building in the notice of lien, and the claimants are entitled to a lien on each building for the amounts respectively due thereon, but we do not think such claimants or their assignees are entitled to a joint lien on both buildings for the entire amounts respectively claimed by them. All other points made by appellant, and worthy of consideration, were noticed by Mr. Justice McFARLAND in the former opinion herein, and we are satisfied with the conclusions therein reached. Judgment reversed, and cause remanded for a new trial, with directions to allow the parties to amend their pleadings as they may be advised.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.

85 Cal. 205

SCHNEIDER v. BROWN *et al.* (No. 13,517.)
(Supreme Court of California. Aug. 1, 1890.)

TRESPASS—INJUNCTION—IRREPARABLE INJURY.

1. In a suit to restrain a trespass the complaint alleged that defendant had entered on plaintiff's land, and had torn up the soil and destroyed the crops, threatening and intending to dig a ditch across it 20 feet wide and 3 or 4 feet deep; that such ditch would cut off from the main body of the tract some 10 acres, which, thus separated, would have little or no value; and that such ditch would divert a large quantity of water over plaintiff's land, and interfere with its cultivation. *Held*, that the complaint makes out a case of irreparable injury.

2. A nonsuit for want of proof of plaintiff's title is properly refused where he is shown to be in possession by his tenant under color of title, and there is no evidence to rebut the presumption of ownership thus raised.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

H. S. Dixon and Church & Cory, for appellant. J. H. Daly and S. J. Hinds, for respondents.

HAYNE, C. This was a suit to restrain a trespass upon real property, and for damages. The trial court gave judgment for the plaintiff, and the defendants appeal. The appeal from the order denying a new trial was not taken in time, and must be dismissed. The appeal from the judgment was not taken within 60 days from its rendition, and therefore no question as to the insufficiency of the evidence can be raised. The verdict of the jury was merely advisory, and therefore any error that may have occurred in the instructions is immaterial. *Dominguez v. Dominguez*, 7 Cal. 426; *Sweetser v. Dobbins*, 65 Cal. 529, 1 Pac. Rep. 540. The original complaint was superseded by an amended complaint, and all questions as to the sufficiency of the former drop out of the case. This leaves the question as to the sufficiency of the amended complaint as the main question to be considered. It alleges that the plaintiff was the owner and in possession of half of a quarter section of land, and then proceeds as follows: "That on or about the 29th day of February, 1888, the defendants knowingly, maliciously, and wrongfully came upon said land with a number of teams and men, and began tearing up the soil and destroying the crops growing upon said land, and plaintiff is informed and believes that said defendants are still engaged, and intend to continue, in tearing up the said soil and destroying the crops upon said land; that the defendants threaten and give out, and intend, if not restrained by injunction, to construct a large ditch across plaintiff's land, twenty feet wide and about three or four feet deep, said ditch being constructed near the southern boundary of plaintiff's land, and along the full length for about half a mile on said land, leaving a strip of land between said ditch and said southern boundary, cutting off from the other part of said plaintiff's land about ten acres, which, without defendants' interference, is of the market value of about \$200 per acre, but which, with said ditch and excavation thereon, said land thus cut off from the main body of said land would be of little or no value, and said ditch would prevent the use and cultivation of the land occupied by said ditch and excavation, therefore injuring and destroying the land over which and in which said ditch is constructed, to plaintiff's great damage; and defendants are contemplating and intend to divert a large quantity of water upon and over the land of plaintiff." We think that the foregoing makes a case of irreparable injury within the meaning of the rule on the subject. The case of *Waldron v. Marsh*, 5 Cal. 120, does not lay down the proposition that in no instance would the cutting of a ditch through land produce "irreparable" injury, but only that the ditch in that particular case did not

produce such injury; but the report does not inform us what the circumstances of that particular case were, and therefore it cannot be said that the decision applies. In this case it is alleged not only that the defendants are destroying the plaintiff's growing crops, but that their acts will render valueless at least 10 acres of valuable land, and that they threaten and intend to continue such acts. This seems to us to be all that is necessary. The findings are sufficient. The contract to farm the land on shares did not make Hern a tenant of the plaintiff. The parties were tenants in common of the crop. *Bernal v. Hovious*, 17 Cal. 541. But if Hern be considered a tenant of the plaintiff, the latter would nevertheless maintain the action, because the injury was clearly an injury to the inheritance.

The motion for nonsuit was properly denied. So far as it was based upon the insufficiency of the amended complaint, what we have said applies. So far as it was based upon the alleged want of proof of plaintiff's ownership, it was without merit. The plaintiff was in possession (by his tenant) under color of title, and there was no evidence to rebut the presumption of ownership which this raises. We therefore advise that the appeal from the order denying a new trial be dismissed, and that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is dismissed, and the judgment is affirmed.

85 Cal. 343

PEOPLE *ex rel.* JOHNSON, Atty. Gen., v. BAGLEY *et al.* (No. 13,847.)

(Supreme Court of California. Aug. 5, 1890.)

MUNICIPAL CORPORATIONS—CHARTERS.

St. Cal. 1883, p. 93, upon the organization, incorporation, and government of municipal corporations, provides (section 4) that any municipal corporation organized prior to January 1, 1880, may reorganize under its provisions. Const. Cal. art. 11, § 8, provides that "any city * * * may frame a charter for its own government consistent with and subject to the constitution and laws of this state," by taking certain steps therein specified for preparing and publishing a proposed charter, which shall become effective when approved by the legislature. Section 6 provides that municipal corporations "shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, organization, and classification * * * of cities and towns," etc. Held that, since the act of 1883, although a general law is simply permissive, a city incorporated thereunder may reincorporate in the manner provided by the constitution, and, when the charter so framed is approved by the legislature, it supersedes the old charter, and the council elected under it becomes the true council of the city.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Const. Cal. art. 11, § 8, provides that "any city * * * may frame a charter for its own government, consistent with, and subject to, the constitution and laws

of this state," by taking certain steps therein specified for preparing and publishing a proposed charter, which shall become effective when approved by the legislature. Section 6 provides that municipal corporations "shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, organization, and classification * * * of cities and towns," etc.

Atty. Gen. George A. Johnson and Carter & Smith, for appellant. F. T. Baldwin and E. I. Jones, for respondents.

GIBSON, C. This appeal is from a judgment entered for defendants upon stipulated facts in a *quo warranto* proceeding prosecuted by the attorney general against them to determine their right to exercise the official powers and functions of the city council of the city of Stockton, of which they claimed, and were adjudged by the trial court, to be the duly-constituted members. The city of Stockton was, prior to the adoption of the constitution of 1879, duly incorporated under a special charter, and continued to exist as such thereunder until the 17th day of December, 1884. On the latter date it became organized as a municipal corporation of the fourth class, pursuant to the provision of an act approved March 13, 1883, and entitled "An act to provide for the organization, incorporation, and government of municipal corporations." St. Cal. 1883, p. 93. The city under that act maintained its corporate organization until the 2d day of March, 1889, when its present charter, framed by its freeholders, and adopted by its electors, in accordance with and pursuant to the amendments to section 8, art. 11, of the constitution of this state, was approved by the legislature. (St. Cal. 1889, p. 577,) and thereby became the organic law of the city in place of the act of March 13, 1883. The portion of the last-mentioned act relative to the city of Stockton provides that the city council shall consist of the mayor and 12 councilmen, 7 of whom shall constitute a quorum for the transaction of business. See sections 601, 620, 621. On the 1st day of January, 1888, by virtue of prior municipal elections regularly held, 12 persons named in the complaint, other than the defendant, became the duly-qualified members of the city council undersaid act, and entered upon the discharge of their duties as such officers. Since then, of the said 12 persons, one has died, and one has resigned, but, as no successor to any of the 12 has been elected or appointed, it is stipulated that unless the defendants elected under the present charter are the legal councilmen, and collectively constitute the city council, then the remaining 10 of the first 12 councilmen are the legal councilmen of the city. The present charter, which, as we have seen, went into effect March 2, 1889, provides that the city council shall consist of five members. At the first municipal election held under it the five defendants were duly elected, and within the proper time duly qualified as members of such city council, and on the 10th day of June, 1889, they each entered upon the office of member of the city

council, and began and still continue to claim and exercise the powers and functions of such office, and collectively since then have claimed to constitute the city council of said city, and have exercised all its powers and functions.

Thus, we perceive, there are two sets of persons claiming to be the councilmen of the city, and to form the city council thereof. The only question arising then is, which of these two sets is the proper one? The persons claiming to be the councilmen under the act of March 13, 1883, were, as conceded, the *de jure* councilmen of the city from the first Monday in January, 1888, until the defendants were elected and qualified to act under the new charter, and, unless the first set of councilmen was superseded as such councilmen by the defendants, they still continue to be such *de jure* officers. The position of the appellant is that the act of March 13, 1883, is a general law and conflicts with the provisions of the present charter in relation to city councilmen, and, as section 6, art. 11, of the constitution provides that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws," the act of March 13, 1883, must prevail; and he cites in support of his position *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929; *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413; *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615. There is no doubt and it is not disputed that the conflict mentioned exists. The act of March 13, 1883, provides for 12 councilmen, 7 of whom are necessary to make a quorum for the transaction of business, while the freeholders' charter provides for but 5 councilmen in all, or 2 less than the requisite number for a quorum under the act referred to; hence they are incompatible with each other, and, if the plaintiff's position is correct, then the freeholders' charter in this respect must yield to that statute. The statute in question, as can be seen from its title above quoted, provides for the organization, incorporation, and government of municipal corporations. Under it six separate and distinct classes of such corporations as are defined in the act of March 2, 1883, (St. Cal. 1883, p. 24,) may be organized. It embraces all the municipal corporations that can be created in the state, except those especially provided for in section 8, art. 11, of the constitution, and is as comprehensive as the subject admits of under the constitution, and is, therefore, a general law within the principle of *Thomason v. Ashworth*, supra, and the cases there cited. But, although it is a general law, we are convinced that it differs from the general laws held in the above cases cited by plaintiff to affect municipal corporations, whether organized before or after the adoption of the constitution of 1879. An examination of those cases shows that each of the statutes therein considered was mandatory, and in this respect differs materially from the statute of 1883. The statute in question is permissive. Until its terms are accepted it does not require corporations falling within any one of its

six classes to organize, but tenders six separate charters, and permits any one of them to be selected as the charter of a city, at the election of those who come within its purview. This is apparent from the first section of the act, which reads as follows: "Any portion of a county containing not less than five hundred inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may be hereafter conferred, by law, upon municipal corporations of the class to which the same may belong." And, also, section 4, which provides that any municipal corporation organized prior to January 1, 1880, may reorganize under the act. But when its terms are accepted that portion of the act relating to the municipality created under it becomes mandatory, and governs such municipality until it is extinguished by being changed into one of a different class under the act by consolidating with some other one, or into one incorporated under section 8, art. 11, of the constitution. We have seen that the city of Stockton elected to and did accept, under the act in question, the charter provided for cities of the fourth class. Now, if the contention of appellant be correct, the city thereby adopted a charter that precludes it from enjoying the benefit of its present or any other charter whose provisions may be inconsistent with those pertaining to a city of the fourth class. Statutes passed under a constitution are subject to and must be controlled by it. They can neither enlarge nor diminish its scope. Therefore the legislature could not abridge the power given in the amendment to section 8, art. 11, of the constitution, to cities containing a population of more than 10,000 and less than 100,000 people, to change their form of government conformably to it. And to hold that any city charter framed, adopted, and approved thereunder must be subject to, and controlled by, the previous charter of the city, when it exists in the form of a general law, to the extent that the latter may conflict with the former, would clearly be such an abridgment. The freeholders' charter, to the extent of such a conflict, would be a delusion that the legislature, if it had the power to affect the constitution, could not be said to have intended. It might in like manner be argued that because the charter adopted by a municipality organized under the act of 1883 is a general law, and would be operative against any subsequent charter of the city if it should consolidate with some other or like municipal corporation, which may be done pursuant to section 4 of the same act, its new charter would have to be consistent with the old one, or be controlled by it. To attempt to so control the new charter of such a municipality in accordance with the rule contended for would, in effect, render section 4 of the act impossible to follow, and, therefore, nugatory; particularly so if both of the cities attempting to consolidate should have charters of a different class under the act of 1883, and should try to consolidate as a city of a class different from either, as

they might do under the same section of the law.

We think the results pointed out which would follow from bringing the act of 1883 within the rule urged by plaintiff are sufficient to show that it does not apply here. It seems clear to us that when the city of Stockton organized as a city of the fourth class, under the permissive act of March 13, 1883, that act then, as far as it applied to cities of that class, became the mandatory organic law of the city, and remained so until the legislature approved a new and different charter adopted by the electors of the city pursuant to the amendment to section 8, art. 11, of the constitution. And that the new charter, when it was approved by the legislature, entirely superseded the former charter under the act of 1883. This being so, the city of Stockton as a city of the fourth class ceased to exist, and passed out of and beyond the scope of the act last mentioned. It therefore follows that the judgment should be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

85 Cal. 238

PEOPLE V. GUNN. (No. 13,591.)

(Supreme Court of California. Aug. 4, 1890.)

MUNICIPAL CORPORATIONS—CHARTER—REMOVAL OF OFFICERS—PARTIES.

1. Const. Cal. art. 11, § 8, provides that any city of between 10,000 and 100,000 inhabitants may frame a charter for itself, by causing 15 freeholders to be elected "by the qualified voters" thereof, who shall prepare a charter, sign it in duplicate, and return one copy to the mayor, and one to the recorder of deeds of the county, that such charter shall then be published in two daily papers of general circulation in the city for at least 20 days, and that within not less than 30 days after such publication it shall be submitted to a vote of the qualified electors, and if ratified by them and the legislature it shall be the charter of the city. *Held*, that where, in calling the election of freeholders, 1,200 inhabitants, including 300 qualified voters, were omitted, and had no voice in the election; and no copy of the charter was delivered to the mayor, and none to the recorder; and it was not published in any daily paper for 20 days; and the election for ratification was called and held in less than 30 days after the completion of the publication,—there was such a violation of the mandatory provisions of the constitution as to invalidate the charter.

2. Said section of the constitution further provides that after being so ratified by the qualified voters, the proposed charter shall be submitted to the legislature "for its approval or rejection as a whole, without power of alteration or amendment," and, if approved by a majority of the members elected to each house, shall become the charter of said city. *Held*, that since the power of the legislature is so restricted, its vote of approval is not a conclusive determination that the previous proceedings were regular and sufficient, and that question is for the court to determine.

3. Where, in a proceeding to remove the mayor of a city from office, the validity of the city charter is drawn in question, and is the issue upon which the decision of the cause depends, the city itself is a necessary party.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Const. Cal. art. 11, § 8, provides that any city of more than 10,000 and less than 100,000 inhabitants may frame a charter for its own government, subject to the constitution and laws of the state, by causing a board of 15 freeholders "to be elected by the qualified voters of said city," whose duty it shall be to prepare and propose a charter, which shall be signed in duplicate, and one copy returned to the mayor, and the other to the recorder of deeds of the county; that such "proposed charter shall then be published in two daily papers of general circulation in said city for at least 20 days, and within not less than 30 days after such publication it shall be submitted to the qualified electors of such city at a general or special election," and, if it shall be ratified by a majority of those voting, "it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, * * * and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city," etc.

Atty. Gen. George A. Johnson and Stanley, Stoney & Hayes, (Hunsaker & Britland, of counsel,) for the People. Jas. P. Goodwin, M. A. Luce, and H. L. Titus, (Garber, Bolt & Bishop, of counsel,) for respondent.

Fox, J. This action is brought under chapter 5, tit. 10, pt. 2, of the Code of Civil Procedure, to remove the respondent from the office of mayor of the city of San Diego, it being charged that respondent has usurped and intruded into and unlawfully exercises such office. Judgment went for defendant on demurrer to the complaint, and from such judgment the plaintiff appeals. The allegations of the complaint, necessary to be considered here, are: (1) That the city of San Diego is, and at all times mentioned in the complaint has been, a municipal corporation of the fourth class, organized, created, and existing under and by virtue of the general law providing for the organization, incorporation, and government of municipal corporations, approved March 13, 1883, and the act to provide for the classification of municipal corporations, approved March 2, 1883. (2) That the defendant claims to have been elected mayor of said city at a pretended election held on the first Tuesday after the first Monday in April, 1889, and at which pretended election he received a majority of the votes cast for mayor; and that claiming title to the office by virtue of such pretended election, and not otherwise, or by other authority, he has obtruded himself into, and ever since held, and now usurps, the said office of mayor, and exercises the functions and duties thereof. (3) It then proceeds to show that said pretended election was one claimed to have been held under and in pursuance of the provisions of a charter pretended to have been framed and adopted under section 8, art. 11, of the constitution, and approved by a joint resolution of both houses of the legislature, and sets out facts which show that such charter was not in fact framed or adopted in accordance with the

requirements of said, or any, section of the constitution, and points out numerous defects in the proceedings, by reason whereof it is claimed, and if the allegations of the complaint are true, and by the demurrer they are admitted to be true, it is correctly claimed that such pretended charter never did become a valid law, and furnished no authority for the holding of such election. The complaint is demurred to on two grounds: (1) That there is a defect of parties defendant, in that the city of San Diego is a necessary and proper party defendant; (2) that the complaint does not state facts sufficient to constitute a cause of action.

1. The authorities are by no means uniform upon the first point made upon this demurrer. Several cases are cited from other states, where proceedings, which in effect would determine the legal existence of a municipal corporation, have been sustained, without making the municipality a party; and that where, as here, the question was directly raised. But we think that the weight of authority in sister states and in England, and the better reasoning, is that whenever the proceeding is such as must test and determine the validity of a municipal charter as such, the municipality, real or pretended, must be made a party. It may be otherwise where the only effect of the proceeding will be to determine the right of some particular person to exercise certain powers under the charter. In this state we are cited to no case, and know of none, where the question of corporate existence was involved, and the question of parties was raised, in which the alleged corporation was not made a party in the first instance, or if not, the court required it to be done, except it be that of *People v. Stanford*, 77 Cal. 360, 18 Pac. Rep. 85,¹ and that was a case of a private corporation. In that case it was expressly held that it would be different in the case of a municipal corporation; that in such a case "it would seem to be proper that a defendant claiming to be a city, * * * and acting as such, should be made a party in an action to determine the validity thereof." In *People v. Riverside*, 66 Cal. 288, 5 Pac. Rep. 350, the municipality was made a party, and held to be the proper party to the proceeding. In *People v. Flint*, 64 Cal. 49, a case of a private corporation, the question was, as here, whether there ever had been a legal incorporation, and the court expressly held that the pretended corporation must be made a party defendant. In *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652; *People v. Parks*, 58 Cal. 624; and *People v. La Rue*, 67 Cal. 526, 8 Pac. Rep. 84, the question of corporate existence was incidentally involved, but in neither of them was any question made as to whether or not the proper parties were before the court. In *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413, and *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929, the question of corporate existence was not involved. In this case, while nominally the proceeding is to oust the defendant Gunn from the office of mayor, it is apparent on the face of

the complaint that the real object of the action is to determine the right of the city of San Diego to exercise the franchise of a municipal corporation under a freeholders' charter claimed to have been adopted by the people, and approved by the legislature. The complaint attempts to make no case against the defendant, except as it is made through the alleged invalidity of such charter. This being its purpose, we are of opinion that the municipality was a proper and necessary party defendant to the proceeding, and hold that the demurrer was properly sustained on that ground. This conclusion necessarily leads to an affirmance of the judgment of the court below, but as new proceedings may be instituted, making the city a party, we deem it proper to state our views on the second ground of the demurrer.

2. In order to show that the charter of 1889 never did become a valid law, and supersede the law under which the corporation theretofore existed, and consequently that the election of April, 1889, was illegal and void, the complaint alleges, (1) that instead of causing the board of freeholders to be elected by the qualified voters of said city, the city council caused them to be elected by only a portion of said qualified voters; that in calling the election therefore for a portion of the city, containing a population of more than 1,200, including 300 qualified voters, was omitted, and given no voice in said election; (2) that when such proposed charter was prepared, no copy or duplicate thereof was delivered or returned to the mayor, as required by the constitution; (3) that no copy of such charter was delivered or returned to the recorder of the county, as required by the constitution; (4) that said proposed charter was not published in two daily papers of general circulation, or in any daily or other paper of said city for at least 20 days, as required by the constitution; (5) that the election for the adoption and ratification of said proposed charter was called and held less than 30 days after the completion of such publication, contrary to the requirements of the constitution. It may be that none of these alleged defects exist in fact, but, for the purposes of the demurrer, these allegations must be taken as true. So taking them, the complaint very clearly states facts sufficient to constitute a cause of action, if brought against the proper party. Responsive to this ground of demurrer the respondent claims.—*First*, that the alleged defects are insignificant and immaterial; and cites many authorities, which, it is claimed, support that proposition. But the misfortune is that they are not in point. They all relate to procedure under statutes held to be merely directory. In this case, the procedure was under constitutional provisions expressly declared to be mandatory and prohibitory. Under such provisions, the mode is the measure of power. The acts required by the constitution to be performed are conditions precedent, and necessary to the validity of the legislation which it authorizes, whether that legislation be by the people of a municipality, under article 11, or by the senate and assembly, under article 4

¹ 19 Pac. Rep. 693.

The city of Riverside attempted to incorporate under the general statute on that subject. With reference to it this court held that "the right to enjoy and exercise the franchise of a municipal corporation depends on a compliance with the provisions of the statute which authorizes the organization of such corporations." *People v. Riverside*, 66 Cal. 291, 5 Pac. Rep. 350. And this in discussing alleged omissions similar to and not more important than those alleged to have taken place in the present case. If this strict compliance is required with reference to the provisions of a statute passed by the legislature, around which are thrown none but the ordinary safeguards of construction, which, in fact, are to be construed liberally for the accomplishment of the object and the promotion of justice, how much more strict should be the compliance with the requirements of a constitution, which on its face declares that all its provisions are mandatory and prohibitory, unless otherwise expressly provided? We are not at liberty to say that any constitutional prerequisite to the validity of a law is of no practical service, or to consider the policy of a provision, when its language seems plain and positive. *Weill v. Kenfield*, 54 Cal. 117. The language of Judge COOLEY in his work on Constitutional Limitations, (page 78,) quoted and adopted in *State v. Rogers*, 10 Nev. 253, is directly in point, and shows that, even in the absence of a clause making its provisions mandatory and prohibitory, the courts will not hold the provisions of a constitution to be directory or unessential, but will rather hold that wherever it prescribes a mode, that mode is the measure or power. *Second*. It is claimed by respondent that the question of whether or not these alleged defects exist, or the proceedings in the framing and adoption of the charter were regular, has been conclusively determined by the legislature in its preamble to the joint resolution of the two houses in approving the same; and authorities are cited which are claimed to support this contention. But in this case, as in the other, the authorities are not in point. They relate to matters of legislative discretion, and to cases where the legislature is authorized to pass laws only in certain contingencies, such as acts for the creation of new counties, when the constitution provides that no county shall be created with less than a certain prescribed population and the like. In such cases it has been held that the determination of the legislature upon the question of whether the contingency had happened which authorized the passage of the act was conclusive. And in all cases, it may be said that unless there is a constitutional inhibition the determination of the legislature upon the question of the policy of the passage of an act is conclusive. But even in such cases, the courts are not excluded from inquiring into the regularity and constitutional sufficiency of the mode adopted by the law-maker in the passage of the act. In this case the legislature was not the law-maker; it did not frame or pass the law. It simply passed a resolution approving it. It was not charged with

any duty, and to it was not delegated any power, either in framing or adopting the law. Its act was not the enactment of a statute. It was not called upon or authorized by the constitution to adjudicate upon the question of whether the law-makers, the municipal authorities and people of San Diego, had proceeded regularly in the framing and adoption or passage of the law or not. That was a judicial question the determination of which belonged to the judicial department of the government, and to meet which the makers of the law, those upon whom the proceedings prescribed by the constitution devolved, were bound to proceed at their peril. The legislature knew nothing, and under the law could know nothing, of the charter, until it was presented to the two houses, not for enactment, but for approval, by those upon whom the power and duty devolved of framing and adopting it. When so presented, it brought with it the presumption of regularity in what had gone before, and the legislature exercised, as to it, simply the same power which is delegated to the governor with reference to bills framed and passed by the legislature, that of approval or rejection. It had no more judicial power to inquire into and determine the regularity or sufficiency of the precedent steps in the history of the framing and adoption of the measure, than the governor would have to question, inquire into, and adjudicate upon, the history of a legislative bill, when it came to him duly certified for his approval or rejection. The preamble neither added to nor detracted from the resolution of approval. The conditions precedent, which are here alleged to have been violated, were all acts to be performed by the law-maker, not facts to be found by the bodies whose sole function was to approve or reject the law. It now remains for the courts to determine, since the matter is disputed, upon proof of the facts, whether these conditions were performed or not. We are not prepared to say that the first of the objections above noted under this point would of itself be sufficient to defeat the charter, if all the other requirements of the constitution have been complied with. The appointment of freeholders may be likened to the selection of a committee to prepare and draft an instrument to be presented for the consideration and approval or rejection of the body making the appointment. The result of their labors is without force or value, until, having been duly authenticated, and so hedged about as to protect it in two separate places from alteration or change, then accurately published in the manner and for the time required by the constitution, so as to give it the largest publicity, and bring it home to the attention of the people to be affected thereby, and 30 full days after such publication given to the people to digest the same, and deliberate thereon, and then, at an election at which all the electors to be affected by its provisions are given an opportunity to vote, it has been approved by a majority of the voters voting at such election. Then, and not till then, has it been given such vitality as to entitle it to

be presented to the legislature. If there approved by a majority vote of the members of each house, it then becomes the organic law of the municipality, "superseding any existing charter, and any amendments thereof, and all special laws inconsistent with said charter." If all the subsequent proceedings have been in conformity to the constitution, it may then be too late to attack the charter on the ground that provision had not been made for the opening of polls in a given precinct of the city, at the election of the freeholders who drafted the charter, especially if it be not shown, and it is not here contended, that the number of voters thus deprived of the opportunity to vote at that election was sufficient to have changed the result. Even then it is questionable whether the attack ought not to have been made before the submission of the charter, and in the form of proceedings to contest the validity of the election. But the other points of objection to the validity of this charter are, in our judgment, if shown to be founded upon fact, vital, and for that reason the demurrer on this ground should have been overruled, and the defendant put to answer. The demurrer being sustained, however, on the first ground, the judgment must be affirmed, and it is so ordered.

We concur: BEATTY, C. J.; PATERSON, J.

McFARLAND, J. I concur in the judgment, and in all that is said in the opinion of Mr. Justice Fox, except in these particulars: (1) I think that the language of the opinion is too strong on the subject of strict compliance with the provisions of the constitution relating to freeholders' charters. Because the constitution declares the provisions to be mandatory, it does not follow that a substantial compliance with them is not sufficient. The proceedings for the adoption of a charter will probably never be so literally perfect that a critical and hostile eye cannot detect in them some slight defect or irregularity, which ought not to be considered fatal. Whether or not there has been a sufficient compliance with the constitution in any particular case must depend on the particular facts of that case. In the case at bar, some of the alleged failures in the proceedings are clearly material. (2) As to the alleged failure to give certain citizens an opportunity to vote for the freeholders, I think that matter should stand upon the same footing as other elections; that is, that it should be shown that the votes of those excluded might have changed the result. In all other respects, I concur in the opinion of Justice Fox.

85 Cal. 216

GIBSON v. SUPERIOR COURT. (No. 13,642.)

(Supreme Court of California. Aug. 2, 1890.)

CERTIORARI—WHEN LIES—SETTING ASIDE DEFAULT.

1. Though the court has no jurisdiction to extend the time to answer beyond that allowed by statute, where such extension is attempted to be made, and judgment by default is thereafter entered, the court has jurisdiction to set aside such default, and plaintiff's remedy thereupon is by appeal, and not by *certiorari*.

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2. On petition for a writ of *certiorari* to such ruling the supreme court has no jurisdiction to set aside the order of the trial court granting an extension of the time to answer.

In bank. *Certiorari* to superior court, city and county of San Francisco; J. P. HOGE, Judge.

For proceedings on writ of review, see ante, 152.

Welker & Welker, for petitioner. Smith & O'Keefe and J. H. Moore, for respondent.

WORKS, J. This is an application for a writ of *certiorari*. The petitioner obtained a judgment by default in the court below. The court subsequently, on application of the defendant, set aside the default. Thereafter the petitioner moved the court to vacate the order last named, and his motion was denied. He claimed in support of this petition that his default was properly taken because the time allowed by statute for the defendant to answer had expired, and also the time for which the court below might have extended the time, and that the court had made an order extending the time to answer beyond the time allowed by law. It is insisted that the court below had no power to extend the time beyond the number of days allowed by the statute, and that therefore it had no jurisdiction to set aside the order defaulting the defendant. But this does not follow. It may be conceded that the court has no jurisdiction to extend the time within which to answer beyond the time fixed by the statute, but it had jurisdiction to set aside a default, whether such extension of time has been granted, or attempted to be granted, or not. If the default was set aside on the ground that the time within which to answer had been extended, and the court had no jurisdiction to grant such extension, the order setting aside the default, and the subsequent order denying the petitioner's motion to vacate the same, might for that reason have been erroneous, but there was no want of jurisdiction in the court to make the orders. The remedy of the petitioner, if he has any, is by appeal, not by *certiorari*. We are also asked to set aside the orders made by the court below extending the time within which the defendant might answer, but this we cannot do in a proceeding of this kind, and if it were done it would serve no useful purpose. If the petitioner should appeal his case, and it should appear in the transcript that the order extending time went further than the law allowed, he would be entitled to the benefit, if any, resulting from such facts on the appeal. Writ and motion denied.

We concur: FOX, J.; SHARPSTEIN, J.; McFARLAND, J.; THORNTON, J.

85 Cal. 134

BEARDSLEY v. FRAME *et al.* (No. 12,199.)

(Supreme Court of California. July 31, 1890.)

PROOF OF JUDGMENT—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under Code Civil Proc. Cal. §§ 911, 912, a justice's docket containing a minute of a judgment is sufficient proof of the judgment to justify the action of the constable in taking property un-

der execution thereon, where such docket is introduced in an action on the constable's bond for damages for the seizure.

2. Where the inventory filed with an assignment omits certain of the assignor's property and also some of his debts, and such omissions were not made in good faith, the assignment is void under Civil Code Cal. §§ 3461, 3465, declaring it void unless an inventory is filed specifying each creditor, and the amount due him, and all the debtor's property not exempt from execution.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

L. F. Coburn and Sawyer & Burnett, for appellant. *Lucas & Miller*, for respondents.

HAYNE, C. This was an action against a constable and the sureties on his official bond for damages for the seizure of certain personal property claimed by the plaintiff as assignee for the benefit of creditors of one Wicktor Ohlson. The defendants had a verdict and judgment, and the plaintiff appeals. The defendant justified under two writs of execution, one of which was in favor of one Hazletine, and the other of one Hobbs. The proceedings in Hazletine's suit were ruled out, but the proceedings in the Hobbs suit were admitted, and we think properly so. The objection made to them is that there was no proof of the judgment. But the justice's docket containing a minute of the judgment was read and, this was sufficient evidence of the judgment. Code Civil Proc. §§ 911, 912. And if the constable acted under execution upon a valid judgment it was a sufficient justification, and shows that he was not a trespasser. So far as this action is concerned, therefore, it does not matter that the Hazletine judgment was ruled out. But it is contended that at the time the Hobbs judgment was rendered the judgment debtor had already assigned his property to the plaintiff, and this brings up the question of the validity of the assignment. It must be assumed in support of the verdict that the jury found that it was not valid, and we are unable to say upon the record before us that this finding can be disturbed. In the first place it is questionable whether the purpose for which the assignment was made is one sanctioned by law. The statute provides that "an assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto * * *

(5) if it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust." Civil Code, § 3457. And the deed of assignment provides, among other things, that the assignee shall "run the saw and stave mill belonging to the said party of the first part, and saw lumber and staves, employing men to do so, and sell the same, shipping the same to San Francisco, or otherwise, as to the trustee shall seem best, and after paying the necessary expenses therefor, to apply the balance of the receipts arising from said sales to the payment of all of the said debts then due," etc. But there is some evidence tending to show that Hobbs consented to the assignment although he did not sign

the deed, as most of the other creditors did, and therefore we do not rest our opinion upon this ground. We think, however, no sufficient inventory was filed. The statute provides that the debtor must file an inventory specifying "all the creditors of the assignor," and "the sum owing to each creditor," (Civil Code, § 3461,) and that unless such an inventory, or a specified substitute, of which there is no question here, be filed, the assignment shall be void, (Id. § 3465.) The answer set up the fact that the inventory filed was "false and untrue," in that it omitted debts due to Hazletine and Hobbs. The debt of Hobbs was omitted altogether from the inventory, and, while the name of Hazletine appears there, the evidence shows that part of the sum due to him was omitted. The evidence also showed that a debt was due to Snow & Lane of \$300, which does not appear on the inventory. And the debtor himself said, when the inventory was presented to him, "I do not see all of my creditors." The statute further provides that the inventory shall contain a list of all the property of every kind not exempt from execution, etc., (see section 3461, subd. 7,) and there is evidence tending to show that some of the debtor's property was omitted from the list. These omissions of debts and property are not merely trivial matters, but are matters of substance; and, if it be assumed that they were made "in good faith," it is open to question whether the assignee can claim that he stands in the same position as if the statute had been complied with. But, however this may be, it must be assumed from the verdict that the jury did not believe that the omissions were made in good faith; and we cannot say upon the evidence that this finding was unwarranted, there being some evidence of tampering with the inventory after it was filed, which, if it be assumed to be true, as it must at this stage of the proceedings, tended to cast suspicion over the whole transaction. In the view we have taken the other questions are immaterial. It is proper to add, however, that if Hazletine has a valid judgment it might affect certain questions as to the distribution of the proceeds of the execution sale, but would not be material here. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

85 Cal. 174

PEOPLE V. STEWART. (No. 20,655.)

(Supreme Court of California. Aug. 1, 1890.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—OTHER OFFENSES.

On an indictment for assault with intent to commit rape on a female under the age of consent, the admission of evidence that defendant had been guilty of lewd and immoral conduct with other young girls is reversible error.

Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

William Darby, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

McFARLAND, J. Defendant was indicted for and convicted of the crime of an assault with intent to commit rape upon the person of one Myrtle Collins, "a female child, under the age of fourteen years." He appeals from the judgment and from an order denying him a new trial. The appellant relies, among other grounds for reversal, upon the alleged error of the trial court in admitting evidence tending to show lewd, immoral, and indecent conduct of appellant with persons other than said Myrtle Collins, and tending to show lewd acts and occurrences between appellant and such other persons. The evidence of the prosecution, with the exception of the testimony of Myrtle Collins herself, consisted almost entirely of the testimony of five or six witnesses to the effect that appellant had been guilty of lewd conduct with several other young girls, and tending to show that he endeavored to corrupt said other girls, and that he had sexual intercourse with some of them. This evidence was objected to by appellant, who took proper exceptions to its admission. The admission of this evidence was clearly reversible error. There is no general rule more firmly settled than that the prosecution cannot prove the commission by a defendant of other offenses for the purpose of increasing the likelihood that he committed the particular offense with which he is charged. *People v. Lenon*, 79 Cal. 628, 631, 21 Pac. Rep. 967; *People v. McNutt*, 64 Cal. 116; *People v. Barnes*, 48 Cal. 551. There is an exception to the rule which allows proof of other acts in some exceptional cases, in order to show the intent with which the act charged was done, but this exception does not apply to the case at bar. Moreover, the precise point was decided in *People v. Bowen*, 49 Cal. 654. In that case the court say: "At the trial the court allowed the prosecution, against defendant's objection, to introduce in evidence the declarations of defendant concerning his misconduct with other young girls. The attorney general admits that this was error, and we agree with the attorney general. Judgment and order denying a new trial reversed, and cause remanded for a new trial." And for this reason the same order must be made in the case at bar. And in this case we do not understand the attorney general as seriously insisting that the ruling of the court on this point was not erroneous.

We see no need of examining the other points in detail. We may say, however, that we think the indictment sufficient, and that the rulings of the court in giving and refusing instructions were, taken together, not erroneous. The statute formerly made the age of consent 10 years. An amendment making that age 14 years took effect on May 15, 1889. The prosecuting witness was 14 years old on May 18th of that year. We take these figures to be correct because they are so stated in the instructions and in the brief of appellant. Most of the acts of appellant, as testified to by the prosecuting witness, occurred

before May 15th, and while she was, under the law as it then stood, of the age of legal consent. She testified, however, to some of such acts as occurring between the 15th and 18th, when she could not legally consent. Perhaps, therefore, the instructions should more clearly distinguish those two periods. If appellant did the acts charged between the 15th and 18th of the said month he would be guilty whether the prosecuting witness actually consented or not; but if they were committed before the 15th or after the 18th, then, in order to constitute the offense charged, some force or intimidation would have to be shown, or some want of consent on her part. Judgment and order reversed, and cause remanded for a new trial.

We concur: **BEATTY, C. J.**; **SHARPSTEIN, J.**

(85 Cal. 63)

FRANKLIN v. SOUTHERN CAL. M. R. CO.
(No. 13,552.)

(*Supreme Court of California.* July 26, 1890.)

CARRIERS—INJURIES TO PASSENGERS ALIGHTING FROM TRAINS.

A passenger on a steam motor railway notified the conductor that she desired to alight at a certain station, but was carried beyond it, and upon a switch, where she was allowed to alight. The engine, meanwhile, had been disconnected from the coach, switched onto the main track, and was coming back to connect with the other end of the coach for the return trip, when it struck and injured plaintiff, who was crossing the track to go to her home. No special warning was given, and several witnesses testified that no bell was rung, or whistle sounded. *Held*, it was eminently a case for the jury both as to negligence and contributory negligence, and a verdict in plaintiff's favor would not be disturbed.

In bank. Appeal from superior court, San Bernardino county; **JOHN L. CAMPBELL**, Judge.

Rolle & Freeman, (*H. M. Willis*, of counsel) for appellant. *Waters & Gird*, for respondent.

Fox, J. Action for personal injuries. Verdict and judgment for \$1,750 in favor of plaintiff, from which defendant appeals, the case coming up on the judgment roll, which includes the evidence embodied in a bill of exceptions. On the trial it was admitted that the defendant, a corporation, owns and operates a motor railroad running from San Bernardino to Colton. The proof shows that the road is operated with cars propelled by steam-power. Two points are presented and insisted on upon the appeal: (1) That the court erred in denying defendant's motion for a nonsuit; (2) that the evidence is insufficient to justify the verdict.

1. It was shown on behalf of plaintiff that on the morning of June 30, 1888, she entered the car of defendant at San Bernardino as a passenger to be transported thence to Colton. Owing to some difficulty in making change her fare was not paid in advance, but it was paid at Colton before she attempted to alight from the car. No question is made but that she was a regular passenger, and had all the rights of transportation, care, and protec-

tion that are due to any passenger traveling by the railroad. The road of defendant enters Colton from the north by way of Conn street. At the north-west corner of Conn and Front streets, commonly called "Thompson's Corner," was situated the office of the company for the town of Colton, and that corner was proved, and in argument is conceded, to have been the usual stopping-place for the car. The conductor was notified by plaintiff and her escort of her desire to get off the car at that place. The track of the road continues south along Conn street, across First street, and then turns to the west, on a strip of land known as the "Railroad Reservation," being a strip of open ground lying between First street and the track of the Southern Pacific Railroad Company. This entire strip of ground is used much as a street, the track of defendant's road traversing its entire length, and the place being open in common with Front street, and used by the public in driving vehicles over it to and from the Southern Pacific Railroad depot. At about 140 feet west of the west line of Conn street there is a platform along the southerly side of the track of defendant's road, where the cars of defendant stop to discharge and receive passengers to and from the Southern Pacific depot. About 240 feet west of this platform there is an automatic switch, by means of which the cars of defendant, without stopping, are switched off onto a track running at a distance of between 3 and 4 feet north of and parallel with the main track for a distance of about 180 feet, where it again connects with the main line, which continues still to the west about 90 feet, and enters an engine-house also belonging to or used by defendant. These distances are computed from a diagram accompanying the transcript. Reaching Colton defendant runs its train onto the side track, slackens its speed, uncouples without stopping, and runs the engine forward onto the main track, the brakeman stopping the coach on the side track. Sometimes the engine runs into the engine-house, and sometimes it stops on the main track without going into the engine-house, but it always comes to a stop, and usually remains some little time oiling up, or the like. It then runs down the main track to the eastern end of the switch, runs up the side track, and couples onto the coach, when the train is ready for its return trip. It will thus be seen that this point west of the platform is practically the switching yard of the defendant. When plaintiff and her escort entered the car at San Bernardino, they notified the conductor that they wished to get off at Thompson's Corner. Upon approaching that point, observing that the train did not begin to slow down, they rose from their seats and signaled the conductor, when he asked them if they wished to get off there. To this they answered in the affirmative, but by that time the car had passed that station, and the conductor said he would stop at the next station, which was the platform aforesaid. The train, however, did not stop at the platform, but was run forward and onto the side track, where the engine was un-

coupled, without stopping, and run forward as usual onto the main track west of the switch, the coach being stopped by the brakeman about midway between the two ends of the switch or side track. At that point there was no platform, on either side, for the accommodation of passengers getting off or onto the cars. The coach was divided into two compartments by a dead-wall crossing the same from side to side. The plaintiff and conductor were in the rear or most easterly compartment, and the brakeman on the platform at the west end of the car. From the rear compartment no person could see anything to the west, on either the main or side tracks. As the coach came to a stop the plaintiff rose, and, having in the mean time found some coin, paid the conductor her fare, receiving some small change in return, and immediately went to the rear door and alighted on the south side, her home being across all the tracks of both roads, on the south side, and some little distance therefrom. Her escort stopped a moment to speak to the conductor, and then followed her. As he started to step down from the platform, by leaning forward and looking outside the coach to the westward, he saw the engine coming down the main track and very near to plaintiff, who was at the moment walking away from the platform, and about to cross the main track, less than three feet from the side of the coach. He gave a warning outcry, and simultaneously the plaintiff felt the motion of the atmosphere made by the approaching engine, and, casting her eyes in that direction, saw the engine almost immediately upon her. She threw herself backward to avoid it, but it was too late, and she was struck down by the engine, and dragged several feet, and rolled over once or twice, receiving personal injuries, for which damages are claimed in this action. Some of the witnesses on the part of the plaintiff testify that no bell was rung, or whistle sounded. All testify that they heard none; and there is no pretense that the plaintiff was warned or cautioned by any person of the approach of the engine, or against getting off on that side. The engine made no stay on this occasion at the west end, but, as soon as it had passed the switch, and come to a halt, reversed, and came immediately back down the main track. But a few moments intervened between the time the coach came to a halt, and the time plaintiff was struck by the engine. The evidence presenting this state of facts, at the close of plaintiff's case in chief, defendant moved for a nonsuit on the ground that plaintiff had failed to prove a sufficient case for a jury; that the evidence failed to show negligence on the part of the defendant; and on the further ground that the evidence did show contributory negligence on the part of plaintiff, which was the proximate cause of the injury she received. The court denied the motion, and defendant excepted.

There was no error in denying this motion. The evidence tending, as it did, to prove the material allegations of the complaint, it was a proper case for the jury. *Alvarado v. De Celis*, 54 Cal. 588; *Leahy v. Railroad Co.*, 65 Cal. 150, 3 Pac. Rep. 622.

Negligence is not absolute, but is relative to the circumstances surrounding the case. *Richardson v. Kier*, 34 Cal. 63; *Needham v. Railroad Co.*, 37 Cal. 410. It always relates to some circumstance of time, place, and person, and whether there was contributory negligence in any given case is generally a question for the jury to pass upon and determine. *Jamison v. Railroad Co.*, 55 Cal. 593. It is generally an inference from facts and circumstances which it is the province of the jury to find, and nonsuit on the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must be set aside. *Schierhold v. Railroad Co.*, 40 Cal. 447. The cases cited by appellant in support of the motion are not parallel cases. They are most of them, if not all, cases of strangers, or persons acting independently, and having no relation to the defendant; cases of persons towards whom the defendant owed no duty other than that which all persons owe to each other under like circumstances of meeting by chance,—not cases involving the duties and obligations of a carrier to a passenger. Carriers owe more than an ordinary duty to their passengers, (*Jamison v. Railroad Co.*, *supra*;) and negligence cannot be imputed to a passenger, such as this plaintiff was, for that she did not anticipate culpable negligence on the part of the carrier. She had a right to act on the presumption that the employees of the defendant would use the degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances. *Robinson v. Railroad Co.*, 48 Cal. 421. In this case the defendant had negligently and wrongfully carried the plaintiff beyond and away from all its usual stopping places, where it was accustomed to receive or discharge passengers, into what was practically its switching-yard, where there were no accommodations for passengers to get on or off its cars, and to a point where defendant knew, though the plaintiff may not have known, that there was special risk and hazard. Under such circumstances, it was defendant's duty to use every precaution for her protection. Whether it did so or not was a proper question to be submitted to the jury; and it was equally for the jury to determine whether she, with such knowledge as she possessed of the peril of the place, and with the presumptions she was entitled to indulge as to the degree of care which the employees of defendant would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury.

2. We have carefully examined the evidence, and find that there is evidence to support the verdict. Indeed, on all the most important points in the case, it seems to be without substantial conflict. The judgment cannot, therefore, be disturbed on the ground of insufficiency of evidence. Judgment affirmed.

We concur: WORKS, J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

PHIELAN v. DE MARTIN. (No. 12,761)
(*Supreme Court of California.* Aug. 18, 1890.)

SALE TO MORTGAGEE—EVIDENCE.

In an action to quiet title defendant alleged that plaintiff made use of his power as mortgagee to compel her to convey the land to him for an inadequate consideration. The evidence showed that plaintiff held mortgages for \$196,000 on the land, which was worth \$215,000, and that, having foreclosed the mortgages and procured an order of sale, he paid defendant \$19,000 for her equity of redemption; that she was allowed the opportunity to procure money to redeem; and that she was not induced to sell by any false representations of plaintiff, but did so willingly, and believing it to be for her best interests. *Held*, that the transaction was fair, and a valid sale.

In bank. Appeal from superior court, Santa Clara county; SPENCER, Judge.

Geo. D. Collins, for appellant. *D. M. Delmas*, for respondent.

MCFARLAND, J. This is an action to quiet title to certain lands in Santa Clara county. Judgment went for plaintiff, and defendant appeals from the judgment upon the judgment roll and a bill of exceptions. The lands in contest were conveyed by deed to plaintiff by defendant in November, 1881. From that time until the commencement of this action, September 29, 1887, plaintiff has been in possession of the premises. The main issue in the case is this: Defendant claims that when she made the deed in November, 1881, the plaintiff held mortgages against the property for large amounts, some of which had been foreclosed, with an order of sale issued, and a sale advertised; that plaintiff used his relation of mortgagee and the power of his mortgages to force her to sell her equity of redemption; that she was poor, and unable to raise the necessary redemption money, and that plaintiff took advantage of these circumstances to compel her to sell for an inadequate consideration; that under this stress she did sell for an inadequate consideration; and that therefore the sale was void. We do not see that there is any important question of law really involved in this case. Admitting that all the contentions of appellant about sales from mortgagors to mortgagees are law,—that is, that they must be shown to be fair, free from undue influence, oppression, or fraud, and for adequate prices,—still the findings of the court, supported by the evidence, bring the sale in this case within the law. The land was incumbered with mortgages to the extent of \$196,000, and the consideration paid defendant was \$19,000. The court finds, among other things, as follows: "That at the time of said conveyance from Francisca L. de Martin to plaintiff, and for a long time before, said Francisca fully understood the character, value, and condition of said property, and was capable of acting understandingly and intelligently in relation thereto, and did so act in and about the property, and said conveyance thereof, and under the independent advice of her attorney, who was skilled in the law, and who did so counsel and advise her honestly, faithfully, impartially, and for her best interests; that plaintiff did not purchase said secu-

rities for the purpose of oppressing said Francisca, or for the purpose of obtaining said premises for less than their fair market value; * * * that plaintiff did not make or cause to be made any false or fraudulent representations to said Francisca in relation to said property, or importune her to make said conveyance; that said Francisca was entirely willing to make said conveyance for said sum of \$19,000, and made the same without importunity from any person, under the belief that it was for her best interests; that said sale by said Francisca to plaintiff for said \$19,000 was greatly to her benefit and advantage, and that said \$19,000 and other property owned by her would have been lost to her if said property had been sold at sheriff's sale under said judgment; that Francisca was given full opportunity to obtain loans upon said property or to sell the same to other persons, if persons could have been found to make such loan or purchase, and that for that purpose plaintiff caused two postponements of the time for the sheriff's sale under said judgments." It is further found that \$215,000, the amount of the liens, and the \$19,000 paid defendant, was a fair value of the property at the time of the conveyance; and, indeed, it is quite apparent from the evidence that said amount could not have been raised on the property from any other source. It is quite clear that if the findings are sustained by the evidence the judgment must stand, and that they are so sustained we have no doubt. An opinion on that question would be mainly a restatement here of the evidence contained in the transcript, which would be a profitless and unnecessary labor. We do not think that section 2889 of the Civil Code was intended to absolutely restrain or does absolutely restrain a mortgagor from subsequently conveying all his title and interest in the mortgaged premises. The judgment is affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; WORKS, J.; FOX, J.; PATERSON, J.

85 Cal. 203

Ex parte CLARK. (No. 20,704.)

(*Supreme Court of California.* Aug. 1, 1890.)

HABEAS CORPUS—CONVICTION OF ANOTHER OFFENSE PENDING FORMER IMPRISONMENT.

Petitioner was convicted in the superior court of a felony, and sentenced to the state-prison. Before the expiration of his term he was brought out on the order of the superior court of another county, charged before a magistrate with murder, and afterwards duly tried, convicted, and sentenced to be hanged. While in jail awaiting execution of the sentence he applied for the writ of *habeas corpus*. *Held*, that after conviction it was too late for him to claim that the superior court had no power to cause him to be brought out of the state-prison for trial for another offense, and that the warden of such prison was entitled to his custody until he had served his term.

In bank. On application for writ of *habeas corpus*.

Carroll Cook and J. E. Foulds, for petitioner. Geo. A. Johnson, Atty. Gen., for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The petitioner was convicted of a felony, and sentenced by the superior court of the county of San Diego to imprisonment in the state-prison at Folsom for a term of years. While so imprisoned he was brought out of the state-prison upon an order of the superior court of the city and county of San Francisco, taken before a magistrate, charged with the crime of murder, and held to answer to the superior court. An information was filed against him by the district attorney. He was tried, convicted, sentenced to be hanged, and is now in the jail of the city and county of San Francisco, awaiting the execution of this sentence. It is contended by the petitioner that the superior court of the city and county of San Francisco had no power to cause him to be brought out of the state-prison for trial for another offense; that the warden of the state-prison is entitled to his custody until the expiration of the term of his sentence to that prison; and that therefore he is entitled to be discharged from custody, or returned to the custody of the warden of the state-prison. The sheriff makes return of the judgment of the superior court of San Francisco, above mentioned, and that he holds the petitioner by virtue of a commitment thereunder. This, it seems to us, is a complete answer to the writ. No matter whether the superior court of San Francisco had the right to order the petitioner out of the custody of the warden of the state-prison or not, he was produced. An information charging him with an offense within the jurisdiction of that court was filed, and the court thereby became and was vested with the power and jurisdiction to try him, and its judgment is valid and binding. Therefore he cannot be heard at this late day to claim, in a proceeding of this kind, that the sheriff has no right to hold him under such judgment. Conceding that the warden of the state-prison might have asserted his right to hold the petitioner under the commitment from the superior court of San Diego county, it is clear to us that the petitioner cannot escape the consequences of a valid judgment rendered against him by showing that another valid judgment had previously been rendered, which had not been fully executed. Writ denied.

We concur: BEATTY, C. J.; THORNTON, J.; SHARPSTEIN, J.; FOX, J.; McFARLAND, J.; PATERSON, J.

85 Cal. 171

PEOPLE v. HONG TONG. (No. 20,653.)

(*Supreme Court of California.* Aug. 1, 1890.)

ROBBERY—EVIDENCE—CORROBORATION—INSTRUCTIONS.

On an indictment for robbery the only witnesses for the state testified that while one of them was paying money to the other defendant grabbed it and ran away. Witnesses for defendant testified that at the time of the alleged robbery he was sick, and confined to his bed. The court charged that there might be "another corroborating circumstance in the evidence of flight," and that flight was "a corroborating circumstance which, with other evidence, might be sufficient to justify a verdict against defendant." *Held*, that

this was misleading, as the witnesses were not corroborated by evidence of defendant's flight, because no other witness than they testified to his flight.

Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Brunson, Wilson & Lamme, for appellant. *Frank P. Kelly*, for respondent.

SHARPSTEIN, J. The defendant, charged with robbery, was tried, convicted, and sentenced to two years' imprisonment in the state-prison. He moved for a new trial—(1) Because the court misdirected the jury in matters of law, and erred in questions of law during the trial; (2) because the verdict is contrary to law and the evidence. The motion was heard upon a bill of exceptions, and denied. This appeal is from the judgment and the order denying the motion for a new trial. The witnesses for the prosecution were two Chinese, Ching Sue and Ah Look, who testified that they met each other in an alley in Los Angeles on the 27th day of December, 1888, about 9 o'clock P. M., when Ching Sue handed Ah Look \$35, and, while counting it over, the defendant grabbed it and ran away. Ching Sue testified that he thought he had never before seen the defendant. He further testified that there were three or four Chinamen with the party who took the money and ran away with him, "two one way and two the other." He did not think that he had ever seen any of them prior to that time. Ah Look, a witness for the prosecution, testified that he had known the defendant by sight a little over a year, but was not personally acquainted with him. His testimony is substantially the same as that of Ching Sue. Both testify that it was quite dark, but there was a light shining through the window of a barber shop sufficient for them to see the features of the person who grabbed the money. Ah Hop, a witness called by the defendant, testified that he was with the defendant from 5 o'clock P. M. until 11 P. M., and that the defendant was ill, and in bed, and that Dr. Hop Semg was there and prescribed for defendant. Defendant substantially testified to the same effect, and also testified that he never knew or saw Ching Sue or Ah Look before he (defendant) was arrested. The witnesses were all Chinese, and, as appears by the record, equally credible. When the court had apparently concluded its charge to the jury, the district attorney said: "I would like to have your honor charge them with the flight of the defendant." The court replied: "I don't know. Oh! the flight at the time of the occurrence?" District Attorney: "Yes, sir." Whereupon the court addressed the jury as follows: "Gentlemen of the jury, there may be another corroborating circumstance in the evidence of flight. While not of itself evidence of guilt, it is evidence which goes to some degree, greater or less, to show guilt. It is a corroborating circumstance which, with other evidence, may be sufficient to justify a verdict against the defendant." From our point of view this appears to be misleading, and liable to prejudice the case of the defendant. In the first place, the witnesses who testified to

the robbery were not corroborated by evidence of the flight of the defendant. No other witness testified to his flight. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. The evidence of the witnesses who testified to the robbery was in no sense corroborated by their testifying that after committing the robbery the defendant fled. We think any jury would have understood the court to mean that the evidence of the witnesses for the prosecution was corroborated in some degree, greater or less, by evidence of the flight of the defendant. That being so, it is quite clear that the error might, and probably did, affect a substantial right of the defendant, for which he is entitled to a new trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: **THORNTON, J.; McFARLAND, J.**

85 Cal. 369

PEOPLE v. COMMON COUNCIL OF THE CITY OF SAN DIEGO *et al.* (No. 13,874.)

(*Supreme Court of California.* Aug. 18, 1890.)

MUNICIPAL CORPORATIONS—SEPARATION OF TERRITORY—MANDAMUS.

1. Act Cal. March 19, 1889, provides that the council of a city, on receiving a petition, signed by not less than one-fifth of the qualified electors, for the exclusion of certain territory from its limits, shall submit the question of such exclusion to the electors of the corporation, etc. The act further provides for the publication of notice, and for further proceedings. A second act, passed the next day, is identical with this, except as to the newspapers in which the notice was required to be published. *Held*, that a petition for *mandamus* to compel the council of the city of S. to submit such question to the electors is not demurrable for failing to state under which of these two acts petitioner seeks to proceed.

2. It is no defense to the issue of such writ that Act Cal. March 16, 1889, which was enacted to reincorporate the city of S., excludes from its limits the territory now sought to be excluded, since that act, so far as it attempts to effect such exclusion, is a local and special law relating to a municipal corporation, and hence is unconstitutional and void.

in bank. *Mandamus.*

Atty. Gen. Geo. A. Johnson and *H. L. Titus*, for petitioner. *James P. Goodwin*, for respondent.

McFARLAND, J. This is a petition for a writ of *mandamus* to compel the persons composing the common council of the city of San Diego, and the mayor of said city, to submit a certain question to the electors of said city concerning the separation of certain lands from the territory now under the municipal jurisdiction thereof. An alternative writ issued, and the case was heard and submitted upon a demurrer and answer to the petition. We have been urged to decide the case speedily; but no brief has been filed by respondents, and not a very elaborate one by petitioner. On March 19, 1889, an act of the legislature was approved, entitled "An act to provide for changing the boundaries of cities and municipal corporations, and to

exclude territory therefrom." St. 1889, p. 356. This act consists of three sections. On the next day, March 20, 1889, another act was approved, having the same title as the one first above named. Id. p. 433. This last act contains only two sections. Section 3 of the first act, and section 2 of the second act, merely contain a provision that the act shall go into effect immediately. Section 1 in the second act is literally the same as section 1 in the first act, except that it does not contain the words, "or, if there is no newspaper published in said corporation, then in some newspaper published in the county in which said corporation is situate." Section 2 of the first act does not appear in the second act; but that section merely provides for certain things to be done in the event that the election shall go against separation or exclusion. All of the first act which is material to the case at bar is contained in section 1 of that act, which, as before said, is identical with section 1 of the second act, with the trifling exception above noted. Therefore the second point of the demurrer, that the petition is ambiguous and uncertain, because it does not state under which of said two acts the election should be called, is not tenable. The two acts are identical. Moreover, when a petition or complaint states facts which, under the law, warrant the relief prayed for, there is no necessity to put the law itself into the pleading. The only other point in the demurrer is that the petition does not state facts sufficient to constitute a cause of action. This point is also untenable, as will appear upon examination of the issues raised by the answer. The demurrer is overruled.

Section 1 of each of the acts above referred to commences as follows: "The boundaries of any city or municipal corporation may be altered, and territory excluded therefrom, after proceedings had as required in this section. The council, board of trustees, or other legislative body of such corporation shall, upon receiving a petition therefor, signed by not less than one-fifth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation the question whether such territory as is proposed by such petition shall be excluded from such municipal corporation and cease to be a part thereof." The section then proceeds to state the manner in which the question shall be proposed to the electors; how the notice of the election shall be given; the character of the ballots to be used; that the legislative body shall designate the time and places at which the polls will be opened, and the officers of such election, and that it shall meet on a certain day after the election, canvass the vote, and declare the results, etc., and that, if a majority of the votes in the whole corporation, and also a majority in the territory proposed to be excluded, shall be in favor of such exclusion, then such territory shall cease to be a part of such corporation. For the purposes of this case there is no need of any further statement of the details of said acts.

The petition states that the city of San

Diego is a duly-organized and existing municipal corporation; that certain persons named as defendants constitute the common council and mayor of said city and form the legislative body of said city; that the number of votes cast at the last municipal election, held April 2, 1889, was 3,111; that on March 17, 1890, a petition was duly presented to said common council, signed by more than one-fifth of the qualified voters of said city, asking that the question be presented to the qualified voters of said city (at a special election, etc.) of altering the boundaries of said city by excluding a certain described territory known generally as "Coronado Beach;" that said petition was referred by said common council to a special committee, who reported that the petition contained the required number of signers, and recommended that the prayer of the petitioners be granted; but that said common council expressly refused, and continue to refuse, to call any election, or to submit said question to the electors, although requested so to do. The answer first denies, upon information and belief, that the petition contains one-fifth of the qualified electors of the city; but at the hearing it was expressly admitted by respondents in open court that the statement of the petition on that matter is true.

(2) The second defense is that respondents are unable to determine under which of the two acts hereinbefore mentioned the petitioner is seeking to proceed. This point has already been decided against respondents, when passing on the demurrer. (3) As a third defense, respondents say that the said act of March 19, 1889, "is unconstitutional and void in this, that it is against public policy." No reason is given, and we see none, for this position.

(4) The fourth and last defense set up in the answer,—and the only one at all plausible,—is based upon an act of the legislature approved March 16, 1889, (St. 1889, p. 302.) This act is entitled "An act to amend an act entitled 'An act to reincorporate the city of San Diego,'" and it contains a description of the territory that shall thereafter constitute the said city. And we understand respondents to contend that by said amendatory act Coronado Beach is taken away from the city of San Diego, and therefore there is no necessity for any further action to accomplish that result. This is, in the first place, inconsistent with the answer, which does not deny the averment of the petition that Coronado Beach is now a part of said city. And, in the second place, if said act of March 16, 1889, has the effect claimed, it is clearly unconstitutional. It is an act which is intended to apply to, and, by express language, does apply to, the city of San Diego alone; and if an act directed at and applicable to one particular named municipal corporation alone, and taking away a large part of its territory, is not special and local within the meaning of the constitution, and in violation of the provisions of that instrument about municipal corporations, then it is difficult to imagine an act that for those reasons would be unconstitutional. No argument to the contrary which requires

examination has been suggested. The said act of March 16, 1889, so far as it undertakes to exclude or take away any part of the territory under the municipal jurisdiction of San Diego, is therefore unconstitutional and void. And, this being so, there is no reason why the respondents should not perform the duty specially enjoined upon them by said act or acts of the legislature first above mentioned. It is not contended that *mandamus* is not the proper remedy. Petitioner asks that this court itself order the election, and fix the day therefor. We shall not examine into our authority to do this. It is to be presumed that respondents refused to order the election on account of some honest doubt as to their power in the premises. We shall assume that they will proceed to perform their duty as prescribed by the statutory law immediately upon being informed of this decision. No further action by this court is at present necessary. Let a final and peremptory writ issue as prayed for in the petition.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

85 Cal. 177

MORE v. CALKINS. (No. 13,565.)

(Supreme Court of California. Aug. 1, 1890.)

MORTGAGES—SALE UNDER POWER—INJUNCTION—RESCISSION OF CONTRACTS.

1. Where part of the amount due a mortgagee is unliquidated and uncertain, and the consideration for the liquidated portion is disputed, a threatened sale of the entire premises covered by the mortgage under a power of sale therein will be enjoined until the equities between the parties can be settled, and the balance due the trustee or mortgagee ascertained.

2. To entitle a person of unsound mind, though not entirely without understanding, to rescind a contract entered into by him before any adjudication of such unsoundness, he must return, or offer to return, everything of value received by him under the contract, as provided by Civil Code Cal. § 1691.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by Thomas R. More, administrator, etc., of Alexander S. More, deceased, against J. W. Calkins. There was a judgment in defendant's favor, and plaintiff appeals. Civil Code Cal. § 1691, provides: "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply * * * with the following rules: * * * (2) He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable, or positively refuses, to do so." Section 38 provides that contracts made by a person entirely without understanding are void; and section 39 provides that contracts made by a person of unsound mind, but not entirely without understanding, before office found, are subject to rescission.

Barclay, Wilson & Carpenter, L. C. McKeeby, and W. H. Wilde, for appellant. Wright & Day, for respondent.

VANCLIEF, C. This appeal is from a final judgment for defendant on general demurrer to the complaint, and the questions for decision relate to the sufficiency of the complaint as against a general demurrer. A. S. More, having commenced the action in his life-time, died pending a demurrer to his complaint. After substitution of his administrator, Thomas R. More, as plaintiff, the demurrer was sustained, and the administrator filed an amended complaint, a general demurrer to which was also sustained; and it is the sufficiency of this amended complaint which is in question here. After averring the death of the original plaintiff, and the substitution of the administrator, the amended complaint proceeds as follows: "*Second.* That heretofore, to-wit, on the 7th day of April, 1888, Alexander S. More, deceased, was the owner in fee-simple and in the possession of several tracts of land lying and being in the county of Ventura and state of California, and particularly described in an instrument executed between the original plaintiff in this action and defendant on the day and year aforesaid and acknowledged by the said Alexander S. More, deceased, on the day and year aforesaid, and by the said defendant on the 9th day of April, 1888, and recorded in the recorder's office of Ventura county, state of California, on the day and year last aforesaid at ten minutes past 11 o'clock A. M. of said day, a copy of which said instrument in writing, marked 'Exhibit A,' is here annexed and made a part of this complaint. *Third.* That said instrument made as aforesaid, acknowledged and recorded as aforesaid, was upon its face a deed by which the said Alexander S. More conveyed the title to the said several tracts of land to the defendant, upon certain conditions and trust therein set forth, but that the same was then, and is now, in law and equity, a mortgage to secure the payment from the said Alexander S. More to the defendant of the sum of \$15,000, by the defendant on the said 7th day of April, A. D. 1888, loaned to the said Alexander S. More, with interest thereon at the rate of 10 per cent. per annum, from date of deed, and for the repayment to the defendant of the sum of about \$43,000, principal and interest, the amount of a mortgage held by Isadore Dreyfus, and due November 5, 1888, which said mortgage the said defendant in the said instrument in writing agreed to assume and pay; and to secure the said defendant the repayment of all taxes which should at any time be paid by him on the said several tracts of lands so conveyed by the said Alexander S. More to the defendant, said taxes and the amount paid upon said mortgage to bear interest at the rate of 10 per cent. per annum; and for the payment by the said Alexander S. More to the defendant of all costs and expenses incurred by the defendant in and about the management and sale of the said several tracts of land aforesaid, and for no other purpose whatever. That on the 5th day of November, A. D. 1888, the defendant did pay to the said Isadore Dreyfus about the sum of \$43,000, principal and interest, on the said mortgage, held and owned by Dreyfus as afore

said, and from the said 5th day of November, A. D. 1888, the said defendant became and was entitled to have and receive of and from the said Alexander S. More the sum of \$43,000, with interest thereon at the rate of 10 per cent. per annum until paid. Plaintiff alleges upon his information and belief that the whole amount of indebtedness of the said Alexander S. More to defendant, exclusive of taxes paid by the defendant for the said Alexander S. More, and the expenses of the management of the several tracts of land aforesaid, is \$58,000, with interest thereon at the rate of 10 per cent. per annum on \$15,000 from the 7th day of April, A. D. 1888, and on \$43,000 from the 5th day of November, A. D. 1888; and that for said sum of \$58,000, and interest, and taxes paid, and interest, the amount of which is unknown to the plaintiff, and the expenses incurred in the management of the several tracts of land, (the amounts of which are also to the plaintiff unknown,) the defendant has a lien upon. But plaintiff denies that the defendant has a lien upon or title to the several tracts of land aforesaid. *Fourth.* The plaintiff further states that by the terms of said instrument in writing between the said Alexander S. More, deceased, and the defendant, of date April 7, 1888, it was provided that the said Alexander S. More should pay to the defendant the additional sum of \$10,000, which the party of the first part hereby agreed to pay to the party of the second part, without interest, and the plaintiff alleges on his information and belief that there was not prior to the execution of said instrument, at the time or since then, the slightest consideration for that part of the agreement; that he has never received from the defendant or any other person a single farthing as a consideration for that portion of the agreement; and the only consideration for that specific portion of said agreement was as follows: The said Isadore Dreyfus had an option in writing, dated the 5th day of November, A. D. 1887, to purchase the said several tracts of land within one year from the date of said option for the sum of \$103,000, and the defendant was to have and receive from the said Alexander S. More the said sum of \$10,000, in case said Isadore Dreyfus should not elect to buy said several tracts of land, and he, the defendant, should find a purchaser or purchasers for the same, at the same price said Isadore Dreyfus held the option for, viz., \$103,000; and the plaintiff alleges that said Isadore Dreyfus did not elect to purchase said several tracts of land at and for the price aforesaid, and that the defendant has not sold the said several tracts of land or any portion of them, and is not in law or equity entitled to receive the said sum of \$10,000, or any part thereof. *Fifth.* The plaintiff further states upon his information and belief that appurtenant to said tracts of land are certain valuable water-rights, viz., the Sespe creek, Fish slough, and the Hojo or Dudley cañon, and that the several tracts of land and water-rights appurtenant to as aforesaid are very valuable, being of far greater value than the amounts due the defend-

ant; and that the defendant can suffer no loss or injury if the sale of the said several tracts of land is delayed, while the estate of said Alexander S. More would suffer irreparable injury if the sale heretofore advertised should take place, as said estate would be without remedy at law if the defendant were permitted to sell the same. And the plaintiff further alleges that the defendant has been in possession of the said several tracts of land and water-rights since the execution of said instrument; has rented the same to several parties who have paid said defendant rent for the same, or are now indebted to him for rent of said several tracts of land and the water-rights aforesaid; and that said defendant has rendered no account of said rents to the estate of Alexander S. More, or given plaintiff any information concerning the same; and that plaintiff is in ignorance of the amounts of said rents and profits. *Sixth.* The plaintiff further alleges that, disregarding the plaintiff's rights in the premises, the defendant has advertised said several tracts of land and the water-rights appurtenant thereto, to be sold at Santa Paula, in the said county of Ventura, state aforesaid, at public auction for cash, on the 10th day of April; and that said amount of \$10,000, so wrongfully and illegally inserted in said instrument in writing as being a debt of the plaintiff due to the defendant, is demanded, and the defendant is about to sell the said several tracts of land and the water-rights appurtenant thereto to satisfy that said sum of money last aforesaid, as well as the others named in said instrument. *Seventh.* And for a further cause of action the said plaintiff alleges: That at and prior to the date of the execution and delivery of the instrument of writing theretofore referred to, copy of which is hereto annexed and marked 'Exhibit A,' as this plaintiff is informed and believes, the said Alexander S. More was incapable of executing said alleged instrument; that the said Alexander S. More attained his legal majority in the month of June, 1887; that prior thereto and thereafter the said Alexander S. More was of infirm health, and was physically and mentally diseased, so that when he became of age, lawfully to contract debts and make agreements, he was incapable of making lawful contracts by reason thereof; that the agreement and mortgage made to Isadore Dreyfus on the 5th day of November, 1887, was unlawful and void; that therein the said Alexander S. More was incapable of giving his consent thereto by reason of said physical incapacity. That this plaintiff is informed and believes, and on that information and belief alleges: That said Alexander S. More, by reason of his physical and mental condition, and not having proper control of himself, and capacity to act in a reasonable and proper manner, contracted habits of inebriety and further and seriously affected his mental condition, so that he became and was still further incapacitated to make any lawful agreement, or execute any conveyance; that while in this condition the said Alexander S. More executed and delivered to the said J. W. Calkins the said instrument

of writing, whereby the whole administration of his estate and affairs was transferred from himself to said Calkins; that therein the said Calkins induced said More to sanction and authorize the payment of sums of money for which there was no consideration, to-wit, not only all the expenses of the management of said estate by said Calkins, without supervision or control of said More, or of an authorized guardian, but also the payment of the \$10,000 hereinbefore referred to, which was without consideration and void, and by reason of the physical condition, induced by disease and confirmed and rapidly acquired habits of inebriety, the said Alexander S. More was, at the date of the execution of said instrument of writing, *non compos mentis*, and the said instrument of writing was void. And this plaintiff further alleges that since the beginning of this action the said Alexander S. More has departed this life, and that this plaintiff is the administrator of his estate as heretofore set forth; that the said property so described in said instrument of writing is a part of the estate of said Alexander S. More, deceased, and that the plaintiff herein, as such administrator, is entitled to the possession and administration of said estate; that the debts named in and payments required to be made by the said instrument of writing were incurred during the incapacity of said Alexander S. More, and that great and irreparable damage will be done to the estate of said More if the said Calkins be allowed to proceed to sell said property under the provisions of said void instrument of writing. Wherefore the plaintiff demands judgment—*First*, that the defendant render an account of the rents and profits of the said several tracts of land and the water-rights appurtenant thereto, received by the said defendant since the 7th day of April, 1888; *second*, that the said sum of \$10,000, described in said instrument as a non-interest bearing debt, due from the plaintiff to the defendant, be adjudged and decreed to be without consideration, and void, and that the said defendant, his agents and attorneys, be forever enjoined and restrained from collecting the same or any part thereof; *third*, that the said instrument in writing, executed between the said A. S. More and defendant on the 7th day of April, 1888, be adjudged and decreed to be void, and of no effect or virtue in law or equity; and the said defendant be forever restrained and enjoined from selling or disposing of the said tracts of land and the water-rights appurtenant thereto, or either or any of them, by virtue of the authority of said instrument, executed as aforesaid between the said Alexander S. More and the defendant, and such other and further relief as the court may deem just and equitable in the premises, and for costs."

Exhibit A, annexed to the complaint, omitting the description of the lands and other property conveyed and assigned, is as follows: "Alexander S. More to J. W. Calkins. This indenture, made the seventh day of April, 1888, between Alexander S. More of the city and county of Santa Barbara, state of California, the party of the

first part, and J. W. Calkins, of said city, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of \$15,000 to him in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the agreements and covenants herein entered into by the party of the second part, does by these presents grant, bargain, and convey unto the said party of the second part, [here follows description of lands, water ditches, and contracts;] to have and to hold the aforesaid lands, rights, easements, contracts, claims, demands, and other property hereby conveyed, assigned, or transferred to the party of the second part, his successor or successors and assigns, upon the trusts and confidences, and subject to the powers, hereinafter expressed, to-wit: The party of the second part is hereby empowered and authorized to sell and convey, assign, and transfer, lease, mortgage, or hypothecate any of the aforesaid lands, tenements, and hereditaments, water and ditch rights, and easements, or other property hereby conveyed or assigned, or any part thereof, or interest therein, and to sell and transfer or hypothecate the aforesaid contracts, or either of them, or any interest therein, and any sales of any of said lands, rights, easements, or other property, may be made by the party of the second part, at such price and upon such terms as to cash, or on credit, as he, the said party of the second part, may deem advisable. And the party of the second part is further empowered and authorized to institute and prosecute or defend such suits and actions, or other proceedings at law, as may be by him deemed advisable to protect or secure the rights and interests of the parties hereto, or either of them, in any of the lands or other property herein described, and particularly the rights and interests of the party of the first part, in and to the waters of Sespe creek and Fish slough, and the water-claims and ditch-rights hereinabove mentioned; and the party of the second part may compromise any of said suits, actions, or proceedings upon such terms as he may deem most advisable, and he may join the party of the first part as a party to any of said suits, actions, or proceedings, and the expenses of such suits, actions, or proceedings, paid by the party of the second part, shall be deemed a disbursement for the benefit of the party of the first part thereto, and the payment thereof, with 10 per cent. interest thereon from the time of disbursement, shall be deemed to be secured by these presents. The party of the second part and his successors shall, during the continuance of these trusts, have the sole possession, control, and management of all the lands and other property, rights, and interests hereby conveyed and transferred. And the said party of the second part shall (in the event that Isadore Dreyfus does not exercise his option to purchase the aforesaid property under said contract entered between him and the party of the first part, the 5th day of November, 1887, and does not become the purchaser of the same) proceed with all diligence to sell, under

the powers hereinabove expressed, the aforesaid lands, water-rights, and other rights, easements, and other property as a whole or in parcels as he, the said party of the second part, or his successors in trust, may deem most advisable; and out of the proceeds of such sales, and the rents, issues, profits, and proceeds of said lands, contracts, and other property, the party of the second part, or his successor or successors in trust, shall pay—*First*, the reasonable expenses of the management of said lands and property, and of the execution of these trusts; *second*, to the said J. W. Calkins the sum of \$15,000, with interest thereon at the rate of 10 per cent. per annum, together with the additional sum of \$10,000, which the party of the first part hereby agrees to pay the party of the second part, without interest, also the amount which may be paid out by the party of the second part in satisfaction of the mortgage executed to Isadore Dreyfus and hereinafter mentioned, and the amount of money paid out in the course of the execution of these trusts, and the powers hereby conferred, and for the payment of such taxes and other liens as may be levied on or be imposed upon any of the aforesaid property during the continuance of these trusts, (except taxes and assessments upon this deed of trust, or the debts or other obligations hereby secured,) with interest at the rate of 10 per cent. per annum upon all sums paid out as aforesaid, (with the exception as to taxes and assessments above specified,) and the residue, if any, of the proceeds of said lands, contracts, or other property, and other property and rights, shall be paid over to the said party of the first part, his personal representatives or assigns, and the residue of said lands remaining unsold shall, after the execution of these trusts, be reconveyed to said party of the first part, his heirs or assigns; and the residue, of any other of said property, rights, claims, or interests, then remaining in the hands of said party of the second part, or his successors in trust, shall be reassigned and transferred to the said party of the first part, his personal representatives or assigns; and the party of the second part agrees that in the event that said Isadore Dreyfus shall not exercise his option under the contract of November 5, 1887, above mentioned, to purchase the lands and property in said contract mentioned, and shall not become the purchaser of the same thereunder, he, the said party of the second part, or his personal representatives, will pay and discharge at its maturity that certain mortgage upon said lands executed by the party of the first part to Isadore Dreyfus the 5th day of November, 1887, and recorded in the office of the county recorder of said Ventura county, in Book 9 of Mortgages, p. 613, together with the debt thereby secured; and that he will pay all taxes and assessments which may be levied upon said lands or other property during the continuance of these trusts, having the right to reimbursement for the same as hereinabove specified. In witness whereof the parties have hereunto set their hands and seals the day and year first above

written. [Seal.] ALEXANDER S. MORE.
[Seal.] J. W. CALKINS."

1. Whether the instrument is merely a mortgage, with power of sale, or a deed of trust conveying the legal title, I think the amended complaint states a cause of action for an accounting before a sale of the property by the defendant, and for a temporary injunction against the sale pending the accounting. "Sales under powers in deeds of trust or mortgage are a harsh mode of foreclosing the rights of the mortgagor. They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity. Upon very slight proof of fraud or unfair conduct, or any departure from the terms of the power, they will be set aside. * * * A sale ought not to be made when the debt is uncertain or in dispute; and, if made, it may be set aside." Perry, Trusts, (4th Ed.) § 602x. "And if there is doubt or dispute as to how much is due, or if the debt is unliquidated, a sale will be enjoined. The amount of the debts must be certain; and, if it is not so, the creditor must file a bill to ascertain the amount, and pray for leave to sell to pay the amount found due." Id. § 602ee. In Jones on Mortgages it is said: "When the accounts between the parties are complicated, and the balance due under the mortgage is uncertain, a sale may sometimes be enjoined until the equities between the parties, which should affect the amount due under the mortgage, are settled, and the balance due can be ascertained." Section 1813. The power of a court of equity over sales under powers in mortgages and trust-deeds is exemplified to a considerable extent in the case of Van Bergen v. Demarest, 4 Johns. Ch. 37, wherein an injunction was granted at suit of an infant heir of the mortgagor, on the ground that the amount due was in dispute; and, upon the hearing, the sale was subjected to the following restrictions: (1) That the amount due should be computed by a master; (2) that the master be associated with the mortgagee in making the sale; (3) that the further notice of the sale should be given; and (4) that only so much should be sold as the master deemed sufficient, in case a part could be sold without prejudice. In Cole v. Savage, Clarke, Ch. 361, a sale was enjoined on the ground that the mortgagee, in his notice of sale, claimed more than was due. See, also, Draper v. Davis, 104 U. S. 347; Kornegay v. Spicer, 76 N. C. 95; Capehart v. Biggs, 77 N. C. 261; Bridgers v. Morris, 90 N. C. 32; Rossett v. Fisher, 11 Grat. 492; Curry v. Hill, 18 W. Va. 370; Shultz v. Hansbrough, 33 Grat. 576; Osburn v. Andre, 58 Miss. 609; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. Rep. 834; Peck v. Peck, 9 Yerg. 301; Johnston v. Eason, 3 Ired. Eq. 330; Wilkins v. Gordon, 11 Leigh, 547; Sandford v. Flint, 24 Mich. 28; Marks v. Morris, 2 Munf. 407; Jones, Mortg. §§ 1859, 1860. The complaint in this case shows that a considerable portion of the demand of defendant, for the payment of which he has advertised for sale all the property described in the instrument, is unliquidated and uncertain; and that \$10,000 of the liquidated portion of his claim is disputed by the

plaintiff on the ground that it is unsupported by any consideration whatever. It also avers that the value of all the property greatly exceeds the amount of the just and lawful indebtedness of the plaintiff to the defendant. The fact that it appears upon the face of the instrument that payment for all loans and advances, and compensation for all services, with extraordinary interest, is provided for, exclusive of the promise to pay \$10,000 without interest, tends to corroborate the averment that there was no consideration for the promise to pay the \$10,000. But for the presumption that there is a consideration for every promise in writing, there would appear to be no consideration for the promise to pay the \$10,000 without interest; but this presumption is disputable, and the plaintiff has disputed it in this case. In addition to this, the extraordinary and almost unlimited power granted by the instrument invites scrutiny as to the honesty and fairness of the transaction, and tends to induce a court of equity to restrict the execution of it to such mode as may do justice to the grantee with the least detriment or inconvenience to the grantor. Upon the facts alleged, and appearing upon the face of the instrument exhibited, I think the court would have been justified in ordering an account to be taken of what was due the defendant, and in controlling the mode of sale as to the notice to be given, the limitation of the amount and portions of the property to be sold, and whether or not it should be sold in parcels; and also in ordering the sale to be made by its own commissioner, if deemed necessary to secure a fair sale, for the highest obtainable price. Pending these proceedings, a sale by the defendant must necessarily have been enjoined.

2. I think the demurrer to the second cause of action attempted to be stated in the complaint, based upon sections 38 and 39 of the Civil Code, was properly sustained. That A. S. Moore was "entirely without understanding" is not directly or indirectly, definitely or indefinitely, stated in the complaint, and therefore the instrument executed by him was not void. Conceding, for the purpose in hand, that it is stated in the second count that A. S. Moore was of "unsound mind," though "not entirely without understanding," yet it is not stated that the plaintiff or his intestate ever restored or offered to restore, paid or offered to pay, to defendant the money (\$58,000) loaned to and paid for the plaintiff's intestate under the contract; nor is it stated that the plaintiff is ready or willing to restore anything of value received from defendant under the contract; therefore, upon the facts stated, the contract should not be rescinded. Civil Code § 1691. I think the judgment should be reversed, and the cause remanded, with instruction to the court below to overrule the demurrer to the first count of the complaint.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is re-

versed, and the cause remanded, with instructions to the court below to overrule the demurrer to the first count of the complaint.

85 Cal. 90

McPHERSON v. WESTON *et al.* (No. 12,057.)
(Supreme Court of California. July 30, 1890.)

PLEADING—AMENDMENT—EVIDENCE—RIGHTS OF PURCHASER.

1. Where, in an action on a note, one defendant, a co-indorser thereon, has answered unqualifiedly admitting that he indorsed the note, it is not error to allow him to amend by alleging that for a valuable consideration his co-indorser agreed to hold him harmless on the note, that not being inconsistent with his former admission.

2. Nor is it error to allow a further amendment after plaintiff has rested, setting up the circumstances of the indorsement more fully, where the new matter operates no surprise to plaintiff, it being within the discretion of the court to allow amendments during the progress of the trial, under Code Civil Proc. Cal. § 473.

3. Parol evidence is admissible to show such agreement between defendant and his co-indorser.

4. One who purchased the note after its maturity takes it subject to such agreement, and also to a further agreement by the co-indorser that he would not dispose of such note to a third person, and hence such purchaser can maintain no action thereon against defendant.

5. Such an action is not against the legal representative of a decedent for a claim against the estate, nor does defendant's testimony as to the circumstances of his indorsement tend to establish a claim against the estate of his co-indorser; and hence, though such co-indorser is dead, such testimony is not prohibited by Code Civil Proc. Cal. § 1880, subd. 3, relating to transactions with decedents.

Commissioners' decision. Department

2. Appeal from superior court, Kern county; B. BRUNDAGE, Judge.

Lewis Shearer and Wm. F. Stewart, (C. W. Cross and H. L. Gear, of counsel,) for appellant. Henry E. Highton, for respondent.

GIBSON, C. This action was brought in the superior court of Kern county to foreclose a mortgage. The cause was tried by the court without a jury, upon the issues tendered by the second amended answer of defendant Robinson, all the other defendants having defaulted, and resulted in a judgment of dismissal of the action in favor of Robinson. After a motion for a new trial was made and the statement therefor settled and filed, the cause was by stipulation of counsel transferred to the superior court of Santa Clara county, which court by its order granted the motion for a new trial. From that order defendant Robinson appeals. The first trial of this case, which resulted in a judgment in favor of defendant Robinson, was had upon his original answer to the complaint, in which he admitted the making of the promissory note, and the execution of the mortgage, and that he and his co-defendant Alexander Forbes, who was the joint payee with himself in the note, indorsed, transferred, and delivered the note and mortgage to Forbes Bros., and at the same time waived demand, protest, and notice of the same, but denied that the plaintiff received the note or mortgage from Forbes Bros. by indorsement for value or otherwise, or that he was the

real party in interest, and averred that Alexander Forbes was the real party in interest, and that the action was being prosecuted in the name of the plaintiff solely for the benefit and convenience of said Forbes, and further averred that plaintiff's cause of action was barred by the statute of limitations. This last defense prevailed in the trial court, but upon appeal it was held that the action was not barred, and that the plaintiff was entitled to maintain the action, and the case was reversed and remanded for a new trial. 64 Cal. 275. Before the retrial the court below permitted the defendant Robinson to file an amended answer, in which, among other defenses, he changed the effect of the unqualified admission in his original answer respecting the indorsement of the note and waiver of demand, protest, and notice of demand made by himself and Alexander Forbes, by averring that at the time the indorsement and waiver were made said Forbes, his joint indorser, agreed with him that he, Forbes, would advance the \$5,000 with the agreement on the part of defendant that he, defendant, would pay Forbes on demand one-half of the sum so advanced, and that in consideration of this promise on his part Forbes agreed to hold defendant harmless on the indorsement; and that defendant should not in any event be required to pay the note or any part of it.

The allowance of this amended answer respondenturges was erroneous, because it permitted the defendant to change his admission in his original answer into a denial, contrary to the rule in *Spanagel v. Reay*, 47 Cal. 608. In that case it was held that an admission in an answer could not, for the purpose of a second trial, be amended by the averment of facts that were inconsistent with, and would completely negative, it. But here the amendment complained of is not inconsistent with the admission, but in harmony with it, and does not negative the admission of indorsement and waiver, but explains how they were made, and what effect they were to have, and therefore does not fall within the rule of that case. It is true that upon the application to amend the answer it was not shown why the matter embodied in the amendment, which we must presume the defendant had knowledge of when he filed his original answer, was not included in the latter. Still, as such new matter tended to show under what circumstances the indorsement and waiver were made without contradicting the admission, and would thereby aid the court in doing complete justice between the parties, we do not think there was any necessity for a showing as to diligence. *Pierson v. McCahill*, 22 Cal. 128. The permission to amend was therefore proper. During the last trial, and after the plaintiff had rested his case, and the defendant Robinson had introduced some evidence, he was permitted to file a second amended answer. This is urged as error, mainly upon the same ground as that against the filing of the first amended answer, which has been disposed of, and that it was too late to grant leave to amend during the trial, and after the

plaintiff had rested. The second amended answer did not deny any of the admissions made in the previous answers, but averred certain facts in addition to those in the first amended answer, showing more fully the circumstances under which the note and mortgage were obtained, and the indorsement and waiver made upon the note.

The granting of an amendment to a pleading during the progress of a trial, in order that a case may be fully and justly determined, rests within the discretion of the trial court. Code Civil Proc. § 473. There is no claim made, neither does it appear, that the new matter operated as a surprise to the plaintiff whereby he was prevented from fully controverting it upon the trial; hence, there was no abuse of discretion in granting leave to file the second amended answer. The respondent contends that in admitting parol evidence in support of the issue tendered by the second amended answer as to the agreement between the defendant Robinson and his co-indorser, under which the indorsement and waiver were made, the court fell into error, because such evidence varied the liability that arose from the indorsement. It is a general rule that between an indorser and a *bona fide* holder of paper regularly negotiated, the liability established by the indorsement cannot be disputed. 2 Whart. Ev. § 1059; 1 Daniel, Neg. Inst. §§ 717, 718; *Martin v. Cole*, 104 U. S. 37. But it may be shown by the indorser that from the way in which his indorsement was procured it would be a fraud upon him to permit its enforcement. 2 Whart. Ev. § 1059, note 2, citing *Dale v. Gear*, 38 Conn. 15; *Benton v. Martin*, 52 N. Y. 570; and *Hill v. Ely*, 5 Serg. & R. 363. See, also, 1 Daniel, Neg. Inst. § 722.

From the findings it appears that on March 23, 1876, E. J. Weston and S. Boushey were the owners of a certain mine which Alexander Forbes and L. L. Robinson desired to purchase on speculation. Between the two latter it was agreed to loan to the two former the sum of \$5,000, to be used in the development of the mine. Forbes agreed to advance the amount of the loan, and to see that the same was expended on the mine, and that it should be either repaid or title to the mine acquired, as developments might render most desirable. Robinson agreed to pay Forbes on demand one-half of the \$5,000, and to aid in disposing of the mine in case title thereto should be acquired, Forbes to have the benefit of all the interest until such time as Robinson should pay the \$2,500. On the date above mentioned the owners of the mine made and delivered to Forbes and Robinson their promissory note for \$5,000, payable one year after date, with interest at 2 per cent. per month, compounded quarterly, if not paid. At the same time, and to secure the payment of this note, the makers of it executed to the payees the mortgage in suit. After the receipt of the note by defendant and Alexander Forbes it was indorsed by them subject to the agreement above stated, and for the purpose of placing said Forbes in a position to perform his part of the contract by placing the legal title to

the note in him, so he could attend to the business in his own name, and enforce the payment of the note; and when the note matured the defendant waived protest thereof for the same purpose, and under the same, and the further agreement that said Forbes should not transfer the note to a third party. Said Forbes, at the times when the note was indorsed and the waiver made, informed the defendant that he, Alexander Forbes, constituted the firm of Forbes Bros., during all of which times the defendant supposed he was dealing with Alexander Forbes individually, under the firm name of Forbes Bros.; but at the time of the indorsement the firm in fact consisted of Charles Forbes and Alexander Forbes. The latter at that time was managing partner, and the former knew of, and assented to, all the transactions between his partner and the defendant Robinson. These facts show that it would be inequitable to permit the note to be enforced against defendant Robinson, and the evidence received in support of them we think clearly within the exception to the general rule above stated. The fact that the note was indorsed to Forbes Bros. can make no difference, as the firm consisted of the co-indorser of defendant, and another who had knowledge of, and assented to, the agreement between the indorsers.

The court further found that Alexander Forbes indorsed the note to plaintiff in the name of Forbes Bros., but not until long after its maturity; and that, although indorsed in favor of plaintiff, the note was not delivered to him, but placed in escrow with the Bank of California, together with a promissory note plaintiff made in favor of said Forbes Bros., covering the amount of the principal and interest due to a certain time upon the note in suit, subject to the condition that the notes were only to be withdrawn on the joint order of said Forbes and the plaintiff; and that no such order was made. And it was further found that the note so made and placed in escrow by plaintiff was the only consideration he paid for the note sued upon. Now, assuming that the plaintiff acquired title to the note for value by this transaction, which is contrary to the conclusion reached by the learned judge who tried the case, still he took it long after it matured, and, therefore, subject to any defense which the defendant could have interposed against the firm of Forbes Bros. *Wood v. Brush*, 72 Cal. 224, 13 Pac. Rep. 627; *Coghlin v. May*, 17 Cal. 515; *Coye v. Palmer*, 16 Cal. 159; *Folsom v. Bartlett*, 2 Cal. 163.

One of the conclusions of law drawn from the facts showing how the note was indorsed in favor of plaintiff, and placed in escrow with plaintiff's note to the firm of Forbes Bros., was to the effect that, as plaintiff never acquired any equitable title to the note by the payment of a valuable consideration, nor a legal title thereto by delivery prior to or at the commencement of this suit, he is not entitled to maintain the suit. Whether this conclusion is to be regarded as correct or not, we have seen that whatever interest the plaintiff may have acquired in the note was long after

the note matured, and subject to the equitable defense of the defendant Robinson, which was established in his favor, and precludes the plaintiff from recovering upon the note.

It is further urged by the respondent that as Alexander Forbes, who was one of the defendants who defaulted, died before the last trial, the defendant Robinson should not have been permitted to testify to any fact that occurred prior to his death, as the result of the trial might affect the estate of the deceased. Section 1880, subd. 3, of the Code of Civil Procedure, upon which this objection is based, provides that no testimony can be given by the following persons: "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." This action is not against the legal representative of the deceased upon a claim against his estate. His legal representative, as far as disclosed by the record here, is not a party to it. And the testimony of defendant was not designed, neither did it tend, to establish a claim against the estate of the deceased, but was introduced for the purpose of resisting a claim against himself. His testimony for such a purpose would have been competent had the legal representative of the deceased, instead of the plaintiff here, been prosecuting the action upon the note against the defendant. *Sedgwick v. Sedgwick*, 52 Cal. 336. There are other points made regarding rulings upon the evidence, but they do not call for special examination. We find no prejudicial error in the record, and, therefore, think the motion for a new trial was improperly granted, and advise that the order granting it be reversed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting the motion for a new trial is reversed.

(85 Cal. 196)

WEYSE *et al.* v. CRAWFORD. (No. 13,523.)
(*Supreme Court of California*. Aug. 1, 1890.)

TAXATION—ASSESSMENT—STATEMENT OF PROPERTY
—WAREHOUSEMEN.

1. Plaintiffs made the statement on oath, for purposes of assessment, required by Pol. Code Cal. §§ 3629, 3630, to the effect, that all the property owned or controlled by them was a warehouse and the land on which it was situated. At the assessor's request they also gave him a memorandum of all personality stored in such warehouse for which they had issued receipts, and of which they informed him they were not the owners. *Held*, that the assessor has no authority to arbitrarily add the value of such personality to the amount returned by plaintiffs where he has not cited them to appear and answer under oath as to their property, as section 3632 provides he may do if he believes the statement to be false.

2. Property stored in a warehouse for which the warehouseman has issued receipts is not in his possession within the meaning of Pol. Code Cal. § 3629, which requires that for purposes of assessment a person shall state under oath all property belonging to, claimed by, or in the pos-

session or under the control or management of, such person.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

P. W. Dooner and Dooner & Burdett, for appellants. C. C. Stephens, S. M. Payton, and E. P. Kelly, for respondent.

Fox, J. This action is prosecuted to secure an injunction restraining defendant, tax collector of the county of Los Angeles, from selling certain real property known as "Naud's Warehouse," for delinquent taxes for the year 1887-88. Judgment for defendant, motion for new trial denied, and plaintiffs appeal. Plaintiffs were the owners and in possession of divers pieces of real property, and among others of that known as "Naud's Warehouse," holding the same as tenants in common, the plaintiff O. G. Weyse being the manager, and having the control thereof. In or about the month of April, 1887, O. G. Weyse, in response to the demand of the assessor, made out and delivered to said assessor a statement under oath, in the form prescribed by law and required by that officer, giving a description of what he claimed and swore to be all the property owned by or in the possession or under the control of himself or his co-tenants on the first Monday of March in that year. This statement included the lot and warehouse in question, with divers other pieces of real estate, and a list of personal property, but did not include any goods, wares, and merchandise on store in the warehouse. Subsequent conferences were had between the assessor or his deputy on the one side, and the plaintiff and his foreman at the warehouse on the other, in reference to the personal property in the warehouse. At these conferences, the officer was shown through the warehouse, and given every opportunity he required to inspect the property, and was told that none of it was the property of plaintiffs; that it was simply property left on storage by different parties, and for which warehouse receipts had been issued in the regular course of business; that the plaintiffs had no interest in it, or control over it, and did not then know who it belonged to, or who held the receipts therefor; but at his request the officer was furnished with a written memorandum of the quantity and character of the property, so far as known to the plaintiffs or their foreman in charge, and of the persons to whom warehouse receipts were originally issued therefor. This memorandum, however, was not sworn to. Under these circumstances the assessor arbitrarily added to the sworn statement made by plaintiffs, and made an arbitrary assessment against them of an item as follows: "Miscellaneous merchandise and grain in Naud's Warehouse, \$50,000." And opposite the item made the following note on the margin of the assessment: "Neglected to return statement, as required by section 3633." Plaintiffs' total assessment for the year, including the item above mentioned, amounted to \$91,500. A general reduction of 10 per cent. was made upon the entire assessment roll of the county, which

left the final assessment of plaintiffs \$82,850, of which the item above quoted amounted to \$45,500. In due time plaintiffs tendered the entire taxes imposed for the year upon all the property given in by them, and all that was assessed against them, except the single item above quoted, with all costs and percentage thereon. The tender was refused, and in due course the tax collector advertised to sell the real property for the tax as delinquent, including the tax levied upon this item of \$45,500. It was to restrain this sale that the present action was brought. This arbitrary assessment, and the accompanying marginal note, was made without authority of law, and is void. The tax levied and imposed upon that assessment never became a lien upon the real or any property of plaintiffs, and plaintiffs never became liable therefor. The error into which the assessor has fallen in this case may be a common one, but it is none the less an error. All proceedings in the nature of assessing property for purposes of taxation, and in levying and collecting taxes thereon, are *in invitum*, and must be *stricti juris*. It is the duty of the assessor to demand from each person liable to assessment in his county a statement to be made under oath, as provided in sections 3629 and 3630 of the Political Code. If he makes that statement, then, no matter how false the assessor may believe it to be, he has no power thereafter to make an arbitrary assessment on the ground of neglect or refusal to return a statement; but if the assessor believes the statement to be false he has a right, under section 3632, to subpoena the party making the statement, and also any other person whom he may suppose to have knowledge upon the subject, and examine him or them on oath, as witnesses are examined, touching any property which is assessable in his county. Or, in the absence of a statement, or an insufficient description of real property, he may cite the party to appear in the superior court for such examination, under section 3634, where a summary hearing is guaranteed to him, and all proceedings will be had at the expense of the tax-payer necessary to secure the requisite information for making a proper assessment. If the property owner neglects or refuses to make and return any statement under oath, or if upon being subpoenaed he refuses to appear before the assessor for examination, or refuses upon proper citation to appear before the superior court for examination, in either of those three cases the assessor has power to make an arbitrary assessment, noting on the margin the reason why it was made, and the board of equalization has no power to reduce such assessment, but he has such power in no other case. In this case the sworn statement was returned, so that there was no power to make an arbitrary assessment for failure to make such return. The assessor did not subpoena the party to appear for examination, or cite him to appear in the superior court; hence there was no power to make an arbitrary assessment for failure to comply with such subpoena or citation; and there is no pretense that it was

made for such a cause. For false return or false testimony upon examination there are other and more severe penalties,—the pains and penalties of perjury; but these can only be imposed after due trial and conviction of having sworn or testified falsely. Hence the assessor is not authorized to impose a penalty for false statement, or false testimony. The power is not given to him to convict or to punish for perjury. The only thing for which he can punish, by arbitrary assessment or otherwise, is for refusing to take the oath. He cannot set himself up as the judge to determine that the oath when taken is false. Still, his powers for the protection of the revenue are ample, for in case of refusal to make the return under oath, or testify when properly subpoenaed, he may not only make an arbitrary assessment, but may also prosecute the offender under section 3632, and recover the penalty therein provided for each and every refusal. If the statement is returned, or the examination had, and the assessor believes that the party has sworn falsely, his remedy then is to complain of and prosecute the offender for perjury; but then he becomes the prosecutor, not the judge.

To our minds, the assessor has also fallen into another error in this case; an error founded upon a misconstruction of the word "possession," as used in the first subdivision of section 3629 of the Political Code. That section and that subdivision requires that the party shall return a statement under oath showing separately (1) "all property belonging to, claimed by, or in the possession or under the control or management of, such person." As we understand the case, there is no dispute about the facts in regard to the property intended to be covered by or included in this arbitrary assessment. It did not belong to, was not claimed by, and was not under the control or management of, the plaintiffs. They were mere naked bailees, without interest in or power over the property. It was in their possession only in the sense that it was stored in their warehouse. They had no insurable or other interest in it; could make no use of it whatever. They had issued their warehouse receipts for it, each receipt showing upon its face that the holder of the receipt was the owner of the property described in it, and there on store. Title to the property itself would pass and re-pass by transfer of the receipt, and it was impossible that the warehouseman should know an hour after the receipt was issued who owned the property. All that he could do for the assessor was to tell him to whom the receipts were issued, and that he did do. It was not done under oath, nor did the assessor require that it should be so done. The word "possession," as used in this section, is one of several forms of expression there used to convey the same idea, another of which immediately follows it, and is in the words "or under the control or management of such person." To make the party liable to assessment his "possession" must be one that carries with it the usual marks and indications of ownership. It is true that, ordinarily, possession of personal

property is *prima facie* evidence of ownership, but it is only *prima facie* so; and even to this there are exceptions to the rule. The presence of a trunk filled with wearing apparel in a guest chamber of a hotel, or of a horse in a boarding-stable, is not even *prima facie* evidence of ownership of the trunk or the horses in the keeper of the hotel or stable. So of a carriage in a repair-shop; and so of grain or goods in a warehouse kept only for the storage of goods for hire, as was the case here. Possession by a factor, who does not purchase on his own account, is not evidence of ownership. *Leet v. Wadsworth*, 5 Cal. 404; *Hutchinson v. Bours*, 6 Cal. 385. Much less would it be such evidence in the case of a mere warehouseman, whose sole business was to furnish store-room for hire, and where the sole evidence of possession was that the property was stored in his warehouse. He was then a mere naked bailee. He was not even an agent for the owner. Had no power over the property, either as principal or agent. Under these circumstances, the duty of the assessor was plain; to assess the property to the owner, if he could ascertain who the owner was; otherwise to assess it to unknown owners, and in that case to proceed at once to collect the tax by seizure and sale in the manner provided by law. We are satisfied that he could not assess it to the warehouseman, or make the tax thereon a lien upon the real property of any person other than the true owner. Judgment and order reversed, and the case remanded for further proceedings in accordance with this opinion.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

I concur in the judgment: THORNTON, J.

85 Cal. 274

Ex parte KUBACH. (No. 20,680.)

(Supreme Court of California. Aug. 4, 1890.)

ORDINANCES—VALIDITY—EIGHT-HOUR LAW.

An ordinance of the city of Los Angeles provides that "eight hours' labor constitutes a legal day's work" where the same is performed under a contract with the city; and that any one engaged in performing such a contract who "shall demand, receive, or contract for more than eight hours labor in one day" from any person, or who shall employ Chinese labor, shall be guilty of a misdemeanor, and shall be subjected to a fine. *Held*, that this is an attempt to prevent persons from employing others in a lawful business beyond certain limits, and the ordinance is unconstitutional, and void.

In bank. Petition for writ of *habeas corpus*.

Geo. M. Holton, for petitioner. *C. McFarland* and *Albert Crutcher*, for respondent.

PER CURIAM. This is an application for a writ of *habeas corpus*. The petitioner was tried and convicted of a misdemeanor under the following ordinance of the city of Los Angeles: "The mayor and the council of the city of Los Angeles do ordain as follows: 'Sec. 1. Eight hours' labor constitutes a legal day's work in

all cases where the same is performed under the authority of any ordinance, resolution, or contract of the city, or under the direction, control, or by the authority of any officer of the city acting in his official capacity, and a stipulation to that effect must be made a part of all contracts to which the city, as a municipal corporation, is a party. Sec. 2. It shall be unlawful for any contractor, by himself or through another, when having labor performed under any contract with the city, to demand, receive, or contract for more than eight hours' labor in one day from any person in his employ or under his control, with the promise or understanding that such persons, so laboring over eight hours, shall receive a sum for said day's work more than that paid for a legal day's work. Sec. 3. It shall be unlawful for any contractor by himself or through another, when having labor performed under any contract with the city, to employ Chinese labor thereon. Sec. 4. Any person or persons violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than \$10, nor more than \$50, for every such offense.' It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day. Mr. Cooley, in his work on Constitutional Limitations, says: "The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class by leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments, in which integrity is

of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable." 5th Ed. p. 745. For these reasons we hold the ordinance, so far as it attempts to create a criminal offense, to be void, and that the petitioner should be discharged. It is so ordered.

85 Cal. 155

SPOTTS V. HANLEY *et al.* (No. 12,675.)

(Supreme Court of California. Aug. 1, 1890.)

APPEAL—ASSIGNMENT OF ERRORS—EJECTMENT—EVIDENCE.

1. Assignments of error based on the insufficiency of evidence to sustain the findings of the court cannot be considered where they fail to specify the particulars wherein the evidence is insufficient.

2. In ejectment defendants offered in evidence the record of a judgment in favor of the administrator of one from whom they derived title against plaintiff's tenant for possession of the land in controversy. Plaintiff objected to its admission on the ground that he was not a party to the action. *Held* that, while the judgment was not admissible as bearing on the title, it was admissible to show where the right of possession was from the service of summons in the action.

3. The possession of the administrator under such judgment may be added to that of defendants in order to make the length of time required for title by adverse possession, though defendants claim under a deed from the intestate's heir.

4. The failure of the court to find as to the effect of such judgment on plaintiff's right to claim title to the land is not reversible error where the evidence shows adverse possession in defendants for a sufficient length of time to bar plaintiff's action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

T. Z. Blakeman, for appellant. *Mastic, Belcher & Mastic*, for respondents.

FOOTE, C. This action is in ejectment for certain lots of land in blocks 11 and 12, lying in that portion of the city and county of San Francisco called the "Potrero Nuevo." The defendants had judgment rendered in their favor by the court, which tried the action without the intervention of a jury. The appeal here prosecuted is from an order refusing to set aside that judgment and grant a new trial. The appellant seems to rely mainly for a reversal of the order upon three grounds: *First*, the evidence was insufficient to warrant certain of the findings; *second*, that the court failed to find upon a material issue raised by the pleadings; *third*, that the court committed error in overruling "the plaintiff's objections to the judgment roll, (Plate v. A. J. Taggart being received in evidence,) and in admitting the same in evidence." The plaintiff claims title in his intestate, Dyson, derived from one George Treat, who he maintains was, in the year 1850 and for some time thereafter, in the actual possession of the whole of the Potrero Nuevo, which is a peninsula containing about 1,100 acres of land, bounded on three of its sides by Mission creek, the bay of San Francisco, and Precita creek, and the marshes which adjoin those creeks, and on the end or neck thereof by a stone-wall. The alleged prior possession of the plain-

tiff's intestate, as giving him title under the Van Ness ordinance, seems to be the main ground relied on by the plaintiff to support his contention of his right to recover in this action.

Passing for the moment the question as to whether the specifications of particulars as to the insufficiency of the evidence to support the findings are of such character as to admit of an examination of the evidence in the transcript, it seems that the facts relied on to uphold the claim of the plaintiff are: That George Treat repaired and partially rebuilt a stone-wall and fence across the neck of the Potrero, from Mission to Precita creek, and placed a gate in the wall, through which cattle and horses were admitted, and pastured upon the peninsula above referred to. About the year 1852 this land was settled upon by "squatters," who possessed themselves of various portions of it, and maintained such possession in spite of the efforts of Treat and his grantee, Dyson, to dispossess them. About the year 1856 this whole parcel of land appears to have been divided into blocks and lots, as part of the city of San Francisco. In the year 1852 it seems that Bowman, through whom the defendants claim, entered upon a tract of land contained within the limits of the Potrero, and including the land in controversy here, of about 150 acres in extent, and that his entry was adverse to, and in defiance of, the claim of Treat, and there is evidence which tends at least to show that at first he put up the kind of fences then in use by the "squatters" generally,—that is, "skeleton fences,"—and that he excavated small ditches along the lines of his claim; the westerly side of his claim being bounded by the stone-wall across the neck of the Potrero and one of the creeks above mentioned, the northerly and easterly sides being the fences and ditches common to Bowman and others, "squatters or settlers," who adjoined him on those sides, and the southerly side was bounded by a fence placed there by Bowman between his claim and that which Treat claimed.

When Bowman first erected these inclosures they were slight and insecure, like those of all others who, like himself, claimed the land around which they erected them, but by the year 1854 these inclosures were of as substantial a character as the then condition of the country and the surroundings warranted. They were certainly sufficient to show that Bowman claimed and exercised dominion and control over the land which they surrounded. In the language of the witnesses Bowman's inclosure was "as good as men could make on the Potrero," and "the whole tract was inclosed very well for the times." Bowman and his family lived within this inclosure and upon his claim, in a house which he erected for that purpose, until some time in 1855, when he moved away, having in February, 1854, conveyed his claim to one Stewart. During the time of Bowman's occupancy he kept cattle, horses, and hogs, plowed some of the lands, and had certain buildings thereon, which he rented to others. After

the year 1854, when there was a dispute and some violence between Treat and Bowman as to their conflicting claims, Bowman seems to have remained in peaceable possession until he left in 1855, and delivered possession of the land to Stewart. For it seems that after the dispute and fight between Bowman and George Treat in 1854, when Bowman's house was torn down, that nevertheless Bowman "continued to live there until about the spring of 1855, and C. V. Stewart, his partner and grantee, succeeded him on the place." Then Harvey S. Brown became interested with Stewart, "and they both attended to the property, and watched it, and kept whatever right they had against parties coming on without due process of law, and that was the condition of things." It would thus appear that there was evidence which tended to show that the occupation of the land in question by Bowman and Stewart was exclusive; that all other persons not claiming under them were kept off; and that no interference was attempted of their possession thus maintained after 1854. And it is clear that Bowman stood his ground and maintained his possession after his house was pulled down by Treat and his friends, and that he was not driven off, and did not give up possession to Treat, but that Treat was defeated in his effort to dispossess Bowman by the strong hand, and that no such effort was afterwards made. With reference to the northerly 125 feet of the block 11, denominated the "Sedgely Tract," and described in findings 14 and 15, there was no dispute in the evidence, and it does not seem to be doubted in the appellant's brief that in the year 1861 it was separately inclosed by the grantees of Bowman, viz., Joseph Sedgely and I. W. Shaw, from whom the defendants here, Sedgely and Center, derive their title, and that from that time to the present they and their grantees have continuously kept and maintained actual and exclusive and adverse possession of the whole of that parcel of land. On the 5th of January, 1854, Bowman conveyed to one Francis Altvater a portion of his claim on the "Potrero Nuevo," (the whole of the same being, as before stated, about 150 acres in extent,) which portion included a triangular-shaped piece of block 11, involved in this controversy. On the 1st of December, 1859, Stewart and Pratt, who had succeeded to Bowman's title, and were in possession of the land they conveyed, deeded to Altvater block 16, in contest here. Upon these conveyances being made to him, Altvater took and maintained possession of the lands therein contained, and immediately after the last conveyance just mentioned he inclosed the land, consisting of block 16, and all of block 11 except the Sedgely tract, and all the portion of the street called "Columbia" lying between those blocks, and thereafter, and up to the time of his death, he held and maintained actual, exclusive, and adverse possession of all the land within the inclosure he had thus made. He died on the 3d of December, 1863. At that date an individual named Riley was in possession of the last-described premises as the ten-

ant of Altvater. On March 7, 1864, evidently by collusion with this tenant, Dyson, the plaintiff's intestate, and without the knowledge or consent of Altvater's heirs or representatives, made an arrangement by which, after purchasing certain personal property which Riley had to sell, he placed one Taggart in possession of the premises as his (Dyson's) tenant. On the 9th March, 1865, one Plate, the administrator of Altvater's estate, commenced an action of ejectment against Taggart. On August 22, 1865, Taggart answered the complaint, and on the 27th December, 1875, judgment passed for the plaintiff. Thereupon, on the 28th of December, 1875, by virtue of a writ of possession duly issued, Taggart was ejected by the sheriff, and the plaintiff in the action placed in possession of the premises sued for. Defendants herein deraign title from the son and heir of Altvater, and ever since the date of the ejectment of Taggart have maintained actual, exclusive, and adverse possession of the premises. The present action was commenced on the 27th December, 1880. One of the plaintiff's propositions is that upon the evidence he is entitled to recover because the possession of Robert Dyson, his intestate, and Dyson's grantor, George Treat, of the whole 1,100 acres of the "Potrero Nuevo," inclosed by the bay of San Francisco and Mission and Precita creeks upon three sides, and a stone-wall and fence across the peninsula, was such as that he has title to it conferred by the Van Ness ordinance. Of course if Bowman and his grantee, and not Dyson and his grantor, Treat, had this possession, that contention of plaintiff must fail.

Conceding that the first specification of particulars, of the insufficiency of the evidence to sustain the decision, is full enough to enable us to understand the subject presented, that is, that it is there claimed that the evidence being insufficient to show that Bowman ever took possession, etc., of the 150 acres of the Potrero Nuevo, which includes the land in controversy, and that therefore the evidence is insufficient to show that he ever took possession, etc., of the two blocks of land in controversy, upon the principle that as the greater includes the less he could not have taken possession of the smaller tract unless he took possession of the larger, yet we do not see how, under the decisions of this appellate court, the remaining specifications of the particulars in which the evidence is insufficient to sustain the decision can be considered. The eighth specification is: "There was no evidence to sustain or justify the second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth findings of fact, or either of them." Just such specifications were condemned in *Parker v. Reay*, 76 Cal. 105, 18 Pac. Rep. 124, approving *Edelbittel v. Durrell*, 55 Cal. 279, in which last it is said, speaking of section 659, Code Civil Proc.: "The purpose of the statute is apparent. It was to direct the attention of the court and counsel to the particulars relied on by the moving party to the end that the evidence bearing on the specifications of error might be in-

serted in the statement and considered by the court." The rest of the alleged specifications do not purport to state wherein in any particular the evidence is insufficient to sustain or justify the decision, but are simply narrations of what the evidence was upon the trial. "It is not necessary that the specification should state what the evidence does show. Such a statement is insufficient if standing alone, and surplusage if joined to a proper specification." Hayne, New Trial & App. 432. Here, as we have seen, the specifications stand alone as mere statements as to what the evidence shows, without being joined to a proper specification.

The rule under which the existence or non-existence of *possessio pedis* is determined, which is necessary to confer title under the Van Ness ordinance, is stated in *Brumagim v. Bradshaw*, 39 Cal. 24-50, that "it is the peculiar province of a jury under proper instructions of the court to decide whether or not the acts of dominion relied on, considering the size of the tract, its peculiar condition and appropriate use, were of such a character as usually accompany the ownership of lands similarly situated." When the court sits without a jury it decides questions of fact upon the same basis as the former body. The possession which the law requires, and which, as we think, some of the evidence in the record tends at least to show was the kind of possession which Bowman had, is the subjection of the land claimed to the will of the claimant, and consists in doing as he wishes with the land, and excluding others therefrom. If the proof shows an actual and open occupation of a tract of land marked out by and within visible and defined boundaries, and a subjection of such land to the dominion of the occupant to the exclusion of all others, such proof is sufficient to show a *possessio pedis*, which, if continued long enough, will satisfy the requirements of the law, and establish title whether there be an inclosure or not. *Sheldon v. Mull*, 67 Cal. 300, 7 Pac. Rep. 710; *Howell v. Rogers*, 47 Cal. 291. But the plaintiff seems further to claim that, passing the question as to where the title was when Riley, Altvater's tenant, allowed Dyson's tenant to take possession of the Altvater premises, upon the happening of that event Dyson was in actual adverse possession, and remained by himself or tenants in such possession for such a length of time,—that is, from March 7, 1864, to December 28, 1875,—that his title thereby must prevail, as the defendants only entered and had possession from February, 1876, and this action was begun December 27, 1880, less than five years from the date of such entry and possession, which, as plaintiff contends, cannot avail the defendants under the statute of limitations of five years, because, as plaintiff claims, the possession of defendants since the writ of possession under the Plate judgment was issued cannot be connected with Altvater's possession, it being argued that the defendants are not entitled to add Altvater's possession to theirs to make out their five years' continuous adverse possession by adding to their possession that of one who preceded

them, when they did not enter into possession under or through the one who preceded them. That is, it seems to be urged that the administrator, Plate, was entitled to, and had the possession of, the Altvater land, and the son and sole heir could not convey the title and right of possession while the estate remained undistributed, as it is admitted was the case as to Altvater's estate. As it seems to us, however, the administrator's possession and title were not adverse to the heir, and so far as any but creditors were concerned the heir in whom the title vested, subject only to the right of the administrator to dispose of the land to pay debts, had the right to the title and possession, and the right to maintain an action and recover possession as against any one except the administrator. *Brenham v. Story*, 39 Cal. 179-183; *Code Civil Proc.* §§ 1452, 1453. The administrator is in privity with and represents both heirs and creditors, and a judgment in ejectment recovered by or against an administrator is an estoppel in favor of or against the heir and those claiming under him. *Cunningham v. Ashley*, 45 Cal. 485-493; *McLeran v. Benton*, 73 Cal. 329-342, 14 Pac. Rep. 879. This being so, there is no sound reason for declaring that the judgment recovered by the administrator would not inure to the benefit of those to whom the sole heir had conveyed prior to the recovery of such judgment.

We pass then to the proposition advanced by the appellant in his reply brief, viz., that there is no finding upon a material issue raised by the pleading, in this, that the answer pleads the Plate judgment as an estoppel against the plaintiff, and that there is no finding whether it is or is not a bar to the plaintiff's recovery. As one of the grounds given in the notice of motion for a new trial is that "the decision is against law" the point can be considered on this appeal. *Knight v. Roche*, 56 Cal. 17. It is conceded by the respondent that such judgment would not be a bar as against the right of Dyson's representatives to litigate the question as to the title of the land involved in that judgment because Dyson, the landlord, was not joined in the action against the tenant. But suppose, as we must for the purposes of this point, that the plaintiff was entitled to a finding that such judgment was no bar as to his right to litigate the question above referred to, and that he in that respect was not bound by the judgment, yet, under the other findings of the statute of limitations, etc., in favor of the defendants, such a finding would not aid the plaintiff. The failure to make a finding as to a matter which would not affect the result should not be allowed to reverse an order refusing a new trial. But the plaintiff further contends that the order should be reversed because the court erred in admitting the Plate judgment and the writ of possession in evidence, from the fact that neither Dyson nor his representatives were bound thereby. As to the question of title, it is conceded that they are not so bound. But, as to the question of where the actual possession of the Altvater land was from

the date of the service of summons in the Plate suit against Dyson's tenant, it seems to us that the reasons advanced by respondents' counsel in favor of the admission of the evidence objected to are sound. While the judgment is not an estoppel against the plaintiff from setting up his title, if he have any, it is, as it seems to us, taken in connection with the other evidence, admissible to show where the actual possession of the property was. The tenant by the judgment was found not to have had any right of possession from the date of the summons. His possession was that of Dyson only. If he had no right of possession Dyson had none. In other words, Dyson could not maintain title by adverse possession, when the only possession he had was by a tenant, who did not have any adverse possession, but one founded in fraud and collusion. Whatever disturbs the possession of the tenant alone in possession must disturb that of the landlord, who has given his possession for the time being to the tenant. When a landlord holds possession by a tenant, "that possession ceases to be peaceable when the tenant is sued. A claimant of land who brings his action against the party whom he finds in possession thereby stops the running of limitations in favor of the party's landlord. There is such privity between the tenant and the landlord that, for the purpose of stopping limitation, the suit against the tenant is as effectual as if brought against the landlord also." *Read v. Allen*, 56 Tex. 176-180. It was also held in the case of *Read v. Allen*, 58 Tex. 380-382: "A judgment rendered against a tenant and the pleadings upon which such judgment was rendered are admissible for the purpose of showing when the possession of a landlord through a tenant ceased to be a peaceable possession, but as against the landlord for no other purpose." So in *Allen v. Read*, 66 Tex. 13-20, the same principle seems to be announced. In *Newman v. Bank*, 80 Cal. 368, 22 Pac. Rep. 261, it was decided that a co-tenant, although not joined in an action, was entitled to whatever benefit accrued to a co-tenant that was a party to such action as affecting the possession of the premises involved, the ground of the decision being the privity existing between co-tenants as to possession of property held by them, or one of them. As the privity existing between a landlord and tenant makes the possession of the tenant that of the landlord, it seems to us that, as in this case, where the landlord has his possession disturbed, and by judgment such possession is held not to have existed against the plaintiff in the action, it affects the landlord as well as the tenant, and dates from the time when the action was commenced, for the possession recovered in ejectment relates back to the commencement of the action. *Dunn v. Miller*, 75 Mo. 260, 272; *Sedg. & W. Tr. Title Land*, § 743. For these reasons, and perceiving no prejudicial error in the record, we advise that the order be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. FOR the reasons given in the foregoing opinion the order is affirmed.

85 Cal. 309

Ex parte KEIL. (No. 20,684.)

(Supreme Court of California. Aug. 4, 1890.)

KIDNAPPING—WHAT CONSTITUTES—HABEAS CORPUS.

1. Though a commitment of one charged with the crime of kidnapping is defective in that it does not contain the name of the person alleged to have been kidnapped, this defect is not such as to entitle the accused to be released on *habeas corpus*.

2. Pen. Code Cal. § 207, declares that "every person who forcibly steals, takes, or arrests any person in this state and carries him into another country, state, or county, or who forcibly takes or arrests any person with a design to take him out of this state, without," etc., is guilty of kidnapping. The evidence on which a commitment was issued showed that defendant and others went on board a schooner moored at a wharf in Los Angeles county, and by force took two sailors and carried them to the island of Santa Catalina, 20 miles from the main-land, and detained them there. *Held*, that defendant was not guilty of kidnapping, as the island is in Los Angeles county, and hence there was no design to remove the sailors from the state. McFARLAND and PATERSON, JJ., dissenting.

3. But such evidence shows that defendant is guilty of false imprisonment, and should not be discharged on *habeas corpus*, but may be held on the same commitment until an information is filed against him for false imprisonment.

In bank. Petition for writ of *habeas corpus*.

Max Lowenthal, for petitioner.

BEATTY, C. J. The petitioner in the above-entitled case has been committed on charges of kidnapping and assault with a deadly weapon. He seeks to be discharged on *habeas corpus*, upon the grounds that the warrant of commitment is defective in substance, and that the evidence contained in the depositions shows that he was not guilty of the offense of kidnapping, but, at most, of a false imprisonment.

1. The commitments are defective in form in failing to show the name of the party assaulted and imprisoned, but this defect does not entitle the prisoner to be discharged. Pen. Code, § 1488; *Ex parte* Bull, 42 Cal. 199. Besides, a proper order for holding the petitioner to answer was in every instance indorsed on the depositions by the committing magistrate, and he could, at any time, amend the warrants of commitment so as to make them fully and formally descriptive of the offense proved by the depositions. *Ex parte* Branigan, 19 Cal. 133.

2. The depositions show that the petitioner and others, about midnight of the 26th of February, 1890, went aboard of a schooner moored at the wharf in San Pedro, in the county of Los Angeles, and by threats, display of pistols, and actual force, unlawfully removed two sailors, Bush and Kemp, from the vessel, and conveyed them in an open boat to the island of Santa Catalina, where they were detained for several days, and until they were released by the sheriff of Los Angeles. Kidnapping is thus defined by section 207 of the Penal Code: "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or who forcibly takes or arrests any person, with

a design to take him out of this state, without having established a claim according to the laws of the United States or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of the state, or to be taken or removed therefrom, for the purposes and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person, is guilty of kidnapping." Santa Catalina island is a part of the county of Los Angeles, and there is no evidence in the depositions that the petitioner took or intended to take Bush and Kemp into any other country, state, or county. Petitioner was not guilty of kidnapping therefore, unless he had the "design to take them out of this state," within the meaning of the section above quoted. Whether he had such design or not depends upon whether the channel 20 miles wide between Santa Catalina island and the main-land is, in the sense of the statute, out of the state. The boundaries of California are defined by article 21 of the constitution as follows: "The boundary of the state of California shall be as follows: Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a south-easterly direction to the river Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river to the boundary line between the United States and Mexico, as established by the treaty of May 30, 1848; thence running west and along said boundary line to the Pacific ocean, and extending therein three English miles; thence running in a north-westerly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, all the islands, harbors, and bays along and adjacent to the coast." That Santa Catalina island is embraced by this description is admitted, but it is contended that the waters of the ocean at all points more than a marine league from the shore are out of the state, and that the state has no jurisdiction over them; and, consequently, that in conveying his prisoners from the main-land to the island, 20 miles distant, the petitioner necessarily took them, and intended to take them, out of the state. This presents a nice and important question, as to which the court is not agreed, and, as its decision is not essential to a disposition of this case, it will be left for future consideration. We are satisfied that whether or not any part of the channel between Santa Catalina and the main-land is, as between the state and the nation, or as between the United States and foreign na-

tions, a part of the high seas, a mere design to take a person across such channel from one part of Los Angeles county to another part of the same county cannot be held to be a design to take such person out of the state within the meaning of the Penal Code, and, consequently, that there is nothing in these depositions to show that the petitioners were guilty of the crime of kidnapping. But it does not follow from this that the prisoners are unlawfully held, or that they should be discharged from custody. The depositions show that they were guilty of false imprisonment, (Pen. Code, §§ 236, 237,) an offense of which the superior court has jurisdiction, and also that some, if not all, of them, were guilty of assault with deadly weapons. This being so, it is the right and the duty of the district attorney to file informations against them for the offenses disclosed by the depositions, regardless of the terms of the commitments. *People v. Vierra*, 67 Cal. 231, 7 Pac. Rep. 640. Pending the filing of such informations their imprisonment is lawful. Writ discharged, and petitioner remanded.

We concur: FOX, J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J.

McFARLAND and PATERSON, JJ., (*concurring*.) We concur in the judgment remanding the petitioner, but we think that a design to take a person across that part of the Pacific ocean which lies between the main-land and the island of Santa Catalina is a "design to take him out of this state" within the meaning of that part of the Penal Code which defines kidnapping.

Ex parte MILLER. (No. 20,688.) *Ex parte EREWALDSEN*. (No. 20,685.) *Ex parte ANDERSON*, (two cases. Nos. 20,687, 20,689.)

(*Supreme Court of California*. Aug. 4, 1890.)

In bank. Petition for writ of *habeas corpus*.

PER CURIAM. Upon the authority of *Ex parte Keil*, ante, 742, (this day filed,) the writs herein are discharged, and the petitioners remanded.

85 Cal. 280

TOLMAN v. SMITH *et al.*, (REED, Intervenor.) (No. 13,531.)

(*Supreme Court of California*. Aug. 4, 1890.)

COMMUNITY PROPERTY—PRIORITY OF MORTGAGES—JUDGMENT—JURISDICTION.

1. At the request of the mortgagor, a certain person paid a first and second mortgage. For the sum so paid and an additional loan the mortgagor gave him a fourth mortgage, there being a third at the time of the payment. The first and second mortgages were not canceled, but were assigned to and retained by the person paying them. There was no agreement or understanding that the first and second mortgages should be considered satisfied. *Held*, that the first and second mortgages were not extinguished, but, together with the remedy thereon, were suspended until the fourth mortgage should become due and unpaid, and that then they would revive and have priority over the third mortgage.

2. A husband and wife in a mortgage covenanted that they owned the premises in fee-simple, and would warrant and defend the same. At this time the wife had a contract only for the land in the name of her agent. Thereafter the land was conveyed to her, the deed reciting that

the premises "have been purchased by the grantee with her own money, and are owned and held as her separate property." In a suit to foreclose the mortgage, the wife's grantor testified that he did not know who furnished the purchase money. The wife testified that her husband told her that the property was bought with her separate funds. *Held*, that the evidence was insufficient to overcome the presumption that the property was community property.

3. In such action it was proper to try the question of whether the property was community or separate property, the rule that adverse titles cannot be litigated in foreclosure applying only to interests not subject to the mortgage.

4. Of two mortgages, one given before the mortgagor acquired title, and the other as part of the same transaction, by which he acquires title, (being for part of the purchase money,) the second mortgage has precedence, the mortgagee having no notice of the prior mortgage.

5. A decree in a foreclosure suit that a certain sum is due plaintiff, and that the mortgaged property be sold and applied thereon, there being no provision for docketing a judgment for any deficiency, is not a personal judgment against defendant.

6. A finding "that the law of said states is the same as the law of this state" is a sufficient finding as to the law of the other states.

7. A court does not lose jurisdiction of a suit to foreclose a mortgage by reason of the fact that pending the suit a new county is created including the mortgaged land.

McFARLAND, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

A. W. Hutton and Victor Montgomery, for appellants. Holloway & Kendrick, for respondent.

HAYNE, C. This was a suit to foreclose a mortgage made in Nebraska by the defendants, W. S. Smith and Eunice W. Smith, his wife, upon property in California, to secure a debt payable in Illinois. One Reed filed an intervention for the foreclosure of two prior mortgages upon the property. The trial court gave judgment for the plaintiff, and the defendant Eunice W. Smith and the intervenor appeal.

1. The former appellant makes a number of points, which we shall consider separately:

(a) We think it clear that there was no misjoinder of causes of action.

(b) It was not error to deny the motion for change of venue. The property was in the county of Los Angeles when the action was commenced, and therefore the suit was properly commenced in that county. The court did not lose jurisdiction of the cause by the creation of the county of Orange. Assuming in favor of the appellant that the case should have been transferred to the latter county, the party entitled to such change should have made a motion therefor. No motion was made until after the case had been decided, and then no notice was given to the respondent. Under these circumstances the motion was properly denied.

(c) The parties stipulated that no personal judgment should be rendered against Eunice W. Smith, and it is said that the judgment was in violation of the stipulation; but no personal judgment was taken against her. The decree adjudges that a certain sum is due to the plaintiff, and that the property be sold

and the proceeds applied to the payment of such sum and the costs and expenses. There is no provision for docketing a judgment for any deficiency that may remain after the application of the proceeds of sale. This is not a personal judgment against the appellant.

(d) It is contended that the court erred in omitting to find what was the law of Nebraska and Illinois. Assuming that such a finding was necessary, (compare Civil Code, § 755.) we think that it was made. After stating that no evidence was introduced as to the law of Nebraska or Illinois, the court "finds that the law of said states is the same as the law of this state." This, we think, was sufficient.

(e) The remaining points on behalf of this appellant are based upon the fact that she was a married woman, and that the certificate of her acknowledgment was defective. It is true that the certificate was defective. The complaint prayed that it be corrected, and the judgment was that it be corrected. It is contended, however, that the evidence was insufficient to justify the decision in that regard, and that certain errors and irregularities occurred; but in our opinion it is immaterial whether the certificate was properly corrected or not. The complaint alleges that the property was community property; and, if this allegation be true, the husband had entire control, and could mortgage the property without the consent of the wife, notwithstanding the fact that the deed was made to her. *Meyer v. Kinzer*, 12 Cal. 252; *Tryon v. Sutton*, 13 Cal. 493; *Kohner v. Ashenauer*, 17 Cal. 581; *Landers v. Bolton*, 26 Cal. 394; *Althof v. Conheim*, 38 Cal. 233; Civil Code, § 172. The court found that the property was community property. It is contended, however, that this finding is not justified by the evidence. The evidence is as follows: At the time of the execution of the mortgage this appellant did not have the legal title to the property. It would seem that she had a contract for a conveyance made in the name of her agent, one Cody. The mortgage, however, contained the following clause: "The said Eunice W. Smith and W. S. Smith hereby covenant with said D. H. Tolman & Co. that they own said premises in fee-simple, and will warrant and defend the same against all claims whatsoever." About a month after the execution of this mortgage the owner of the property (one Darby) made a deed to this appellant, which contained the following recital: "The above-described premises have been purchased by the grantee with her own money, and are owned and held as her separate property." The grantor, however, testified, without objection, that he did not know who furnished the purchase money. The wife testified that the property was purchased with her separate funds, but she also testified as follows: "The only source of information as to whether any of my property or money was used in the purchase of said property is what my husband told me." The husband was not called as a witness. Upon this evidence we think that the finding was correct. The act of 1889 in relation to community property did not take effect

until after the trial, and hence does not apply. By the prior law the presumption was that the property was community property, and this presumption could only be overcome by clear and satisfactory evidence. *Smith v. Smith*, 12 Cal. 224; *Meyer v. Kinzer*, Id. 247; *Ramsdell v. Fuller*, 28 Cal. 42; *Morgan v. Lones*, 78 Cal. 62, 20 Pac. Rep. 248. The testimony of the wife is, in effect, merely that her husband told her that her funds were used in the purchase. Of her own knowledge she knew nothing. The only other evidence is the recital in the deed. This deed, it will be remembered, was made after the execution of the mortgage. The mortgagee, therefore, ought not to be bound by a recital which the mortgagor chose to have inserted in the deed; especially in view of the covenant in the mortgage that both husband and wife were the owners. Furthermore, such a recital does not conclude a creditor seeking to subject the property to the payment of his debt. Compare *Swain v. Duane*, 48 Cal. 360. If it has any force at all, it can only operate as a declaration of the grantor; but whatever force it might have as such is destroyed by the testimony of the grantor that he knew nothing about the matter. Neither of the foregoing pieces of evidence, nor both together, amount to clear and satisfactory proof that the property was the separate property of the wife. The presumption above mentioned must therefore prevail, and the property must be held to have been community property, in view of which all that part of the case relating to the certificate of acknowledgment may be treated as surplusage, and any error that may have intervened in relation thereto is immaterial. It is said, however, that the question whether the property was community or separate property could not be tried in the action; but the rule that adverse titles cannot be litigated in foreclosure has no application. That rule applies to interests which are not subject to the mortgage, but there is nothing to prevent the most hostile interests from being covered by the same mortgage, if the owners so choose; and the question whether any interest is or is not subject to the mortgage is one which must necessarily be tried in every foreclosure suit in relation to it. It would be strange if the defendants' mere assertion that the interest was not subject to the mortgage could prevent a trial of that question. In this case the question was tried, and it was determined that the wife's interest was subject to the mortgage; and, as above stated, this was perfectly proper.

2. The foregoing does not conflict with the decision on the former appeal. 74 Cal. 345, 16 Pac. Rep. 189. There appeared from the record before the court that the property was the separate property of the wife, and the decision related to the certificate of acknowledgment.

3. The trial court found that the two mortgages set up by the intervenor had been paid and satisfied, and upon that theory rendered judgment against him. Before examining the correctness of this finding, it may be premised that the mortgages set up by the intervenor were origi-

nally prior to that of the plaintiff. One (which was given to the Commercial Bank of Santa Anua) was made nearly a year before that of the plaintiff. The other (which was given to Darby, the grantor of Eunice W. Smith, for part of the purchase money) was several weeks later than the plaintiff's mortgage; but it will be remembered that neither Eunice W. Smith nor her husband had any title at the time they executed the plaintiff's mortgage. As against them the after-acquired title became subject to the mortgage, but not as against intervening incumbrancers. Now, as above stated, the Darby mortgage was given to secure part of the consideration of the deed from him to Eunice W. Smith, and was part of the same transaction by which Eunice W. Smith and her husband acquired the property. Darby (the owner) had no notice that his grantee had undertaken to mortgage the property before he had conveyed it. (It is found that he had notice, folio 131; but this finding is directly contrary to the only evidence on the subject, folio 222.) And it seems clear that the instantaneous seisin which Eunice W. Smith and her husband may have had by reason of any momentary interval between the deed and the mortgage did not give priority to the mortgage made when they had no title. Compare *Burns v. Thayer*, 101 Mass. 426; *Smith v. Stanley*, 37 Me. 13. Bearing in mind, then, the fact that the two mortgages set up by the intervenor had priority over the plaintiff's mortgage, we proceed to inquire whether the finding that they were paid and satisfied is sustained by the evidence. The only evidence upon the subject is the testimony of Eunice W. Smith, at pages 70-74 of the transcript. In our opinion, what her testimony shows is simply this: That at her request the intervenor paid to the holder of said two mortgages the sums due thereon; that they were not canceled, but were assigned to the intervenor, who retained them; and that Eunice W. Smith thereupon gave to him a new mortgage for \$8,500, which was intended to cover the sums paid by him upon the old mortgages, and \$4,000 additional, loaned by him to her. In other words, the old mortgages were retired, and a new one (having a longer period to run) substituted in their place; but there was no agreement or understanding that they should be considered satisfied, and they were not canceled, but were retained by the intervenor. This does not, in our opinion, show an extinguishment of the old mortgages. Even if the intervenor had not taken an assignment at the time he paid them off, a court of equity would, for purposes of justice, apply the principle of subrogation. *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. Rep. 92; *Gans v. Thieme*, 93 N. Y. 232; *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. Rep. 222; *Bacon v. Goodnow*, 59 N. H. 415. And much more is he entitled to the benefit of those securities, in view of the fact that they were not canceled, but were assigned to him. If nothing else had occurred, it is clear that he would be entitled to enforce the old mortgages. What occurred in addition, viz., the substi-

tution of a new mortgage, did not operate to discharge the old ones, but merely suspended the remedy upon them. It is well settled that, in the absence of an agreement to that effect, the payment of one note by another is only conditional, and not absolute, payment. It extends the time for payment until the maturity of the new note, or, as it is said, "suspends" the remedy upon the old note, but does not extinguish it. *Brewster v. Bours*, 8 Cal. 501; *Griffith v. Grogan*, 12 Cal. 317; *Higgins v. Wortell*, 18 Cal. 333; *Crary v. Bowers*, 20 Cal. 88; *Smith v. Owens*, 21 Cal. 23; *Welch v. Allington*, 23 Cal. 323; *Brown v. Olmsted*, 50 Cal. 165; *Tobey v. Barber*, and notes, 2 Amer. Lead Cases. 225. Now, inasmuch as the remedy upon the debt was suspended, it is clear that the remedy upon the mortgages, which were mere incidents to the debt, was suspended also. And, inasmuch as the new note had not matured at the time of the filing of the complaint of intervention, we think that the intervenor was not entitled to have the old mortgages foreclosed in the present case. See 2 *Daniel, Neg. Inst.* § 1272; *In re Matthew*, 12 Q. B. Div. 506. But, if the intervenor had any rights in the premises, the decree should have saved or provided for them in some appropriate way, and not adjudged that he "be forever barred and foreclosed" of all right in the premises, which in effect adjudged that the intervenor could not enforce the old mortgages in any way, even if the new note should not be paid at maturity. This raises the question whether the old mortgages would be revived, with the debts they were given to secure, in case of non-payment of the new note at its maturity, and whether, if so revived, they would have priority over the plaintiff's mortgage.

In relation to the first branch of the question, it seems clear that all the incidents of the debt ought to be revived with the debt. It is to be observed in this regard that no question of the statute of limitations is involved. The statute had not run on either of the old notes when the complaint of intervention was filed, and the statute is not pleaded or relied upon. Nor is it material that the Code provides that "a mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." Civil Code, § 2922. For, in the first place, as long as the statute of limitations has not run, a renewal or extension of the mortgages is not required. They are alive, though "suspended." And, in the second place, the substituted mortgage was executed with the requisite formalities, and, as shown by the cases cited below, it will be treated by a court of equity as an extension of the old mortgages to the extent of the debt secured by them. And we think that, when revived, the old mortgages will have priority over the plaintiff's mortgages. They will stand just where they stood before they were suspended. This is clearly the result of equitable principles; for, as we have seen, the change did not extinguish the indebtedness or the security. It was a change of form.

merely, and equity regards matters of substance, and not matters of mere form; and the plaintiff did not part with anything, or alter his position in any way, after the change in the form of the indebtedness to the intervenor. He stands now precisely where he stood before such change; and, so far as this question of priority is concerned, is a mere volunteer. This result, which seems clear upon principle, is in accordance with the authorities. The instances in which a court of equity will, to accomplish the ends of justice, keep alive a security which in form has been extinguished, are frequent and familiar. Thus, where a mortgagor conveys the mortgaged premises to a first mortgagee to satisfy the debt, without the expenses of foreclosure, equity will consider the first mortgage as still subsisting as against subsequent incumbrances. *Brook v. Rice*, 56 Cal. 428; *Smith v. Swan*, 69 Iowa, 412, 29 N. W. Rep. 402; *Silliman v. Gammage*, 55 Tex. 366; *Collins v. Stocking*, 98 Mo. 296, 11 S. W. Rep. 750; *Stanton v. Thompson*, 49 N. H. 272; *Edgerton v. Young*, 43 Ill. 468; *Richardson v. Hockenhall*, 85 Ill. 124; *Lowman v. Lowman*, 118 Ill. 586, 9 N. E. Rep. 245. So, if the owner of the equity of redemption acquires the mortgage, a court of equity will, when the purposes of justice require it, treat the mortgage as still subsisting. *Thompson v. Chandler*, 7 Greenl. 381; *Duffy v. McGuinness*, 13 R. I. 597. So, where a first mortgagee purchases under a foreclosure sale, equity will keep his mortgage alive for the purposes of protection against a second mortgagee. *Carpentier v. Brenham*, 40 Cal. 284. And so where, as in the case before us, one mortgage is substituted for another, equity will keep the first alive when the interests of justice require it. In *Gregory v. Thomas*, 20 Wend. 18, this principle was applied, even in an action at law. There, in answer to an objection that the first mortgage was merged, *COWEN, J.*, delivering the opinion, said: "The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, in every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt of equal degree with the former, for the same debt, will not, by operation of law, extinguish it." And the principle under consideration was in substance laid down and applied in *Swift v. Kraemer*, 13 Cal. 530. There it was held that where two notes and mortgages were retired, and a new note and mortgage given to cover the old ones, and an additional advance in cash, the retired mortgages would be kept alive as against an intervening homestead, and the court, per *BALDWIN, J.*, said: "We regard the cancellation of the old mortgages and the substitution of the new as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative." And so in other

cases. See *Pouder v. Ritzinger*, 102 Ind. 571, 1 N. E. Rep. 44; *Packard v. Kingman*, 11 Iowa, 219; *Flower v. Elwood*, 66 Ill. 438; *Walters v. Walters*, 73 Ind. 425. And, even where there has been a formal release and cancellation of a mortgage, a court of equity will set it aside for the purposes mentioned. *Gieb v. Reynolds*, 35 Minn. 331, 28 N. W. Rep. 923; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *Young v. Shaner*, 73 Iowa, 555, 35 N. W. Rep. 629. And see, also, *Barnes v. Mott*, 64 N. Y. 401. It may be remarked that the transcript does not show whether, at the time the intervenor took his new mortgage, he had notice of the plaintiff's mortgage; but, as above stated, the plaintiff in no manner changed his position after the substitution of a new mortgage for the two old ones, and therefore we do not consider that the question of notice is involved, at least in a case like this, where there was no release or cancellation of the old mortgages. We advise that, as against the appellant Eunice W. Smith, the judgment and order appealed from be affirmed, and that as against the intervenor the order denying a new trial be affirmed, but that the decree be modified in accordance with this opinion, the intervenor to recover his costs of appeal.

WE CONCUR: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from, as against the appellant, Eunice W. Smith, are affirmed, and, as against the intervenor, the order denying a new trial is affirmed, the decree modified in accordance with the foregoing opinion, and the intervenor is allowed his costs of appeal.

I dissent. MCFARLAND, J.

85 Cal. 218

CAMPODONICO v. OREGON IMP. CO. (No. 12,606.)

(Supreme Court of California. Aug. 1, 1890.)

APPEAL—PRACTICE—TIME OF FILING POINTS.

The rule of the California supreme court requiring the appellant's points to be filed by a given time does not prescribe, as a penalty for failure to conform thereto, that the judgment shall be affirmed without considering the merits of the appeal, but only that the court may, in its discretion, refuse appellant the privilege of making an oral argument.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Venable & Goodchild, for respondent.

PER CURIAM. The transcript in this cause was filed December 5, 1889, and the cause was placed on the Los Angeles calendar for April 14, 1890. The appellant's points were not filed until April 8th, 26 days after the time when, according to the rule of the court, they should have been filed. On the day the cause was set for hearing, the respondent moved the court to affirm the judgment without considering the merits of the appeal as a penalty upon the appellant for his failure to comply

with the rule. But the rule prescribes no such penalty, and is not understood to involve any, except that the court may, in its discretion, refuse the appellant the privilege of making an oral argument. Motion denied.

85 Cal. 49

STROUSE v. POLICE COURT. (No. 13,826.)
(Supreme Court of California. July 25, 1890.)

WRIT OF PROHIBITION—WHEN LIES.

Under Code Civil Proc. Cal. § 1103, providing that the writ of prohibition may be issued "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law," the police court will not be restrained from proceeding with the trial of a charge of violating the license laws, as, even if it has no jurisdiction of the case, there is a plain, speedy, and adequate remedy at law, by appeal in case of a conviction.

In bank. Application for writ of prohibition.

Alfred Clark, for petitioner.

PATERSON, J. A complaint was filed in the police court of the city and county of San Francisco, on April 24, 1890, charging the petitioner with a misdemeanor in having transacted and carried on the business of selling meat without having first taken out a license as required by an ordinance of the board of supervisors. The petitioner was arrested under a warrant issued on said complaint, and in due time entered a plea of not guilty, and another plea challenging the jurisdiction of the court. It is alleged that, notwithstanding his plea to the jurisdiction, the police court threatens to proceed with the trial of the charge against petitioner, and he prays for a writ of prohibition to restrain the police court from proceeding with the trial of the action.

Section 1103, Code Civil Proc., provides that the writ of prohibition may be issued "in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." This is not such a case. If the petitioner should be convicted in the police court he will have a plain, speedy, and adequate remedy at law, by an appeal to the superior court. *Levy v. Wilson*, 69 Cal. 105, 10 Pac. Rep. 272. Application for writ denied.

We concur: **SHARPSTEIN, J.**; **McFARLAND, J.**; **FOX, J.**; **THORNTON, J.**

85 Cal. 208

Ex parte CHRISTENSEN. (No. 20,653.)
(Supreme Court of California. Aug. 2, 1890.)

LIQUOR LICENSE—CONSTITUTIONALITY OF ORDINANCE.

1. Under Consolidation Act of San Francisco, § 68, providing that "every ordinance or resolution * * * shall, after its introduction in the board, be published," the publication of an amendatory ordinance is sufficient without the republication of the ordinance amended or affected.

2. Order No. 1589 of the city of San Francisco, as amended by order No. 1845, relative to liquor licenses, provides for the payment of a specified license fee, and declares a violation of the order a misdemeanor punishable by a fine of not more than \$1,000, or by imprisonment for not more than six months, or both. Pen. Code Cal. § 435, provides that any person carrying on a business for

which a license is required by the laws of the state without the license so prescribed, is guilty of a misdemeanor. Section 19 prescribes as a punishment for misdemeanors not otherwise provided for, imprisonment for not more than six months, or a fine not exceeding \$500, or both. Held that, though the punishment provided by the ordinance conflicted with that prescribed by the statute, this portion of the ordinance could be rejected, and that providing for the license could stand, as they were not dependent on each other.

3. So, too, portions of the ordinance in conflict with the provisions of the Code of Civil Procedure relative to evidence may be rejected.

4. The provisions of the ordinance making the issuance of a license dependent upon the permission of a majority of the board of police commissioners, and the approval of adjacent property owners, is not in violation of the federal constitution, there being no question of interstate commerce.

McFARLAND, J., dissenting.

In bank. *Habeas corpus.*

Alfred Clarke and Jennie Laird, for petitioner. *Geo. A. Johnson*, Atty. Gen., and *David Louderback*, for respondents.

PER CURIAM. The petitioner was arrested upon a charge of misdemeanor, consisting in the carrying on of the business of a retail liquor dealer in the city of San Francisco without a license. He contends that the ordinance prescribing the license is void for various reasons:

1. The original order, numbered 1,589, was passed in 1880. In 1866, subdivision 39 of section 10 of this order, which relates to liquor licenses, was amended by order 1845, and it is contended that this amendatory order was not properly passed and published in accordance with the provisions of the county government act. But we do not think that the provisions of the county government act apply to the passage and publication of ordinances of the city and county of San Francisco. It is argued, however, that even under the provisions of the consolidation act the order was not properly passed. The main point seems to be that the amendatory order only, and not the original order, was published. But there is no merit in this position. Section 68 of the consolidation act provides that "every ordinance or resolution, etc., shall after its introduction in the board be published," etc. This only requires the ordinance or resolution itself to be published. It does not require the republication of the ordinance or resolution which is amended or affected. Order No. 1845 was a separate order and was complete in itself, and, in our judgment, it was sufficient to publish it only, without republishing the original ordinance. In other respects it was properly passed.

2. It is urged that the order is in conflict with the general laws of the state. The order provides for the payment of a specified license fee, and declares that violation of the order shall be a misdemeanor, and shall be punishable by a fine of not more than \$1,000, or imprisonment not more than six months, or both. The latest general law on the subject is section 435 of the Penal Code, which is as follows: "Every person who commences or carries on any business, trade, or profession, or calling, for the transaction

or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of misdemeanor." And the punishment of misdemeanors, not otherwise provided for, is imprisonment for not more than six months, or a fine not exceeding \$500, or both. Pen. Code, § 19. It is argued that these two provisions are in conflict, and *In re Sic*, 73 Cal. 143, 14 Pac. Rep. 405, is cited. In the *Case of Lawrence*, 69 Cal. 611,¹ it was held that the words "by any law of the state" included a municipal ordinance. In this view it must be admitted that the punishment provided by the ordinance conflicts with the punishment provided by the statute. But there is no other conflict between the two provisions. There is no conflict as to what the offense is. The provision of the Penal Code simply provides that whoever transacts certain business without a license shall be punished in a certain way. It does not purport to fix the license fee, or provide for its issuance. For that it refers to other laws. Therefore the other laws cannot be in conflict with the Code in so far as it fixes the fee, or provides for the issuance of the license. It is only in conflict with the Code so far as it attempts to prescribe the punishment. This latter, however, may be discarded entirely without affecting the provision that the business shall be licensed in a certain way. If, for example, the order provided no punishment whatever for doing business without a license, but merely provided what the license should be, it would be valid, and the statute would supplement it by making the failure to comply with the order a crime, and providing the penalty. The portion of the ordinance prescribing the penalty may, therefore, be rejected, and the portion of the ordinance providing for the license may stand. For nothing is better settled than that, if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected. The *Case of Sic* is not like that before us. There the law did not refer or relate to the ordinance, but each provision was complete in itself, and provided for the punishment of the same act, and the objection was that if both were valid a man might be punished twice for the same offense. Nothing of the kind could happen under the provisions under consideration here. The complaint is not insufficient under this view. It states the fact that the petitioner was doing business without the requisite license; refers to the original order and to the amendatory order by number; and concludes that his acts are "contrary to the form, force, and effect of the statute in such cases," etc. It is further argued that the provisions of the order are in conflict with the provisions of the Code of Civil Procedure in relation to evidence. This seems to be based upon the fact that the order makes certain provisions in relation to the burden of proof, and as to the effect of certain acts as evidence. It may be considered

that the board has no power to establish rules of evidence for the guidance of courts. But the prisoner has not yet been tried, and it cannot be presumed that the court which is to try him will fall into error. These portions of the order are distinctly separable from the others, and consequently may be rejected without affecting the remainder.

3. It is argued that the order is in violation of the provisions of the federal constitution. This seems to be based upon the fact that the issuance of the license is made to depend upon the permission of a majority of the board of police commissioners, or, if that cannot be obtained, upon the approval of 12 property owners in the block in which the business is carried on. The language of the order on this point is as follows: "No license as a retail liquor dealer or as a grocer and retail liquor dealer shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than 12 citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocery and retail liquor dealer is to be carried on." The objection is that this makes the license depend upon the arbitrary will and pleasure of the board of police commissioners in the first instance, and of the 12 property owners in the second; and the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, and other cases from the federal courts, are cited. But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. See *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273. And, if the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases. There is no ground for raising the question of interstate commerce in this case, and therefore, even if it be conceded that the conditions were arbitrary, they were within the power of the board. The learned counsel in a supplemental communication calls attention to the fact that the supreme court of the United States has just held subdivision 33 of section 10 of this same ordinance to be invalid. We presume that the decision proceeded upon the ground of interstate commerce. But that subdivision may be stricken out, and the rest of the order may stand. The petitioner had been doing business under a license, and it is contended that he was entitled to notice of its withdrawal. But, under the ordinance, a license of this character could be granted for three months only. The petitioner's license expired on June 17th,

¹11 Pac. Rep. 217.

and was not renewed. The complaint against him was filed June 20th. It thus appears that it was not the case of the revocation of an existing license, but of the refusal to issue a new license after a previous one had expired. In such a case we do not think that notice to the petitioner was necessary. Various other points are made, but we do not think there is any merit in any of them. The prisoner is remanded to the custody of the chief of police.

I dissent: MCFARLAND, J.

86 Cal. 37

DAVIES v. CITY OF LOS ANGELES *et al.*
(No. 13,803.)

(Supreme Court of California. Sept. 15, 1890.)

CONSTITUTIONAL LAW—CITY CHARTERS—STREET
ASSESSMENTS.1. Const. Cal. art 11, § 8, provides for the
preparation and adoption of a charter for any

city, which shall be submitted to the legislature, and adopted by it, or rejected, "without power of alteration or amendment;" but requires such charter to be "consistent with and subject to the laws of the state;" and section 6 provides that all charters "shall be subject to and controlled by general laws." *Held*, that St. Cal. 1889, p. 70, providing for the opening and widening of streets within municipalities, being a general law, is applicable to the city of Los Angeles, though its charter was framed under said section 8. BEATTY, C. J., and Fox, J., dissenting.

2. St. Cal. 1889, p. 70, is entitled, "An act to provide for laying out," etc., "any street," etc., "within municipalities, and to condemn and acquire any and all land and property necessary and convenient for that purpose." *Held*, that provisions therein for the condemnation of land and for assessments on other lands to pay therefor are the means by which the object of the act, the laying out, etc., of streets, is to be accomplished, and hence the act is not unconstitutional because the subject of assessments is omitted from its title.

3. Such statute provides for publication of notice of the resolution of the city council to undertake the improvement, with a description of all lands to be affected; of notice of the filing of the report of commissioners appointed to consider the improvement, and of the confirmation of their report; and also of notice of the assessments made against land, and of their sale in case of delinquencies. And provision is made for the appearance of parties aggrieved to state the objections at each stage of the proceedings. *Held*, that the fact that personal service of notice on the parties to be affected is not required does not render the statute objectionable as a taking of property without due process of law. BEATTY, C. J., dissenting.

4. The provisions of the act for a lien on land for benefits assessed against it are not rendered invalid by the mere fact that, as the improvement may never be completed, the benefits may never accrue.

5. Nor are the provisions for assessments void because the amount thence arising may be greater than is needed, for the act itself provides for refunding the excess. BEATTY, C. J., dissenting.

6. Such act is not in violation of Const. Cal. art. 11, § 13, as delegating municipal functions to a special commission, as the commissioners therein provided for are merely the agents of the municipality, and their acts are not binding or effective until they are approved and confirmed by the city council.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

C. McFarland and Wells, Guthrie & Lee, (Horace G. Platt and Pierson & Mitchell, amici curiæ,) for appellants. John Haynes, (Cameron H. King and Henry E. Highton, amici curiæ,) for respondent.

WORKS, J. This is an action by the respondent against the city of Los Angeles and W. E. Morford, street superintendent of said city, to declare void an assessment made against the respondent's property for the payment of the expenses of opening and widening a certain street in said city, and to enjoin the enforcement thereof. There was a demurrer to the complaint, which was overruled, and, the defendants standing on their demurrer and refusing to answer, judgment was rendered accordingly, and the defendants appeal. The proceedings complained of were had under and in conformity to the act of the legislature of 1889, providing for the opening and widening of streets. St. 1889, p. 70. It is not only contended that

the statute referred to was not fully complied with, but the statute itself is attacked on the ground that it is unconstitutional; and it is further claimed that, as the special charter of Los Angeles contains ample provisions for the opening and widening of streets, the statute is not applicable to that city. The latter of these propositions is mostly relied upon, apparently, by counsel for the respondent, as it is much more fully and elaborately argued than other questions presented in his brief. But the point is made that the statute is unconstitutional on several grounds, and these points are supported by the attorneys, who are interested in other cases involving the same questions, and who have for that reason been allowed to file briefs.

As the question whether the statute in question or the special charter of Los Angeles shall prevail is presented by counsel for respondent alone, it will be first considered. The learned counsel has presented his views in support of the charter as the prevailing and only law in force in the city with great clearness and ability, but his whole argument is, in our opinion, in the face of direct constitutional provisions, and a number of decisions of this court. His contention is that the charter of the city contains provisions covering the entire subject embraced in the act referred to; that the provisions of the two are wholly inconsistent and irreconcilable, and cannot stand together; that a charter prepared and approved as this was, under the provisions of the constitution, cannot be altered, amended, annulled, repealed, or superseded by any act of the legislature, general or special; and that, therefore, proceedings of this kind cannot be taken under the statute but must be had under the charter. Section 8, art. 11, Const., as amended, provides: "A city, or consolidated city and county, containing a population of, etc., may frame a charter for its own government, consistent with and subject to the laws of this state, by causing a board of fifteen freeholders, who shall have been, for at least five years, qualified electors thereof, to be elected by the qualified voters of such city, or city and county, at any general or special election, whose duty it shall be, within one hundred days after such election, to prepare and propose a charter for such city, or city and county. * * * And, if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or, if such city be consolidated with the county, then of such city and county, and shall become the organic law thereof, and supersede any existing charter or amendment thereof, and all special laws inconsistent with such charter. * * * All courts shall take judicial notice thereof. The charter so ratified may be amended, at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city, or city and county, to the quali-

fied voters thereof, at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the electors voting thereat, and approved by the legislature, as herein provided for the approval of the charter." This section provides, in terms, that a charter framed under it shall be "consistent with and subject to the laws of this state." And section 6, art. 11, further provides that "all charters framed or adopted by authority of this constitution shall be subject to and controlled by general laws." The language of this latter section is plain and unambiguous, and cannot be explained away by any reasoning, however ingenious. It makes all charters framed or adopted under the constitution subject to and controllable by general laws. *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615; *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929. See, also, *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652. The question before us was carefully and thoroughly considered in the cases cited, and it is conclusively shown that a charter like the one under which the city of Los Angeles exists is subject to general laws, and that a statute like the one now attacked is a general law, within the meaning of the constitution. It is useless to discuss the propriety of allowing the legislature to interfere by general laws with the local affairs of a city. The constitution so provides, in plain terms, and, so far as the courts of the state are concerned, this must settle the controversy. If the power given the legislature to enact laws of this kind is an evil affecting the rights of the city governments, the remedy is by amendment of the constitution. The courts cannot override a plain constitutional provision, however objectionable it may seem to parties interested. The only question about which there could be any reasonable doubt is whether the statute under consideration is a general law or not, and that question has been firmly settled by several well-considered cases, above cited, and should be equally beyond controversy in the courts of this state. It is contended that although the statute is general in its terms, and made applicable to all cities, it was, in fact, passed for the purpose of affecting the improvement of a certain street in the city of San Francisco; but we must be governed by the language of the act, and not by any outside showing as to the intent and object of its passage. Counsel concedes that the decided cases give a "construction to these provisions wholly inconsistent with that for which I [he] contend," but attempts to show that the precise question involved here has not before been presented in such form as to make a decision of it necessary. Perhaps the precise question now before us has not been presented in the same form that it is now presented, but the precise principle here involved has been presented, and decided adversely to his contention, which is the same thing in effect.

It is urged upon us that the statute is unconstitutional so far as it gives authority to assess the property of persons with-

in the assessment district, because the subject of such assessment is not included in the title of the act. The title of the act is as follows: "An act to provide for laying out, opening, extending, widening, straightening, or closing up in whole or in part any street, square, lane, alley, court, or place within municipalities, and to condemn and acquire any and all land and property necessary or convenient for that purpose." We think this point is not well taken. The subject of the act, and the only one, is the laying out, opening, extending, widening, straightening, or closing up streets, squares, lanes, alleys, and courts, or places, and all of the provisions of the act relating to the condemnation of lands, and assessments of other lands to pay therefor, are the means by which this one object of the statute is to be accomplished. Therefore the title of the act, instead of containing less than is necessary, contains more than the constitution requires. *De Witt v. San Francisco*, 2 Cal. 289, 299; *People v. Briggs*, 50 N. Y. 553, 563; *Brewster v. City of Syracuse*, 19 N. Y. 116.

It is further contended that the statute is unconstitutional because it provides for taking property without due process of law, because the notice provided for may be given generally by posting, and no personal notice to each of the parties interested is required or authorized. Section 2 of the act provides that before ordering the work to be done the city council shall pass a resolution declaring its intention to do so, describing the work of improvement, and the land deemed necessary to be taken therefor, and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, costs, and expenses thereof. Section 3 provides for notice of the passage of such resolution as follows: "The street superintendent shall then cause to be conspicuously posted along the line of said contemplated work or improvement, at not more than three hundred feet in distance apart, but not less than three in all, notices of the passage of said resolution. Said notices shall be headed, 'Notice of Public Work,' in letters not less than one inch in length, shall be in legible characters, state the fact of passage of the resolution, its date, and, briefly, the work or improvement proposed, and refer to the resolution for further particulars. He shall also cause a notice, similar in substance, to be published for a period of ten days, in one or more daily newspapers published and circulated in said city, and designated by said city council; or, if there is no daily newspaper so published and circulated in said city, then by four successive insertions in a weekly or semi-weekly newspaper so published, circulated, and designated." Sections 4 and 5 provide when and how the owners of either the property to be taken or that to be assessed may appear and object to the improvement, and for a hearing of such objections by the city council. Following sections provide for the appointment of commissioners to determine the value of the land to be taken, the amount of expenses, and that

such commissioners shall determine the value of the land taken, fix the amount of expenses, assess the benefits to the several tracts of land within the district, and that they report their proceedings to the city council. Section 13 provides for notice of the action of the commissioners as follows: "Said report and plat shall be filed in the clerk's office of the city council, and thereupon the clerk of said city council shall give notice of such filing by publication for at least ten days in one or more daily newspapers published and circulated in said city; or, if there be no daily paper, by three successive insertions in a weekly or semi-weekly newspaper so published or circulated. Said notice shall also require all persons interested to show cause, if any, why such report should not be confirmed, before the city council, on or before the day fixed by the clerk thereof, and stated in said notice, which day shall not be less than thirty days from the first publication thereof." Section 14 provides for objections to be made by parties interested, for a hearing of such objections, and a decision by the city council. The report of the commissioners, as confirmed or corrected, is required by section 15 to be certified to the street superintendent by the clerk, and by section 16 notice by the street superintendent is required as follows: "The superintendent of streets shall thereupon give notice by publication for ten days in one or more daily newspapers published and circulated in such city, or city and county, or by two successive insertions in a weekly or semi-weekly newspaper so published and circulated, that he has received said assessment roll, and that all sums levied and assessed in said assessment roll are due and payable immediately, and that the payment of said sums is to be made to him within thirty days from the date of the first publication of said notice. Said notice shall also contain a statement that all assessments, not paid before the expiration of said thirty days, will be declared to be delinquent, and that thereafter the sum of five per cent. upon the amount of each delinquent assessment, together with the cost of advertising each delinquent assessment, will be added thereto." The same section provides for the sale of the lands assessed if the assessments are not paid. It is further provided by section 18 that in case any owner of land neglects or refuses to accept the amount allowed him as damages, or objects to the report as to the necessity of taking his land, proceedings may be taken to condemn the same under the law of eminent domain. Thus it will be seen that notice of every material step to be taken as against either the owners of land to be taken or of lands to be assessed is required to be given, and an opportunity to be heard at each step of the proceedings is provided for. Therefore, if constructive service is sufficient in this class of cases, the objection made to the statute on this ground is without foundation. *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. Rep. 921. It must be borne in mind that two proceedings are contemplated and provided for in the act, one against the property to be condemned for

the use of the street, the other to assess other property benefited by the improvement. This action is not by the owner whose land has been condemned. If the notice provided for as against him or his property is not sufficient, it cannot avail the respondent in this case, because a perfect means of condemning property is provided for, as we have seen, by section 18, and this object may be accomplished, and the statute be valid, conceding that the notice provided for as against the owner whose land is to be taken is insufficient. So the question is reduced to this: Is notice by posting and publication sufficient as against the land to be assessed, or must personal notice be given? As to this question, it seems to us there is no room for controversy. The legislature has the undoubted right to say what notice shall be given in this class of cases, so long as the notice required to be given is reasonable, and the proceeding is not arbitrary, oppressive, or unjust, and the notice provided for need not be a personal one. *Lent v. Tillson*, 72 Cal. 404, 413, 14 Pac. Rep. 71; *Scott v. City of Toledo*, 36 Fed. Rep. 385, 396. The notice provided in this case is sufficiently definite. The property to be affected must be designated in the resolution of intention, and the notice must refer to this resolution for particulars. This being so, the notice is sufficient to call to the attention of parties interested that the improvement is contemplated, and, by a reference to the resolution which becomes, by reference to it, a part of the notice, it is sufficient to apprise them that their property is included within the district, and will be affected by such proceeding. In this the notice differs materially from the one condemned in *Boorman v. Santa Barbara* 65 Cal. 313, 4 Pac. Rep. 31.

The next point urged against the statute is that it "authorizes an assessment for benefits and a sale and conveyance on delinquency, while the improvement supposed to confer the benefits is hypothetical, and may be incapable of materialization." In support of this objection to the law, it is contended that the benefits that will result to the land assessed must be rendered certain before the lien is imposed, and that the statute does not require this to be done. But, although counsel attempt to show that the benefits to result need not be made certain, under the statute, they fail to convince us that there is or may be any greater uncertainty under this statute than any other which leaves the amount of benefits likely to result to property from a proposed improvement to the mere judgment of parties upon which the duty of making the assessment devolves. In this connection it is contended that the benefit to result to property affected is left in uncertainty, because, under the statute, the work may never be accomplished. But the assessment of benefits is made upon the theory that the work is to be accomplished, and if it is not it is quite certain that no benefit could result. Such a contingency could hardly invalidate the statute.

Again, it is claimed that the "provisions of the act admit of an assessment for benefits largely in excess of the amount need-

ed." We are not convinced of the truth of this contention. But if, as is contended might be the case, the expenses should prove to be less than has been estimated by the commissioners in any given case, and the assessments are therefore too high, the act provides for refunding the excess. To hold that the assessment would be invalid, and the statute authorizing it void, because the expenses incurred and the amount assessed did not, or might not, correspond exactly, would defeat every law of this kind. The amount to be assessed depends upon the amount found by the commissioners to be necessary to meet the expenses of the improvement, and not upon the actual expenses as shown by the completion of the work. The fact that it may subsequently appear that they erred in estimating the amount cannot invalidate the assessment, or otherwise avail the owners of the property assessed, after the report of the commissioners has been made and confirmed by the city council.

Again, it is contended that so much of the statute as provides for the assessment of the value of the property taken is invalid for various reasons. For the purposes of this case this point may be conceded. The statute itself recognizes the fact that by such a proceeding the property owner cannot be compelled to part with his property. It is only a means by which the value of the property may be ascertained, and, if the amount thus fixed is satisfactory to the owner, and he voluntarily conveys to the city for that sum, the object sought is accomplished without the expense of condemnation proceedings. It is simply a means provided of agreeing to a conveyance of the property for the purposes of a street, the commissioners acting as the agents of the city. If the owner voluntarily conveys the property, the title thus obtained is as good as one procured by a condemnation proceeding, and the expense of such proceeding is avoided. Of this the owner of property assessed can have no reason to complain. But, if the owner is not satisfied, and refuses to make the conveyance, then it is provided that the property may be condemned as in other cases. We are unable to see how these provisions can affect the validity of the statute, or the liability of the respondent to pay the assessment made against him. So it is claimed that the provision in the statute that the city may enter upon the land and proceed with the work before the damages are paid is contrary to section 14 of article 1 of the constitution. But this does not concern the party whose property has been assessed. It is a question affecting the rights of the city and the party whose property is sought to be taken.

Finally, it is contended that the statute is in violation of section 13 of article 11 of the constitution of this state, because it delegates to a special commission the power to perform municipal functions. But conceding, without deciding, that the opening or widening of public highways within a city are municipal functions, it does not appear that any such functions were delegated to this commission. The

commissioners are simply made the agents of the municipalities to assist them in opening streets. They act under the direction of the city authorities, and their acts are not binding or effective until the same are approved and confirmed by the city council. Therefore, the act done is the act of the city, at last, and not of the commissioners. The case of *Mellon v. Pittsburgh*, 31 Leg. Int. 212, is not in point. The provision of the Pennsylvania statute, held in that case to be invalid, delegated to the commission named therein independent powers. They were not subject to the control of the municipal authorities in the performance of their duties, and it was upon this ground that the act conferring such powers upon them was held to be in violation of a section of the constitution of that state similar to if not identical with ours. But the complaint contains an allegation that the property within the assessment district was not all assessed. This allegation rendered the complaint sufficient. *People v. Lynch*, 51 Cal. 20; *Moulton v. Parks*, 64 Cal. 181; *Dyer v. Harrison*, 63 Cal. 447; *Diggins v. Brown*, 76 Cal. 318, 13 Pac. Rep. 373.

Numerous briefs have been presented in this case, some by attorneys not of counsel in the case. They have shown great ability, industry, and ingenuity in the attempt to break down this statute. We have given all of these briefs our careful attention, realizing the importance of the questions presented, and have endeavored to notice and pass upon every point made. After this thorough presentation and examination of the case, we are constrained to hold that the statute under consideration is valid; that it is in force within the limits of the city of Los Angeles. But the allegation in the complaint that the property was not all assessed rendered it sufficient, and the demurrer should have been overruled. Judgment affirmed.

WE CONCUR: THORNTON, J.; MCFARLAND, J.; PATERSON, J.

FOX, J. I concur in the judgment, but do not concur in what is said in support of the proposition that the act of 1889 is in force in the city of Los Angeles. Of the written laws of this state there are four classes, each established in a different mode, and by a different body or branch of the government, and each equally binding upon the courts within its appropriate sphere:

(1) The first of these is the constitution. This is established by the people of the whole state, acting in their collective capacity, and as to all other state laws is the supreme law of the land. The mode of establishing all other written laws of the state, or of any part of the state, is that, and that only, which is prescribed or permitted by this supreme law so established by the people. This law, in its operation upon the people as individuals, and upon every department of the government which is established by it, is made by its own terms mandatory and prohibitory, except when otherwise within it expressed. Const. art. 1, § 22.

(2) The general statute laws of the state. By the constitution it is ordained that these must be established by the legislative department of the state government. The mode and manner of their passage is prescribed in sections 15, 16, art. 4. It must be by bill, and requires the concurrent action not only of the two houses of the legislature, but of the governor; or, if he refuses to concur, then a consideration of his reasons, and reaction thereon by both houses, and the concurrence of two-thirds of all the members elected to each house. Thus acting, the legislative department may establish necessary and appropriate laws upon all subjects, and for all purposes not in conflict with or prohibited by the constitution, and must establish laws upon certain subjects, and for certain purposes named in the constitution. The term "general laws," as used in all constitutions or statutes, has both a general, or common, and a technical, or restricted, meaning. In which sense it is used depends in each particular instance upon the context, and the general scope of the instrument, or of that part of the instrument in which it is found. In one of these senses that is held to be a general law which applies to and operates upon all of a given class of places or persons; in the other, that is a general law only which applies to and operates upon all persons and in all places alike.

(3) Municipal charters, framed and adopted by the people resident within the municipality affected, acting directly, and in the manner prescribed in section 8, art. 11, of the constitution. Such charters may be said to be general laws in that they apply to and operate upon all people within the territorial limits of the municipality alike; but they are special and local in that they have no force or effect outside of such territorial limits. Their establishment by the legislative department of the state government is expressly prohibited by the constitution. Article 11, § 6. For the establishment of these laws, the constitution takes from the legislature and delegates to the people of the municipalities respectively, when they shall see fit to exercise it, the power to frame and adopt the law, and in that way to establish a special and local law such as the legislature is forbidden to establish; the general law-making department of the state government having no power in the premises as such, but the members of the two houses of the legislature being required to express their assent to or approval of the instrument as a whole, without alteration or amendment, before it becomes an established law. When so established and approved it is valid law, — a part of the written law of the state, — as much so, and as binding upon the courts, as any act of the legislature; but, unlike an act of the legislative department of the state government, that department has no power ever to alter or amend it. Alterations or amendments of it, like alterations or amendments of the constitution, can only be made by the people by whom the original was adopted. So far as it is not in conflict with the constitution or the general laws of the state, and

by that I mean laws which operate upon all persons and in all places alike, it is beyond the reach of the legislature, and "supercedes any existing charter and all amendments thereof, and all special laws inconsistent with such charter." Article 11, § 8. In my judgment the word "special" as there used includes all laws which are not general in the broadest sense; that is, all laws which do not operate upon all persons and in all places in the state alike.

(4) The remaining class of written laws consists of municipal ordinances established by the legislative departments of the respective municipalities, and in the manner prescribed by their respective charters, or by the general law in cases where municipalities are acting under general law.

In dissenting from the opinion of my associates in this case, I concede that the several cases cited by Mr. Justice WORKS, heretofore decided by this court, contain expressions which in form justify the conclusion reached in his opinion; but this is the first time in which a case has come before the court directly involving a conflict on matters purely local and municipal between the provisions of a special charter framed and adopted by the people, as authorized by the constitution, and the provisions of an act of the legislature which is a "general law" only in the narrow and restricted sense of being a law which on its face applies to all municipal corporations. Being so, it furnishes the first and only opportunity which we have had of taking a broad and comprehensive view of the provisions of the constitution affecting municipal corporations. There can be no doubt that the court has always been correct in its expressions indicating that municipal corporations acting as such under the general municipal incorporation law must be governed by and conform to general laws of this class, which on their face affected and were framed to apply to all municipalities, for that is not only in conformity with the express provisions of the constitution, but also with the general interpretation of statutes. One act of the legislature will always repeal another and earlier which is in direct conflict with it on the same subject, unless expressly provided otherwise. But, under the constitution, an act of the legislature will not repeal, and cannot repeal by implication or in express terms, the provisions of a special charter like that of Los Angeles, and other municipalities having charters framed and adopted by the people, and approved by the members of the two houses, unless it is done by force of some express provision of the constitution itself. I do not accede to the proposition that the court has been heretofore correct in holding that municipalities, acting under special charters granted by the legislature, before the adoption of the present constitution, and at a time when municipalities could only be established in that way, were governed by and their charters must yield to the provisions of laws which are general only in the sense that they apply to municipalities generally, and not elsewhere; but the court has so often so held, in considering

statutes like the one sustained in this case by the leading opinion, that if this were the case of such a corporation I might hesitate about expressing my dissent at any length, at this late day, to a decision which only reaffirmed opinions expressed by the first justices elected under the present constitution. But this is not such a case. As before said, the question now comes up for the first time for the interpretation of what may be called a "constitution charter," and if the court cannot correct what I conceive to be the errors of the past it can, and think it ought, at least to refuse to perpetuate those errors as against these new charters which are expressly authorized and protected by the constitution. What I conceive to be the error of the past, and the error now proposed, grows out of what, in my judgment, is a misinterpretation of the term "general laws," as found at the close of section 6 of article 11 of the constitution. The closing words of that section are: "Cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

It is said that the common law of England is made up of "general customs" and "particular customs," the former being those customs which prevail throughout the realm, and the latter those which prevail in particular places. It would have been better for us, and we should have fallen into less of error, if we had retained those descriptive words of the early law-writers in the same sense in which they used them, and said of our own statute laws: They consist of—(1) General laws, which are such as prevail throughout the state, and operate upon all persons, and in all places, alike. (2) Particular laws, which are such as apply to a particular class, or particular classes, of persons, or in particular places, but not to all persons and in all places. (3) Special laws, which are such as are passed for the accomplishment of some special purpose, or for the benefit of some particular person. Of these perhaps relief bills are the most common example. (4) Local laws, which are such as apply in some particular place only. With such a classification as this, we should never have fallen into such confusion as now prevails as to the meaning of the term "general laws," and the court would from the beginning have interpreted that term as used at the close of section 6, as above quoted, as I believe it ought now to be interpreted. If we give to this term, as is given to it in the opinion of Mr. Justice WORKS, and in the cases which he cites, an interpretation which includes anything less than the entire state, and all persons and all places in it, we make section 8 of the same article of the constitution a farce and a snare. Undersuch an interpretation it is worse than folly for the people of a municipality to avail themselves of the express permission of the constitution, and frame and adopt for themselves a municipal charter which the constitution forbids the legislature to alter or amend; for, if this interpretation is to prevail, the legislature may do indirectly

what it is expressly forbidden to do directly. To so hold is to impute to the framers of the constitution an absence of intelligence, or a degree of duplicity, which I cannot conceive to be possible. On the other hand, to construe the term "general laws," as used in this place and in this connection, as meaning only those laws which apply throughout the state, governing all persons and all places in the state, makes the constitution in this regard one harmonious whole, and secures to the people one of the very objects had in view in calling the convention which framed the constitution,—the right of local self-government as to matters purely local and municipal, a right which is utterly defeated by the prevailing construction. The same rule should be applied in construing the words quoted by Mr. Justice WORKS from section 8, to the effect that these charters must be "consistent with and subject to the laws of this state." Of course that refers to general laws, since the legislature is forbidden to pass special or local laws for the government of municipalities, and since by the same section of the constitution these charters, which are both special and local, supersede "all special laws in conflict therewith." When the constitution says in section 8 that the charter framed and adopted in accordance with the provisions of that section must be "consistent with and subject to the laws of this state," it means the same laws as those meant in section 6, where it says that they "shall be subject to and controlled by general laws." In *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615, and *People v. Henshaw*, 76 Cal. 436, 18 Pac. Rep. 413, the charters under consideration were special charters, passed by the legislature, and subject to alteration and amendment, under the constitution under which they were passed, at the will and pleasure of the legislature. Even if it be true that since the adoption of the present constitution such charters are to be controlled by general laws of the restricted character which apply only to particular places,—namely, to municipalities, and not to the state at large,—laws such as I have herein suggested should be designated as "particular laws;" and not as "general laws." It does not follow that section 8 of article 11 of the constitution should be destroyed and rendered worse than nugatory by holding that charters established under its provisions should also be subject to that limited kind of general laws. *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929, is not in conflict with these views, for there the court was acting, not upon the provisions of the charter generally, but upon the single provision of such a charter establishing a police court. That provision may be void, and the balance of the charter be valid. If void, as in the more recent case of *People v. Toal*, ante, 603, (decided during the current month,) I felt compelled to concede it to be, it was not so because of conflict with a law of the class here under consideration, but because of conflict with the constitution itself, the language of the constitution being that such courts must be established, not "by law," but "by the legislature." Another

clause of the constitution provides that such courts shall have such jurisdiction as is conferred upon them "by law." Under the constitution, therefore, the court must be established by the legislature, but, being so established, I have no doubt jurisdiction might be conferred upon it by one of these charters, in cases arising under the charter, or under municipal ordinances passed in pursuance thereof. *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652, was, it is true, a case in which the same charter here under consideration was involved. But there the question was as to the validity of the charter as a whole, the real question being as to whether it had been properly approved by the legislature. It was suggested that even if properly approved it was still invalid, because some of its provisions were in conflict with the provisions of some of this class of mis-called general laws. It was correctly held that a conflict of some particular provision of a charter with such a law would not vitiate the whole charter, and, in discussing that question, it was merely assumed that the ruling in the former cases might apply to these charters, but without deciding that they would do so.

Entertaining these views, I am clearly of the opinion that the act of 1889, under which the proceedings complained of in this case were had, does not apply to municipalities acting under charters framed, adopted, and established as provided in section 8, art. 11, of the constitution, and is not in force within the limits of the city of Los Angeles.

BEATTY, C. J. I concur in the judgment, and in the main in the opinion of Justice Fox. For the reasons set forth in the dissenting opinions of Justice McKINSTRY in *Thomason v. Ashworth*, 73 Cal. 73, 14 Pac. Rep. 615, and in *People v. Henshaw*, 76 Cal. 453, 18 Pac. Rep. 413, I think those cases, and the case of *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929, were erroneously decided, and that the provisions of the charter of Los Angeles with respect to the opening and widening of streets apply in that city to the exclusion of the statute of 1889. I think, moreover, that the statute is unconstitutional on two grounds: *First*, it does not, when tested by the liberal doctrine of *Lent v. Tillson*, 72 Cal. 404, 14 Pac. Rep. 71, provide for any proper notice to owners of property affected; and, *second*, it permits assessments upon the property supposed to be benefited in excess of the benefits.

85 Cal. 614

BIGELOW v. CITY OF LOS ANGELES *et al.*
(No. 13,301.)

(Supreme Court of California. Sept. 11, 1890.)

INJUNCTION—EVIDENCE—REMEDY AT LAW.

On application for an injunction against the erection of a bridge by a city, the affidavits as to the effect of the structure on plaintiff's property were conflicting. Plaintiff had stood by until the greater part of the work was completed, and disclaimed any intention of permanently enjoining the construction of the bridge, but she only desired to secure the amount of damages occasioned to her property before the work was completed. There was no claim that defendant was

unable to respond in damages. *Held*, that the injunction was properly denied.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge. *Wells, Guthrie & Lee*, for appellant. *C. McFarland, S. C. Hubbell, and Chapman & Hendrick*, for respondents.

PATERSON, J. This is an action to restrain the city of Los Angeles and the California Bridge Company from erecting a bridge and viaduct across the Los Angeles river on First street within the city limits. The hearing of the application for a preliminary injunction was had upon the pleadings and affidavits. Thereupon the court denied the application, and vacated the preliminary order, which it had made, restraining the defendants from further proceedings pending the hearing of the motion. The material allegations of the complaint are denied in the answer of the city, and also in the complaint of intervention which the court allowed to be filed on behalf of the Los Angeles Cable Railway Company; and the affidavits used on the hearing are very conflicting as to the size, height, and effect of the structure. The showings made by all parties evidently left the court in doubt as to the probable effect of the viaduct upon the property of the plaintiff; and, as the plaintiff had stood by until the greater part of the work had been completed, and was endeavoring only to secure the amount of damage occasioned to her property before the work was completed, and disclaiming any intention of perpetually enjoining the defendants from constructing the bridge, the court deemed it best to let the work go on, there being no claim that the defendant is unable to respond in damages. In this conclusion we think the court was right; but, whether right or wrong, there was no such abuse of discretion as would warrant us in setting aside its order. "It accords with the theory of our system that the supreme court shall have the benefit of the judgment of the district [now superior] court at the final hearing below, and, except in a clear case, we ought not to anticipate the final judgment * * * by our action on appeal from the order granting [or denying] the preliminary injunction." *Patterson v. Supervisors*, 50 Cal. 345; *Middleton v. Franklin*, 3 Cal. 238; *White v. Nunan*, 60 Cal. 406. The fact that the work sought to be enjoined is one of a public nature, one which affects the public convenience, and that there is no doubt of the ability of the defendant to respond in damages, are important matters to be considered in determining the right to an injunction. *Real Del Monte Consolidated G. & S. Min. Co. v. Pond G. & S. Min. Co.*, 23 Cal. 84; *Logansport v. Uhl*, 99 Ind. 531; *Payne v. English*, 79 Cal. 540, 21 Pac. Rep. 952; *Crawford v. Bradford*, 23 Fla. 404, 2 South. Rep. 782; *Omaha Horse Ry. Co. v. Cable Co.*, 32 Fed. Rep. 727. Counsel for appellant seems to fear that, unless the city is compelled to make compensation before the work is completed, plaintiff will be left without a remedy for the damages sustained by her, the provisions of the Code with respect to eminent domain being the only procedure

prescribed for assessing the damages. In *Reardon v. San Francisco*, 66 Cal. 506, 6 Pac. Rep. 317, the court said: "If compensation has not been had in condemning the land for the street under the statute for such condemnation, it can be recovered in an action." The question as to what damages are recoverable by abutting owners in cases of obstructions in public streets by municipal corporations acting in behalf of the state for the better convenience of the public is not necessarily before us on this appeal. The subject, we may say, however, in thus passing over the point, was thoroughly and carefully considered in *Reardon v. San Francisco*, supra. Other points made by appellant do not require notice. Order affirmed.

We concur: FOX, J.; McFARLAND, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment.

85 Cal. 610

ROSENBERG *et al.* v. FORD. (No. 13,548.)

(Supreme Court of California. Sept. 11, 1890.)

MORTGAGES—CONSIDERATION.

A wife joined her husband in executing a mortgage of the homestead, declared on community property, to secure notes made by the husband. He shortly afterwards died, and she became his administratrix, and published the notice required by law to creditors to present their claims within four months. The holders of the notes and mortgage failed to present them within the prescribed time, so that they became barred; but the administratrix, in ignorance of this fact, executed another mortgage to secure these notes and others made by her. Held, that this mortgage was without consideration in so far as it secured the husband's notes secured by the first mortgage.

In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Goodwin & Goodwin, for appellant. *F. B. Whiting* and *Ben. Morgan*, (*W. W. Kellogg*, of counsel,) for respondents.

PER CURIAM. This action is for the foreclosure of a mortgage. It appears that the appellant and her husband, in his lifetime, executed a mortgage to secure certain notes, made by the husband, upon a homestead declared upon community property. The husband afterwards died, and the wife qualified as the administratrix of his estate, and published the notice required by law for creditors of the estate to present their claims within four months of the publication of the notice. The holders of the notes and mortgage failed to present them, or either of them, within the time prescribed by the notice for allowance or rejection. After such neglect on their part, they obtained another mortgage from the defendant, Mrs. Ford, securing the payment of other notes, the amounts of which were made up of the original debt of the husband, and of the sum of \$292, borrowed by the wife prior to the time she gave the second mortgage and notes. At the time she thus executed that mortgage and the notes it secured, she did not know that the first mortgage and notes were barred for the want of presentation, etc., but executed them in ignorance and mistake as to

the law upon such a matter. It is also alleged in the answer that she believed the first mortgage and notes to be valid, and the plaintiffs represented them so to be, and that she was liable to pay, satisfy, and discharge them when she executed the last notes and mortgage; but it is not alleged that at such time the plaintiffs knew that they were invalid, and concealed such knowledge from her. Several months after the execution, by the defendant, of the notes and mortgage now under consideration, she, for the first time, discovered that they were barred; and, as soon as she learned such to be the law, she notified the plaintiffs that she had executed these obligations under such mistake of law, and that they were invalid, except as to the sum of \$292, and interest thereon, which was what she had herself individually borrowed of them. It is further alleged in the answer that, except as to the \$292, and interest, the notes and mortgage were without consideration as to the defendant. The conclusion of law, from the findings, is that the consideration for the execution, by the defendant, of the promissory notes and mortgage set forth in the complaint, is, in all respects, adequate and sufficient in law, and that said mortgage is a valid and binding lien upon the property and premises therein described. Assuming, as we must under the decision in *Camp v. Grider*, 62 Cal. 20, affirmed in *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375, and *Association v. King*, 83 Cal. 443, 23 Pac. Rep. 376, that the failure to present for approval and allowance the first notes and mortgage operated as a bar to the foreclosure of the mortgage, it then becomes important to determine whether the execution of the last notes and mortgage, so far as the amount of the first notes is concerned, was based upon an adequate consideration. It is argued for the appellant that the notes first given were for the husband's debt alone, and the wife's joining in the first mortgage was to secure the payment of that debt, she not being liable on the debt, or receiving, so far as the record shows, any consideration whatever for the execution of the mortgage; that, when the notes became barred, they were debts of her husband, not hers; that, when the mortgage was barred, it was one (as to the debt secured thereby) on which she was a surety merely; that she was not bound, either legally or morally, to pay the debt of her husband, or to resecure its payment after it was barred; that she could obtain no benefit by so doing, but would be prejudiced, since, by the non-presentation of the claims of the plaintiffs, she was precluded from having the debt paid out of the estate, leaving out the homestead; that the notes of the husband were executed and the debt contracted before the execution of the first mortgage, which she signed at the request of her husband, and that the debt was not contracted on the faith that she would sign it; that there was no legal obligation for her to execute notes and a mortgage in lieu of those already barred; that there was no benefit conferred on her by the execution of the second mortgage,

except to the extent of the \$292, which was a separate and distinct consideration from the first notes and mortgage; that she had received nothing, by way of consideration, out of that which her husband received as the basis of the first notes; that she had once jeopardized the homestead to secure the payment of those notes, and the plaintiffs, by their own negligence, had not only gotten the first notes and mortgage barred, but had deprived the defendant of her statutory right to have the mortgage first satisfied out of property of the estate other than the homestead; that she received nothing beyond the \$292, and the plaintiffs cannot be said to have been prejudiced, so far as her conduct was concerned, to any extent, so as to make it a sufficient moral consideration to support a new contract from her to the promisee to pay the debt of another; that the notes and mortgage the plaintiffs gave up were of no value; that their collection was not enforceable either against the homestead or the estate; and that the plaintiffs, as promisees, were certainly not prejudiced by getting new notes and a new mortgage in lieu of those that were barred. The further point is made that, from the allegations of the answer, it appears that both parties were under a mutual misapprehension as to the law when the notes and mortgage now under consideration were executed, and that there is no finding upon the issue made. We think the appellant is right in both of these contentions, and that, for these reasons, the cause must be reversed. The mortgage, so far as it covered the amount included in the former mortgage on the homestead, was without consideration. The debt was not the debt of the appellant. She was under no personal obligation, either legal or moral, to pay it, and the failure to present it as a claim against her husband's estate released the homestead property. Judgment reversed as to the amount included in the original mortgage, and affirmed as to the balance, and the court below is instructed to modify the judgment accordingly; the respondents to pay the costs of this appeal.

PATERSON, J., dissenting.

85 Cal. 580

PEOPLE V. AH OWN. (No. 20,645.)

(*Supreme Court of California.* Sept. 10, 1890.)

GAMBLING—CRIMINAL PROSECUTION—OPINION
EVIDENCE.

1. On an indictment under Pen. Code Cal. § 330, for playing the game of "tan," where the policeman who arrested defendant has testified that he did not see defendant engage in the game that was being played, it is error to allow him to testify that from the position defendant occupied at the table, he supposed that he was the banker, since that is a mere opinion of the witness.

2. An instruction that the jury should find defendant guilty if they found from the evidence, either that he himself directly played or conducted the game, or that he aided and abetted others in so doing, is not prejudicial to defendant.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

A. L. Hart, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

SHARPSTEIN, J. The information charges that "the said Ah Own, on the ——— day of February, A. D. 1888, at the city of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, and feloniously play, carry on, open, cause to be opened, and conduct, as owner, for gain, a certain banking game known as and by the name of 'tan,' said game being then and there played with certain devices, to-wit, buttons, checks, and Chinese coin, and other money, and other representatives of value, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." Section 330 of the Penal Code reads as follows: "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employe, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, stud-horse poker, seven and a half, twenty-one, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or any other representative of value, is punishable by fine of not less than two hundred nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid, such imprisonment not to exceed one year; and every person who plays or bets at or against any of said prohibited game or games is guilty of a misdemeanor." Under the information it was incumbent on the prosecution to prove that the defendant played, carried on, opened, or caused to be opened, and conducted, as owner, a game of "tan." To prove that allegation the prosecution placed upon the witness stand the police officer who arrested the defendant and made the complaint against him before the committing magistrate. The witness testified, in substance, that, on the night of the 21st of February, 1888, he arrested the defendant; that on the night of the arrest, at about 9 o'clock, he was passing along and noticed that the front door of the house in which the arrest was made was closed; that he walked around the house quickly; that there was a little counter in front where the Chinese have a little store; that he jumped over the counter, and pushed himself into the room where a game of "tan" was being played; that, when he got into the room, the Chinaman that was dealing dropped his stick, and, with the players, ran to the back end of the room; that the defendant occupied a chair which witness called the "banker's chair;" that the defendant was behind the table; that the witness reached and caught defendant and held him, and obtained some of the money that was on the table in front of him. The witness then gave a description of the game of "tan." On his cross-examination the witness testified, in substance, that, at the time he went into the room, he saw the game in operation; that one man had a stick in

his hand, pulling the buttons out; that the witness did not know who he was; that he did not see the defendant doing anything, but only saw him occupying the position which he had previously described; that he did not see the defendant conduct the game, nor did he see him take into his hand any instrument with which the game was conducted, nor did he see him take into his hand any of the money that was on the table or in the drawer. The following cross-examination was thereupon conducted: "Question. Did you see him do anything towards playing the game of 'tan'?" Answer. Well, my judgment was— Q. You need not state your judgment. I asked you the fact. Did you see him do anything towards conducting the game of 'tan,' or any other game? A. Well, about the position that he occupied— Q. I do not ask you about the position. I am asking you about the fact, and I ask you to give an impartial statement of the fact without putting your judgment in. A. I have stated what I saw." The last foregoing question was thereupon repeated to the witness, to which he answered, "No." "Q. You saw him sitting there in a chair? A. Yes. Q. And that is all that you saw? A. And his moving and trying to get away." The witness then gave a description of the room, of the persons in it, the surroundings, the instruments for playing the game, etc., and thereupon the judge asked the following question: "Could you tell from the position at the table whether he was the man who received and paid out the money?" Counsel for defendant objected to the question as being irrelevant, and as involving an inference of the witness. The court overruled the objection, defendant excepted, and the witness answered: "Yes, he occupied the position of the man that paid the money." The witness on his further cross-examination stated, among other things, that he supposed that the defendant was the banker from the position he occupied, and that if there had been some other person in that room who was not interested in the game, and had been occupying that place, and had been sitting in that chair for a moment to rest, he, witness, would naturally have supposed that he was the banker, and would have prevented him from running a banking business under such circumstances. And after some further statements of like import, the district attorney asked the following questions: "You stated that if you should go into the room where 'tan' had been carried on, and saw a man in that position, that you would say that he was the banker. Would you say that, if you did not see the implements of the game, the buttons, and the lead, and the money, and the stick, and the money in the drawer ready to pay off the debts,— would you say that, if you did not see them?" Counsel for defendant objected to the question as being argumentative and calling for an inference of the witness. The objection was overruled, defendant excepted, and the witness answered, "No." It is clear that the court, by overruling the objections to these two ques-

tions, admitted evidence of the opinion of the witness upon facts which were in evidence before the jury, and upon which the jury were as competent as the witness to form an opinion; and a jury should not be influenced by the opinion of any one not more competent to form one than themselves. As a general rule the opinion of witnesses is not admissible in evidence. They must speak to facts within their knowledge. "A witness can testify of these facts only which he knows of his own knowledge,—that is, which are derived from his own perceptions,—except in those few express cases in which his opinions, or inferences, or declarations of others, are admissible." Code Civil Proc. § 1845. This case, obviously, is not within the exception to the general rule.

We think the court erred in overruling the objections to the questions which called for the opinion or inferences of the witness upon facts to which he had testified, and that it is an error of a character which imports injury to the appellant. *Rice v. Heath*, 39 Cal. 609; *Spanagel v. Dellinger*, 38 Cal. 278; *Sweeney v. Reilly*, 42 Cal. 402; *Ponce v. McElvy*, 51 Cal. 222. Among other instructions to the jury the court gave the following: "Every person who deals, plays, carries on, or causes to be opened, or who conducts any game of tan played within any device for money, checks, credits, or other representative of value, is guilty of a crime; and all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or, being present, did aid and abet in its commission, are principals in such crime so committed. And if you find from the evidence, beyond a reasonable doubt, that the defendant did deal, play, carry on, or cause to be opened or conducted, either directly himself, or aided and abetted some other person in dealing, playing, carrying on, or conducting, a game of tan with any device for money, checks, credits, or other representative of value, at the time and place mentioned in the information, you should find a verdict of guilty; but otherwise you should acquit him. The word 'play' as used in this instruction does not refer to such persons as play or bet at or against the game; that is, those who are on the outside betting or playing at the game." While this instruction is justly obnoxious to unfavorable criticism, we fail to see that appellant could be prejudiced by it. We purposely refrain from expressing any opinion as to the sufficiency of the evidence to justify the verdict of the jury, because a retrial must be had. Judgment and order reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; WORKS, J.; FOX, J.; PATERSON, J.

85 Cal. 542

HEWLETT v. PILCHER *et al.* (No. 13,459.)
(*Supreme Court of California*. Sept. 10, 1890.)

RES ADJUDICATA—ISSUE OUT OF CHANCERY.

1. Defendant conveyed land to N., who afterwards conveyed to P., and he mortgaged it to plaintiff. Defendant then sued and had the

conveyances to N. and P. set aside, on the ground that they had colluded and obtained the conveyances from him by fraud. Held that, in a suit by plaintiff to foreclose the mortgage, this judgment is not admissible to show fraud as against plaintiff.

2. Where issues are submitted to a jury, but the court afterwards adopts their verdict and finds on all the issues, errors in the instructions given become immaterial, as the correctness of the judgment may be tested by the evidence alone.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Geo. D. Shadburne, for appellants. *Geo. R. Williams*, (*Jas. G. Maguire*, of counsel,) for respondent.

WORKS, J. The appellant Watson, being the owner of certain real estate, conveyed the same to one Newstadt, who subsequently conveyed the same to one Pilcher. Pilcher mortgaged the property to the respondent. After the execution of the mortgage, Watson brought an action against Newstadt and Pilcher to set aside the conveyance by him to Newstadt, and the conveyance from Newstadt to Pilcher, on the ground that they had colluded together, and procured the conveyance from him by fraud, and procured a judgment against them setting aside said conveyances. This action was brought by the respondent to foreclose his mortgage, and Pilcher and Watson were made parties defendant. Judgment was rendered for the plaintiff, foreclosing the mortgage, and the defendant Watson appeals from the judgment, and the order denying him a new trial. The answer of Watson denied the material allegations of the complaint, and by way of affirmative defense alleged that he, the defendant, was the owner of the mortgaged property at the time the mortgage was given, and that Pilcher, the mortgagor, had no title thereto. There was no allegation that Newstadt and Pilcher procured the conveyance from the defendant by fraud, but it was averred, in general terms, that the plaintiff took the mortgage for the purpose of defrauding the defendant, that he took the same knowing that the property had been procured from the defendant by fraud, and that the plaintiff had not taken the proper precautions to ascertain the true condition of the title. On the trial the defendant offered in evidence the judgment roll in the case of the defendant against Newstadt and Pilcher, in which the conveyances above mentioned were declared fraudulent, and set aside. The evidence was objected to and excluded, and this is claimed to have been error. We do not think so. The plaintiff was not a party to that judgment, and was not bound by it in any way. As against him, it was necessary for the defendant to allege and prove that the conveyances referred to were fraudulent, and that the plaintiff had knowledge of the fact, or sufficient information to put him upon inquiry. The fraud was not alleged in the answer, and, if it had been, the judgment against Newstadt and Pilcher was not competent to prove it as against the plaintiff. But it is claimed that it was competent to prove title in the defendant. It

was competent to prove his title at and from the time the judgment was rendered, but the plaintiff's mortgage was taken prior to the rendition of the judgment, and the plaintiff admitted the defendant's title from the date of the judgment. Notwithstanding the deed from the defendant to Newstadt was procured by fraud, it conveyed the legal title, and a mortgage taken from Newstadt's grantee would be a valid lien upon the land, as against the claim of the defendant, if the mortgagee had no notice of the fraud, and the judgment subsequently recovered setting aside the deeds could not affect this lien. *Randall v. Duff*, 79 Cal. 115, 19 Pac. Rep. 532, and 21 Pac. Rep. 610. It is contended that the findings of the court are contradictory, and that some of them are not sustained by the evidence; but we think otherwise. Certain instructions were asked by the defendant, and refused, and certain instructions given which it is claimed were wrong, and this is assigned as error. We are unable to say that these instructions were erroneously refused, conceding that they state the law correctly. It is stated in the bill of exceptions that other instructions were given by the court. For what we know from the record the instructions given may have included the propositions contained in those refused. As the appellant is bound to show error, and the instructions given are not before us, we must presume that they correctly and fully charged the jury as to the law of the case. Again, this was an equity case. Certain special issues were submitted to the jury, but the court finally adopted the findings of the jury, and found on all of the issues. This being so, the refusal to give instructions is not cause for a reversal of the case. If the findings are not sustained by the evidence, they may be tested by the evidence. If erroneous conclusions are drawn from them, the question may be presented in this court, and, in either event, the question whether the court erred in giving or refusing instructions becomes immaterial. *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. Rep. 540. The question of fraud, discussed by the appellants' counsel, does not arise, for the reason that fraud is neither alleged nor proved. Judgment and order affirmed.

We concur: **BEATTY, C. J.**; **FOX, J.**; **SHARPSTEIN, J.**; **McFARLAND, J.**; **THORNTON, J.**

(85 Cal. 574)

GOLDMAN v. ROGERS. (No. 13,145.)

(*Supreme Court of California.* Sept. 10, 1890.)

EJECTMENT—EVIDENCE—ISSUE OUT OF CHANCERY.

1. Where, in a suit to quiet title, there is an issue out of chancery, it is sufficiently shown that the court adopted the verdict of the jury by recitals in the judgment that the court made its findings of fact and conclusions of law in part from such verdict.

2. The verdict of the jury on an issue out of chancery being a part of the judgment roll in the suit under Code Civil Proc. Cal. § 670, such verdict is sufficiently identified by the certificate of the clerk that the record on appeal is a "correct transcript of the issues submitted, and answers thereto, and verdict of the jury thereon."

3. Plaintiff in ejectment claimed the land under an execution sale, and defendant, the wife of

the execution debtor, alleged in her cross-complaint that she had bought the land with money belonging to her separate estate. *Held*, that where a jury have found that she did buy it with her own money a finding on the issue of her marriage to the execution debtor is unnecessary.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; C. H. MARKS, Judge.

Chas. G. Lamberson and Lamberson & Taylor, for appellant. *Cosper & Boller*, for respondent.

BELCHER, C. C. The plaintiff brought this action to recover possession of two lots of land in the town of Tulare, the complaint being in the ordinary form in ejectment. The defendant, by her answer, denied all the averments of the complaint, and then, by way of cross-complaint, set up that she purchased the lots on the 25th day of July, 1882, and received a good and sufficient bargain and sale deed thereof, in her own name, which was afterwards recorded, and that she "paid therefor money owned by her in her own exclusive right;" that ever since the date of her purchase she had been the owner of the lots, and in the actual and exclusive possession thereof; that the plaintiff claimed an estate or interest in the property, adverse to her, under and by virtue of a deed made to him by a constable, under date of December 31, 1886, in pursuance of a sale of the property under an execution issued on a judgment against one H. G. Rogers, but that the plaintiff had no estate, right, title, or interest whatever therein; wherefore she prayed that her title be quieted. The answer to the cross-complaint denied that the defendant purchased the lots at the time named, or at all, or that she "paid for said land, or any portion thereof, with money owned by her in her own exclusive right, or owned by her at all;" and it alleged that the property was purchased by H. G. Rogers, who was, at the time, the husband of defendant, and paid for with money earned by him, and which was their community property, and that plaintiff had acquired the title of H. G. Rogers under an execution sale, and was the owner of the lots. When the case came on for trial, special issues were framed and submitted to a jury, and a verdict was returned in favor of the defendant. The court then made further findings, and gave judgment for the defendant, from which the plaintiff appeals on the judgment roll. The court found that the plaintiff obtained a judgment in a justice's court against H. G. Rogers, and, under an execution issued thereon, caused the lots to be sold on the 22d day of December, 1885; that he bid them in, and on the 31st of December, 1886, obtained the constable's deed for them, and that this was his only title; that H. G. Rogers and the defendant were married in 1878, and, at the time the judgment above named was obtained, and the lots levied on sold and conveyed by the constable, they were husband and wife; that on the 25th day of July, 1882, the defendant obtained a deed for the lots in her own name, and thereupon went into, and ever since had been in, possession of the

same; that at the time of the purchase of the lots defendant had money which was her separate property; and "that all the allegations and averments of defendant's cross-complaint are true, and all the allegations and averments of the plaintiff's complaint and the denials and allegations of plaintiff's answer to defendant's cross-complaint are untrue." And the jury found that the lots were wholly paid for by the defendant with money which she had at the time of her marriage, and which was her separate property.

1. It is argued for the appellant that the verdict of a jury in an equity case is merely advisory, and has no force or effect until approved and adopted by the court; that there is nothing in the record here to show that the verdict of the jury was adopted by the court, and hence there is no finding upon the material issue as to whether or not the lots were paid for with money which was the separate property of the defendant; and that, for the want of such finding, the judgment should be reversed. This position is not sustained by the record. The findings of the court recite: "And the court and jury having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause and the arguments of the respective attorneys thereon, and the cause having been submitted to the jury upon certain special issues of fact raised by the pleadings and proofs in said case, and to the court upon other remaining issues raised therein, the court now finds the following facts," etc. And again: "The jury in this action having found a verdict in favor of the defendant herein upon the special issues submitted to them, which said special issues, as submitted, and the verdict of said jury, are on file in this action; therefore, as conclusions of law from the foregoing facts, and from the verdict of the jury upon the special issues of fact submitted to them, the court now hereby finds and decides," etc. And the judgment also recites: "This cause having been regularly called and tried by the court and jury, and the jury having found their verdict in favor of the defendant upon special issues of fact submitted to them, and the court having made its findings of fact and conclusions of law therefrom, and from the verdict of the jury on said special issues of fact, and the decision thereon in writing having been duly rendered by the court, which are on file in this cause," etc. From these recitals it very clearly appears, we think, that the court did adopt the findings of the jury. It was not necessary that the word "adopt" be used in order to show an adoption.

2. It is contended that the verdict of the jury "cannot be considered for the further reason that it does not appear by any indorsement thereon to have ever been identified as such a verdict, or filed as such, and does not appear to have been recorded or entered upon the minutes of the court." But the clerk of the trial court certifies "the foregoing to be a full, true, and correct transcript of the issues submitted and answers thereto, and verdict of the jury thereon, in the foregoing

entitled action, as appears from the originals thereof on file in my office, and of the whole thereof." This was a sufficient identification of the verdict. It was a part of the judgment roll, (Code Civil Proc. § 670,) and will be presumed to have been properly recorded and entered by the clerk in the minutes of the court, as required by section 628 of the Code.

3. It is further contended that the findings of the court in regard to the marriage relation of the defendant are contradictory, and, being so, that they cannot support the judgment. This contention is based upon the following facts: The property was purchased in July, 1882, and the plaintiff alleged in his answer to the cross-complaint that it was purchased by "one H. G. Rogers, who was at such time the husband of defendant." The court found that H. G. Rogers and the defendant were married in 1878, and that at the time the judgment was obtained against him, and the property levied on sold and conveyed by the constable, they were husband and wife. It also found that all the allegations of plaintiff's answer to the cross-complaint were untrue.

Now conceding, without deciding, that there was a conflict in the findings in regard to the defendant's marital relations in 1882, still the question is, was that issue, in view of the other findings, at all material? The defendant was sued in ejectment as a *feme sole*, and the question was, did she own the demanded premises, or did the plaintiff own them? If the property was bought and paid for by defendant with money which she had at the time of her marriage in 1878, and which continued to be her separate property, then clearly she was the owner, and was entitled to have judgment entered quieting her title as against the plaintiff, whether at the time of her purchase she was the wife of H. G. Rogers or not. In our opinion, when the verdict of the jury was returned and adopted by the court, the issue referred to became immaterial, and it was not essential that there be any finding upon it. The facts found sustain the judgment, and there was no necessity to go further and find on other issues. We find no prejudicial error in the record, and advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

85 Cal. 598

WILSON *et al.* v. MORTON *et al.* (No. 13,447.)

(Supreme Court of California. Sept. 10, 1890.)

STATUTE OF FRAUDS—CONTRACTS—ACTIONS—EVIDENCE.

1. A contract by which defendants agree to pay plaintiffs a certain sum per acre for all land that plaintiffs shall examine and advise defendants to buy is not one for the purchase or sale of real estate, and hence is not required to be in writing by Civil Code Cal. § 1624.

2. In an action on such contract it is not error to exclude evidence offered by defendants to show that they had employed and paid other persons to advise them in regard to the same land.

PATERSON, J., dissenting.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. N. O. Bradley, G. E. Lawrence, and T. M. McNamara, (Stephen M. White, of counsel,) for appellants. Oregon Sanders and W. A. Gray, for respondents.

PER CURIAM. Plaintiffs alleged that defendants agreed to pay them fifty cents an acre for all lands in the county of Kern which they should examine and advise defendants to purchase, and which should be afterwards purchased by defendants; that in pursuance of the agreement they examined 14,020 acres of land, and advised defendants to purchase the same; that all of said lands were purchased and were afterwards sold by defendants, whereby defendants became indebted to plaintiffs in the sum of \$7,010. The jury returned a verdict in favor of plaintiffs for \$3,520. Judgment was entered for that amount. A motion for new trial was denied, and defendants appealed. The contract was not one required by the statute of frauds to be in writing. Section 1624 of the Civil Code does not apply. Plaintiffs are not claiming commissions as defendants' agents, or brokers, for the sale or purchase of real estate. The compensation claimed by them is for services rendered in pointing out property purchased by the latter, and for advice given them. We think the evidence is sufficient to sustain the verdict. While it is not clear to us how the jury, under the evidence, took 11 sections as the basis of the verdict, we should not disturb the verdict on the ground that there is no evidence to support it.

We see no error in the ruling of the court excluding the evidence offered by defendants to show that they had employed and paid other parties to assist them in selecting a portion of the lands described in the complaint. If the evidence was not wholly incompetent, it was so uncertain and immaterial that it could not have aided the jury in determining the issues between the parties. Judgment and order affirmed.

PATERSON, J., (dissenting.) The defendants, in their answers and in their testimony, flatly denied that they had ever employed plaintiffs, or either of them, to examine any lands or advise them in relation thereto. In corroboration of their own testimony they offered to show that they had employed and paid other parties to assist them in selecting the lands described in the complaint. The questions propounded to the witnesses Oaks and Root for this purpose were objected to, and ruled out. I think the questions were proper, and should have been allowed. The fact that defendants were advised by other parties, if shown to be true, would not of course be a defense to plaintiffs' claim if the contract was made and the services were performed as alleged by them; but it was a circumstance which the defendants were entitled to have before the jury in determining the issues. If the defendants could have proved to the entire satisfaction of the jury that they had been fully advised by Root and Oaks as to the character of the lands prior to the time of the alleged contract with

plaintiffs, and had paid them 50 per cent. of what the land was worth for this assistance, it would be for the jury to say, in determining the conflict of evidence, whether they had also paid plaintiffs 50 cents per acre for their services; and, if the sum of the two compensations amounted to the entire value of the land, the fact that defendants had paid Root and Oaks would have been an important factor in determining whether they had also engaged the services of plaintiffs. The deductions to be drawn from ordinary business transactions, free from taint of fraud or collusion, are often of great aid in such cases. *Sedgwick v. Sedgwick*, 56 Cal. 214. The fact that defendants did not specify in the questions asked just how many acres the witnesses had pointed out, in no way affects the question of the admissibility of the evidence. Counsel cannot be expected to sum up the whole case in one question. Subsequent questions would have developed the fact as to quantity, and how much, if anything, was actually paid to Root and Oaks.

THORNTON, J., (*concurring*.) I find no error in the record, and concur in the judgment.

(85 Cal. 585)

PEOPLE v. WARD, Justice of the Peace.
(No. 20,639.)

(Supreme Court of California. Sept. 10, 1890.)

JUSTICES OF THE PEACE—MISCONDUCT—DISTRICT ATTORNEY.

1. Pen. Code Cal. § 1385, provides that "the court may either of its own motion or on the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed." Section 1386 provides that "neither the attorney general nor the district attorney can discontinue a prosecution except as provided in the last section." *Held*, that on an indictment of a justice for taking jurisdiction of a criminal proceeding after it has been dismissed before another justice of the same township by order of the prosecuting attorney, and brought before a justice of another township, it is error to instruct that the district attorney has authority to dismiss a criminal prosecution before a justice of the peace.

2. An indictment which avers that defendant took jurisdiction of such prosecution for the sole purpose of making the acquittal of accused a bar to another pending prosecution for the same offense, but does not aver that he intended to acquit accused, or that he acted from corrupt or partial motives is not sufficient, under Pen. Code Cal. § 758, punishing "district, county, township, or municipal officer" for willful or corrupt "misconduct in office."

In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

Spencer & McEnerney, for appellant.
O. P. Dobbins and J. M. Gregory, for respondent.

McFARLAND, J. The defendant was indicted for, and convicted of, misconduct in his office of justice of the peace, and judgment was rendered removing him from office for causes stated in the judgment. He appeals from the judgment, and from an order denying a new trial. The defendant had been justice of the peace at Vacaville township, Solano county, for many years, and the evidence shows him to have been a man of exceptionally good character for

truth, honesty, and integrity. This case arises out of the prosecution of one Dayton G. True for the alleged petty offense of stealing three dollars from one F. C. Chapman, and from certain supposed conflict of jurisdiction, and somewhat unpleasant feeling, between the justices of the peace of said township and a justice of the township of Suisun, in said county; and, leaving out of view, for the present, questions about the sufficiency of the indictment, we think that the jury were erroneously misled, to the prejudice of the defendant, by the instructions of the court on the power of the district attorney in criminal prosecutions. True was first arrested on a warrant issued by R. LONG, also a justice of the peace at Vacaville, where the alleged offense appears to have been committed, if at all. The interest taken in the prosecution and defense of True seems to indicate that questions were involved which do not usually arise in ordinary cases of larceny of as small an amount as three dollars. A trial took place before Justice LONG and a jury, which lasted two or three days. The district attorney of the county assisted in the prosecution, and it appears, from uncontradicted evidence, that, while the jury were out considering their verdict, the district attorney said that if the jury did not agree he would go before GILLESPIE, a justice at Suisun, because he knew that he could get a jury at Suisun that would convict True. The jury did fail to agree, and were discharged. True's attorney asked to have the case set again for another trial, and the district attorney objected. On April 15, 1889, LONG set the case for a trial on April 22d, and on April 17th made an order for 40 jurors. In the mean time the district attorney had moved and asked that the case before Justice LONG be dismissed for the purpose of commencing it again before GILLESPIE, at Suisun, and LONG had refused to dismiss it. On April 15th, the district attorney sent a note to LONG requesting him to immediately dismiss the case, which he again refused to do. But on April 15th, and while the case was still pending before LONG, at Vacaville, another complaint for the same offense was made by Chapman, at the instance of the district attorney, before Justice GILLESPIE, at Suisun, on which True was again arrested, and taken to Suisun. True's attorney then went before the superior judge of the county on a writ of *habeas corpus*, and also on a writ of prohibition, seeking, on the one, to have True discharged, and, on the other, to prohibit GILLESPIE from proceeding in the case, on the ground that he had no jurisdiction because the case was pending before Justice LONG, at Vacaville. The judge denied both writs. Owing, we suppose, to some language used by the judge in passing on the question, a telephone message was sent to LONG, at Vacaville, to the effect that the superior court had ordered him to dismiss the case. He supposed that this message came from the district attorney; but it was not sent by him, although with his knowledge. Thereupon, on April 18th, LONG made on his docket the following order: "By order of Superior Judge BUCKLES the case of *People v. Dayton G. True* is hereby dismissed."

On April 19th, True's attorney caused a complaint to be made against True for the same offense, before the defendant in the case at bar, F. P. Ward, justice at Vacaville. Upon this complaint, which was a sufficient one, defendant issued a warrant, upon which True was arrested and brought into court. He pleaded "not guilty" and his attorney vigorously insisted upon a speedy trial. The main witnesses who had testified against True in Long's court, viz., Long himself, Chapman, and Harley, were in court. Long was examined. Chapman was put on the stand, but refused to testify, and was fined for contempt, although the fine was afterwards remitted; and Harley left the court-house, and refused to return and testify, although a constable notified him to come, without, however, having a subpoena. Judgment was afterwards, on the same day, entered acquitting True. There is no pretense that the defendant, Ward, acted in the premises corruptly, or with an improper purpose of acquitting True. Indeed, the original prosecutor, Chapman, said that he believed that Ward would be as liable to convict True as to acquit him; that he would have acted honestly, and given an honest judgment. He thought, however, that the district attorney should have been present. There was evidence tending to show that the defendant, Ward, knew of the previous proceedings in the case, as above stated.

Under these circumstances the court instructed the jury, among other things, as follows: "I instruct you that the district attorney is the law officer of the county, the attorney for the people in all criminal matters, and, as such, it is his duty to institute and conduct to a judicial determination criminal proceedings in the justices' courts of this county. Incident to these duties as district attorney, he has the right to control the prosecution of such cases, and has the right to move the dismissal of any criminal proceeding, in any justice court of this county, when, in his judgment, public justice demands it; and it is the duty of the justice, before whom such proceedings are pending, to enter a dismissal upon the motion of the district attorney. The district attorney is amenable to the law, as all officers are, and, should he exercise the functions of his office corruptly, there is a remedy by which he may not only be deprived of his office, but punished for such corruption or willful misconduct in office." Instruction 4. "I instruct you that, whenever the district attorney may find that justice demands it, he has the right, and it is his duty, to institute criminal proceedings in any justice court in the county, even if it be in a court remote from the residence of the defendants, and in another township, other than the one in which the crime is alleged to have been committed; and therefore I instruct you that the district attorney, if he believed that justice could not be done in the case of the People v. True in the township of Vacaville, for any cause whatever, had a right, and it was his duty, to dismiss the proceedings in said township, and bring them in Suisun township." Instruction 5.

Whether or not it is the duty of a district attorney to endeavor to remove a prosecution from one justice's court to another court, "remote from the residence of the defendant," in order that he may more readily obtain a conviction, or whether it is his duty to commence a prosecution in a second court before it has been ended in the first, are questions not necessary to be here determined. But we find no authority for the proposition that "it is the duty of a justice, before whom such proceedings are pending, to enter a dismissal upon the motion of the district attorney." The general provisions on the subject are contained in sections 1385 and 1386, Pen. Code, and are as follows: "1385. The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal may be set forth in an order entered upon the minutes. 1386. The entry of a *nolle prosequi* is abolished, and neither the attorney general nor the district attorney can discontinue a prosecution, except as provided in the last section." The only other statutory provision bearing on the subject to which our attention has been called is contained in the county government act, to the effect that the district attorney, when not engaged in the superior court, "must attend upon magistrates in cases of arrest, when required by them." It is clear, therefore, "the court" alone has the power to dismiss a criminal action. The instruction of the court on this point was erroneous, and that the error was prejudicial to appellant is obvious. The jury were thereby taught that the district attorney had full control over the prosecution, and the different courts in which, at various times, it has appeared; and they may well have believed that, if appellant knew of its previous history, and the action of the district attorney in the premises, he entertained the last complaint against True for the alleged purpose of thwarting the designs of a superior officer. That appellant had jurisdiction to try True, notwithstanding the pendency of the case before the justice at Suisun, must be taken to be the law of this case—*First*, because the prosecution had set the precedent; and, *second*, because the court instructed the jury as follows: "I instruct you that the defendant, Ward, had a legal right to entertain the criminal complaint against True, and to try the case, and render his judgment thereon, although such judgment would be a bar to another prosecution for the same offense." For this reason, therefore, the judgment would have to be reversed. We have discussed the foregoing questions because they are of general interest; but we are satisfied that the indictment in this case is not sufficient, and that the demurrer to it should have been sustained. It is drawn under section 753, Pen. Code, which provides for an accusation by the grand jury against any "district, county, township, or municipal officer" for willful or corrupt "misconduct in office." Assuming that it will lie against a judicial officer, still, when, as in the case at bar, it is against

such an officer, it must contain averments showing judicial misconduct. To remove a judicial officer for misconduct in office is a grave proceeding; and to do so without proper averments and proofs is to strike a blow at the independence of that important department of the government. The act charged must have been done in the discharge of judicial functions, and must be charged to have been done with corrupt, partial, malicious, or other improper motives, and with knowledge that it was wrong. In *Jacobs v. Com.*, 2 Leigh, 709, which was a prosecution of justices of the peace, the court of appeals of Virginia say: "It is a well-established principle that a judicial officer cannot be prosecuted criminally for any judgment rendered by him, however illegal, unless rendered from some motive of malice, partiality, or corruption. Much less can a prosecution be carried on when the act done is within the pale of his lawful authority, without such corrupt motives. In indictments of this character, it is usual to charge the judgment or thing done corruptly, wickedly, or maliciously." It is further held, in this case, that there must be an averment that the defendants knew the act charged against them to have been wrong. In *State v. Ross*, 4 Ind. 541, an indictment against a justice of the peace was held defective because it "did not state that he knew his decision to be in violation of law." See, also, *Triplett v. Munter*, 50 Cal. 644. Now, in the case at bar, there is no averment whatever of any illegal act by appellant. He had full jurisdiction and authority to do all the acts charged, and there is no averment of any corrupt or malicious motive. There is no averment that he entertained the complaint against True for the purpose of acquitting him, and there is no averment that he knew what he did to be unlawful or wrong. In fact, as before stated, there is no averment that he did any unlawful act. Indeed, the apparent theory of the indictment is that he did a lawful act with an unlawful intent. But assuming that there can be a crime consisting of intent alone, without any unlawful act, still the indictment, upon that theory, is entirely insufficient. The only averment on that point is this: The indictment, after reciting the facts above stated, and somewhat more in detail, concludes as follows: "That the said action of said F. P. Ward, as justice of the peace of said township, was done knowingly and willingly, and for the express purpose of making the said acquittal, by him, of said defendant a bar to the further prosecution of said Dayton G. True, for the same crime of petit larceny, before the said justice of said Suisun township." Of course, either the acquittal or conviction of True would have been, by operation of law, a bar to any other prosecution, and the averment that the appellant intended the necessary legal consequence of the judgment is of no significance. But, as before said, there is no averment that appellant intended to acquit True, or that he acted from corrupt, malicious, or partial motives, or that he knew his acts to be unlawful. It was found necessary to put important things

into the judgment which are not in the accusation. For these reasons, we think the indictment insufficient. Judgment and order reversed, with directions to the superior court to sustain the demurrer to the accusation.

We concur: PATERSON, J.; FOX, J.; SHARPSTEIN, J.; WORKS, J.

85 Cal. 535

BOAS v. FARRINGTON. (No. 12,964.)

(*Supreme Court of California*. Sept. 10, 1890.)

VENDOR AND VENDEE—CONTRACT—ABSTRACT OF TITLE.

The contract between plaintiff and defendant for the purchase, by the former, of the latter's ranch, provided for payment in three installments, and further contained the following stipulations: "Title to be good, or the money to be refunded, party of the first part [defendant] to furnish abstract of title to said land." Defendant furnished the abstract shortly after plaintiff had made the first payment. Held that, where such abstract failed to show a good title, plaintiff was entitled to recover the money already paid, even though defendant, as a matter of fact, had a good title.

Department 1. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

Archer & Bowden, for appellant. *Marcus Rosenthal*, (*E. F. Preston*, of counsel,) for respondent.

WORKS, J. One Rosenthal and the appellant entered into the following contract: "This agreement made the 20th day of August, 1887, between William Farrington of Santa Clara county, state of California, the party of the first part, and Joseph Rosenthal of the city and county of San Francisco, state of California, the party of the second part, witnesseth: The party of the first part has this day agreed to sell, and deed, by bargain and sale deed, his ranch in Santa Clara county, bounded as follows: On east by Quito road; south by lands of Mitchell, Neva, and Cox; west by Campbell's creek; north by lands of T. Scully, and a short portion of the Saratoga avenue, containing about 210 acres,—together with all improvement thereto belonging for the price of two hundred and fifty dollars per acre, payable as follows: Five thousand dollars on the signing of this agreement, twenty-one thousand two hundred and fifty dollars on the 20th day of September, 1887, and the balance on or before two years; with interest at 8 per cent. per annum, payable semi-annually, with bond and mortgage secured on the within-described premises; title to be good, or the money to be refunded; party of the first part to furnish abstract of title to said land. Witness the hand of party of the first part this 20th day of August, 1887, at San Jose, Cal." Rosenthal paid the \$5,000, and thereafter the appellant furnished the abstract provided for in the contract. The abstract failed to show a good title to the land in the appellant. Rosenthal demanded a return of the \$5,000, which was refused. His claim therefor was assigned to the respondent, who brought this action to recover this sum of money. The court below rendered judgment for the plaintiff,

and this appeal is by the defendant, from the judgment, and comes upon the judgment roll. The court below found that the abstract furnished by the appellant did not show a good title in him, but that, as a matter of fact, he had a good title to the property. The whole controversy on this appeal turns upon the proper construction to be placed upon the contract above set out. The appellant contends that the contract did not require him to furnish an abstract showing a good title, or at most that he was not bound to furnish it at the time the defective one was furnished, or at any time before the time for the final payment of the purchase money; and that, as it appeared at the trial that he had a good title to the property, he was entitled to judgment. We cannot so construe the contract. It is apparent, from the terms of the agreement, that the question of title was to be determined before the respondent's grantor could be required to make the second payment, as, at that time, the subsequent payments were to be secured, and the whole matter closed up, but, if this were not so, and the appellant was not bound by the terms of the contract to furnish the abstract until a later day, he waived this right, and did furnish it before Rosenthal offered to rescind. Certainly, when the abstract was furnished, the purchaser had the right to act upon it, and, as it failed to show a good title in the vendor, the vendee was not bound to lay out of the use of his money, and pay the whole balance of the purchase money before he could recover back any part of what he had paid. If the vendor had a good title, as the court below found he had, he should have furnished an abstract showing it, and upon it being called to his attention, either by the demand for a rescission or otherwise, that it was defective, he should have at once caused a perfect abstract to be furnished. He did neither; and in his answer stands by the abstract furnished by him, and asserts that it was a good one. If the abstract was a good one, it showed that his title was bad. It is too late now for him to assert that he was not bound to furnish an abstract at all, or that he was not bound to furnish it at the time he did. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

85 Cal. 555

MCLEAR v. HAPGOOD *et al.* (No. 13,720.)
(*Supreme Court of California.* Sept. 10, 1890.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE—ESTOPPEL.

1. In a suit to restrain defendants from diverting the waters of a stream which plaintiff claims by adverse user, where two witnesses and plaintiff himself testify that such user exists, and there is put in evidence a written agreement between plaintiff and defendants that the latter shall pay him for the use of the water during seasons when there is not enough for all parties, a finding that plaintiff is the owner of the water will not be disturbed on appeal.

2. Plaintiff is not estopped from claiming the water by a recital in the agreement that defendants are "the owners of the surplus waters."

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

J. C. Black, for appellants. Goodwin & Goodwin, for respondent.

HAYNE, C. This was a suit to restrain the defendants from diverting the waters of a certain stream. The trial court gave judgment for the plaintiff, and the defendants appeal. The plaintiff's right is based upon adverse user. His testimony, and that of the witnesses Theilbar and Rebecca King, tends to show such user; and it was shown that the defendants agreed in writing that they would pay the plaintiff for the use of the water during seasons when there was not enough for all parties. This agreement was in force during a limited period only, but it was a clear acknowledgment of the plaintiff's right. This evidence was at least sufficient to raise a substantial conflict, and, therefore, the finding as to the ownership of the water cannot be disturbed. It is contended, however, that the plaintiff is estopped, by a recital in the agreement referred to, from denying the defendants' right to the water. But the recital was that the defendants were "the owners of the surplus waters," etc. The defendants contend that the word "surplus" was interlined without their knowledge after the execution of the agreement. But the word was entirely in accord with the tenor of the agreement. For, if the defendants were the owners of the water, why should they have agreed to pay the plaintiff for it? And the plaintiff distinctly testified that the word was in the agreement before he signed it. The most that can be said is that the evidence in relation to the matter was conflicting. The recital, therefore, did not estop the plaintiff; and there is no sort of foundation for a claim of equitable estoppel. The plaintiff, therefore, must be held to be the owner of the water to the extent claimed; and there was sufficient evidence that there was not enough for both parties. Finally, it is urged in the reply brief that the findings are conflicting. The position in this regard is that the sixth finding is in conflict with the others. But we do not think so. There is no dispute about the ownership of the "water ditch" mentioned in that finding. The ownership of this ditch is entirely distinct from the right to divert the water of the stream; and to say that the latter is an incident of the former is to assume the whole question. It is not contended that the findings are contradictory in any other respect; and we deem it sufficient to say that we have examined the findings, and find no material conflict therein. The other matters do not require special notice. We therefore advise the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

85 Cal. 557

MCLEAR v. HAPGOOD *et al.* (No. 13,189.)
(*Supreme Court of California.* Sept. 10, 1890.)

CONTINUANCE—SURPRISE.

Defendant moved for a continuance on the ground of surprise, in that there was a material

alteration in an instrument executed by him, and introduced in evidence by plaintiff, as he expected to show by a witness, to obtain whose attendance the continuance was asked. He saw the instrument with the interlineation coming from plaintiff's possession the day before he moved for the continuance, and he did not make such motion as soon as plaintiff's evidence was in, but proceeded to examine witnesses as to the execution of the instrument. *Held*, that it was not error to refuse the continuance.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

J. C. Black, for appellants. *Goodwin & Goodwin*, for respondent.

HAYNE, C. This is a separate appeal in the same case as No. 13,720, (*McLear v. Hapgood*, ante, 788, just decided.) The only ground relied upon here is that the defendants were surprised by the discovery, at the trial, of a material alteration in a document introduced in evidence by the plaintiff, viz., the interlineation of the word "surplus" in such document. The position is that, if the defendants could have shown that this word was inserted after the execution of the document, the plaintiff would be estopped by the recitals of the instrument, and that their motion for a continuance should have been granted for the purpose of enabling them to obtain the evidence of experts, and of the defendant D. A. Block, in relation to the matter. It is the rule, however, (subject to but few exceptions,) that a party claiming to be surprised must move for a continuance at the earliest practicable moment. He is not ordinarily allowed to wait until he sees how the case is going before he makes his motion. In the present case it appears that the document in question was introduced as part of the plaintiff's case; that the defendant, who appeared *in pro. per.* and for his co-defendants, saw the duplicate agreement coming from the hands of the plaintiff, and saw the interlined word "surplus," on the day before he moved for a continuance; that, being so informed of the facts, he did not move for a continuance at the time the document was introduced in evidence, or at the close of the plaintiff's case, but proceeded to open the case for the defendants and himself, took the stand, and "testified as to the circumstances attending the signing of said contract," and "placed upon the witness stand defendant Joseph Hapgood, and his son Nathan Hapgood, and interrogated them fully as to the circumstances attending the signing of the agreement." Such being the case, we cannot say that there was an abuse of discretion in refusing the continuance. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

WILLARD v. DILLARD, Judge. (No. 20,692.) (*Supreme Court of California*. Aug. 26, 1890.)

In bank. Petition for writ of *mandamus* to the superior court, Santa Barbara county; R. M. DILLARD Judge.

J. W. Taggart, for petitioner. *R. B. Canfield*, for respondent.

BEATTY, C. J. Let the alternative writ of mandate issue in this cause as prayed, commanding the said respondent, upon two days' notice to the district attorney of the said county of Santa Barbara, to proceed to settle, and to settle, the bill of exceptions in the case of *People v. May Willard*, in which case an appeal has been taken from the judgment rendered in said superior court to this court, or that he show cause before this court, at the opening of the court on the first day of the October term thereof, in the city of Los Angeles, why he has not settled the same.

85 Cal. 383

PEOPLE v. ROSS. (No. 20,678.)

(*Supreme Court of California*. Aug. 26, 1890.)

CRIMINAL LAW—FORMER JEOPARDY—REMARKS OF COUNSEL.

1. The commencement of the trial and the discharge of the jury, without defendant's consent, on account of the sickness of one of the jurors, do not constitute jeopardy, and evidence of such proceedings is not admissible in support of a plea of former jeopardy on another trial for the same offense.

2. On a criminal trial the counsel for defendant refused to reply to the opening argument of the prosecuting attorney after the evidence was in, and the latter claimed the right to argue the case further to the jury, which claim the court denied. The prosecuting attorney then remarked in the presence of the jury that "the defense was endeavoring to prevent the prosecution from arguing the truth of the charge." *Held*, that this was not prejudicial to defendant.

In bank. Appeal from superior court, San Joaquin county; JOSEPH H. BUDD, Judge.

A. V. Scanlan, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

SHARPSTEIN, J. The commencement of the trial of the defendant, and the discharge of the jury, on account of the sickness of one of the jurors, without the consent of the defendant, did not constitute jeopardy or an acquittal of the defendant of the crime for which he was on trial; and evidence of that proceeding was not admissible to support a plea of once in jeopardy or former acquittal in a subsequent trial, upon the same or another information, filed against him for the same offense. Nearly a century ago KENT, J., speaking for the supreme court of New York, in *People v. Olcott*, 2 Johns. Cas. 301, said: "All the authorities admit that when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice the result must be the same." The unanimity of authorities upon that question remains the same to this day. The question is now too well settled to admit of argument. It is not an open one in this court.

The only other exception presented by the record is to a remark made by the district attorney, which is presented as follows: "After the introduction of all the evidence admitted in the case, the assistant district attorney argued the case to

the jury, and the attorney for the defendant declined to reply, whereupon the assistant district attorney claimed the right to argue the case to the jury, which claim the court denied. The assistant district attorney thereupon stated to the court, and in the presence and hearing of the jury, that 'the defense was endeavoring to prevent the prosecution from arguing the truth of this charge to the jury,' to which statement defendant then and there excepted, and which statement defendant assigns as error." There was no occasion for the remark, and it would have been better for the district attorney to have refrained from making it, but we cannot see how the defendant's case could be prejudiced by such a piece of *badinage*. Judgment and order appealed from affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; FOX, J.; PATERSON, J.; THORNTON, J.; WORKS, J.

§5 Cal. 300

HUSE v. DEN *et al.* (No. 12,729.)

(Supreme Court of California. Aug. 30, 1890.)

DEEDS—DELIVERY—SALES BY EXECUTORS—SUBROGATION—IMPROVEMENTS.

1. The grantor in a deed of trust, made to effect a settlement in favor of his wife and children, was named as one of the trustees therein. The deed was duly executed and acknowledged, and the other trustee, who was present at its execution, consented to act. The deed remained in the possession of the grantor, but he had it recorded, and afterwards in his will he recognized it as an existing trust. *Held*, that there was a sufficient delivery of the deed.

2. Purchasers of land at void sales by executors can claim no rights of subrogation where they know that the land was subject to a trust, and that the executors had no authority to sell, and where the purchase money was applied to various purposes, indiscriminately with money arising from sales of personality.

3. Under Code Civil Proc. Cal. § 741, in an action to recover land from purchasers at a void sale by executors, no allowance for improvements can be made, except as an offset for damages claimed for withholding the possession.

Department 2. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

Henry E. Highton and Philip G. Galpin, for appellants. *Oliver P. Evans and T. B. Bishop*, for respondents.

McFARLAND, J. This is an appeal by defendants Hollister *et al.* from an order denying a new trial. There is also another appeal by the same defendants (No. 12,728) from the judgment rendered in the action. The transcripts in the two appeals are substantially the same; and, as the points in the two are similar, they have been argued and submitted together. The subject-matter involved is the ownership and right of possession of two tracts of land, each being part of the Rancho Dos Pueblos in the county of Santa Barbara—one containing 2,785 acres, and the other 112 acres. The main issue, as to the ownership, is between the heirs of Nicholas A. Den, deceased, and Hollister *et al.*, who claim as purchasers from the executors of said Den, deceased, these purchases having been made without any orders of the probate court. The judgment of the court be-

low was in favor of the heirs, and against the purchasers, who appeal. The case has been in this court before. It was first decided in the lower court in favor of the purchasers, but, upon appeal, the judgment was reversed in this court, and the cause remanded. After some amendments to the pleadings it was tried again, with the result as above stated. When the case was here before, the history and facts of the case were so fully stated in the opinion of the court that we do not deem it necessary to restate them here. See *Hill v. Den*, 54 Cal. 6. And many of the questions involved were decided at that time and have become the law of the case. We will therefore notice the new features which the present appeals present.

1. An important document in the case is a deed of trust, embracing one undivided half of the rancho, executed by said Nicholas A. Den and wife to himself and one R. S. Den, on September 16, 1851. This deed was attacked on the first trial as invalid and inoperative for various reasons then presented, but this court held that deed to create a perfectly valid and operative trust for the purposes which it declared, (54 Cal. 19, 20;) and such must now be held to be the law on that point. On the first trial, however, while the appellants here denied the effect of this deed as claimed by the heirs, they admitted its due execution, but, before the second trial, they amended their pleadings so as to deny its execution. Therefore, the point as to its execution was not before this court on the former appeal. But at the second trial the court below found that it was delivered, and we think the finding is based on sufficient evidence. There is no dispute that the instrument was signed and acknowledged by Nicholas A. Den and his wife; but it is contended that there was no sufficient delivery, because there was no formal and physical handing of it over to the other trustee, R. S. Den. But R. S. Den was present when it was prepared, signed, and acknowledged, and consented to become one of the trustees therein, and act as such. It remained afterwards in the possession of Nicholas A. Den, who caused it to be recorded in the recorder's office a month or two afterward, and was among his papers at the time of his death, and in his will he referred to it, and recognized it as an effectual vesting of the property mentioned in it in the grantees in trust. The intent of the grantor is the main thing to be discovered. Here the grantor was himself nominally one of the grantees. The deed was intended to be a deed of settlement for the benefit of his children, and was in the nature of a covenant to stand seised for the benefit of the *cestui que trust*. It was formally acknowledged and recorded. The other grantee was present, and accepted the trust, and the grantor recognized it in his subsequent will. These circumstances were sufficient to warrant the court in finding a complete execution of the instrument.

2. Nicholas Den died on March 3, 1862, leaving a widow and 10 children. He, also, left a will, which was duly probated, in which Jose Maria Hill, Charles E. Huse, and Alfred Robinson were named as exec-

utors. Robinson afterwards resigned as executor, and Hill and Huse undertook, without any order of the probate court, to sell and make conveyances of land of the estate to Hollister and others, under which conveyances appellants claimed the legal title at the first trial. But this court, on the former appeal, construed the will, and held that it gave no power to the executors to sell the real property, that such sale could have been made only under an order of the probate court, and that the sales and conveyances attempted to be made were void. 54 Cal. 21, 22. This ruling was not only clearly correct, but is the law of the case. It is urged, however, that although the sales by the executors were void, still the doctrine of estoppel *in pais* may be invoked by appellants. But the facts and pleadings on that point are substantially as those on the former appeal, and this court then held that "there is no foundation here for the claim of an estoppel *in pais*. The rules which govern in such cases have been so often laid down here that they do not require repetition." This ruling, adopted by the court below, meets our approbation, and is also conclusive on the point. 54 Cal. 23.

3. The point that the heirs were barred by the statute of limitations was also made on the former appeal, and decided adversely to appellants, this court holding that "the statute of limitations has no application." 54 Cal. 23.

4. The appellants make the point, which does not appear clearly to have been made at the former trial and appeal, that, upon the doctrine of subrogation, they are entitled to be reimbursed the amounts paid by them at the void sales. On this point we agree with the findings and opinion of the learned judge of the court below. When one purchases land at a void judicial sale, in entire ignorance that it is void, and in good faith pays money thereon which is applied to the satisfaction of a lien or incumbrance upon the land, it has been held, in some cases, that he should be put in the place of the creditor, to the extent, at least, that his money has satisfied the lien. But in the case at bar the purchasers knew of the deed of trust and the will; knew of the want of power of the executors to sell without an order of the probate court; were warned not to purchase without the order and sanction of said court; and purchased in the face of this knowledge and caution. They were not, therefore, ignorant purchasers in good faith, to whom the doctrine of subrogation would, under any circumstances, apply. Moreover, their payments were not made to the heirs who are parties here, but to the executors and trustees, who used the money indiscriminately with other moneys received from sales of personal property and other lands for various purposes. As said by the court below: "Neither by allegation in the pleadings, nor in the evidence, has any successful attempt been made to segregate the various payments or applications of these heterogeneous funds." For these reasons we think the court was right in rejecting this claim of

subrogation, and, therefore, it is not necessary to examine the question whether such a claim was not within the exclusive province of the probate court, and whether a court of equity, under our system, has jurisdiction to enforce payment of claims against an estate of a deceased person.

5. Appellants contend that they should have been allowed for the value of their improvements made on the land. Without entering into the discussion of the question whether any such allowance can be made to one who has not been a purchaser without knowledge and in good faith, we think it clear that under our statute, and former decisions in this state, such allowance can be made only as an offset for damages claimed for withholding possession. Code Civil Proc. § 741. Such allowance was made in the case at bar. The court found that the value of the improvements placed on the land was in excess of the value of the rents and profits, and therefore allowed respondents no judgment for rents or damages. This was all that appellants were, under any view, entitled to demand.

We have thus referred to all the main points in the case, and see no others necessary to be noticed in detail. We find no error committed by the court below. This case has been very elaborately and ably presented in the various briefs of counsel. A great many authorities have been cited and discussed. It would be impossible for us to review those authorities in an opinion without exceeding all reasonable bounds. We have therefore given only our conclusions. The order denying a new trial is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

HUSE v. DEN *et al.* (No. 12,723.)

(Supreme Court of California. Aug. 30, 1890.)

Department 2.

Henry E. Highton and Philip G. Galpin, for appellants. Oliver P. Evans and T. B. Bishop, for respondents.

PER CURIAM. This is an appeal from a judgment, and on the authority of *Huse v. Den*, ante, 790, (No. 12,729, this day decided,) the judgment is affirmed.

85 Cal. 633

COLUSA COUNTY v. HUDSOON. (No. 13,494.)

(Supreme Court of California. Sept. 11, 1890.)

HIGHWAYS—CONDEMNATION—DAMAGES.

1. On proceedings to condemn a right of way for a public highway, where the owner of the land claims damages for the additional fencing required, it is a question for the jury whether the land is worth fencing for any use to which it may be put.

2. Such owner is entitled to compensation for a private road which he had laid out and graded through his land, and which was taken for a public road.

In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

B. F. Howard, A. G. Dyas, and McKune & George, for appellant. H. M. Albery, for respondent.

BEATTY, C. J. This is a proceeding to condemn a right of way for a public road. After the usual proceedings for viewing and laying out the road, and refusal of the defendant to accept the compensation awarded by the commissioners and board of supervisors, this action was commenced by the district attorney, and tried by the court and a jury, to which were submitted several special issues concerning the question of damages and benefits. The jury awarded \$50 for the value of the land to be taken for the proposed road, \$100 as damages to the land not taken, and found that the land not taken would be benefited in the amount of \$50. Upon this verdict and additional findings by the court, a decree was entered condemning the land for the right of way, awarding the defendant \$100 damages; and that being the precise sum previously awarded by the board of supervisors and refused by the defendant, the plaintiff had judgment for the costs of the proceeding, amounting to over \$200. Defendant moved for a new trial. His motion was overruled, and the appeal is from that order. It appears from the bill of exceptions that the defendant's land is a mile in length, by a quarter of a mile in width, containing 160 acres, and extending across a high ridge of hills; that prior to the laying out of the proposed highway the defendant had a private road graded through his land from end to end, and crossing the ridge on the same route; that the highway was laid out 20 feet in width, on each side of the center of said private road. The evidence as to the character and value of defendant's land, the uses to which it is adapted, and the necessity of fencing it for any use of which it is susceptible, is very conflicting. Some of the witnesses for the plaintiff think the land is not worth more than a dollar and a quarter an acre; others put it higher, some estimating it at four dollars. But those who put this valuation upon it base their estimate upon the value of the timber, for which it is worth as much without as with an inclosure. The plaintiff himself values the land at seven dollars an acre for agricultural and horticultural purposes, to which he says it is adapted, and says that it is necessary for these purposes, as well as for grazing, to fence it. It appears, however, that although he had resided on the land four years he had never attempted to inclose more than two or three acres prior to the service of summons in this proceeding, though about that time he commenced, and at the date of the trial had partially completed, the inclosure of forty acres more. He says that it is and has been his intention to inclose the entire tract; that the cost of such exterior fence would be from twelve to fifteen hundred dollars; and that the cost of the additional fencing which would be rendered necessary by the opening of a public road through the land would be at least \$1,000. The plaintiff's witnesses generally say that defendant's land is valuable only for grazing and the timber that may be cut from it; that for grazing purposes it might be useful to fence it, but that the owner could afford

none but the cheapest kind of a fence. And several of them testify that any fence sufficient to turn stock would cost more than the land is worth, and consequently that with or without the proposed highway the defendant could never afford to inclose it. The defendant objected to all testimony tending to prove that his land was not worth fencing, and excepted to the rulings of the court admitting it. Upon these exceptions, and upon exceptions to the charge of the court to the jury to the effect that, if they found from the evidence that his land without the proposed road was not worth fencing for any purpose to which it could be put, no damages could be allowed for cost of fencing, defendant presents the principal question involved in his appeal. He contends, as we understand his contention, that he is the sole judge whether it is necessary or profitable to fence his land, and that it cannot be left to a jury to say that the land is not adapted to any purpose that would pay for the cost of fencing; that, having shown that some of the land is susceptible of cultivation, and all of it adapted to grazing, for which purposes fencing is useful, the cost of erecting and maintaining a fence on each side of the proposed highway is an essential item of damage caused by the opening of it, and must be allowed notwithstanding the opinion of witnesses and the finding of a jury that if the highway were not opened the land would not for any purpose justify the expense of inclosure. The authorities do not sustain this contention. Whatever may be the facts of this case, it is easy to suppose such a case as the witnesses for the plaintiff testify to,—a case in which a tract of land is not worth inclosing for any use to which it can be put. As such land will never be fenced except in obedience to some whim of the owner, which the legislature is not bound to regard, it is evident that the opening of a highway through it will not involve the necessity of erecting fences, the only effect would be to make an inclosed lane through uninclosed land, and it would be absurd to allow the cost of erecting and maintaining such fences as an item of damages. If such a case may arise, it follows necessarily that its existence must be left to the determination of the tribunal established by the constitution and the laws for the estimation of the damages to be awarded for property taken for public use. Every objection that can be urged against the submission of such a question to the decision of a jury can be urged with equal effect against the whole scheme and doctrine of the law of eminent domain. It may be true that the finding of a jury upon the question of the necessity of fencing will, in some cases, operate most unjustly against the owner of the land. It is equally true that the finding as to the damages in any case may be unjust. But the necessity of taking private property for highways and other public uses is paramount, and must always remain so; and, until some better and safer method of ascertaining the compensation to be awarded to the owner is devised, we must be content to abide by the verdict of an

impartial jury, notwithstanding the possibility that injustice may sometimes be done. As to this particular question, the law is correctly stated in *Lewis on Eminent Domain*, § 498, as follows: "Where by taking a part of a tract additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land, then the burden of constructing and maintaining such fence, in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. In some of the cases cited an allowance was made for the cost of fencing as a specific item, and the language of many of the decisions seems to warrant the same view; but this is clearly not correct, unless such an allowance is required by the statute under which the proceedings are had. It is a question of damages to the land as land. If, in view of the probable future use of the land, additional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it." The case of *Butte Co. v. Boydston*, 64 Cal. 110, which is cited and relied on by both appellant and respondent, is in perfect accord with the foregoing statement of the law. The only point there decided was that the defendant was entitled to prove, if he could, the necessity of fencing, and if he did prove such necessity that the cost of additional fencing rendered necessary by the opening of the road was an item of damages. Aside from the point decided, all that was said in the opinion of the court is consistent with, and in fact implies, the proposition that the question as to the utility or necessity of fencing the land is for the jury. We see no error in the rulings of the superior court in relation to this question.

The other principal question in the case relates to the claim of the defendant for compensation for his private road, the value of which, as an improvement, he offered to show. The superior court excluded all evidence as to the value of this road, holding, in effect, that the land to be taken must be valued without any reference to the existence of the road, and just as if it were so much grazing land wholly unimproved. In this we think the court erred. If a man had constructed a bridge across a stream on his own land, and for his private use, and if the county should lay out a highway to cross on that bridge, it would scarcely be contended that the county could condemn the bridge for the public use, without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed, and the defendant's graded road in this case. The grade is there. It must have cost something, and is no doubt of some

value. The county proposes to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive, the county will get the benefit, and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition. He will enjoy the highway in common with the general public, and must pay his share of the cost. In so far as the highway is a benefit to him, he is chargeable, and has been charged, with the value of the benefit. If he contributes to the construction of the road and improvement in the shape of a mile or more of grading, he is entitled to the value of that improvement, and it was error to exclude evidence as to such value. We see no other error in the record, but for the reasons stated the order appealed from must be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: MCFARLAND, J.; PATERSON, J.; WORKS, J.; FOX, J.; THORNTON, J.; SHARPSTEIN, J.

85 Cal. 622

McGRATH v. WALLACE *et al.* (No. 13,302.)
(*Supreme Court of California.* Sept. 10, 1890.)

ADVERSE POSSESSION—INTERRUPTION.

One in possession of land under a tax-deed, which was insufficient to vest the title in him, cannot claim title by adverse possession where it is shown that, within the time required to perfect such title, there was a judgment against his tenant, in possession of part of the land, in favor of a grantee of the former owner, under which such grantee was put in possession.

Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

F. D. Ryan and *R. B. Wallace*, for appellants. *Ed. M. Martin* and *Clinton White*, for respondent.

FOX, J. The action is to quiet title, accompanied with a prayer for possession, the complaint alleging that defendants are in possession, claiming an interest in the property, but without right. Judgment for plaintiff, from which, and an order denying a motion for new trial, defendants appeal. Defendant Mary A. Wallace became the owner of the property in fee, April 23, 1862. In 1865 the property became delinquent for taxes. Suit was brought under the statute then in force for the recovery thereof, resulting in a judgment and order of sale. At the sale Eli Mayo became the purchaser. The court finds that these proceedings were insufficient to divest the title of Mary A. Wallace. But under these proceedings, and a writ of assistance issued therein, Mayo was put into possession in August, 1865, and "from that time until March, 1878, (except for a short space of time, during the latter part of 1875 and the first of 1876, when John H. Reeves had possession of the front portion of said property,) said Eli Mayo had the open, notorious, actual, continuous, and exclusive possession and use of said property, claiming to own it as against the whole world. On March 28, 1878, Mayo conveyed the property to plaintiff, who entered into posses-

sion thereof, and continued in the open, notorious, actual, continuous, and exclusive possession and use thereof, claiming to own the same, until about January, 1883, when the defendants ousted her." This quotation is from the findings. This action was commenced in August, 1883.

Even if it be true, as matter of law, that the proceedings culminating in the sale for taxes in 1865 were insufficient in law to divest the title of the defendant Wallace, they did culminate in a judgment and decree of court, ordering a sale of the property, followed by a sale, a failure to redeem, and in due time a sheriff's deed and a writ of assistance, under which the purchaser was put into possession. He entered under color of title, claiming to be the owner, and his subsequent continuous possession, of the character found by the court, was sufficient to give him perfect title, unless there was some other fact the existence of which defeated the running of the statute of limitations in his favor. The court finds that Mary Wallace was, and continued to be, a minor until May 2, 1875. The statute therefore did not commence to run in favor of Mayo until after that time, but it did commence to run in favor of himself and his grantee at that time, and nearly eight years elapsed after that before the possession thus acquired, claimed, and held was interrupted by the defendants, as appears from the finding. But this finding is attacked on the ground that it is not supported by the evidence. In addition to what is already quoted, the findings further show that on May 6, 1876, Mary A. Wallace conveyed the property to Theodore Le Roy, who began an action against John H. Reeves as defendant, in the circuit court of the United States, for the possession of said lot. According to the preceding finding, Reeves was then in possession of the front part of the lot. This suit terminated in a judgment in favor of plaintiff therein, August 9, 1878. The court finds that "in 1879 the marshal went through the form of executing this judgment, but the proceedings taken were not sufficient to constitute a change of possession of the property, nor was the plaintiff's possession of the property disturbed thereby." The evidence bearing upon the question consists of that of Eli Mayo, plaintiff's grantor, who showed possession from 1865 to 1876, and tax-receipts for that period. He says: "In 1875 I moved a house onto the lot, and gave possession to Reeves. He never had possession of the whole lot; never of the rear of it." He also says that he paid some of the taxes after 1876, but does not say that he paid them all, or for what years, or produce receipts therefor. Mrs. Reeves testifies that she and her husband lived on the lot a few months, and at that time Mr. Harnett had houses on the rear portion of the lot, and there was a cross-fence between them. The evidence also shows the introduction of the judgment roll in *Le Roy v. Reeves*, showing service of summons on Reeves May 18, 1876, which record is followed by uncontradicted evidence that, when the marshal went to put the plaintiff in possession under the judgment, the lot was fenced, but otherwise vacant,

and the marshal put plaintiff's agent in possession of the lot. This suit, judgment, and the execution of the same, constituted in law such an interruption of the possession of plaintiff as prevented her from acquiring title by prescription, under the statute of limitations. The possession must have been continuous. *San Jose v. Trimble*, 41 Cal. 536. Even if she had paid the taxes during all that period, that alone, in view of this interruption of possession, would not have given her title. The finding is therefore not supported by the evidence, and as she had no paper title, but relied, and must rely, upon the statute of limitations for title upon which to recover, the judgment and order appealed from must be reversed, and the case remanded for new trial. A complaint *quia timet* counting upon title alone, as this one does, is not supported by evidence of prior possession insufficient to make title under the statute of limitations. Plaintiff in such a case must stand upon title, and this may be defeated by the defendant in possession showing an outstanding title in a third person, without connecting himself with it. *Cramer v. Porter*, 41 Cal. 466. This rule applies to all the parties; but on the trial, before the final decision of the case, but some time after the submission thereof to the judge for decision, the defendant Wallace applied to the court, upon notice, for leave to open the case, and allow her to supply an omission which it was claimed had been inadvertently made at the trial, and introduce a deed from Le Roy to herself of the property, thus bringing the record title back to herself, and which deed was made before the commencement of this action. The court, in the exercise of its discretion, denied the motion, and this is claimed to have been error. The granting of the motion was a matter resting in the discretion of the trial court, and its ruling would not be disturbed in this court, unless there was a clear abuse of discretion. As the case must be reversed on other grounds, and the omission is not likely to occur a second time, it is not necessary to determine whether there was an abuse of discretion or not. We do not deem it necessary to discuss other points made in the briefs of counsel. Judgment and order reversed.

We concur: PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

WORKS, J. I concur in the judgment on the following grounds stated in an opinion prepared in this cause by Mr. Commissioner HAYNE:

"The trial court gave judgment for the plaintiff, and the defendants appeal. The complaint was probably intended as a complaint in a suit to quiet title, and is sufficient as such. It may also be assumed for the purposes of this opinion to be sufficient as a complaint in ejectment upon title. We shall consider these different aspects of the case separately.

"1. The judgment cannot be sustained as a judgment in ejectment upon title.

"(a) It is clear that the plaintiff had no paper title. The findings show that

'on April 23, 1862, the defendant Mary A. Wallace became the owner in fee-simple by means of a proper conveyance to her of the property in controversy;' 'and that the property was sold for taxes in 1865 to one Mayo, to whom a deed was made. But it is further found that 'the proceedings culminating in the execution and delivery of said deed to Eli Mayo were not sufficient to vest title in him, or to divest the title of the defendant Mary A. Wallace.' This left the paper title in Mary A. Wallace, who retained it until 1876, when she conveyed it to one Le Roy, in whom, so far as the record shows, it is still outstanding.

"(b) The plaintiff did not show a title by adverse possession. The findings show that in August, 1865, Mayo was put in possession of the property under a writ of assistance, and that 'from that time until March, 1878, (except for a short space of time during the latter part of 1875, and the first of 1876, when John H. Reeves had possession of the front portion of said property,) said Eli Mayo had the open, notorious, actual, continuous, and exclusive possession and use of said property, claiming to own it as against the whole world. On March 28, 1878, Mayo conveyed the property to the plaintiff, who entered into possession thereof, and continued in the open, notorious, actual, continuous, and exclusive possession and use thereof, claiming to own the same until about January 9, 1883, when the defendants ousted her.' If the foregoing were the only facts in relation to the matter, there could be no doubt that the plaintiff had acquired a title by adverse possession, upon which she could maintain either an action of ejectment or an action to quiet title. The foregoing, however, are not the only facts in relation to the matter. The findings show that 'the defendant Mary A. Wallace was a minor until May 2, 1875.' The plaintiff's possession before that date, therefore, does not count. And in April, 1878, a statute was passed requiring the payment of all taxes 'which have been levied or assessed' as a condition of adverse possession, (Code Civil Proc. § 325;) and, after this statute went into effect, it was necessary that the plaintiff should have paid the taxes. It is not contended that there is any sufficient affirmative showing as to the payment of taxes. The findings are silent upon the question, and the evidence does not show any payment after 1878. The plaintiff introduced tax-receipts up to 1876, at which period a showing of such payment was not necessary, but none subsequent to that date. And the fact that 'Mayo testified that he paid some of the taxes after 1876,' is insufficient as a showing of payment after 1878. Now, assuming in favor of the plaintiff that it is not necessary that the findings should affirmatively show that taxes were not levied or assessed, and consequently that, so far as the findings are concerned, the plaintiff has a title by adverse possession, yet, upon the evidence, it must be held that the showing is insufficient. For under the latest decision in the matter it must be held that the burden is upon the party claiming by adverse possession to show either that he has

paid the taxes or that none have been assessed. *Reynolds v. Williard*, 80 Cal. 605, 22 Pac. Rep. 262. It must be held therefore that *Reynolds v. Williard* overrules *Oneto v. Restano*, 20 Pac. Rep. 743, upon this point, and establishes the rule to be followed. In this view the evidence showed no title in the plaintiff by adverse possession.

"Upon the record before us, therefore, it must be held that the plaintiff had no title, but a mere naked prior possession. This is not sufficient to support a complaint upon title alone. As a matter of course, evidence of possession raises a rebuttable presumption of title. But here such presumption is rebutted by proof that the title is outstanding in Le Roy. It is equally true that as against a mere trespasser prior possession is a sufficient foundation for the action. But where prior possession alone is relied on as the foundation of the action it must be alleged in the complaint. Possession without title is clearly not title, though as above stated it is some evidence of title. And hence, a complaint which counts upon title alone is not supported by evidence of prior possession, if it affirmatively appears that the plaintiff has no title. In other words, where the plaintiff relies upon title alone it is sufficient for the defendant to show that the title is outstanding in a third person without connecting himself with it. *Cranmer v. Porter*, 41 Cal. 466. If, therefore, the action is to be considered as in ejectment, the judgment must be reversed.

"2. The same result would follow if the complaint be considered to be a complaint to quiet title; for we do not understand that a mere naked prior possession is sufficient to maintain the action. We do not think that one who has no kind of interest in the property, and who may not even be in possession at the commencement of the action, can require all persons who claim an interest in the property to disclose the nature of their claims, and have them judicially determined. Compare *People v. Center*, 66 Cal. 555, 556, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. This is not in conflict with *Pennie v. Hildreth*, 81 Cal. 130, 22 Pac. Rep. 398. One of the points decided in that case was that an administrator had sufficient interest to maintain the action, of the correctness of which we have no doubt; but it was also decided in that case that the denial of the plaintiff's allegation of ownership raised a material issue, and this was put upon the ground that the plaintiff must have some interest in the property. In this regard the court said: 'The basis of his right right to require the adverse interest to be produced, exposed, and judicially determined is his own interest in or ownership of the land. This is the one thing necessary for him to prove in order to make out his case.' 81 Cal. 132, 22 Pac. Rep. 400. This language is not inconsistent with what was previously said in the case, viz., that it was not necessary that the plaintiff should have title; for that refers to the whole title. The court went on to say that the statute was broad enough to cover 'every interest or estate in lands

of which the law takes cognizance.' But this a very different thing from saying that it covers a case where the plaintiff has no interest whatever. It may be conceded, without affecting the decision in this case, that any interest which the law recognizes as such is sufficient foundation for a suit to quiet that interest. This would not be in conflict with *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518. All that was decided in that case was a question of pleading. The plaintiff there filed a complaint to quiet title in the usual form, and under it sought to have a decree that defendant should convey to him the legal title. The court held that this could not be done. The theory of the action was that the defendant had some claim which was invalid and void as against the plaintiff, and it was manifestly in contradiction of the pleading to maintain that the defendant's claim was not invalid or void, but on the contrary was the legal title, and that a conveyance of it should be decreed. It is not necessary in this case, however, to decide what interest the plaintiff must have to maintain the action. All that it is necessary to hold is that he must have some interest, and that a mere prior possession without right is not such interest."

allowed in a foreign country or state, and the probate thereof, duly authenticated, shall be produced, the same shall be filed, and the court must appoint a time for the hearing, and if, on the hearing, it appears that the will has been proved, allowed, and admitted to probate in any foreign country, it must be admitted to probate in this state. *Held*, that the question whether a will has been duly proved and allowed in a foreign country is a fact which the court must find from the evidence, and, where the court finds that a will has been properly probated in a foreign country, and admits it to probate in this state, its action cannot be attacked collaterally, but only by direct appeal. Affirming 23 Pac. Rep. 207.

2. Code Civil Proc. Cal. § 392, requires actions for the foreclosure of mortgages to be tried in the county in which the subject of the action, or some part thereof, is situated, and where real property is situated partly in one county, and partly in another, the plaintiff may select either county, and the one selected is the proper county for the trial of the action. *Held*, that where land is sold by the sheriff of the county of S. under foreclosure proceedings instituted in that county, and part of the land is shown to be in the county of K., but it does not appear where the remainder is situated, it will be presumed that the mortgaged premises consist of one body of land, situate partly in the county of S. and partly in the county of K. Affirming 23 Pac. Rep. 207.

3. A general demurrer will be sustained to a bill attacking a sale under a decree of foreclosure when such bill fails to state facts showing that the foreclosure sale was void.

On rehearing. For former report, see 23 Pac. Rep. 207.

Wm. Shipsey and Graves, Turner & Graves, for appellants. *W. H. Spencer and J. M. Wilcoxon*, for respondents.

PER CURIAM. The judgment appealed from in this case was affirmed January 31, 1890. A rehearing was granted, and the case has been reargued in printed briefs.

We have carefully considered the arguments of the learned counsel for appellant on the rehearing, but find nothing in them having the effect to change the former opinion. It is true that section 5 of article 6 of the present constitution was inappropriately cited in that opinion to sustain the foreclosure sale, made before the present constitution was adopted; but the validity of that sale is supported by section 392 of the Code of Civil Procedure, which was also cited. On the facts stated in the cross-complaint, there should be no question that it must be presumed that the district court had jurisdiction of the action to foreclose the mortgage, and, consequently, power to order a sale of all the mortgaged property in one parcel, since it must be presumed that it consisted of one body of land situated partly in San Luis Obispo county. But counsel for appellant contend, on rehearing, that, conceding the jurisdiction of the district court to decree a sale, it should have ordered that part of the land situated in Kern county to be sold in Kern county. In this, we think, counsel is mistaken, for reasons stated in the former opinion; but, admitting, for the sake of the argument, that they are right, yet it seems that they make only a case of error in the exercise of admitted jurisdiction, which did not make the decree void, or subject to the collateral attack here made upon it. If the decree was not void, it authorized the sheriff of San Luis Obispo county to make the sale,

and to execute the deed; for it is averred in the cross-complaint that the sheriff made the sale and executed the deed in accordance with the decree of the court, and not otherwise.

Counsel further contend, on the rehearing, that, if there was any defect in the cross-complaint, it was only that of uncertainty or ambiguity, for which a general demurrer should not have been sustained; but there was a deficiency of substance necessary to constitute a cause of action. To constitute a cause of action the cross-complaint must have stated facts showing, or from which it might be inferred or presumed, that the foreclosure sale was void; but, instead of this, it stated facts from which it must be presumed that the sale was authorized and valid. For the reasons here, and in the former opinion, stated, the judgment is affirmed.

86 Cal. 31

PEOPLE v. MURRAY. (No. 20,672.)

(Supreme Court of California. Sept. 15, 1890.)

CRIMINAL LAW—PROVINCE OF COURT AND JURY—INSTRUCTIONS.

1. On trial for robbery, a charge that the jury is bound to presume that the prosecuting witness states the truth, the defendant not having proven the falsity of his statements, is an invasion of the province of the jury, and erroneous under Const. Cal. art. 6, § 19, which declares that "judges shall not charge juries with respect to matters of fact."

2. When, in answer to a question asked for the sole purpose of contradicting a previous statement of defendant, he admits that he has been convicted of larceny, it is erroneous to charge the jury as to that admission, and also that "as to how much credit such a man is entitled to is for you to determine."

Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

P. Reddy, for appellant. Atty. Gen. Geo. A. Johnson, for respondent.

McFARLAND, J. The defendant was convicted of robbery, and appeals from the judgment, and from an order denying a new trial. He was charged with taking forcibly and feloniously from one Henry Braker a certain watch and chain of the value of \$30. The only witnesses on the part of the prosecution were the prosecuting witness, Braker, and two policemen, who arrested the defendant. Braker testified that on the night between November 9 and 10, 1889, he was sleeping in an old cabin (which had been part of the sleeping apartment of a boat) at the foot of Kearny street, San Francisco; that one Lewis had come into the cabin early in the evening, and had gone to sleep; that about 2 o'clock in the morning the defendant and one Kenny came into the cabin, and forcibly took from him the watch and chain, and also a knife. (Kenny and Lewis were informed against jointly with defendant.) The policemen testified that they arrested the defendant shortly afterwards, and found on his person the watch and chain, as described by Braker. This was substantially all the evidence for the prosecution. On the part of the defense, the defendant and Kenny and Lewis, and

also a witness named Hamilton, (not charged with the offense,) all testified that on the night in question the prosecuting witness, Braker, and the defendant and others, including some sailors who left immediately afterwards to go on their ship, were engaged in throwing dice in the said cabin for money; that during the game Braker put up his watch and chain on the game; and that defendant finally won the watch and chain, and Kenny won the knife. Here, then, was a keen conflict of testimony; and, as defendant admitted possession of the watch and chain, it was a conflict practically between four witnesses for the defense and one for the prosecution. Under these circumstances, the appellant contends that, in instructing the jury, the court, to the prejudice of appellant, invaded the province of the jury, and violated section 19 of article 6 of the state constitution, which provides that "judges shall not charge juries with respect to matters of fact." And in this contention we think that appellant is right. The prosecuting witness, Braker, on his cross-examination, developed a remarkable want of knowledge of his antecedents. He not only could not tell when he was born, or who either of his parents was, or where he came from, or how he happened to be here at all, but his testimony in other respects was certainly subject to some criticism. And in respect to this witness the court instructed the jury as follows: "There are attacks upon the witness, and you will consider them, and see how far they rest upon the testimony in the case. The young man who appears as a prosecuting witness testifies to a life which I will not characterize. He is unfortunate enough not to know who his father and mother are, or, perhaps, when he was born. As to particular transactions that occurred seven or eight years ago, he did not undertake to state. If his statements are untrue, the defendant should have an opportunity to disprove them. His testimony being thus given, and the defendant not proving their falsity, you are bound to presume what he states to be the truth." The propositions stated in the last sentence cannot be maintained under any view. If the phrase, "and the defendant not proving their falsity," be taken as a statement that the defendant had not proven their falsity, as the jury might very easily understand it, then it directly took away from the jury the determination of a fact about which there was not only a conflict of testimony, but with respect to which, in number of witnesses at least, there was a preponderance of four to one against the prosecuting witness. And if it be taken to merely mean that the jury were bound to take, as true, the statements of Braker about the manner in which he lost his watch, unless the defendant disproved them, it is equally untenable. The jury were not bound to take the testimony of any witness as true. From the manner of the prosecuting witness, and the nature of his whole testimony, the jury might have disbelieved him if the defendant had not introduced any evidence at all. This whole matter was for the jury, and not the court.

The defendant was a witness for himself,

and testified, among other things, that, on July 1, 1889, he was working for his father, and on cross-examination was asked this question: "Is it not the fact that on that day, July 1, 1889, in this city and county, you were convicted, and were serving on that day a term of imprisonment for petty larceny?" There is some confusion in the record as to whether the proper objection was made to this question at the proper time, and as to what answer the witness gave. There was an objection made, however, and counsel for the prosecution said: "The question is asked simply for the purpose of contradicting him." Whatever the answer was, therefore, the testimony was introduced simply for the purpose of contradicting his statement that he was working for his father on the day named. But the court instructed the jury as follows: "The defendant here admits that he has been convicted of petty larceny. As to how much credit such a man is entitled to, is for you to determine." This could be understood in no other way than as a statement that, in the opinion of the court, such a man as defendant was entitled to but little credit. It was based on a fact not in evidence for such purpose, and it was a broad inroad into the province of the jury. Then as to the witnesses for the defendant, generally, a rule was given different from that which was applied to the prosecuting witness. The court said: "On the other side the leading witness, the defendant, and the others with him testified that they started somewhere from the center of the city on an invitation to go to the cabin and get some beer. They went over there. It is for you to consider the probability of a story of seven or eight men collected together in a cabin, drinking and gambling for three pence a bit, and whether they gambled there up to 11 or 12 o'clock. That is a matter for your consideration as to the probability of their story." The instructions above quoted, and others of similar import, were violations of the rule that "to weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law," (*People v. Dick*, 34 Cal. 666; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. Rep. 396;) and of section 1847, Code Civil Proc., which, speaking of a witness, provides that "the jury are the exclusive judges of his credibility." A part of the charge on the subject of reasonable doubt, and also on one or two other matters, is somewhat obscure, but it can readily be made clear on another trial.

There is only one other matter to be noticed. We think that the court went too far in cautioning the jury against believing the defendant and the two other persons charged with the crime, although we would not be prepared to say that the judgment should be reversed for that reason. In *People v. Cronin*, 34 Cal. 191, it was held not to be error for a court, speaking of the credibility of a defendant who was a witness for himself, to tell the jury that "you should consider his relation and situation under which he gives his testi-

mony, the consequences to him from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation." That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but, if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief. The credibility of the witness in such a case should be left as much as possible to the jury. In the case at bar the court, speaking of the defendant and the two other witnesses who were also charged with the offense, said to the jury, among other things, as follows: "While they are allowed to testify, they are not given the same effect as witnesses unattended by indictment, or men not charged. They are not entitled to the same consideration." This language, if not error, is at least on the verge of error. Here is a case where several men have a dispute about a watch. Three of them swear that it was put up and lost on a game of chance; one of them swears that it was taken from him forcibly, and that there was no gambling at all; and the jury are instructed that the testimony of the three is not entitled to the same consideration as the testimony of the one, because the latter procured an information to be made against the former. This seems to be carrying the rule very far; and we allude to the matter because a criminal trial, which is usually a very simple thing when compared with the intricacies of the trials of civil cases, is so often complicated by new instructions on matters of evidence. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; THORNTON, J.

85 Cal. 385

MOULTON *et al.* v. KNAPP *et al.* (No. 11,757.)

(*Supreme Court of California*. Aug. 30, 1890.)

INJUNCTION—LACHES—EQUITY.

Where defendants consent to waive all defenses, and confess judgment on the strength of a verbal agreement that plaintiffs will stay execution for a year, they cannot enjoin a sale under the execution which plaintiffs levied before the end of the year, being guilty of laches in standing by and permitting the execution to be levied without moving the court to recall it.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

T. Z. Blakeman, E. G. Knapp, Wright

& Hazen, and W. B. Sharp, for appellants. Turner & Maddox and J. H. Budd, for respondents.

FOOTE, C. A. W. Moulton and four other persons instituted this action for an injunction against Sewell Knapp, E. G. Knapp, and R. B. Purvis. It was alleged, among other things, in the complaint that the plaintiffs were stockholders and directors in a corporation denominated the "Oakdale Lumber and Water Company," and that they together owned three-fourths of the stock in that company; that the affairs of the corporation were in such a condition as that any suit or action brought against it would necessarily embarrass its interests, as the corporation was just getting into shape that would make it in a short time a paying institution; that on the 3d day of April, 1886, S. Knapp had two notes against plaintiffs, one for about \$7,500, and the other for about \$1,000; that upon the day above mentioned he commenced an action against the makers of those notes, the plaintiffs here, to recover what he claimed was due him; that about two days after this he went to these plaintiffs, and informed them that he had brought the suit; that he did not wish to annoy them, but wanted to be secured in the payment of his claims; that if they would waive all defense to the notes, and acknowledge themselves jointly and severally indebted to him on these instruments, and authorize the clerk of the court where the action was pending to enter up immediate judgment in favor of S. Knapp, that he would stay all proceedings thereon, and stay execution upon the judgment for the period of 12 months from the date thereof. To this the parties applied to consented, and, in writing, waived all defense, and consented and directed judgment to be entered up as agreed upon. The agreement is in this language: "In the superior court, state of California, in and for the county of Stanislaus. Sewell Knapp, Plaintiff, against Thomas Roberts, C. H. Head, A. W. Moulton, C. W. Sproul, Abner Potter *et al.*, Defendants. No. 617. We, the undersigned, defendants in the above-entitled action, do by these presents acknowledge ourselves jointly and severally indebted and liable to the above-named plaintiff, Sewell Knapp, on the two notes sued upon herein as they are pleaded, and we hereby expressly waive all right of defense herein, and authorize and direct the clerk of said court to enter herein in favor of said S. Knapp and against us, or against as many of us as subscribe our names hereunto, immediate judgment for the sum of eighty-five hundred (\$8,500) dollars, principal, and \$222, interest, all in United States gold coin,—in all \$8,722. Dated at Oakdale, April 5, 1886. THOMAS ROBERTS. A. W. MOULTON. C. W. SPROUL. A. POTTER. C. H. HEAD. Attest: H. WOLFE." It is then alleged that, in violation of the agreement to stay execution, etc., Knapp induced these plaintiffs to deposit their certificates of stock in the incorporated company in a safe in the office of such corporation. The judgment was duly entered up and recorded by the clerk

of the county, and thereupon became a lien upon all the real property of the defendants in Stanislaus county. That all these facts were fully known both to S. and E. G. Knapp, the latter of whom was the attorney of the former. It is then charged that in violation of the agreement for a stay of execution, and in fraud of the plaintiff's rights, S. Knapp caused an execution to be issued and levied upon the certificates of stock in the safe in the office of the corporation heretofore mentioned, the sheriff, R. B. Purvis, taking them into his possession, and on the 14th of April, 1886, posted notices that he would sell all the right, title, and interest in the shares of stock of these plaintiffs, the judgment debtors in the execution, on the 20th of April, 1886; that after the sheriff thus had taken the certificates of stock into his possession, S. Knapp promised the plaintiffs to postpone the sale until they could raise the money to pay the judgment; that he did not postpone the sale, but caused the shares of stock to be sold as advertised, and bought them in for the sum of \$500, and transferred them to E. G. Knapp, who now claims them; that all this was done, as the plaintiffs believe, with the knowledge of E. G. Knapp, who is now threatening to take from the plaintiffs all their rights and property in the corporation above mentioned, and cause to be levied other executions upon the individual property of these plaintiffs; and that R. B. Purvis, the sheriff, into whose hands the executions have come, will sell sufficient property, at least, to satisfy the judgment, if not restrained by injunction. The prayer is that he may be prevented from selling the property; and that S. Knapp may be compelled to carry out his agreement to stay execution for one year; and that he and E. G. Knapp be compelled to return to plaintiffs the certificates of stock; and that all proceedings subsequent to the judgment rendered against plaintiffs and in favor of S. Knapp be declared null and void; and that E. G. Knapp, who is alleged to be insolvent, and threatens to transfer the certificates of stock, be ordered to refrain from so doing; and that all process be recalled, and everything done subsequent to the judgment be declared to have been done in fraud of the plaintiffs' rights, etc. The action was instituted in the county of Stanislaus, and an order to show cause was also made in the superior court of that county. Pending the hearing of that motion, a temporary restraining order was made, dated the 30th of April, 1886. On the 2d of June of the same year an order changing the place of trial was made. Demurrers were filed to the complaint, and on the 16th of June the judge of the superior court of San Francisco, to which jurisdiction the cause had been submitted by the change of venue, overruled the demurrers, and granted an order restraining the defendants, from which this appeal is taken.

There is no sufficient reason given why the plaintiffs did not move the court in which the judgment was given and made, and to which they were parties, to recall the execution, and to make an order which would prevent any further issuance

of such process, or the taking of any other step to enforce the judgment, until the expiration of the year agreed on for the stay. If this motion had been entered before the sale under execution the plaintiffs could have made the same showing of facts that they have done in their complaint. It was said by the appellate court in *Imlay v. Carpenter*, 14 Cal. 173: "And even where fraud is relied upon as an answer to the motion the courts are clothed with ample powers to frame issues, and to try and determine the same, either with or without the intervention of a jury. A resort to a formal action would seem to be as unnecessary as it would certainly be expensive and dilatory. But even if no such summary relief could be granted as against the judgment, the court is invested with plenary power over the execution, and may set it aside, and order a perpetual stay, or make any other order in reference to it required for the protection and preservation of the rights and interests of the respective parties." And the court held in that case that, as the plaintiff had an adequate and speedy remedy at law, he was not entitled to the assistance of a court of equity. If the plaintiffs here had made such a showing as would have warranted the trial court, on a motion therefor, to set aside the execution that had been levied, and to stay all other process until the expiration of the year agreed upon, no sale of the stock would have taken place, or anything else been done which would have made the situation of affairs different from the *status* it was agreed they should occupy for that period. We do not see, after the laches of the plaintiffs in not taking advantage of their adequate and speedy legal remedy by motion as heretofore stated, that they can be said to have made in their complaint a sufficient showing to entitle them to the injunction which they obtained; and this view of the matter is, as we think, supported by the decision of the appellate court in *Ede v. Hazen*, 61 Cal. 360, and the cases there cited. For these reasons we advise that the order appealed from be reversed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

WORKS, J. I concur in the judgment, but it is unnecessary to decide in this case that the respondents were entitled to have the execution recalled on motion based upon a mere verbal agreement for the extension of time. It is enough to say that they were not entitled to the remedy sought in this action.

86 Cal. 60

GARNER v. ERLANGER. (No. 13,300.)

(*Supreme Court of California*. Sept. 17, 1890.)

JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—DISCRETION OF TRIAL COURT.

An order denying or granting a motion, under Code Civil Proc. Cal. § 473, to set aside a default on the ground of mistake, inadvertence, surprise, or excusable neglect rests in the discretion of the trial court, which will not be interfered with on appeal except in a plain case of

abuse; and, where the motion is based on the fact that defendant failed to observe what county was named in the summons, the order of the court refusing to set aside the default will not be disturbed.

Commissioners' decision. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Justice Jacobs, for appellant. *Church & Corey*, for respondent.

BELCHER, C. C. This is an appeal from an order refusing to set aside a judgment entered against the defendant by default, in the county of Tulare. The motion was made, under section 473 of the Code of Civil Procedure, upon the ground of mistake, inadvertence, surprise, and excusable neglect. The action was upon a promissory note for \$450, dated "Kingsburgh, February 13th, 1888," and payable at Kingsburgh one year after date, with interest. Kingsburgh is in Fresno county, and the summons and copy of the complaint were served on defendant in the county of Tulare on the 28th day of February, 1889. The judgment was entered on the 13th of March, 1889. It appears from the affidavit of defendant, filed in support of his motion, that the note had been left with the First National Bank of Fresno, as collateral security for the payment of another note, made by the plaintiff to one Smith, and that defendant had been informed by the president of the bank that, unless the other note was paid on or before the 13th day of February, 1889, suit would be commenced on his note. The affidavit then proceeds to state "that, for the reason that said note was made payable at the county of Fresno, this affiant believed, and never entertained any doubt but what, if suit were brought upon said note, it would be brought in said county of Fresno, and, at the time he was served with the so-called 'summons,' and so-called 'complaint,' copies of which are hereto attached, he supposed, as a matter of course, that such suit had been commenced and brought in the superior court of said county of Fresno, and that he therefore had thirty days within which to file his pleading to said complaint; * * * that, at the time the so-called 'summons' in said action was served upon this affiant, [he, thinking, of course,] he had been sued in the superior court of the county of Fresno, did not notice or think of looking at the title or name of the particular court in which such action was brought, and did not notice that the word 'Tulare' was written where he supposed the word 'Fresno' would be, in the name or title of the court in which said action was brought, and remarked to his attorney that he would have thirty days within which to answer said complaint; that thereafter he handed said papers, copies of which are hereto attached, to his said attorney, and instructed him to attend to the matter, and prepare the necessary pleading; that his said attorney, after inspecting the said papers, informed this affiant that such suit had been brought in the county of Tulare, and that the time for answering said complaint had already expired; that this affiant was taken en-

tirely by surprise at such information, he never having thought or supposed that such suit would be, or had been, brought in said county of Tulare; that affiant has fully and fairly stated the facts constituting his defense to said action to his said attorney, and is, by him, advised and informed, and verily believes, that he has a good and valid defense to said action on the merits thereof." It has been frequently held by this court that a motion like that of the appellant is addressed to the sound legal discretion of the trial court, and that an order granting or denying the motion will not be reversed on appeal unless a clear abuse of such discretion is shown. *Coleman v. Rankin*, 37 Cal. 247; *Watson v. Railroad Co.*, 41 Cal. 17; *Dougherty v. Bank*, 68 Cal. 275, 9 Pac. Rep. 112. In *Coleman v. Rankin*, the action was bought to determine an adverse claim of title to real property. The summons was served on the 25th of March, and judgment by default was entered on the 8th of April. The defendant moved, on the 9th of April, to have the judgment set aside, and, in his affidavit, stated that when he received the summons, he placed it in his hat, and it was lost therefrom; that he made no note of the time of the service, and had no means of fixing the date thereof; that about five days before making his affidavit, and at several subsequent times, he called at the office of his counsel, but did not succeed in finding him until the 8th of April, when he retained him to defend the action; that he subsequently learned from his attorney, for the first time, that the day for answering had expired; that, if he had not lost the summons, he verily believed he would not have failed to make a note on the paper of the time of service, and to have filed his answer in proper time. The motion was denied by the trial court, and the order was affirmed on appeal. The law applicable to such motions is thus clearly and succinctly stated in the syllabus of the case: "An order denying or granting a motion to set aside a judgment by default on the ground of mistake, inadvertence, surprise, or excusable neglect of the defaulting party rests in the sound discretion of the court, and, except in a plain case of abuse of this discretion, will not be disturbed by this court on appeal. Where the defaulting party discloses, in the case presented by him for an order to set aside such judgment, a degree of negligence, carelessness, and lack of diligence not to be predicated of a prudent business man in a matter of material concern to him, this court will not, on appeal, disturb the order of the court below denying such application." In this case it appears that appellant was served in Tulare county, and that he held in his hands copies of the summons and complaint for more than 10 days, without once looking at them to see whence they were issued, or where he had been sued. This shows a degree of carelessness not easily accounted for, and the court below may well have concluded that he was guilty of such inexcusable neglect as should deprive him of the relief sought. In the exercise of its discretion the court denied the motion, and, in doing so, we cannot

say that it acted improperly, or in any way abused the discretion with which it was clothed. A motion was made to dismiss the appeal, but, as we think the respondent right on the merits, it is unnecessary to consider that question. We advise that the order be affirmed.

We concur: GIBSON, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

85 Cal. 376

CURTISS v. STARR *et al.* (No. 12,872.)

(*Supreme Court of California.* Aug. 26, 1890.)

NEW TRIAL—CONFLICTING EVIDENCE—DISCRETION OF JUDGE.

In civil cases, the trial judge should set aside the verdict of the jury and grant a new trial whenever he is not satisfied with the verdict upon the evidence; and his order in that regard will not be disturbed on appeal if the evidence is substantially conflicting.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Charles F. Hanlon, for appellant.
Hutchinson & Campbell, for respondents.

HAYNE, C. This is an appeal by the plaintiff from an order granting the defendants' motion for a new trial. The order did not specify the ground upon which it was made; and, in such case, it is settled that if the record shows any valid ground upon which the order may have been made, the appellate court will presume that it was made on such ground. In this case the record shows a valid ground upon which the order may have been made. The complaint consists of two counts. The appellant's counsel asserts that the verdict was based upon the second count alone; and, for the purpose of this opinion, we assume that such was the case. We therefore dismiss from consideration the first count, and the evidence under it. The substance of the second count is that the plaintiff delivered to the defendant (a corporation) certain wheat to be sold on commission at a fixed price; and that the defendant sold the wheat at a less price, contrary to its instructions, and without notice to the plaintiff. It is obvious that the instruction to sell at a fixed price is a main foundation of such a case. Take that away, and the case falls to the ground. Now the plaintiff's letter of instructions showed no such limitation. On the contrary, it said: "Sell same at your discretion." This being so, it was incumbent upon the plaintiff to show affirmatively that the instructions were changed before the wheat was sold. He introduced some testimony tending to show this, and the jury evidently believed it, but, for reasons above stated, it must be presumed that the judge did not; and if he did not, it was his duty to grant a new trial. The rule as to conflict of evidence does not apply in the trial court. The judge should set aside the verdict whenever he is not satisfied with it upon the evidence, and his order in that regard will not be disturbed on appeal if the evidence

is substantially conflicting. *Dickey v. Davis*, 39 Cal. 569; *Sherman v. Mitchell*, 46 Cal. 580; *Irving v. Cunningham*, 58 Cal. 306; *Breckenridge v. Crocker*, 68 Cal. 403, 9 Pac. Rep. 426. The learned counsel is in error in supposing that this rule is confined to cases tried without a jury. It is plain, therefore, that the order appealed from must be affirmed.

It may be added that, in our opinion, the trial court was wrong in its theory that the written instructions could not be changed by parol. If any subsequent parol instructions were given to the agent, they were binding, subject to the right to sell for reimbursement of advances, as provided by section 2027 of the Civil Code. The error, however, was in favor of the defendant, and does not affect the question of the correctness of the order appealed from. It is noticed merely for the guidance of the court upon a retrial. We advise that the order granting a new trial be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

85 Cal. 632

Ex parte REILLY.

(*Supreme Court of California.* Sept. 12, 1890.)

CONSTITUTIONAL LAW—JURISDICTION OF COURTS—JUDGMENTS.

1. Const. Cal. art. 6, § 1, provides that the legislature may establish inferior courts, whose jurisdiction and powers, under section 13, must be regulated "by law;" and sections 15 and 16 of article 4 provide that no law can be passed except by bill concurred in by both houses, and signed by the governor. *Held*, that Const. Cal. art. 11, § 8, which provides for the adoption of city charters by mere resolution of the legislature, without the approval of the governor, was not intended to supersede the above provisions of article 6 in relation to the establishment of inferior courts, and that the provisions of the charter of the city of Los Angeles, so adopted, establishing a police court, and defining its jurisdiction, are void. Following *People v. Toal*, ante, 603.

2. The judgment of a justice of the peace in a prosecution for battery of which he has jurisdiction as justice is not invalid because he claims to exercise authority as police judge, under an act which does not apply to him.

In bank. *Habeas corpus.*

Frederick Stanford, for petitioner. *M. T. Owens*, for respondent. *Stephen M. White*, *amicus curiæ*.

BEATTY, J. Petitioner was arrested, tried, and convicted upon a charge of battery, alleged to have been committed in the city of Los Angeles. The trial took place before a justice of the peace who styles himself *ex officio* police judge of the city of Los Angeles, and who appears to have been acting as such police judge by designation of the mayor, in pursuance of the so-called "Whitney Act," which it was intimated in the first decision in *People v. Toal*, 23 Pac. Rep. 203, applied to the city of Los Angeles. The claim of petitioner is that his imprisonment is illegal because, under the freeholders' charter of Los Angeles, the police court thereby created had exclusive jurisdiction of the offense with

which he was charged, and, consequently, that Lockwood, a justice of the peace, designated under the Whitney act, had no jurisdiction. The final decision in the *Toal* Case, ante, 603, (filed August 4th,) disposes of this contention. It is there held that the charter provisions concerning the police court are void; that such court had no jurisdiction in any case, and necessarily no exclusive jurisdiction.

It is conceded that Lockwood was a justice of the peace. As such, he had jurisdiction of the offense of battery, and his judgment in this case is none the less valid because he styled himself *ex officio* police judge of Los Angeles, thereby claiming to exercise his authority under the Whitney act. Conceding that the Whitney act does not apply to Los Angeles,—and it seems it does not,—the justice of the peace had authority to act, and his judgment is valid. Writ discharged, and prisoner remanded.

We concur: FOX, J.; WORKS, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

86 Cal. 27

PEOPLE *ex rel.* CAMPRELL v. WATERMAN, Governor. (No. 14,000.)

(*Supreme Court of California.* Sept. 13, 1890.)

JUDGE—TERM OF OFFICE.

Act Cal. March 5, 1887, increased the number of judges of the superior court in San Bernardino county from one to two, and provided that the governor should appoint an additional judge of said court "who shall hold office until the first Monday after the 1st day of January, A. D. 1889, and at the next general election a judge of said court of said county shall be elected to hold office for the term prescribed by the constitution and the law." The next general election was in November, 1888. Const. Cal. art. 6, § 6, prescribes six years as the term of office of a superior court judge. *Held*, that, there being no provisions to the contrary, the judge thus elected held office for six years from said January 1st, though the term of the other judge would expire, and another judge be elected to the vacancy before the expiration of that time.

In bank. Application for mandate.

H. Goodsell, Jr., for applicant. *George A. Johnson*, Atty. Gen., and *Anderson, Fitzgerald & Anderson*, for respondent.

FOX, J. This is an application for a writ of mandate against the governor of the state, requiring him, in his forthcoming proclamation for the general election to be holden on the first Tuesday after the first Monday in November next, to call for and order the election of two judges of the superior court in and for the county of San Bernardino, instead of one, as proposed by the governor. No point is made in this case as to the power of the court to issue its writ for such a purpose against the executive, and in the view we take of the real question involved, it is unnecessary for us to consider upon or determine this preliminary question.

The facts briefly stated are these: By the statute and laws under which the superior court in San Bernardino county was originally organized provision was made for but one judge of that court. Under the law as it thus stood, Hon. James A. Gibson was elected judge for the term commencing on the first Monday in

January, 1885, and ending on the first Monday in January, 1891. May 13, 1889, he resigned, when Hon. C. W. C. Rowell, the present incumbent, was appointed. Under the law that appointment continues until the next general election, which will be in November, in 1890. At that time an election must be held to fill the vacancy created by the resignation of Judge Gibson for the balance of the unexpired term for which Judge Gibson was elected. Const. art. 6, § 6. That term itself, however, expires on the first Monday in January following, so that under the constitution the people will also be required, at the same election, to elect a judge of the superior court for the full term of six years, commencing on the first Monday in January next, in place of the judge who may finish out the term for which Judge Gibson was originally elected, and which term then expires. This is the plain course of proceeding to be pursued, so far as relates to the judgeship originally created under the constitution, for that county. Section 9, art. 6, of the constitution empowered the legislature, at any time, by a two-thirds vote of the members of both houses, to increase or diminish the number of judges of the superior court in any county. Acting under this authority the legislature did, on March 5, 1887, by an act duly passed, increase the number of judges of the superior court for the county of San Bernardino from one to two, and empowered the governor to appoint an additional judge, to hold office until the first Monday after the 1st day of January, 1889, and provided that at the "next general election a judge of such superior court should be elected to hold office for the term prescribed by the constitution and the law." The next general election was that one held in November, 1888, at which a judge was elected in accordance with the provisions of said act. The question here relates to the term of his office. Does it expire under "the constitution and the law" at the same time with that of the other judge of the same court, or was he elected for the term of six years from and after the first Monday after the 1st day of January, 1889? To our minds the answer to this question is, under the constitution, too clear to require argument, or the citation of authorities other than the constitution itself. The people did not elect the present incumbent in 1888 to fill a vacancy, or the balance of an unexpired term, but to fill a new office created by authority of the constitution, the term whereof commenced, by the provisions of the law of its creation, on said first Monday after the 1st day of January, 1889, and which, by the provisions of the constitution, (article 6, § 6,) runs for the period of six years. We think that, under the provision of the constitution as now established, there can be no doubt that whenever a new judgeship is created by the legislature in any county, the first judge elected to fill the place is entitled to hold the same for the term of six years from the first Monday after the 1st day of January next succeeding such election, and the future terms thereof commence at each succeeding sixth year. No vacancy in a term

can occur until a term has commenced, and there is nothing in the constitution which requires that the terms of the judges of all the superior courts, or of all the judges of the same superior court, should begin and end at the same time. Nor is there anything to indicate that the judges of these courts are all to be elected at regular elections for state officers. Under the terms fixed by the constitution, this could not be made to happen oftener than once in 12 years if all were to be elected at the same time. But taking the provisions of the constitution, and the language of the act creating the office, together, there can be no doubt about the time of the commencement of the term of this office, or that the incumbent is to hold for the full term prescribed by the constitution. Section 2 of the act reads: "Within ten days after the passage of this act the governor shall appoint an additional judge of the superior court of the said county of San Bernardino, who shall hold office until the first Monday after the 1st day of January, A. D. 1889, and at the next general election a judge of said court of said county shall be elected to hold office for the term prescribed by the constitution and the law." The term prescribed by the constitution is six years, and there is no law prescribing a different term, so there is no conflict between the constitution and the law. The writ must be denied. So ordered.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

86 Cal. 264

MEYERS v. POND *et al.* (No. 14,022.)

(Supreme Court of California. Sept. 18, 1890.)

ELECTIONS AND VOTERS—BOARD OF REGISTRATION.

Pol. Code Cal. § 1142, provided that when an election is ordered, the board of supervisors must appoint for each precinct one inspector and two judges, who shall constitute a board of election for such precinct, and in the city and county of San Francisco the supervisors must appoint an additional inspector and two additional judges in each precinct, who, with the original inspector and judges, shall constitute a board of election, and shall canvass the votes for such precinct, and shall be present at the closing of the polls. Act Cal. March 18, 1878, ("An act to regulate the registration of votes, and to secure the purity of elections in the city and county of San Francisco,") created a board of election commissioners, and gave it some of the powers in regard to elections theretofore exercised by the board of supervisors. Section 19 provided that there should be in each precinct a board of precinct registration, to be constituted in the following manner: "The board of election commissioners shall appoint the one original inspector, and the two original judges of election provided for in section 1142 of the Political Code for each precinct. * * * In addition to acting as election officers * * * [they] shall serve as precinct registration officers for enrolling the electors of their respective precincts." Act March 20, 1889, ("An act to amend" certain sections of the Political Code "relating to elections,") amended said section 1142 so as to provide that when an election is ordered the board of supervisors or other board having charge of elections in the counties and cities and counties, shall appoint for each precinct two inspectors, two judges, and two clerks, to be selected one from each of the two principal political parties. "The inspectors and judges so appointed shall constitute a board of election for

such precinct," which "shall canvass the votes for such precinct, and must be present at the closing of the polls." *Held*, that the act of March 20, 1889, by its amendment of section 1142, did not provide for a "board of precinct registration" of four persons, two inspectors and two judges, instead of three persons, one inspector and two judges, in each precinct of the city and county of San Francisco, the provisions of said amendment applying only to a "board of election." Fox, J., dissenting.

Mandamus.

H. C. Dibble, J. A. Waymire, Dorn & Dorn, Meyer Jacobs, and E. S. Pillsbury, for petitioner. *Stanley, Stoney & Hayes, Spencer & McEnery, Naphtaly, and Friederich & Ackerman*, for respondents.

McFARLAND, J. This is a petition for a peremptory writ of *mandamus* commanding the respondents, who compose the board of election commissioners of the city and county of San Francisco, to appoint a board of precinct registration in each precinct in said city and county to consist of two inspectors and two judges, to be selected respectively from the two opposing political parties which cast "the greatest number of votes at the next preceding general election." It is admitted that the respondents are about to appoint such precinct boards to consist of only one inspector and two judges,—the inspector and one judge to be taken from one of said political parties, and the other judge to be taken from the other political party. The following are the statutory provisions bearing on the question: On the 18th day of March, 1878, section 1142 of the Political Code was as follows: "When an election is ordered, the board of supervisors must appoint for each precinct, from the electors thereof, one inspector and two judges, who constitute a board of election for such precinct; and, in the city and county of San Francisco, the board of supervisors must also, prior to the election day, appoint for each precinct, from the electors thereof, an additional inspector and two additional judges, who, with the original inspector and judges, shall canvass the votes for such precinct, and who must be present at the closing of the polls. Otherwise the board of election must appoint the additional inspector and judges, or supply the place of an absent member thereof. The original and additional inspector and judges shall thenceforth constitute the board of election, the members relieving each other in the duties of canvassing the ballots, which may be conducted by at least half of the whole number; but the final certificates shall be signed by a majority of the whole." On that day (March 18, 1878) an act of the legislature was approved, entitled "An act to regulate the registration of voters, and to secure the purity of elections in the city and county of San Francisco." By this act a system of precinct registration was created for said city and county, and powers formerly exercised by the board of supervisors, with respect to elections, were conferred upon a new body, created by the act, called the "Board of Election Commissioners." Section 19 of that act was as follows: "There shall be a

board of precinct registration in each precinct of said city and county, which shall be constituted in the following manner: The board of election commissioners, as soon as is practicable after they have divided the city and county into election precincts, as hereinbefore provided for, shall proceed in the manner provided in section 13, hereof, to appoint the one original inspector and the two original judges of election, provided for in section 1142 of the Political Code for each precinct. Said inspector and judges shall serve for one year, unless otherwise ordered by the commission, and in addition to acting as election officers at all the elections during the year, shall serve as precinct registration officers for enrolling the electors of their respective precincts on the precinct registers thereof. All other election officers shall be appointed by the board of election commissioners at such time as shall be necessary before the election." On March 20, 1889, an act of the legislature was approved entitled "An act to amend" certain enumerated sections of the Political Code, "relating to elections." By this act section 1142, above quoted, was amended. That part of this section, as thus amended and re-enacted, which is pertinent to the case at bar, is as follows: "When an election is ordered, the board of supervisors or other board having charge and control of elections in each of the counties and cities and counties of the state, shall appoint for each precinct from the electors thereof whose names appear upon the last assessment roll of said county, or city and county, two inspectors, two judges, and two clerks, the inspectors, judges, and clerks to be selected respectively from the two opposing political parties which cast the greatest number of votes at the next preceding general election. The inspectors and judges so appointed shall constitute a board of election for such precinct. Said board of electors shall canvass the votes for such precinct, and must be present at the closing of the polls. The members of said board shall relieve each other in the duties of canvassing the ballots, which may be conducted by at least half of the whole number; but the final certificate shall be signed by a majority of the whole." The foregoing statutory provisions are all that are necessary to be here cited in full.

Now, it is contended by petitioner that, by virtue of the amendment of section 1142, of the Political Code, approved March 20, 1889, last above quoted, it has become the clear and imperative duty of the respondents to create a board of precinct registration in each precinct of San Francisco, to be composed of four persons, viz., two inspectors and two judges, instead of three persons, viz., one inspector and two judges. But it is evident that there is no such requirement to be found in the statutory law. The said act of March 20, 1889, amending certain sections of the Code, makes no change, and does not purport or attempt to make any change, of the persons who have charge of the registration of voters. It deals mainly and almost exclusively with the matter of holding

elections; and, so far as it provides for any change of officers at all that change relates entirely to those who are to take charge of the election on the day of the election,—to receive the ballots, to canvass them, and to certify the result. Section 1142, as amended, after providing for the appointment of two inspectors, two judges, and two clerks, equally from the political parties, (which appointment, by section 1131, must be made "at least fifteen days prior to an election,") then provides that "the inspectors and judges so appointed shall constitute a board of election for such precinct." The section then prescribes their duties, which are stated to consist in being present at the polls, canvassing the ballots, making certificates, etc. But there is no duty imposed on them, and no power given them to take part in the prior registration of voters. That duty is imposed on other officers, and it has been imposed, generally, throughout the state on county clerks, assisted by county assessors. In San Francisco, however, by the said act of March 18, 1878, (section 19 of which is above quoted,) the power of supervising registration was conferred upon three distinct bodies or persons, each appearing to be to some extent independent of and a check upon the others, viz.: (1) A board of election commissioners, composed of five of the most important municipal officers of the city and county; (2) a registrar, appointed by the governor of the state; and (3) a board of precinct registration, who are given some power during the last few days before the time for registering expires, and who were composed,—not of the precinct board of election as provided at that time, by section 1142 of the Political Code, to which said section 19 of the act referred,—but of certain persons who form a part of that board, viz.: One inspector and two judges. If the legislature had desired the registration board to consist of a larger number, or the whole, of the boards of elections, it could easily have done so, for the latter board at that time consisted of two inspectors and four judges. And that statute (of March 18, 1878) is the only law now existing for the creation of boards of precinct registration in San Francisco. And, as that statute provides that such board shall consist of three persons, this court could not command the respondents to put a fourth person on it without usurping legislative power. To do so would be, not to construe doubtful language in a statute, which courts, from necessity, must often do, but to create a new piece of legislation,—which the legislature alone can rightfully do. Counsel for petitioner seem very much impressed with the notion that, as the legislature intended by the amendments of 1889 to have the boards of election composed of persons taken equally from the two political parties, therefore, it should be held to have intended to apply the same rule to those having charge of the registration of voters in San Francisco. But, whatever may be imagined as to such intention, it is sufficient to say that no such intention was expressed. And it may be remarked, in passing, that legislators might well have thought that

the rule of equal party representation could be conveniently applied to boards of election officers, who sit for only a day or two, and must, necessarily, be composed of comparatively a large number of persons, while it could not be well applied to registration, which is a continuous process, requiring attention for long periods. There certainly is no remote intimation that the party rule was intended to apply to registration in any part of the state other than the city and county of San Francisco. The petition is denied, and the proceeding dismissed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

Fox, J. Idissent. Since the amendment of section 1142 of the Political Code, there are no such officers known to the law as "the one original inspector and the two original judges of election" in the city and county of San Francisco, but there are in said city and county two inspectors and two judges, all "original,"—all equal before and under the law, and all to be appointed at the same time; the appointees to be selected equally from the two parties, etc. Members of the board of registration are simply so *ex officio* by virtue of their appointment as inspectors and judges of election. As the amendment of section 1142 was made after the act of March 18, 1878, and the latter is not, and never was, a complete law without reference to said section, it must conform to the section of the Code, as so amended, or else it has become entirely inoperative so far as relates to the board of registration. It should not be held to have become inoperative if the two can be harmonized. I see no difficulty in so construing them as to harmonize with each other, nor do I think that such a construction will amount to judicial legislation. In my judgment the writ should be granted.

85 Cal. 434

PEOPLE v. ALSEMI. (No. 20,626.)

(*Supreme Court of California.* Sept. 3, 1890.)

HOMICIDE—INSTRUCTIONS.

The last paragraph of an instruction on manslaughter was: "But if you find from the evidence that in truth and in fact the deceased nor his associate intended no such assault nor the commission of a felony, and a reasonable person in defendant's position would not have so believed, and the defendant had no reasonable cause for so believing, such killing by the defendant, without malice, but without sufficient cause, real or apparent, will constitute the crime of manslaughter." The other seven paragraphs most clearly and correctly laid down the law on the subject. Held that, as the rest of the instruction was free from ambiguity, and the only trouble with this paragraph was its grammatical construction, the jury would not be considered to have been misled by it.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Wm. P. Veuve and B. E. Bennett, for appellant. Geo. E. Johnson, Atty. Gen., for the People.

Fox, J. Information for and conviction of manslaughter. Two points only are made on this appeal.

1. The first point is that the evidence is insufficient to justify the verdict. We have carefully examined all the evidence given in the record. While the testimony of the defendant, who was sworn as a witness in his own behalf, conflicts with that of the witnesses on the part of the prosecution, and there is also a slight variance between the testimony of one of the other witnesses, as he gave it on the trial, from that which he gave on the preliminary examination, we think the decided preponderance of evidence is in support of the verdict, and it cannot be disturbed on the ground of insufficiency of evidence.

2. Exception is taken to the following language found in the instructions of the court to the jury: "But if you find from the evidence that in truth and in fact the deceased nor his associate intended no such assault nor the commission of a felony, and a reasonable person in defendant's position would not have so believed, and the defendant had no reasonable cause for so believing, such killing by the defendant, without malice, but without sufficient cause, real or apparent, will constitute the crime of manslaughter." It must be conceded that this particular paragraph of the instructions is not artificially drawn; but the question is, was the jury misled by it? To determine this we must consider it by the light of common understanding, rather than the strict rules of grammar, and also in connection with its context. So considered, and read in connection with all that the judge said upon the subject to which it related, it seems impossible that the jury could have been misled by this single sentence of the charge on that subject. As printed in the record, each sentence of the instructions is given as a separate paragraph; but upon examination it will be found that the one here quoted and the seven paragraphs next preceding it constitute the instruction of the court on the subject referred to, and in the said seven paragraphs the court has most clearly and correctly laid down the law on that subject. All the balance of the charge on the subject is free from ambiguity, and we cannot conceive that the jury, after so clear an exposition of the law, were misled by a single sentence of this kind. The sentence is not, in our judgment, susceptible of the interpretation placed upon it by counsel for appellant, but, on the contrary, properly corrected by the grammatical rules invoked by counsel himself, it would be a correct statement of the law, and we have no doubt the jury so understood it. Judgment affirmed.

We concur: PATERSON, J.; WORKS, J.

35 Cal. 559

PRESTON v. KNAPP. (No. 13,549.)

(Supreme Court of California. Sept. 10, 1890.)

SALE—EVIDENCE—APPEAL—REVIEW.

1. In an action for the price of flour, bran, etc., it appeared that plaintiff had been working as teamster for the original owner. Plaintiff testified that the original owner authorized him to sell so much of the goods as might be necessary to pay a debt due him, and to apply the proceeds to the payment of that debt; that he afterwards

sold the goods to defendant's testator; and that the latter promised to "settle" with him. It appeared, however, that, on taking these goods from a warehouse where they were deposited, plaintiff did not claim them as his own, but receipted for them in the name of the original owner, his employer; and that, on the delivery of the goods, defendant's testator, who knew of plaintiff's relation to the original owner, credited them to the original owner's account. *Held*, that the evidence was not sufficient to establish a sale of the goods by plaintiff to defendant's testator.

2. An executrix who has proceeded to the trial of a claim against her decedent's estate, without objecting to the complaint, and who has expressly admitted that the claim had been presented to her in due time, and that she refused to act upon it, cannot for the first time raise the objection on appeal that the presentation and rejection of the claim were not alleged in the complaint.

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. W. Street, (*E. G. Knapp*, of counsel,) for appellant. *F. D. & G. W. Nicol*, for respondent.

VANCLIEF, C. This action was commenced against Sewell Knapp, in his lifetime, to recover \$493.81 for goods sold and delivered to him by I. N. Miller, the latter having assigned his demand to the plaintiff. After having answered, denying the sale and delivery of the goods and his indebtedness to Miller, Sewell Knapp died, and his executrix, Caroline Knapp, was regularly substituted as defendant, on motion of defendant's counsel. The case was tried by the court on the original pleadings, it being expressly admitted by the defendant on the trial that the claim had been presented to the executrix for allowance in due time, and that she had refused to act upon it. The trial resulted in a judgment for plaintiff for the sum demanded, against the executrix absolutely, and independently of "due course of administration." The appeal is from the judgment, and from an order denying defendant's motion for a new trial.

1. The judgment should have been made payable in due course of administration, and not otherwise. This error, however, could be corrected by a modification of the judgment, without a new trial; but, as will appear, a new trial should be granted upon another ground.

2. Appellant's counsel contend that, inasmuch as the complaint was not amended after the substitution of the executrix, by adding thereto an averment that the claim had been regularly presented to and rejected by the executrix, it is insufficient to support the judgment. But, as no such objection was made in the court below, and as defendant expressly admitted on the trial that the claim had been presented to the executrix in due time, and that she had refused to act upon it, and made no objection on the ground that it was not presented in due form, it is too late to make the objection that the presentation and rejection of the claim were not alleged in the complaint, for the first time, on this appeal. *Hentsch v. Porter*, 10 Cal. 555; *Coleman v. Woodworth*, 28 Cal. 568; *Bank v. Howland*, 42 Cal. 130; *Drake v. Foster*,

52 Cal. 225. The object of the statutory requirement of presentation and rejection of claims against estates, as a condition precedent to the commencement of suits upon them, is to save to estates of deceased persons the costs and expenses of useless suits,—suits to recover what would have been allowed and paid by the executor or administrator without suit. The merits of such claims do not depend in any degree upon their presentation and rejection before suit. The defense that a claim had not been presented and rejected before suit does not question either the validity, or the maturity of the claim, but simply challenges the remedy by suit, on the ground that another remedy provided by law has priority, and should be exhausted before commencement of suit. In other words, that the demand, or some part thereof, should be disputed and rejected, in the mode prescribed by law, before the commencement of suit. For these reasons it has been decided in the cases above cited that the defense to a claim against an estate that it had not been presented to and rejected by the executor or administrator before commencement of suit upon it is of the nature of a defense in abatement, which is presumed to be waived if not expressly made in the court of original jurisdiction, and that it will not be first heard and considered on appeal.

3. It is contended that the finding that Miller, plaintiff's assignor, sold and delivered the goods to Knapp, defendant's testator, is not justified by the evidence, and I think this point is well taken. The goods, alleged to have been sold and delivered by Miller to Knapp consisted of wheat, flour, bran, and middlings, delivered at different times in 1886, viz., March 24th, April 7th, and May 8th, and are admitted to have been the property of G. W. Hale, unless he had sold them to Miller before they were delivered to Knapp. Plaintiff claims that Miller purchased the goods from Hale before the alleged sale and delivery to Knapp; but the defendant denies this, and contends that Knapp purchased the goods from Hale, and that Miller, as the agent and teamster of Hale, merely hauled and delivered them to Knapp for Hale. It appears that both Hale and Miller had running open accounts with Knapp during the time the goods were being delivered, and that Knapp credited the goods to Hale's account, on his books, at the times of delivery. It is admitted that, before and during the time the goods were being delivered to Knapp, Miller was in the employ of Hale as teamster, driving Hale's team, of which it appears that Knapp had notice. It also appears that the goods had been deposited and stored by Hale while he owned them in Tulloch's mill, at Knight's Ferry, and thence the greater part of them were hauled directly to Knapp's store, by Miller. But it appears that, by some means not disclosed, about one-fifth part of the goods had been "left with Mr. Preston, [presumably the plaintiff,] in his warehouse at Jamestown," by whom, and not by Miller, they were delivered to Knapp. This appears by the testimony of Miller and the copy of the

account. Exhibit C. As to his purchase of the goods from Hale, Miller testified: "I was working for G. W. Hale at the time I delivered this merchandise to Mr. Knapp. I became, while working for Mr. Hale, the owner of certain wheat, flour, and bran by transfer from Hale, who owed me \$111, and he [Hale] had wheat and bran in Knight's Ferry, and he told me I could have it, and sell until I was clear of it. * * *

They were transferred to me in part payment of my claim against Hale for \$111. * * * Mr. Hale had this merchandise in Knight's Ferry. He was owing me \$111, and he says: 'Now I want to pay you. Will you take that wheat, and sell it whenever you can, and take your pay out of it?' And I said I would, and Knapp bought it and said he would settle with me. * * *

Hale's agreement was for me to take the flour and sell it, and collect the money. The flour was at Tulloch's mill, Knight's Ferry. No transfer was made to me at Tulloch's mill. The wheat and flour belonged to Hale, and when I got it from Tulloch I receipted for it in my own name. I am positive I signed my own name." At this point six receipts to Tulloch of different dates signed "G. W. HALE, per I. N. MILLER," were produced, and the witness and plaintiff's counsel admitted that they were the receipts given by Miller for the goods in question. As to the sale and delivery by Miller to Knapp, Miller testified: "I hauled a load to Mr. Knapp's at his [Knapp's] request, and delivered it on my account to him; delivered the items set out in that account. [Plaintiff's Exhibit C.] Some of this wheat and these other goods were left with Mr. Preston in his warehouse, at Jamestown. They were afterwards delivered to Mr. Knapp upon my account, before he died. They are my goods at the present time. Hale and I were not interested in the goods. I did not tell Mr. Knapp that they were delivered on Mr. Hale's account. * * *

Have received in all \$85, and no more, on account of the claim, from Knapp and his clerks at different times, after the delivery of the goods, and before the assignment to Preston. * * * I can't tell when I got the first amount of money from Mr. Knapp. I kept it in my head, what I drew. Had not been in the habit of drawing money from him. I had my money deposited with him. Never drew against the money. Got the first of this \$85 after delivery of most of the stuff. Have no memory of the money I received. Eighty-five dollars is the whole amount; \$75 of that from Mr. Knapp, \$10 of that from W. H. Knapp. Think the largest amount at any one time was \$40; that was in the store at Columbia." W. H. Knapp, called by plaintiff, testified that he was the son of Sewell Knapp; that he was keeping his father's books during the time the goods were delivered; that plaintiff's Exhibit A, viz.: "3625 wheat, 1573 lbs.; flour, March 24, '86. S. KNAPP, T."—was in his handwriting; that the books contained an account of the goods in question at the prices charged for them by plaintiff, but that they were credited to the account of Hale; that he did not remember paying anything to Miller on that

account; that he had paid Miller different amounts on his own account; that the book containing Miller's account was not present, but was in Columbia; that he never knew that Miller had any interest in the goods, and credited them to Hale, by his father's direction; that some of the goods were hauled from Jamestown by teams from Columbia. E. W. Murphy, a witness for plaintiff, testified that he had been driving and clerking for Knapp for the last eight years, and, as the agent of Knapp, he received from Miller that part of the goods in question described in plaintiff's Exhibit B, as follows: "Columbia, April 7, 1886. Rec'd of I. Miller 395 lbs. bran; 13 bbls. flour. S. KNAPP. E. M." That he understood from Knapp that the goods were to go to the credit of Hale, and so entered them on Knapp's books at the time. At Miller's request, he had given Exhibit B as a memorandum of the amount of bran and flour delivered. Neither Hale nor plaintiff was called as a witness by either party. On the part of the defendant, D. W. Tulloch testified that he delivered the goods from his mill to Miller, as the teamster and agent of Hale, and took receipts from him as such; that all the goods were not delivered to Miller, but that a teamster from Jamestown received a part of them. Considering all the circumstances, I think the evidence on the part of the plaintiff was insufficient to prove his case, even *prima facie*. It depends entirely upon the testimony of Miller, which, taken as a whole, seems to be both inconsistent and unreliable. That he "became the owner" of the goods is his legal conclusion from the facts that Hale authorized him to sell the property and apply the proceeds of the sale to the payment of Hale's indebtedness to him, amounting to \$111. The goods had not been actually, nor constructively, delivered to him before the time he says he became the owner of them, nor at any time before they were delivered to Knapp. The quantity of none of the different kinds of goods of which he says he became the owner—wheat, flour, bran, and middlings—had been ascertained or designated by weight, measure, or otherwise, nor separated from the whole quantity which Hale had stored at Tulloch's mill; and it seems incredible that it was ever the intention of the parties that Miller should take and become the owner of all Hale's wheat, flour, etc., stored at Tulloch's mill, of the market value of \$578.81, "in part payment" or in full payment of Hale's debt of only \$111. Miller's legal conclusion that he became the owner of the goods while they were stored at Tulloch's mill is only at par with his assertion that he was still the owner of them at the time of the trial. The reliability of Miller's testimony as to facts is tested, somewhat to its disadvantage, by the proof that he was, at least, mistaken in positively testifying that he receipted for the goods to Tulloch in his own name. Taken all together, I think the evidence, on this branch of the case, substantially tends to prove only that Hale authorized Miller, as Hale's agent, to sell and collect the pay for so much of the goods as might be nec-

essary to pay the debt of \$111, and to apply the proceeds to the payment of that debt. As to the alleged sale of the goods by Miller to Knapp, it is to be observed in the first place that Miller, except as agent for Hale, could pass to Knapp no better title to the goods than he had; and, in the second place, if he had no title, and passed none from himself to Knapp, there could have been no implied promise of Knapp to pay him the value of the goods. An implied promise, if any, must have been to pay the owner of the goods delivered, and not to pay the owner's servant or agent who delivered them. It follows that the plaintiff must recover, if at all, upon a valid, express promise of Knapp to pay him for the goods. Is the evidence sufficient to prove such a promise? It should be borne in mind that to Knapp, and all others who knew Miller's relation to Hale to be that of Hale's servant, as teamster, the acts of Miller in hauling and delivering goods were ostensibly and presumptively the acts of Hale, in the absence of notice to the contrary. Now the only evidence claimed to have any tendency to prove that Knapp had any notice that Miller owned or claimed the goods, or that he was selling or delivering them on his own account, or that Knapp promised to pay Miller, is the loose, indefinite testimony of Miller. He first testifies that, when Hale asked him if he would sell that wheat, and take his pay out of it, "I said I would, and Knapp bought it and said he would settle with me." Further on he says: "I hauled a load to Mr. Knapp's at his [Knapp's] request, and delivered it on my account to him; delivered the items set out in that account." Exhibit C. Yet that account states that a considerable portion of the "items set out" in it were delivered by Preston; and the witness proceeds to say: "Some of this wheat and these other goods were left with Mr. Preston in his warehouse, at Jamestown. They were afterwards delivered to Mr. Knapp upon my account." All this testimony of Miller seems to be intentionally evasive of the questions in dispute. He does not say that Knapp was informed, or had any kind of notice that the goods belonged to him, nor that they were delivered on his account. Nor does he say that Knapp "bought" the goods from him, or promised to pay him, but only that "Knapp bought it, and said he would settle with me." From whom did Knapp buy it, and what or on whose account did he say he would settle? It is possible, however, that Miller intended to be understood, and even supposed he had said, that he informed Knapp that the goods belonged to himself and not to his master or principal, and that he sold and delivered them on his own account; and, also, that Knapp promised to pay him. But, under the circumstances of this case, his testimony is too indefinite and uncertain to prove an express promise of Knapp to pay him for the goods. Considering the weakness and uncertainty of Miller's testimony, the failure to corroborate and strengthen it by the testimony of Hale and the plaintiff casts an additional shade of suspicion upon it, as Hale must have known all about

the transaction between himself and Miller, and the plaintiff could have explained the conditions and circumstances under which he delivered a portion of the goods to Knapp. No reason or excuse for not having called them as witnesses appears. The alleged payment of \$85 by Knapp to Miller is accounted for otherwise than as having been a payment on account of the goods. It is admitted that Miller had a running account and money on deposit with Knapp at the times he drew this money; and W. H. Knapp testified that the money was charged to Miller's account, as he understood it should be, when Miller drew the money. I think the judgment and order should be reversed, and a new trial granted.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial granted.

PATERSON, J., dissenting.

84 Cal. 124

CITY AND COUNTY OF SAN FRANCISCO v.
STRAUT *et al.* (No. 12,746.)

(*Supreme Court of California.* May 12, 1890.)

ADVERSE POSSESSION—WATER LOTS—PUBLIC TRUSTS.

Act. Cal. March 26, 1851, which grants the use of certain beach and water lots to the city of San Francisco for 99 years, with a proviso that the city shall pay into the state treasury, within 20 days after their receipt, 25 per cent. of all moneys arising from the sale of the property, does not create a trust in the city in favor of the state, so far as the land itself is concerned; and hence the city's title to such land is subject to extinguishment by adverse possession under the statute of limitations. Following *Holladay v. Frisbie*, 15 Cal. 631.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by the city and county of San Francisco against William E. Straut and others to recover certain beach and water lots granted to the city by the act of March 26, 1851. There was a judgment for defendants, and plaintiff appeals. The provisions of the act of 1851 are thus stated by Justice FIELD in *Holladay v. Frisbie*, 15 Cal. 631: "By the act of March 26, 1851, a grant is made to the city of the use and occupation of the beach and water lots therein described, with certain specified exceptions, for the period of 99 years, with a proviso that the city shall pay into the state treasury, within 20 days after their receipt, 25 per cent. of all moneys arising in any way from the sale or other disposition of the property."

Craig & Meredith, for appellant. *Cope & Boyd*, for respondents.

Fox, J. The only question on this appeal is whether the claim of the plaintiff is barred by the statute of limitations. Confessedly it is so barred, unless the title of plaintiff was charged with a public trust, and for that reason not subject to extinguishment by adverse possession under the statute of limitations. The action is

election for the recovery of one of the beach and water lots of San Francisco. It was found that the defendant Straut, and his lessor, Boyd, had been in the continuous, open, notorious, adverse possession of the lot for 12½ years next before the commencement of this action, and judgment went for defendants, from which, and an order denying a motion for new trial, plaintiff appeals.

The title of plaintiff is that, and that only, which was derived under the beach and water lot act. St. 1851, p. 309. Appellant claims that by the terms of the act the premises were "impressed with a public trust." Whether it was so impressed or not was determined by this court in *Holladay v. Frisbie*, 15 Cal. 631, where the court, speaking through Mr. Justice FIELD, said: "The right of the state to the percentage, and the obligation of the city to pay the same, can only arise after the city has parted with the estate, and received the consideration. * * * Nor does the proviso create a trust in the city in favor of the state, so far as the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the state. * * * The interest which the state reserved is to a portion of the proceeds arising upon the sale or other disposition of the property, if any proceeds were received by the city. * * * The interest of the city in the beach and water lot property is a legal estate for ninety-nine years. * * * The city may have * * * parted with its interest in a variety of ways, without the receipt therefrom of any moneys." A reference to the act under which appellant claims fully justifies this decision. The grant is for a term, but during the term no beneficial interest in the land whatever is reserved to the state. The city is not required to sell. The only provision is that, if she does sell, she shall pay twenty-five per cent. of the proceeds of the sale to the state. The only right of the state is in the proceeds when realized, but with no obligation on the part of the city ever to realize any proceeds. The right of the city, therefore, for the term is as absolute a title and as free from trust as that of any private proprietor. The title thus granted may be extinguished by adverse possession, under the statute of limitations. *San Francisco v. Calderwood*, 31 Cal. 585. To the same effect is *Hoadley v. San Francisco*, 50 Cal. 274, 275, so far as relates to lands of the city not held in trust, or dedicated to a public use. See, also, *Yolo Co. v. Barney*, 79 Cal. 378, 21 Pac. Rep. 833. Judgment and order affirmed.

We concur: BEATTY, C. J.; PATERSON, J.

86 Cal. 22

KERCKHOFF-CUZNER M. & L. Co. v. CUMMINGS. (No. 13,600.)

(*Supreme Court of California.* Sept. 13, 1890.)

MECHANICS' LIENS—CONTRACTS NOT EXCEEDING \$1,000.

Code Civil Proc. Cal. § 1184, relating to mechanics' liens, which provides that no money shall be paid on a building contract by the reputed owner to the contractor until after the com-

commencement of the work, and that 25 per cent. of the contract price shall be reserved for at least 35 days after the completion of the work, applies only to those contracts where the price to be paid thereunder exceeds \$1,000, as provided by section 1183; and, where the contract price does not exceed \$1,000, the reputed owner may pay the whole of it to the contractor, either before the commencement of the work or during its progress, unless a written notice is served on him by the laborers or material-men, that they have performed labor for, or furnished material to, the contractor, or that they have agreed so to do, as prescribed by section 1184. Following *Sidlinger v. Kerkow*, 22 Pac. Rep. 932. BEATTY, C. J., and THORNTON and Fox, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Action to enforce a lien for material by the Kerckhoff-Cuzner Mill & Lumber Company against George Cummings and another. There was a judgment in plaintiff's favor, and defendant Cummings appeals. Section 1183, Code Civil Proc., (as amended 1887,) provides: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000, and shall be subscribed by the parties thereto; and the said contract, or a memorandum thereof, setting forth the names of all of the parties to the contract, and description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; * * * otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Immediately following this provision of section 1183 is the following provision of section 1184: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work: provided, that at least 25 per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. * * * In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

Wells, Guthrie & Lee, for appellant.

Graves, O'Melveny & Shankland, for respondent.

GIBSON, C. The plaintiff furnished certain building material of the value of \$429.87 to the defendant Singer, for the alteration and repair of a dwelling-house owned by the other defendant, Cummings, who had contracted with Singer to have him alter and repair said dwelling-house, and furnish the necessary material therefor. To recover the value of the material so furnished of Singer, and to enforce a lien claimed therefor upon the house of Cummings, this action was brought, and resulted in a personal judgment against Singer, who defaulted, and a foreclosure of the lien claimed upon the property of Cummings. From the judgment so rendered against him, Cummings appeals. The appellant in his answer set up as a separate defense that he entered into a verbal contract with Singer, by which Singer was to make certain repairs on the appellant's house, and furnish material for the same, for the sum of \$451, portions of which sum were to be paid every Saturday night as the work progressed; that while the work was being done, payments were made, and after it was completed Singer was paid in full; that during the performance of the contract by Singer, the respondent did not serve any notice upon the appellant to the effect that it had furnished material for the building to Singer, but that about one month after the work had been completed, and the appellant had paid Singer, the contractor, in full, the respondent notified the appellant that there was a certain amount due for material furnished to Singer; that appellant thereupon notified respondent that Singer had been paid in full, and there was nothing due from the appellant to him. To this portion of the answer the respondent demurred upon the ground that it did not constitute a defense to the action. The demurrer was sustained, and the trial was had with such portion of the answer eliminated. The ruling thus made presents the only question in the case, as to whether notice is necessary from the material-man to the owner, in cases where the contract price does not exceed \$1,000, in order that the owner may be required to hold back sufficient money due or that may become due the contractors to meet the claim of the material-man, and satisfy any lien he may file therefor. The respondent, in support of the ruling of the court below, sustaining the demurrer to the answer, contends that all contracts between the reputed owner and the contractor, whether the price to be paid thereunder exceeds \$1,000 or not, as provided for in section 1183 of the Code of Civil Procedure, are subject to and controlled by section 1184 of the same Code, which requires the price, payable under contracts between the reputed owner and the contractor, to be paid in money, and in installments after the commencement of the work, and the reservation of one installment of at least 25 per cent. of the whole price for at least 35 days after the completion of the work; and that the contract price under the contract in this case having been made payable in a

manner different from that prescribed by section 1184, the contract was of no effect as to respondent, and the only notice it (respondent) was required to give was the filing of the lien within the proper time. This contention is contrary to the doctrine of *Sidlinger v. Kerkow*, 82 Cal. 42, 22 Pac. Rep. 932. In that case, it was held that the provisions of section 1184, relative to the payment of the price payable under contracts between the reputed owner and contractor, do not apply to such contracts when the price does not exceed \$1,000, but only to such contracts when the price exceeds that sum; and that a contract in which the price to be paid does not exceed the sum last mentioned is effective as to all persons who may perform labor for, or furnish material to, the contractor, or both. This being so, it is clear that no part of the contract price under such a contract need be withheld by the reputed owner; and he may pay the whole of it to the contractor before the commencement or after the completion of the work, unless the notice prescribed in section 1184 is given. That section provides that any person, except the contractor, who performs labor, or furnishes material, or both, may at any time give to the reputed owner a written notice containing the requisite specifications that he has performed labor, or furnished material, or both, to the contractor or other person acting by the authority of the reputed owner, or has agreed to do so. "Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor, or materials, or both, have been furnished or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim, and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding \$100 in each case, besides reasonable costs provided for in this chapter." This notice must be given in time to intercept the money in the hands of the reputed owner; otherwise the payment of it to the contractor in accordance with the terms of the contract, which, as has been shown, may be made to suit themselves when the contract price does not exceed \$1,000, will operate as a complete discharge as far as the reputed owner is concerned; because section 1183 makes a contract between the reputed owner and the contractor, regardless of the amount of the contract price, a lien to the extent of the whole contract price in favor of all persons, except the contractor, and, as to him, for whatever remains after the claims of the others are satisfied, thus making the liability of the owner to all persons, except the contractor, who performs work or supplies material, depend upon whether there is anything due on the contract to the contractor. And if the contractor be paid in full before the notice prescribed in section 1184 is given, the mechanic, laborer, and material-man are remediless, except as against the contractor personally. In the

present case, the answer of the owner avers that the contract between himself and the contractor was verbal; that the price to be, and that was, paid thereunder was less than \$1,000; that it was to be, and was, paid every Saturday night as the work progressed; and that the last installment was paid upon the completion of the work; that the only notice that he received was about one month after he had paid the contractor in full. These averments, if true, under the construction given to sections 1183 and 1184 in *Sidlinger v. Kerkow*, are sufficient to constitute a defense on the part of the appellant, who is the owner of the building, against the claim of lien of the respondent for the material furnished. It may be well to remark that the only notice which, from the record, appears to have been given by the respondent to the appellant was that resulting from the filing of the lien 29 days after the completion of, and the full payment for, the work. We therefore advise that the judgment appealed from be reversed, and the trial court directed to overrule the demurrer to the answer.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed, and the trial court is directed to overrule the demurrer to the answer.

We dissent, and will file a dissenting opinion: BEATTY, C. J.; THORNTON, J.; FOX, J.

(86 Cal. 58)

In re MOORE'S ESTATE. (No. 13,540.)

(Supreme Court of California. Sept. 16, 1890.)

APPEALABLE ORDER.

Where a testator appoints his wife trustee to manage the estate, and in the event of her death before his grandchildren, who are to succeed her in the trust, come of age, then the trust to devolve upon his son, and the wife voluntarily renounces the trust, and procures an order substituting the son as trustee, no appeal lies from a subsequent order vacating the first, as it is not enumerated among the appealable orders in Code Civil Proc. Cal. § 963.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

In regard to appeals from orders in probate proceedings, Code Civil Proc. Cal. § 963, subd. 3, provides that appeals may be taken "from a judgment or order granting, refusing, or revoking letters testamentary, or of administration or of guardianship, or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof, or against or in favor of setting apart property or making an allowance for a widow or child, or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor or administrator or guardian, or refusing, allowing, or directing the distribution or partition of an estate or any part thereof, or the payment of a debt, claim, legacy, or distributive share, or confirming or refusing to confirm a report of an appraiser setting apart the homestead."

Baker & Grant and Grove L. Johnson, for appellants. *E. R. Bush and C. W. Thomas*, for respondent.

WORKS, J. The decedent left a will by which he disposed of a certain water-ditch and lands connected therewith, and, among other things, provided in his will that his wife should have the management of the ditch and lands, in trust, during her life, and that in case of her death before certain other trustees, grandchildren of his, named in the will as trustees, should arrive at full age, the management of the ditch should devolve upon his son, also named in the will. The widow came into the court below, in which the settlement of the estate was pending, and voluntarily renounced her management of the property, and consented to the appointment, by the court, of the son to such management. All of the parties interested in the property appeared, and consented to this order substituting the son as manager of the ditch, except the minor trustees, whose right to act as such, and who, upon becoming entitled to act as such trustees, would have but a naked legal title to the property, to hold and manage the same for the benefit of others. These minor trustees were not notified of the pendency of the application for this order, nor did they appear either in person or by guardian when the order was made. Subsequently the court below set aside and vacated the above-mentioned order, on the application of the widow and one of the minor trustees. Proper notice of the motion to vacate the former order was given, and the motion was made and granted on the ground that the court had no jurisdiction to make the same.

This appeal is from the order vacating the former order. The respondent contends that the order appealed from is not an appealable order, and that, therefore, the appeal should be dismissed. We think this point is well taken. Appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in section 963 of the Code of Civil Procedure, and the order appealed from in this case is not one of the number. Const. Cal. art. 6, § 4; Estate of Calahan, 60 Cal. 232; Estate of Dean, 62 Cal. 613. Appeal dismissed.

We concur: BEATTY, C. J.; PATERSON, J.; McFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

85 Cal. 378

PEOPLE v. HOOD *et al.* (No. 20,621.)

(Supreme Court of California. Aug. 28, 1890.)

GAMING—BUNCO—EVIDENCE.

On a criminal prosecution for fraudulently winning money by means of the game of bunco, it is error to permit a witness to describe, as an expert, not the game actually played by defendants, but the game of bunco generally.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM A. CHEENEY, Judge.

Geo. A. Johnson, Atty. Gen., for the People. *Stephen M. White and Bleeker & Barham*, for respondents.

v.24P.no.15—52

WORKS, J. Rose, one of the defendants in this action, was tried and convicted of the crime of fraudulently winning money by means of a game of bunco. He moved for a new trial, which was granted, and the people appeal. One of the grounds upon which the motion was granted was that a witness for the people was allowed, as an expert, to describe, not the game actually played by the defendants, but the game of bunco generally. His testimony on this point was as follows: "It generally takes threemen to start a game. The first one, after the victim is picked out, he finds his antecedents, his name, and his relations, and where he is from. After he is sufficiently conversant with the antecedents of a person, his family, and so on, he communicates to what we call a 'capper.' The capper introduces himself as a relative of some friend or some relative of his. The capper approaches the victim,—he has various names, as 'sucker,'—'How do you do?' Mr. so-and-so probably not recognizing him he says: 'I am so-and-so. I met you at such a place; met some of your relatives.' Asks him to take a walk. They take a walk, and come to the place. It is up-stairs. Not necessarily up-stairs. In this case it was up-stairs. He hauls out a card, and says to the victim: 'By the by, I believe I have drawn a prize. We'll go up-stairs, and draw it, and cash the thing.' Asks him to come. Opens the room. There is a gentleman behind the desk, called the 'banker.' He says, 'I believe I have drawn a prize,' and throws down the card. He goes over to see. He says: 'Yes; you have drawn \$101.' He asks to cash it, and he goes and pays him over \$100. 'Well, we don't pay any fractional parts of prizes, but we will give you a ticket, the drawing on which takes place some future day.' He says: 'Well, I haven't any time. I am going out of the city to-day or to-morrow, and my friend is also going out of town. We have no time to stay.' 'Well,' he says, 'we are provided with by-laws, and from the by-laws I will see what I can do.' Finally he finds a section, and he says: 'There is a section which allows a special drawing. The cards are similar to the little card here. The highest number is 48, isn't it?' There are different games, some of them as high as 60. He says: 'Take eight cards, each of the denomination of one to eight.' Forty-eight numbers they have there. He draws, and the probabilities are that he will draw a star number the first time,—a small prize number,—but before he can draw he has to double up; that is, you have to double the amount of money you have up. When that takes place two or three times that is doubled up. Finally he is told what amount he has. Then he asks his friend to draw, and he consents. He draws, probably, the first time \$500; puts up \$1,000, and gets another draw; double up, and another draw. The second time they put up \$2,000, until they have his capacity exhausted. They then draw, and make it appear the blank number there,—28. After the cards are spread out, there are eight drawn, and the numbers run from one to six. One takes the highest and the others the lowest number,

and six takes eight,—48. Every one of those draw a capital prize. They have different numbered and shaped cloths. I have seen one of sixty numbers and ten lower. If the victim stays with the game he loses every dollar he has got in it. They usually use, for the purpose of counting numbers on the cards, 'strippers and cappers,' as they call them, and a banker, generally. Strippers are cards marked with a little dot on the end, and, if they are spread out for the purpose of losing everything, the capper draws. The numbers on those little marked cards generally draw No. 28, which denotes you have lost everything. Sometimes they manipulate the whole eight of them on top and he will say, 'The top cards are just as lucky to us as any,' and he draws off the first eight. They are placed there by manipulating the cards. Twenty-eight is the draw on the cloth. Strippers are cards which can be identified from the rest of the cards as marked. From the number of the cards picked up, he may have a number of those cards, that is, the losing number, in favor of the bank. They are marked cards. Those strippers can be separated from the rest of the cards in the pack by little kinks of the hand. Generally, the party setting behind as banker is an expert at that, who can handle any deck of cards. There is only one chance for a sucker to win at bunco,—if he draws the first chance, if he bets \$50 and takes it, and walks out with it. That has been done. They give the sucker no chance. Generally the dealer counts up the numbers, but the capper sometimes does. There are eight cards, numbered from one to six. Amongst them are eight of those cards marked. They have various marks on them; some wider, some narrower, and some with a little dot,—anything by which it can be easily selected. They manipulate those eight cards. Those eight cards are generally numbered what is called a 'general blank,' and, when that is drawn, that ends the game. The bank has all the money. They are generally played as being covered. I have seen it when it was covered over, and they pretend to hunt over the cloth for twenty-eight. Suppose that I was dealer. I would take a bunch of cards, shuffle them, turn the numbers down, spread them out, over. 'Well,' the capper says, 'I will draw four,' and lets his friend, the sucker, draw four. Then hands to the dealer, and turns them over. He deals them. He can count off any number he pleases. The capper naturally agrees with him, and the banker too. If the sucker disputes it, there is two against one, who will insist that number has been drawn. The cards are picked up so quick that there is no chance to see the numbers drawn. If it is the first bet, that is, \$50 or \$100, that will draw \$10 or \$20 prize, and then they will cover the different prizes. That is the way bunco is played. I never saw it played any other way than a fraudulent way. It is a fraudulent game. That is what it was invented for." In connection with this testimony, the court below stated, in the presence of the jury, that the question whether the game played was a bunco game or

not was one of fact for the jury. We are not sufficiently acquainted with the bunco game to know whether the description given of it by the witness was accurate or not, but, if it was, the game must be a very peculiar one, commencing on the street, and carried on by conversation between the bunco man and his victim, and ending up-stairs in some building in a game of chance. The witness appears to have been a detective, who had been acting as such in this case, and his description of the game seems to have been very materially aided by the testimony of the gentleman who claimed to have been defrauded of his money, and who described his experience very much as the witness described the game of bunco. The court below did not err in granting the new trial on this ground. The testimony admitted was clearly incompetent, under the decision of this court in *People v. Carroll*, 80 Cal. 153, 22 Pac. Rep. 129; and, as was very justly said by the learned judge of the court below, in his opinion delivered in passing upon the motion, the evidence could not but have been injurious to the defendant. Order affirmed.

I concur: Fox, J.

PATERSON, J. I concur in the judgment. The information is very uncertain, and radically defective. Two offenses—a misdemeanor and a felony—can be seen in the allegations, but neither appear with that certainty required by the provisions of the Penal Code. It would be useless to attempt to show the defects, as the information is hopelessly insufficient.

85 Cal. 448

UNITED LAND ASS'N *et al.* v. KNIGHT. (No. 12,748.)

(*Supreme Court of California.* Jan. 2, 1890.)

PUBLIC LANDS—PATENTS—AUTHORITY OF LAND-OFFICE—EVIDENCE.

1, Act Cong. 1864, § 7, (13 U. S. St. at Large, 334,) provides that "it shall be the duty of the surveyor-general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable, whenever such degree designates the specific boundaries of the claim; but when such decree designates only the out boundaries within which the quantity confirmed is to be taken, the location shall be made as near as practicable in one tract, and in a compact form, * * * and it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of this section before approving any plat and survey forwarded to him." Act Cong. 1851, § 13, (9 U. S. St. at Large, 631,) provides that "the patent shall issue to the claimant on his presenting to the general land-office an authentic certificate of confirmation, and a plot or survey of said land duly certified and approved by the surveyor-general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and furnish plots of the same." The decree confirming defendant's land claim described the land as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to

include the area aforesaid." The survey made under this decree included by metes and bounds land below the line of ordinary high tide. The patent following the survey described the lands by metes and bounds, but recited the decree of confirmation. *Held*, in ejectment for the lands below high tide, that the north, east, and west boundary lines given in the decree and recited in the patent would prevail over those given in the survey and the granting clause of the patent, as there was no power by which land could be included in the survey and patent, the claim to which had not been confirmed by the decree. McFARLAND, J., dissenting.

2. Plaintiff, to make his *prima facie* case, had the right to prove by surveys and maps, accompanied by parol evidence, that the premises were below the line of high tide at the date of the conquest.

3. This evidence is not overcome by a patent read by defendant which includes the premises, if the patent shows upon its face that, by reason of the specific boundary also given in the patent, the officer making it had no power over land below high tide.

4. The officer had no power to act upon land not confirmed to the Mexican grantee; nor can he by issuing a patent conclusively adjudicate upon his power over such land.

5. The evidence of plaintiff was admissible, and upon all the evidence the judgment is affirmed.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

E. F. Preston and James A. Waymire, (Samuel Wilson and Thomas B. Bishop, amici curiæ,) for appellants. Doyle, Galpin & Scripture, for respondent.

PATERSON, J. This is an action of ejectment to recover a block of land lying below ordinary high tide in the city and county of San Francisco, and being a portion of that part of San Francisco known as "Mission Creek Lands." The defendant claims under a patent of the United States to the city, issued June 20, 1884, in satisfaction of a pueblo grant of four square leagues, which was confirmed, by the decree of the United States circuit court, May 18, 1865. The tract confirmed by this decree is described as "a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues. Said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid," subject, however, to certain deductions for lands previously reserved or dedicated to public use by the United States. Under the decree referred to a survey was made, and on August 13, 1868, was approved by the United States surveyor general for the state of California, which fixed the southern boundary of the land by following the high-water mark, thus excluding the lands of Mission creek, of which the land in suit is a part. Subsequently, in 1884, the secretary of the interior caused another survey to be made, one line of which ran directly across the mouth of Mission creek, thus in-

cluding the lands of Mission creek as a part of the grant to the city. The patent to the city recites the decree confirming the grant. Plaintiffs' claim of title 'a based upon a deed from the tide-land commissioner to Ellis, dated November 24, 1875, and subsequent conveyances to them. They contend that the state, upon its admission into the Union, by virtue of its sovereignty, became seised of the land, it being tide-land. This right of the state, they claim, is recognized by the decree confirming the grant to the city. It is claimed that the patent is bound to follow the decree in fixing the boundary at high-water mark, and that so much of the patent as attempts to convey lands below high-water mark is void, because in excess of the authority of the officials issuing the patent. Appellant contends that a party in an ejectment suit cannot question the validity of a United States patent for land upon the ground that it does not follow the decree confirming the grant; that the patent from the United States government to the city and county of San Francisco for the pueblo lands confirmed to it under the acts of congress of March 3, 1851, and of July 1, 1864, by the decree of the United States circuit court, which patent conforms in its description of the lands granted to the final survey, made as provided in the latter act in accordance with the instructions of the commissioner of the general land-office, is conclusive evidence, as against the state of California and its grantees, of the right of the city and county to all the land embraced within the exterior limits of the survey, including tide-lands lying below the line of ordinary high tide. It is said that the question is no longer an open one in this state. The case of *People v. San Francisco*, 75 Cal. 388, 17 Pac. Rep. 522, is cited and relied on in support of this contention. It did not appear in *People v. San Francisco*, whether the decree of confirmation was made a part of the patent. In this case it is shown that the patent contains full recitals of the decree, and shows upon its face that the tract confirmed embraced "so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, viz., 7th of July, 1846,) on which the city of San Francisco is situated, as will contain an area of four square leagues," etc. It shows that three sides of the tract are bounded by natural monuments, namely, "on the north and east by the Bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." If it be conceded, however, that the decision referred to covers the questions involved as fully as is claimed by the appellant, we feel satisfied that the supreme court of the United States would not follow it in this case or any other, involving the same questions, which might go to that court on a writ of error. "It has always been the practice here to adopt that view of a legal question which has been taken by the supreme court of the United States, when the question is within the branch of the jurisdiction of that

court which may be exercised by writ of error to this court." As the question is a federal question, it is one which will be decided ultimately by the supreme court of the United States. *Belcher v. Chambers*, 53 Cal. 635.

The question involved in this case is whether the officers of the land department had power to patent land outside of the natural boundaries given in the decree of confirmation. If the land department had no jurisdiction to act, if any portion of the land described in the patent was not a part of the public domain, or if there was no legislation authorizing its conveyance by the land department, then, under the decisions of the United States supreme court in *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and other cases therein cited, the patent is inoperative to pass the title; and objection can be taken to it on these grounds at any time, and in any form of action. Upon her admission into the Union, the state of California became the owner, by virtue of her sovereignty, of all the tide-water lands within her borders lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state, of course, could not take more than the United States received; and the claim of the state, by virtue of her admission and her sovereignty, was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the exterior boundaries of larger tracts. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674. The United States government has exercised the power vested in it, and has, through its courts, and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving, as the boundaries thereof on the west, the north, and the east, the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such a line as would include, between it and the high-water lines north of it, said four square leagues of land. This, it seems, the surveyor did not do; but, ignoring the natural boundaries fixed by the court in its decree for the west, north, and east, ran his line below the line of high tide, and across the mouth of Mission creek, and included within his description the lands described in the complaint,—lands of the state not included within the decree of confirmation. Following the survey, the patent describes the land by metes and bounds.

The government of the United States is in duty bound to carry into effect the stip-

ulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by congress; and it would seem that when congress vested in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land-office to require a substantial compliance with the directions of the section before approving any survey and plat forwarded to him," the officers of the land department are, as to such lands, merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Section 13 of the Act of 1851 (9 U. S. St. 631) provides that "the patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of confirmation, and a plat or survey of said land, duly certified and approved by the surveyor general, whose duty it shall be to cause all private land claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of said claims the said surveyor general shall have the same power and authority as are conferred on the register of the land-office by section 6 of the act, 'to create the office of surveyor of the public lands for the state of Louisiana,' approved March 3, 1831." Under this provision, we think it clear that the power of the surveyor general is restricted to the claim as finally confirmed. It has been decided in several cases, on appeal from decrees of confirmation, that the description must be followed; that "the decree is a finality, not only on the question of title, but as to the boundaries which it specifies." *U. S. v. Halleck*, 1 Wall. 455; *Fossat Case*, 2 Wall. 649; *Higuera v. U. S.*, 5 Wall. 829; *Van Reynegan v. Bolton*, 95 U. S. 35. In *Higuera v. U. S.*, the court declared that "confirmation must precede the survey which is made subject to such an order, and, if the decree of confirmation is so indefinite and incongruous that it cannot be executed, then it is void, and of no effect, and the claim to the land stands upon the same footing, in legal contemplation, as a claim which was never presented to the commissioners for adjudication." In the *Fossat Case* the court held that it was not competent for the district court to depart from its own decree in the exercise of the power conferred by the act of June 14, 1860; that the court was bound to execute the decree by fixing the lines of the grant in conformity with the provisions of the decree, the decree being not only the foundation of the validity of the grant, but of the proceedings in the survey and location of the land confirmed. In that case, as in this, the decree provided for specific boundaries on three sides of the tract, and left one side to be surveyed. If the court, which then had the power to supervise and confirm or reject the survey, as the land department now does, could not alter or depart from the specific boundaries

given in its own decree, how can the officers of the land department? These cases, to be sure, were direct appeals to the supreme court of the United States; but they bear directly upon the question of the authority of the officers of the land department to patent lands outside of the boundaries of the decree of confirmation, and that is the question here. If the land granted is not within the power of the officer, the grant or patent is invalid. In *Polk v. Wendal*, 9 Cranch, 87, Chief Justice MARSHALL said: "There are cases in which a grant is absolutely void, as where the state had no title to the thing granted, or where the officer had no authority to issue the grant." In *New Orleans v. U. S.*, 10 Pet. 662-731, the court said: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face, it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee." So in this case, unless congress has given the land department power to dispose of land belonging to the state of California,—lands lying outside of the boundaries of the decree,—a patent to land shown to be outside of such decree is invalid. In *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, it appeared that land which had been previously granted to the state by the swamp-land act was held by the defendant under a patent from the United States issued on a pre-emption claim. The court held the patent to be invalid as a conveyance, because the land was not, at the time it was patented to the defendant, within the granting power of the land-office. The state of California took the lands in controversy, in 1850, as effectually as if she had received them by grant from congress. If the land department had the power to determine that land outside of the decree of confirmation should be conveyed, it would necessarily have the power to pass on its own right to convey the land, but the decree of confirmation was the foundation of the power to make the patent. It precedes and limits the power of the officers of the land department. If the latter are not limited by the decree, then the court may confirm a tract in one place, and the officers locate it in another, and the patent which attempts to convey the latter tract controls the former. This cannot be, for the whole power of deciding what shall be granted in pursuance of the treaty is intrusted to the judicial department. Section 7 of the Act of 1864 (13 U. S. St. 334,) shows that the power of the land department is limited by the provisions of the decree: "It shall be the duty of the surveyor general of California, in making surveys of private land claims finally confirmed, to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim; but, when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location shall be made, as near as practicable, in one tract, and in a compact form, * * * and it shall be the duty of the commissioner of the general land-office to require a sub-

stantial compliance with the directions of this section before approving any survey and plat forwarded to him." Here is an emphatic declaration by congress that the decree is the limit of the power of the land department, and shows very clearly, we think, that congress has not given to the officers of the land department the exclusive and final power of determining whether any land is within or without the location of the decree, or of locating grants in places where the courts have not located them. If such power is not conferred upon the land department, any attempt to convey land outside of the permanent boundaries named in the decree is not an error of judgment simply, but is an act void for want of jurisdiction. Under the laws of Mexico existing at the time of the treaty, lands below and within 200 *varas* of the sea-shore could not be held in private ownership, (*Wheeler, Land Titles*, 13;) and the land-officers of the United States could not, in the absence of a judicial adjudication that such land belonged to a Mexican claimant, convey to him. "All that place is called 'sea-beach' which is covered by the waters of the sea when at its highest point during all the year." *Hall, Mex. Law*, 448. The king could not alienate such lands. *New Orleans v. U. S.*, 10 Pet. 726; *Milne v. Girodeau*, 12 La. 324. The shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads, and gulfs, and the rivers, although they may not be navigable, (Mission creek is navigable,) their beds, mouths, and the salt marshes. *Hall, Mex. Law*, 448-503; *Civil Code Mex.* art. 802.

A patent cannot be issued by the land department to a person not named in the decree, because the courts, and not the department, are given the power to determine the persons to whom the lands were granted by Mexico. If the judgment of the court should decree that the grant is a forgery, and therefore void, and the land department should patent the land claimed, the action of the department would be shown to be void upon the production of the decree, because congress has given to the courts jurisdiction to determine the validity or invalidity of the claim. Of course, in cases where the court, by its decree, has established the validity of the grant, and a tract of a certain number of acres has been confirmed to be located within the exterior limits of a larger tract, it is left to the officers of the land department, in their discretion, to locate and survey the requisite number of acres within the larger tract; and their action in execution of the decree is not subject to attack in any collateral proceedings, because it is within their jurisdiction, and in pursuance of the decree. In such cases there cannot possibly be any conflict between their action and the directions of the decree. It is auxiliary to the decree, and as conclusive as the decree itself. Unless we bear in mind the distinction between cases of this kind—the confirmation of a certain number of acres to be located within the exterior boundaries of a larger tract, and designated by the supreme court of the United States as "floats"—

and cases in which the boundaries, or some of them, are definitely fixed by the decree, the decisions upon the subject will appear to be very conflicting. An examination of the authorities cited at the argument of this case and the argument of *People v. San Francisco*, with this distinction in view, will illustrate the principle stated, and explain what would otherwise seem to be a conflict of decisions on the subject. In *Moore v. Wilkinson*, 13 Cal. 478, relied on by parties claiming under the patent from the United States, the court regarded the grant "as conveying an interest to four leagues lying within a larger tract." Page 486. It is true the patents, in some cases, seem to have gone beyond the boundaries of the *deseno*, and yet they were held not to be void; but it was so held in each case because the parties attacking the patent had no title to land lying outside of the exterior boundaries, and were not, therefore, in a position to attack the validity of the patent. In *Doolan v. Carr*, the court held (only *WAITE*, C. J., dissenting,) that one who had not even connected himself with the paramount source of title might question the validity of the patent. 125 U. S. 618, 8 Sup. Ct. Rep. 1228. In *Ward v. Mulford*, 32 Cal. 369, the district court, as it had the right to do under the law then applicable to its decrees, had reviewed the survey, and confirmed it. Even if its action were irregular, it was not void. But at the time the grant before us in this case was confirmed the surveyor was not required to report his action to the court for confirmation, and no report was made. In *Chiple v. Farris*, 45 Cal. 539, the patent covered only a portion of the tract described in the decree, but not the land in controversy. Plaintiff had no legal title, because no patent had been issued to him under the decree. The question as to the power of the land department to patent lands outside of the boundaries of the decree was not involved. Within the boundaries of the decree it may act. Without the boundaries it has no jurisdiction. Furthermore, in that case the descriptions were both by metes and bounds, and it is expressly admitted by respondent in that case, in his written points, that if the side lines of the tract in controversy were the sea-shore a different rule would apply. In *Teschemacher v. Thompson*, 18 Cal. 11, the court assumed that the grant was of "a specific quantity lying in an area of larger extent." Page 24. In *Cassidy v. Carr*, 48 Cal. 339, there was no conflict between the decree and the patent. The survey and patent, as the court said, simply carried out the decree, and were conclusive between the parties. Of course, where "the survey and the patent but carry out the decree" the patent is conclusive between the parties. In none of the cases cited is the question of the power of the officer to issue a patent for land not embraced in the decree considered. It does not follow logically that, because the patent is conclusive in all cases where the land department had jurisdiction, it is conclusive as to all lands lying without the boundaries of the decree, as well as

within them. The surveyor cannot incorporate into the decrees lands not confirmed, nor can he shift on the surface of the earth the natural boundaries,—mountains, bays, or oceans. The presumption always is, doubtless, that the metes and bounds follow the decree; but to hold that the positions of the natural monuments are indisputably fixed by the course and distances of the surveyor, and approval of the land-officers, would be placing a construction upon the acts of congress never intended by that body, and not warranted by the decisions of the national courts. The land department has power to do what the court cannot do, viz., locate, survey, and patent tracts of land designated by the court within larger areas; and when a rancho is confirmed by name to fix its boundaries, but when the court itself, in its decree, fixes one or more of the boundary lines, the department has no jurisdiction to go beyond it. The distinction between the different kinds of grants is clearly and fully stated in *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, and in *U. S. v. Curtner*, 38 Fed. Rep. 1. In *Doolan v. Carr*, supra, the court said: "There is no question as to the principle that, where the officers of the government have issued a patent, in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times, to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, —then their act was void,—void for want of power in them to act on the subject-matter of the patent, not merely voidable. In which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." Under this and other decisions, including many decisions of this court, (*McLaughlin v. Powell*, 50 Cal. 64; *McLaughlin v. Heid*, 63 Cal. 208; *Railroad Co. v. McCusker*, 67 Cal. 67, 7 Pac. Rep. 122; *Mining Co. v. Oliver*, 75 Cal. 194, 16 Pac. Rep. 780, quoted approvingly in *Wright v. Roseberry*, supra,) the evidence offered and admitted was competent, relevant, and material, and fully established the findings of the court. The deeds to Ellis, and evidence of the location on the earth's surface of the line of high tide, were properly admitted.

Now, if it be true, as a matter of law, that the surveyor general had no power to include in a survey any land, the claim to which was not confirmed by the decree of the circuit court, and that neither the commissioner of the land-office nor the secretary of the interior had any power to direct or approve such a survey, the only question is, which of the west, north, and east boundary lines, respectively, shall prevail, those given in the decree, and recited in the patent, or those given in the survey, and employed in the granting clause of the patent? In determining this question, there is no violation of the principles which forbid a collateral attack upon such instruments. There is no such attack. It becomes simply a question of construction. Both descriptions are upon the face of the patent, and the case is one in which the plaintiffs claim that the defendant's title depends upon a deed describing the property by natural boundaries, and also by metes and bounds; that the description by metes and bounds includes land not included within the natural boundaries, and which defendant claims to own, but which is in fact owned by plaintiffs; that their title should be quieted because the natural and permanent boundary lines should prevail over the description by metes and bounds. A determination of this question will in no way affect the location of the south line. By the decree, the surveyor was to fix that line; but, if the surveyor had run his line through the bay of San Francisco, and taken in lands of the state lying below the high-water mark on the eastern shore of the bay, or lands lying in the foot-hills of the county of Contra Costa, would it be contended that the patent, although reciting the decree confirming four leagues on the peninsula of San Francisco, with the bay of San Francisco as the eastern line thereof, is conclusive evidence, as against the estate or its grantees, of the right of the city and county of San Francisco "to all the lands embraced within the exterior limits of the survey, including tide land lying below the line of ordinary high tide," and in fact conclusive against everybody as to all lands included in the survey, wherever located? If the plaintiff, in the case supposed, would not be prevented from showing that the metes and bounds included land belonging to him, not confirmed by the decree, and which the land-officers could not convey, why may he not show the same thing in this or any other kindred case? In *More v. Massini*, 37 Cal. 432, the court said: "The call for the seashore as the southern boundary must be regarded as the more definite and certain, and will prevail over a call for a mere station, and over the courses and distances."

But, whether we consider it as a collateral attack, or a mere matter of construction, it is clear, we think, that, under the decisions of the supreme court of the United States in *Doolan v. Carr*, supra, and other cases there cited, "want of power in an officer of the land-office to issue a land patent may be shown in an action at law by extrinsic evidence, although the patent has been issued with all the forms

of law required for a patent of public land." There were no errors in the rulings of the court. The evidence shows beyond doubt that the land in controversy is outside of the natural boundaries of the decree. The judgment is therefore affirmed.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.

THORNTON, J. I concur in the judgment, and will file an opinion hereafter.

I dissent: MCFARLAND, J.

IN BANK. ON REHEARING.

(Sept. 4, 1890.)

FOX, J. This case was first heard and an opinion thereon filed in department.¹ Subsequently a rehearing in bank was granted, and after argument a decision was filed January 2, 1890. This was followed by divers petitions for a second rehearing, representing that the case was one of great public importance, involving the validity of land titles to a very considerable and what is now a very valuable portion of the city of San Francisco, and in view of the alleged importance of the questions involved, a rehearing was granted. Upon this hearing elaborate oral arguments have been made, and all who desired have been permitted to file printed briefs and arguments, all of which have been carefully considered, and we are still constrained to adhere to the conclusion first reached in bank, and announced in the opinion written by Mr. Justice PATTERSON. This is not, as assumed on behalf of appellant, a case of conflict between two parties, both claiming under the government of the United States; nor is it a case where one is claiming under patent issued by the government of the United States, and the other is a mere naked trespasser, failing to connect himself with any paramount source of title. The defendant, and those who are situate like him, and on whose behalf argument is here made, claims under the pueblo of San Francisco. That pueblo claimed, and derived its title, not under the government of the United States, but under the government of Mexico. Its grant was not a special one, made by the supreme legislative authority of the sovereign state, but was one made by the ministerial officers of the government, under, and necessarily in conformity with, its general laws. Necessarily so, for if the ministerial officers exceeded the authority conferred upon them by law, then their act was void. It must, therefore, be assumed that the grant was only such as the ministerial officers were authorized by law to make.

The patent of the United States, invoked by the appellant, is not an original grant,—does not emanate from the source of title,—but is a mere acknowledgment that the pueblo had title from the Mexican government, the predecessor of the United States, and a release of all claim on the part of the United States to the property found by its judicial tribunals to have been so vested in the pueblo. The

¹ Not reported.

patent was not necessary to invest the pueblo with title, for its title existed at the session of the territory. It was recognized by the decree of final confirmation, (cited in the former opinion,) and as shown by that decree it was of a fixed and definite quantity of land, with its boundary on three sides fixed and established by the terms of the original grant, and marked by the hand of nature as limited by the shores of the sea. It required to be surveyed for one purpose only, that of so fixing and establishing the boundary which was left undetermined by the original grant as to secure the given quantity, exclusive of that which was held by title paramount within the natural boundaries so fixed and the survey so made. The patent was only evidence of the pre-existing title. *Waterman v. Smith*, 13 Cal. 419.

The only purpose of a survey was that of establishing the one undetermined line, the southern line, of the body of land to which the pre-existing titles should attach. In the case of this pueblo, it undoubtedly became necessary, in order to secure the quantity, to make a general survey of the whole, and also a survey of the several parcels within the exterior boundaries which were confessedly held by adverse claimants holding under paramount title; but this necessity and power existed only for the purpose of ascertaining and determining the one undetermined and uncertain boundary line, that on the south. The right to make that survey, and establish that boundary, belonged to the political department of the government, and could not be exercised by the courts. But the court could ascertain and fix the position of the natural boundaries which were designated in the grant, and did so. While the courts could not and cannot interfere with the action of the political department of the government in fixing the one boundary which was left undetermined by the grant as finally confirmed, they must determine whether the prior rights of third parties have been interfered with by the survey and patent issued thereon. While the survey and patent are conclusive upon the courts in actions of ejectment, they are so only when not in conflict with the prior rights of third persons, and in such actions their inconclusiveness can be asserted to the extent essential for the protection of such prior rights. *Moore v. Wilkinson*, Id. 486.

The patent, so far as it is construed as a conveyance, is to be construed only as a quitclaim, releasing to the patentee such interest as the United States possessed in the land conveyed by the original grant, and it takes effect by relation at the time when the proceedings were originally instituted before the board of land commissioners for the confirmation thereof. As a record of the government, it is evidence that the claim asserted was valid under the laws of Mexico, (*Yates v. Smith*, 38 Cal. 71;) but it is valid as such record only to the extent that it conforms to the decree of the judicial department of the government in reference to those matters upon which the judicial department were empowered to decide; that is to say, the de-

cree of confirmation, with reference to the fixed natural boundaries, and to the survey made by the political or ministerial department, established the only boundary which was not fixed and determined by the patent. As a deed it can convey nothing which the government had not the power to grant or confirm at the date of filing the petition for confirmation. See *Doolan v. Carr*, 8 Sup. Ct. Rep. 1228, cited by Mr. Justice PATERSON, and cases therein cited. It certainly could convey nothing which was not at that time vested, and never afterwards became vested, in the United States, and this question may be inquired into, upon collateral attack, in an action of ejectment. In *Smelting Co. v. Kemp*, 104 U. S., 641, the supreme court of the United States, in passing upon this question of collateral attack upon a patent in an action of ejectment, says: "If they [the lands embraced in the patent] never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which he had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such case the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." In the later case of *Wright v. Roseberry*, 121 U. S. 519, 7 Sup. Ct. Rep. 985, the same court again considers the question, and not only quotes and approves the foregoing, but also the following passage: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed." And still later, in *Doolan v. Carr*, supra, the same court again says: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, * * * or that they had been previously transferred to others." In view of these recent and oft-repeated decisions of the court of last resort, to which the question can be carried, there can no longer be a doubt about the right of the courts, even in actions of ejectment, when the parties present and rely, as in this case, upon a patent from the United States, to inquire as to whether or not the description given in the patent includes

land which the government or its officers had no power to convey. This being so, then, when the patent was offered in this case, the plaintiff had a right to challenge its validity, not perhaps as to everything that it purported to convey, but as a conveyance of a particular tract for the recovery of which the action is brought, on the ground that that tract was not embraced within the lands covered by the grant which the patent was intended to evidence, and was not land of which the government or its officers had the power to make valid conveyance. Being so challenged, it is found and conceded that the land lies, not on or near the southern boundary of the four leagues for which the grant is confirmed,—the only boundary which the ministerial officers of the government were required, authorized, or empowered to establish,—but midway between the northern and southern extremities of said four leagues, and near to, but outside of, the eastern boundary thereof, as said boundary had been fixed and established by the laws of the nation making the grant, and found and confirmed by the judicial department of the government in its decree of confirmation. Was it outside of that boundary? It is found, and at the argument admitted, to be below ordinary high-water mark, in a navigable arm of the bay of San Francisco. If so, it was outside the boundary line of the grant, under the laws of the country by which the grant was made. Under the laws of that country, these lands below ordinary high-water mark constituted the beach, or sea-shore, and, “with respect to the ownership, it pertains to the nation which is mistress of the country of which it forms a part; and, with respect to use, to all men.” *Leyes*, 3, p. 6, tit. 28, p. 3. The king could not alienate such lands. See *New Orleans v. U. S.*, 10 Pet. 726, and other authorities cited by Mr. Justice PATERSON. That the government did not alienate them is established by the decree of confirmation quoted in the former opinion, by which decree it is expressly declared that the lands so granted, and of which confirmation is decreed, are bounded on the “north and east by the bay of San Francisco, and on the west by the Pacific ocean.” That the ministerial officers of the government were bound by the description given in that decree, so far as the decree did give definitive boundaries, and had no right to include in the patent lands outside of such boundaries, is abundantly established by the authorities cited by Justice PATERSON in his opinion.

Again, the land in dispute was not land which the government had the power to grant at the date of the filing of the petition for confirmation. Not having been granted by the Mexican government before the conquest, it remained the property of the sovereign. The petition for confirmation was not filed until long after the admission of California into the Union. Immediately upon such admission, the state, by virtue of her sovereignty, became seised of the land, the same being tide-land of the bay of San Francisco. The land did not, therefore, belong to the United States and even congress had no

power to grant it to another. *Quoad* this land, the patent is absolutely void, for the reason given in *Polk v. Wendall*, 9 Cranch, 87, cited on behalf of appellant,—the government in whose behalf the patent was issued had no title to the thing granted. It is claimed on behalf of appellant that the doctrine of *stare decisis* should be applied to this case, and that, when so applied, the question here involved is *res adjudicata*, under the decision of this court in *People v. San Francisco*, 75 Cal. 389, 17 Pac. Rep. 522. We do not think so. That case was decided on demurrer to a complaint which admitted on its face that the patent was in “due form of law,” was based upon a survey certified to have been made in strict conformity with instructions of the commissioner of the general land-office, which instructions had been given under the directions of the secretary of the interior, was issued under the great seal of the United States, and purported, by virtue of the authority of said decree of confirmation, and in pursuance thereof, to grant and convey to the city of San Francisco the land embraced and described in the plat and survey, and including the premises within the exterior boundaries thereof. See page 393. The decree itself is also copied in full into the opinion, (see page 392,) but did not there, as here, appear to have been a portion of the patent. It shows upon its face that the grant, as confirmed, was bounded on the east by a natural boundary, to-wit, ordinary high-water mark of the bay of San Francisco, as the same existed at the date of the conquest of the country, namely, the 7th of July, 1846. This decree has been accepted, and become final, and settles the question for this and all other courts, and for all other officers and tribunals, as to what was included in the grant, so far as this eastern boundary was concerned. But the court, on demurrer, was bound to take as true the allegation of the complaint that the survey was made and patent issued “by virtue of the authority of said decree, and in pursuance thereof,” and that it did “grant and convey to the city of San Francisco the tract of land” embraced and described in said plat and survey, and “including the premises within the exterior boundaries thereof.” Taking these allegations to be true, the bill being *quia timet*, affirmance of the judgment which had been rendered for defendant on the demurrer necessarily followed. But it is insisted that the case did not go off upon the proposition that these allegations must be taken as true; but the court considered and determined the broad question of the conclusiveness of the patent as the same is here and now presented. This seems to have been the course pursued by the court, and it furnishes the strongest possible argument for refusing to accept the opinion then given as conclusive of the case at bar, for it was one not necessary to the decision of the case. But disregarding that point, the court was not then convincing in its reasoning, or happy in its selection of authorities in support thereof. Neither of the three recent decisions of the supreme court of the United States cited above,

and referred to in the opinion of Mr. Justice PATERSON, were cited by counsel, or referred to by the court. It is hardly possible that the conclusion of the court in *People v. San Francisco*, as to the conclusiveness of the patent as a conveyance of land below ordinary high-water mark, could have ever been reached, if the attention of the court had been called to the cases of *Smelting Co. v. Kemp*, *Wright v. Roseberry*, and *Doolan v. Carr*, supra. In fact, the two later cases were decided after the briefs were filed in *People v. San Francisco*.

One of the cases upon which the court rests its conclusion in *People v. San Francisco* is that of *Cassidy v. Carr*, 48 Cal. 339. In that case the claimant held under a Mexican grant held to be a perfect grant. It was confirmed to the extent of two leagues, and no more, although he claimed to have received juridical possession of a larger quantity. He took no appeal. In due time his two leagues were surveyed off, the survey approved, and patent issued. He accepted the patent, and then the question in the action was whether he could still claim title to lands not included within the survey given in the patent, but claimed to have been included within the limits of his original juridical possession. The court held that having accepted the patent he was estopped from claiming lands outside the boundaries of the description therein given. The question was so different from the one here involved that we are unable to see how the decision constitutes any authority upon this question whatever. In *Moore v. Wilkinson*, 13 Cal. 487, another of the cases relied upon in support of that opinion, the grant was for merely four square leagues, but within a tract almost without limit as to extent or a western boundary; and the order was that "the judge who may give possession will cause the same to be measured according to the ordinance, leaving the remainder which may result to the nation for its proper uses." Upon confirmation, approved survey, and patent, the same being for four leagues, and no more, the question was whether persons without title, but claiming to have settled within the exterior boundaries of the tract from which the four leagues were to be taken prior to the confirmation and survey, and to have filed declaratory statements as pre-emptors, could attack the patent on the ground that the patented lines did not conform to the juridical possession. The court held that in such a case they could not; that the patent was conclusive of the validity of the grant, of its confirmation, of the survey, and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land patented. It could hardly have held otherwise, for the survey was within the natural exterior boundaries named in the grant, of which, as in this case, natural exterior boundaries were given on three sides, and within those natural exterior boundaries no valid pre-emption claim could be made until survey and segregation of the grant. But the case is in no

sense parallel to the one at bar, or the one in support of which it is cited. *Chipley v. Farris*, 45 Cal. 539, is another of the cases cited in support of that decision. It, like that of *Cassidy v. Carr*, was a case where the grantee, having received and accepted his patent, was seeking to claim lands excluded from the patent. It was not authority for the case in which it was cited, and is not in this. *Teschemacher v. Thompson*, 18 Cal. 11, is also cited and relied upon as authority to the conclusiveness of the patent, and also that the Mexican government had power and authority to make grants of these lands. As we read that case, it does not support either of these propositions. The lands in controversy there were not within the boundaries of or near any pueblo or other probable seat of commerce. The great body of the land in controversy was not below ordinary high-water mark, but salt marsh,—lands above ordinary and below extraordinary high-water mark. Incidentally, it was claimed, and the supreme court held, that in that case the boundary of the Mexican grant ran to ordinary low-water mark; and that, the sea-shore having been granted by the Mexican government at that point, the state took in subordination to the grant; and that her rights were postponed to and must abide the event of the action of the general government in the settlement of that private land grant; and that the patent was conclusive of the fact that the land had so been granted by the former government. In that case, also, the survey was one approved by the judicial department of the government. Here the government, through its judicial department, has determined that the lands below ordinary high-water mark were not included in the grant, and directed that the survey be made accordingly. Not being so included, and the court having so decreed, it follows that the rights of the state were not subordinate to, or postponed to the settlement of, the grant to the pueblo. The same may be said of *Ward v. Mulford*, 32 Cal. 365, also cited in support of that decision. It was almost on all fours with *Teschemacher v. Thompson*, and was decided on the authority of that case. In that case, as in the others, both the grant and the survey thereof had been confirmed by the judicial department of the government, and included the salt marsh. The court properly held that where the Mexican government had before the conquest granted those lands, the rights acquired by California by virtue of her sovereignty were subordinate to the grants so made. There is nothing in the conclusion reached now, or on the former hearing of this case in bank, in conflict with these authorities. The difference is found in the facts. There it was adjudged in and by the decree of confirmation that the lands in dispute had been granted by the Mexican government before the conquest; here it has been adjudged and determined in and by the decree of confirmation that they had not been so granted. The adjudication in both cases is final.

The only remaining case cited in support of the opinion in *People v. San Francisco*

is that of *Leese v. Clark*, 18 Cal. 574, 20 Cal. 425. All that was decided in that case bearing upon the case at bar was that "the defendants, taking whatever interest they possess in subordination to the future action of the government * * * in determining the location of the older grant, are in no position to question these proceedings;" and that "the term 'third person' refers, not to all persons other than the United States and the claimants, but to those holding independent titles, arising previous to the acquisition of the country." Both of these propositions may be accepted as true, but they do not militate against the view we have taken of this case. The plaintiffs in this case, it is true, do not claim by virtue of an older grant than the Mexican government. What they claim is that the *locus in quo* was never granted, and under its laws could not have been granted, by the ministerial officers of the government of Mexico; that this fact is established, not only by reference to the laws of Mexico, but also by the final adjudication of the courts of the United States in and by the decree of confirmation of the grant which was made; that, not having been granted, it remained at the date of the conquest the property of the nation, and passed as such to the United States; that, the United States having made no grant thereof upon the admission of California into the Union, September 9, 1850, it became the property of the state by virtue of her sovereignty, and the United States could not thereafter make a valid grant thereof. The state did not take in subordination to the older grant, and her rights were not postponed until the settlement of the rights of the older grantee; for there was no older grant in any manner affecting the property, none which included it even within its exterior boundaries. And on all the authorities this conclusion seems to be correct.

Teschemacher v. Thompson and Ward v. Mulford may be accepted as authority for the proposition that the Mexican government could, and sometimes did, make grants covering the salt marsh lying between the high lands and the sea-shore,—the lands between the high-water mark of extraordinary tides at the full of the moon, or spring-tides, and the ordinary high-water mark of the tides in their daily ebb and flow, and even sometimes extended the grant below ordinary high-water mark; but that fact does not prove that she could, or ever did, make grants of lands lying on the sea-shore, below the ordinary high-water mark of the daily ebb and flow of the tides, within the boundaries of a pueblo. In *People v. San Francisco* the court says: "No authority has been cited in support of the statement that, by the law of Mexico, tide-lands could not be included within the pueblo lands." That may have been true, but the court failed to mark the distinction between "tide-lands" and "sea-shore;" between lands made productive by the occasional overflow of the tides, and lands made barren by the regular and daily overflow thereof. Of the one, it had before it two examples of the fact, estab-

lished by decree of the federal courts, that the Mexican government could and sometimes did grant them; of the other, no example has ever been furnished where the government made such a grant. That it did not make a grant of such lands in this case is attested by the decree of confirmation. In support of the proposition that a pueblo could not own land below ordinary high-water mark, the court was then cited to, and we again cite: *Dwinelle*, Col. Hist. San Francisco, addend. 42; *Wheeler*, Land Titles San Francisco, 13; *Civil Code Mex.* art. 802; *Dom. Civil Law*, bk. 7, tit. 8, § 1, art. 1; *Hall*, Mex. Law, § 1466; *New Orleans v. U. S.*, 10 Pet. 662; *Mayor v. Maynow*, 1 Mart. 207; *Milne v. Girodeau*, 12 La. 324. There being no grant to which the rights of the state were subordinate, and to the settlement of which the rights of the state were postponed, she became vested with the title immediately upon her admission into the Union. Thereafter there was no power in the government of the United States to make a grant of the land; and the act of its ministerial officers in including it within the survey and patent of a grant theretofore made was in excess of their jurisdiction, in violation of the decree of confirmation, and void. The patent, so far as these lands were concerned, was in effect but the execution of the decree of confirmation. *U. S. v. Minor*, 114 U. S. 242, 5 Sup. Ct. Rep. 836. "When a decree gives the boundaries of a tract to which the claim is confirmed with precision, and has become final, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." *U. S. v. Hancock*, 133 U. S. 196, 10 Sup. Ct. Rep. 264. And it was the duty of the surveyor, in making a survey of the claim finally confirmed, to "follow the decree of confirmation as closely as practicable, whenever [and wherever] such decree designates the specific boundaries of the claim." *Id.*; section 7, Act Cong. July 1, 1864, (13 St. 334.) Surely, if a ministerial officer, in executing a decree which fixes specific boundaries, includes land excluded by the decree from those boundaries, his act can have no force or validity as a conveyance, and especially so if the party executing the conveyance has no title. As in *Jones v. Martin*, 13 Sawy. 317, 35 Fed. Rep. 348, so here. The meander line down the coast was necessary for the purpose of ascertaining quantity, "but, when done, it was the shore line as fixed by nature, and shown upon the ground, and not the meander line as run by the surveyor, that determined the boundary of the grant."

But there is still another aspect in which this case may be viewed. We have spoken of the rights of this pueblo as a pre-existing title. That pre-existing title was never a fee, under the Mexican law. A grant to a pueblo was not "a private land grant" in the sense which took title out of the state. It was the mere vesting in the pueblo,—a political subdivision of the state,—of the use of the land in trust for the benefit of the inhabitants thereof, and with power, as the representative of the state, to make grants which should vest title in private ownership of *solares*, or house lots,

and *suertes*, or sowing lots, to settlers; the remainder to remain vacant, to the end that gifts thereof might be made to new settlers. These grants, as they are generally called, did not deprive the state itself, at any subsequent period, of making what are technically denominated "private land grants," vesting title in natural persons of any portion of the lands lying within the four leagues of the pueblo which had not already passed into private ownership; and this power on the part of the state was not unfrequently used. It was notably so used in several instances within the pueblo of San Francisco, and the grants so made by the state within the pueblo have been recognized and confirmed. And, as hereinbefore shown, the power of the pueblo to make grants that should vest title in private ownership, unlike that of the state, did not extend to that of making grants upon the sea-shore. The fee of all the land which had not passed into private ownership remained always in the government, and that upon the sea-shore was unincumbered by the trust or power conferred upon the pueblo. The result was that, upon the conquest, all the property upon this peninsula which had not already passed into private ownership became part of the public domain of the United States, and subject to the same laws as affected other portions of the public domain. But in executing or carrying out the provisions of the treaty of Guadalupe Hidalgo, our government added the features of our own town-site laws, and saw fit to vest in the successor of the pueblo the fee of that over which before the pueblo had exercised power only as the agent of the sovereign. The land thus became subject to the combined trusts created by the Mexican law relating to pueblos, and the American law relating to town-sites. In this sense, and this only, the patent from the United States became a grant; but as such it could convey nothing which had at the conquest become a part of the public domain, unincumbered with the trust resting in the pueblo. The premises being a portion of the public domain, unincumbered by said trust, the title thereto, in accordance with the laws of the United States, passed out of the federal government before the making of the patent.

It is claimed on behalf of appellant that quantity was the controlling element in the decree of confirmation. It is enough to say that while quantity was required, and the claimant was entitled to quantity, it was no more controlling than the natural boundaries on the north, east, and west, fixed by the decree. And the decree itself gave leave to go south for quantity, but it did not give leave to go north, east, or west for quantity, even if the government had possessed lands of its own in those directions which it had power to appropriate to make up quantity.

In view of what was said in the former opinion, which this is not intended either to supersede or modify, but merely to supplement, it does not seem necessary to further extend this discussion. After a careful review of all the authorities cited and arguments made, we still adhere to the conclusion reached in said former opin-

ion in bank, that the judgment of the court below must be affirmed. So ordered.

We concur: SHARPSTEIN, J.; PATERSON, J.

THORNTON, J., (*concurring*.) In whatever point of view this case may be regarded, I am of opinion that the evidence was admissible to show that the land in controversy was situated below the ordinary high-water mark of the bay of San Francisco, as it existed on the 7th day of July, 1846. Whatever the right of the pueblo was to the land, for which confirmation was sought by the city of San Francisco, it was never held to extend below the ordinary high-water mark of the bay. It was so adjudged by the decree of confirmation entered in May, 1865. The act of congress of March 8, 1865, ratified the decree as it was made and entered. If there was no judicial determination, binding on the state, fixing a different boundary from that of high-water mark as determined by the decree, the evidence above referred to, in my judgment, was clearly admissible. As the decree adjudges to the city nothing beyond high-water mark, evidence was admissible to locate this line so as to show that the land sued for was outside of that line. In my opinion, the patent which sets forth the decree shows no different determination as to this line from that set forth in the decree itself. The patent shows the only other determination insisted on; and this, when rightly construed, does not vary from the decree. To rightly construe the patent, the whole of it must be taken into view, and, regarding all its parts, high-water mark should be held to be the controlling call, to which course and distance must yield. The patent is but the execution of the decree. *U. S. v. Minor*, 114 U. S. 241, 242, 5 Sup. Ct. Rep. 836. The survey and the patent are made to carry out its provisions. The maxim that public officers are presumed to do their duty comes in aid of the view that the line of high-water mark is the controlling call. The officers who made the survey and issued the patent should not be presumed to have gone beyond the decree which they were to carry out, if it can be justly held that their acts show that they are consistent with its requirements. See *More v. Massini*, 37 Cal. 432-436; *Jones v. Martin*, 13 Sawy. 317, 35 Fed. Rep. 348. I adhere to my concurrence in the opinion of Justice PATERSON delivered on the previous hearing of this case, and will add that I perceive nothing in the opinion of Justice Fox inconsistent with the opinion of Justice PATERSON. With these views, I must hold that the judgment should be affirmed.

McFARLAND, J. I dissent. I could not express my views of the question involved in an original opinion as satisfactorily to myself, and certainly not as satisfactorily to others, as they are expressed in the deliberate opinion of this court, delivered by Mr. Justice McKINSTRY in the recent case of *People v. San Francisco*, 75 Cal. 388, 17 Pac. Rep. 522. The reasoning of that opinion and the authorities therein cited are, to my mind, unanswerable and conclusive.

It is said that in that opinion the court was not happy in its selection of authorities, and that it ought to have been controlled by *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; and *Smelting Co. v. Kemp*, 104 U. S. 636. But it happens that all the authorities cited in *People v. San Francisco* dealt with the very matters involved in this case, that is, with rights claimed under Mexican grants; with the conclusiveness of United States surveys and patents in such cases; and with powers exercised under the act of March 3, 1851, and subsequent acts to ascertain and settle such claims in the state of California. On the other hand, *Doolan v. Carr* merely decides that the United States land department has no power to issue a patent to a railroad company for land as "public land" which lies within a Mexican grant. *Wright v. Roseberry* merely decides that, when land has been segregated and identified as swamp land, a United States patent issued for it afterwards is worthless; and, as to *Smelting Co. v. Kemp*, it merely holds that a patent to a mining claim cannot be attacked collaterally in a court of law. I cannot possibly see how any of these cases have any bearing whatever on the power of the United States government, under the treaty with the Mexican government, to determine the rights of land claimants under the latter government by any methods and through any tribunals which she may choose to adopt for that purpose. As to any rights which the state of California had at the time of that treaty, it is sufficient to say that she had not then been born. Moreover, the case of *People v. San Francisco* was decided after the fullest argument and consideration, having been heard twice; and, as it established a rule of property, it is a case to which, in my judgment, the rule of *stare decisis* should be strictly applied. I think, therefore, that the judgment in the case at bar should be reversed.

We concur: BEATTY, C. J.; WORKS, J.

86 Cal. 107

SCHAUFELLE v. DOYLE *et al.* (No. 12,892.)
(*Supreme Court of California.* Sept. 30, 1890.)

INJUNCTION—WHEN GRANTED—INSOLVENCY OF
DEFENDANT.

1. In a suit to restrain defendants from raising the level of the street in front of plaintiff's hotel, it appeared that they were about to raise it three feet above the level of plaintiff's property. *Held*, that this was an obstruction of plain-

tiff's reasonable use of the street, for which injunction would lie in the absence of anything to show that defendants were proceeding under legal authority in a legal manner.

2. It was not necessary to show that defendants were insolvent to entitle plaintiff to an injunction.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

N. A. Dorn, W. M. R. Parker, and Geil & Morehouse, for appellant. *W. A. Kearney and Wm. H. Webb*, for respondents.

THORNTON, J. Suit for an injunction. The plaintiff alleged in her complaint that she was the owner of and carried on the business of keeping an hotel and lodging-house upon a certain lot fronting on Alvarado street, in the city of Monterey; that the defendants, who were insolvent, were unlawfully digging up and reggrading Alvarado street at various places between certain points thereon, and threatened to continue to do so; and unlawfully threatened to fill up and raise the grade of said street in front of plaintiff's premises to an additional height of about four feet, and thereby ruin her business, and damage her buildings in a sum not less than \$3,000, and render them useless and uninhabitable, and necessitate the filling up of her lot to a height of 10 feet, at the rear end, which would make access to it from that side impracticable and inconvenient; that said defendants in like manner threatened to tear up her sidewalk on said street, and dig up and destroy her sewerage system, and thereby render her premises unwholesome, and uninhabitable, and create a nuisance that she would be compelled to abate; that she would suffer the destruction of her business, irreparable injury, and impoverishment, if such threats should be carried out. Thus it appears the defendants were sued as mere naked trespassers; but they, in their answer, averred that they had the authority of the city of Monterey to raise the grade of Alvarado street, and to place a sewer in the same by virtue of a certain contract between them and the city, made and entered into pursuant to an act of the legislature entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," and approved March 18, 1885, (St. 1885, p. 147.) From the evidence introduced on the trial, it appears that the defendants were about to raise the level of the street about three feet above the level of plaintiff's hotel. Upon plaintiff's resting her case, defendants moved for a nonsuit upon the ground that it appeared from the evidence that any damage she might sustain by the performance of the proposed work could be fully compensated for in money; and that it did not appear that the defendants were insolvent and unable to make such compensation. The court granted the motion, and from the judgment in favor of defendants, and an order denying a motion for a new trial, plaintiff has prosecuted this appeal. The defendants having offered no evidence of their affirmative defense, it cannot be considered here. They are presented here

as naked trespassers, and must be so regarded in determining this appeal. The insolvency of defendants is entirely irrelevant, and that circumstance will be laid out of the case in passing on the questions to be herein determined.

The plaintiff here is an abutter on the street above mentioned, and like every abutter has the right of access to and egress from her land abutting on the street. This right of access and egress is property of which she cannot be deprived, though for a public purpose, without compensation first made. *Williams v. Railroad Co.*, 16 N. Y. 97-111; *Story v. Railroad Co.*, 90 N. Y. 122; *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. Rep. 528. This right exists though the abutter has no estate in fee in the street. Though she does not

own the fee of the street, she does own an easement in it in the right of access to her lot, and egress from it, which are elements of such easement. *Railroad Co. v. Combs*, 10 Bush, 382, and cases above cited. In *Railroad Co. v. Applegate*, 8 Dana, 310, the supreme court of Kentucky said, in discussing the rights of abutting owners to the use of a street, that "if it should appear that such use encroaches on any private right, or obstructs the reasonable use and enjoyment of the street, by any person who has an equal right to the use of it, we shall be ready to enjoin all such wrongful appropriation of the highway." On this subject, see *Elliott, Roads & Streets*, 526, 527, 537, and cases cited in notes. Upon the facts appearing in this case, we are of opinion that the reasonable use of the street by the plaintiff is obstructed, and her individual rights are encroached upon, by the defendants, and that an injunction should have been granted. The injury here is to plaintiff's right of access to her hotel from the street, and egress from the hotel to the street. Like the injury in *Richards v. Dower*, 64 Cal. 62, it is a permanent injury to the inheritance, which, if permitted to continue, will ripen into a right. It will remain and continue to subject plaintiff to loss and damage, unless thousands of dollars are expended to obviate it. The court erred in granting a nonsuit. Nothing said above is intended to have any bearing on the question of the rights of the authorities of Monterey to improve the street involved herein, when proceeding under a constitutional statute, and in accordance with its provisions. Judgment and order reversed, and cause remanded for a new trial.

We concur: **McFARLAND, J.**; **SHARPSTEIN, J.**

86 Cal. 91

JAFTE v. LILIENTHAL. (No. 13,538.)

(*Supreme Court of California.* Sept. 29, 1890.)

ASSUMPSIT—PLEADING.

1. A complaint states a good cause of action which alleges that defendant's intestate, being engaged to marry plaintiff's daughter, requested plaintiff to make suitable preparations for "a betrothal reception" and "a wedding feast," and to purchase household goods "for both parties," and promised to repay plaintiff the money expended, which, in pursuance of the request, and in reliance on the promise, plaintiff did expend for the purposes mentioned.

2. In such case plaintiff need not aver what disposition has been made of the goods, as the cause of action became complete upon his expending the money in pursuance of defendant's request.

3. Where the complaint alleges that the expenditures were "pursuant to said request of" defendant, "and at his special instance and on his account and behalf," it need not state that they were made before defendant's death.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

D. M. Delmas, for appellant. W. H. L. Barnes and Lambertson & Taylor, for respondent.

HAYNE, C. The defendant had final judgment upon a general demurrer to the complaint, and the plaintiff appeals. The complaint alleges in substance, that the defendant's intestate, one Solomon Lowenberg, being engaged to marry the plaintiff's daughter, requested plaintiff to make suitable preparations for "a betrothal reception" and "a wedding feast," and to procure suitable wearing apparel for his daughter, and to purchase household goods "for both parties," for use in their married life, and "then and there promised said plaintiff to repay him" whatever money he should expend for the purposes mentioned; that plaintiff "paid, laid out, and expended, pursuant to said request of said Solomon Lowenberg, and at his special instance, and on his account and behalf, and relying upon his promise of repayment and reimbursement as aforesaid, the sum of \$2,000 in suitable preparations of the character requested; that Lowenberg died before the marriage, and that the sums expended by plaintiff have not been repaid; and that the claim of the plaintiff has been rejected by the administrator of the estate. We think that the complaint is good as against a general demurrer.

It is argued for the respondent, in the first place, that it does not appear what was done with the articles purchased, and that the presumption against the pleader requires that such articles be considered to be in the possession of the plaintiff, and that he cannot have both the goods and the money. But the cause of action was complete when the plaintiff expended the money in pursuance of the request of Lowenberg. It was not necessary for the complaint to go on and state what had become of the goods. And if it be assumed in favor of the respondent that the retention of the goods by the plaintiff would be a defense, it is a matter to be set up by the answer. The presumption against the pleader does not require him to anticipate matters of defense.

It is argued, in the next place, that it does not appear whether the expenditures were before or after the death of Lowenberg. But the complaint alleges that the expenditures were "pursuant to said request of said Solomon Lowenberg, and at his special instance and on his account and behalf," which would not be legally true if they were made after his death.

The other criticisms upon the complaint do not require special notice. We therefore advise that the judgment be reversed,

with directions to overrule the demurrer, with leave to the defendant to answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer, with leave to the defendant to answer.

83 Cal. 629

CRAWFORD v. INDEPENDENT S. & P. WORKS
et al. (No. 12,732.)

(Supreme Court of California. May 2, 1890.)

APPEAL—WEIGHT OF EVIDENCE.

The denial of a motion for a new trial on the grounds that the verdict was not supported by the evidence will not be disturbed on appeal where the evidence before the jury consisted of the positive testimony of plaintiff and the denial of defendant.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

George E. Lawrence, for appellant. E. McGraw, for respondent.

SHARPSTEIN, J. The plaintiff in his complaint alleges that "the Independent Stove & Pipe Works is a copartnership, doing business in the city and county of San Francisco, and that the defendants Jacob Broeder, Francis Bornheimer, and Catherine Bornheimer were members of and comprised said firm;" and that on April 15, 1885, said defendants became indebted to plaintiff in the sum of \$307, on a balance of account of goods, wares, and merchandise theretofore sold and delivered by plaintiff to said copartnership at its special instance and request; that defendants have not paid said sum or any part thereof, but the whole remains due and owing by defendants to plaintiff. Defendants Francis Bornheimer and Jacob Broeder answer jointly, denying that they and defendant Catherine Bornheimer were members of or composed said alleged copartnership, and denied that at any time said defendants were indebted to plaintiff in said sum of \$307, or any other sum. Defendant Catherine Bornheimer answered separately, denying that she was ever a member of said copartnership, or that the defendants or she was indebted to the plaintiff in any sum whatever. The action was tried by a jury, which returned a verdict against all the defendants in favor of the plaintiff, assessing his damages at the sum of \$307, for which sum a judgment was entered in his favor against all the defendants. Defendant Catherine Bornheimer moved for a new trial, which was denied, and from that order and the judgment against her she appeals. The grounds upon which appellant mainly relies for a reversal of the order denying her motion for a new trial are that the evidence shows she was not a partner with her co-defendants, and that she never held herself out to the plaintiff as a partner of said co-defendants. There is evidence that she did, and evidence that she did not, so hold herself out to the plaintiff as a partner with her co-defendants for the purpose of obtaining credit with the plaintiff for the

goods sold to said partnership. The plaintiff testifies that she did; she testified that she did not. It was for the jury to determine whom they would believe, and the court below having denied a new trial we cannot disturb the order on the ground of insufficiency of the evidence to justify the verdict. The instructions of the court to the jury, and excepted to by appellant, are not erroneous. Judgment and order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

95 Cal. 522

HAMMOND v. WALLACE *et al.* (No. 13,307.)
(Supreme Court of California. Sept. 6, 1890.)

EQUITY—LACHES—RESCISSION—APPEAL.

1. A year and a half after a sale of land at auction the vendor sued to set it aside because of an agreement between the vendee and another restraining the latter from bidding, of which the vendor averred he had no knowledge "at the time of the sale and conveyance." The question of laches was raised on motion to nonsuit, and there was no offer to amend. *Held*, that the delay was unreasonable, and fatal to the action.

2. A suit to rescind in such case will not lie, unless the consideration paid is returned or tendered before suit, and an allegation that the plaintiff "is willing and able to return" it, and "now offers to do so," is insufficient.

3. Error in granting a nonsuit is error of law which may be reviewed without any specification of the evidence.

BEATTY, C. J., and WORKS, J., dissenting.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *Atwell & Bradley* and *A. B. Hunt*, for appellant. *A. N. Drown* and *O. Sanders*, for respondents.

PER CURIAM. Plaintiff is the assignee in insolvency of Uhlhorn & Maples. On June 9, 1884, he caused to be sold at public auction certain lands belonging to them, and the defendant Wallace became the purchaser, and in due time received a deed of conveyance. She afterwards sold and conveyed various portions of the lands to the other defendants. On November 18, 1885, about one year and a half after the sale, this present action was brought to set aside the sale, on the alleged grounds that the property was bid in at a grossly inadequate price, and that the defendant Wallace had conspired with one Clowe and others to prevent competition in bidding. It is also averred that the other defendants purchased of Wallace with full knowledge of the alleged fraud practiced at the auction. The court below granted a nonsuit, and rendered judgment for defendants; and plaintiff appeals from the judgment, and from an order denying a new trial. The appeal from the judgment was not taken until nearly two years after the judgment was entered, and it is therefore dismissed. Respondents contend that the question whether or not the granting of the motion for nonsuit was sustained by the evidence cannot be considered, because there is no specification of the particular in which the evidence was insufficient, but it seems to have been settled that an error, if any, in granting a nonsuit is an error of law, and, if excepted to and speci-

fied as such, as was done in the case at bar, may be reviewed without any specification of the evidence. *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. Rep. 243; *Donahue v. Gallavan*, 43 Cal. 576; *Cravens v. Dewey*, 13 Cal. 42. As to all the defendants other than the defendant Wallace, there is no room to doubt the correctness of the nonsuit and the judgment. There is nothing to show that either of them had any reason to suppose that there had been any fraud or irregularity, if any such there was, at the auction sale, or that there was any agreement or understanding between either of them and the defendant Wallace that the land was, under any circumstances, to be reconveyed to the latter. Indeed, the evidence showed affirmatively that such was not the case. The motion for a nonsuit on the part of defendant Wallace was made on several grounds, and among others that the complaint does not state facts sufficient to constitute a cause of action; that plaintiff was not entitled to rescind without first returning and restoring or offering to restore to said Wallace everything which he had received from her under contract, and without doing so or offering to do so, before suit brought, and that there is no averment in the complaint of such offer; that it does not appear from the evidence that the plaintiff made any offer to defendants sufficient to entitle him to a rescission or to maintain this action; that plaintiff is not entitled to recover by reason of his delay in bringing this action; that the proof does not correspond with the allegations; and that "the testimony of the plaintiff does not show, or attempt to show, the alleged fraudulent conduct of the defendant set forth in the complaint in this action, and complained of herein." It does not appear upon which, or upon how many, of the stated grounds of the nonsuit the court based its decision. It is contended by the appellant that there was some testimony tending to show that there was a fraudulent agreement between defendant Wallace and M. E. Clowe, with respect to their bidding at the auction sale, and that the court, on a motion for a nonsuit, had no right to overlook or disbelieve that testimony. The testimony of plaintiff, Hammond, showed that he was endeavoring to make an advantageous sale of the land. He says: "I had spoken to Mrs. Wallace, Mr. Crocker, and several other persons, every one I thought likely to buy, in reference to the bidding,— was endeavoring to make a sale of this land. I asked for and received a written bid, because I did not want to put up the property or advertise it for sale without I thought it would bring a reasonable sum. * * * I made every effort I was able to to develop a sale of this property, before I made any application to the court for leave to sell." He did receive a written bid from Mr. Clowe, who agreed to make that bid at auction if the land was put up for sale in that way. He says that "the bid I received [from Clowe] was satisfactory to me." The sale was properly advertised, and there was a "fair attendance" at the auction. The property was offered subject to certain mortgages, which

aggregated \$47,000, and subject also to a certain asserted claim of homestead on a part of the land. The bid which Clowe had made, according to his promise, at the auction, was \$6,516.26. This bid, considering the mortgages, and not considering the homestead claim, was substantially over \$53,500. The defendant Wallace raised the bid a few dollars; and, there being no other bid, she got the property at her offer. She went into possession, and remained in possession about a year, when she sold various parts of the lands to the other defendants. On its face the sale seems to have been entirely fair. At the trial some of plaintiff's witnesses, speaking three years after the sale, testified that in their opinion the price was inadequate. But the plaintiff, who had informed himself on the subject, testified that the bid was satisfactory to him at the time. And, considering all the evidence on the point, and the delay in bringing the suit, and that mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale, we would not be warranted in saying that the nonsuit was erroneous on account of the evidence concerning the said inadequacy.

There was, however, some evidence to the point that there was an agreement between the defendant Wallace and Clowe that the latter, after his first bid, should not bid further against Wallace. There was no evidence to show an attempt to influence any other bidders. This evidence consists of the testimony of the two insolvents, Maples and Uhlhorn, and one other witness, about declarations which they say Mrs. Wallace made. Maples testified that before and immediately after the sale the defendant Wallace told him that she would have to pay Clowe a certain sum of money to keep him from bidding against her, and she had given him her note for that purpose. Uhlhorn testified that in June, 1885, Mrs. Wallace told him that she had given Clowe her note for a certain sum of money to keep him from bidding; and, moreover, that he had told her at that time that Maples was going to make trouble "about the money given to Clowe, and was going to upset the sale" on that account. One other witness, Nelson, who was in litigation with the defendant, testified that defendant once told him that she paid Clowe money not to bid against her. So that, if there was any such agreement between Wallace and Clowe, Maples knew of it at the time of the sale, and Uhlhorn must have known of it soon after, because he testifies that he knew of it before June, 1885, at which time he says Mrs. Wallace told him. How long before that he knew it he does not say. And Maples, according to his testimony, was himself a party to the fraud. And, according to the plaintiff's testimony, this action was brought at the instigation of Uhlhorn & Maples, who would be the principal gainers by a judgment for plaintiff if the lands are now as valuable as they claim them to be. And, indeed, if the lands were as valuable at the time of the sale as they are now asserted to have been, there would have been no apparent necessity for proceedings in insolvency.

Now, it is contended by appellant that on a motion for a nonsuit (although this is an equity suit, in which the court had full control) the court was bound to overlook all other considerations, and to take the testimony of Maples, Uhlhorn, and Nelson, notwithstanding any inconsistencies or improbabilities there may have been in it, as furnishing some evidence that the alleged agreement was made between Wallace and Clowe; and that therefore the court erred in granting the nonsuit. But admitting that, under extreme rules about nonsuits, originating in actions at law, where there were juries whose province it was to decide the facts, there was sufficient evidence to establish, *prima facie*, the one fact of the alleged agreement about the bidding at the sale; still that was not the only fact necessary to plaintiff's case. The motion for nonsuit was based upon several grounds, and among others that there was delay in bringing the suit, and that it could not be maintained without restoring or tendering to defendant the money which plaintiff had received from her. Assuming that the alleged contract of Wallace and Clowe about the latter not bidding was void, then, while it was in an executory form, a court would not have enforced it as between them, but would have left them just where it found them. But the executed contract of the sale of the land from plaintiff to Wallace was not void, although plaintiff, at the proper time and by proper conduct, might have rescinded it, and had it annulled by a court of equity, upon sufficient averments and proofs. But the first requisite of rescission is prompt action. The Code says: "He must rescind promptly." Civil Code, § 1691. In such a case a party cannot wait until time shall demonstrate whether the contract sought to be rescinded turned out to be good or bad; and this is particularly true in a new country where values change rapidly. Of course if Uhlhorn & Maples could be considered as the only real parties in interest, there would be no basis whatever for this case. But taking plaintiff in his legal status as representing himself, or others besides Uhlhorn & Maples, then his complaint is fatally defective on this point. The only averment on the subject of laches is as follows: "Plaintiff avers that he had no knowledge, at the time of sale and conveyance of the property, of the collusion and fraud practiced by the defendant Emeline Wallace as aforesaid." As one year and a half elapsed between the sale and the commencement of the action, there is no averment that during that time he did not have such knowledge. *Collins v. Townsend*, 58 Cal. 614. And, although this point was made on the motion, there was no offer to amend the complaint. This delay was unreasonable and fatal to the action. *Bailey v. Fox*, 78 Cal. 396, 20 Pac. Rep. 868; *Burkle v. Levy*, 70 Cal. 234, 11 Pac. Rep. 643.

Moreover, there is neither averment nor proof that plaintiff ever made any attempt to rescind or make any tender of, or offer to return, anything of value received from defendant previous to the filing of his complaint, or any tender at all.

The only averment upon the subject is that plaintiff is "willing and able to return to the defendant all the moneys which she paid to him on the purchase of the property, and all the moneys which she has lawfully or legitimately paid out or expended on account of the purchase of said property, and now offers to do so." This is not sufficient. In *Herman v. Haffenegger*, 54 Cal. 161, a case very similar to the one at bar, the plaintiff had at least alleged "that prior to the commencement of the action he rescinded the contract, and had offered to return to the defendant what he received thereunder." But the court said: "It nowhere appears that any offer to return was made previous to action brought. * * * He could not maintain the action until he had so returned, or offered to do so. This was a condition precedent to his maintenance of the action. And, as he did not comply with this requisite, the lawsuit was properly granted." See, also, *Gifford v. Garville*, 29 Cal. 589, and cases cited; *Collins v. Townsend*, 58 Cal. 608; *Bohall v. Diller*, 41 Cal. 533. In the case at bar there is not even any averment or proof of a rescission of the contract, or of any attempt to rescind, to say nothing of the absence of averment or proof of tender or offer to return to defendant anything of value received from her. And, under the authorities above cited, this defect in plaintiff's case is fatal.

The exceptions taken to rulings of the court on the admissibility of evidence relate to the question whether the alleged contract about bidding at the sale was in fact made, and to the issue of the adequacy of the price, and are not, therefore, under the views above expressed, important. For the reasons above given, we see no sufficient cause to reverse the judgment of the superior court. Judgment and order affirmed.

We dissent: BEATTY, C. J.; WORKS, J.

85 Cal. 518

CHATFIELD v. McDANIEL *et al.* (No. 13,541.)

(*Supreme Court of California.* Sept. 6, 1890.)

PLEADINGS—DEMURRER—AMENDMENT—TENDER OF DEED.

1. The complaint in an action to recover money paid on a contract to convey lands alleged that plaintiff tendered the amount due at the time provided by the contract, but that defendants refused to convey. The case was set for trial five months after the answer was filed; but no demurrer or motion to strike out was filed, and no notice that judgment on the pleadings would be asked was given until the parties announced themselves ready for trial. Plaintiff then asked judgment on the ground that the answer denied no material allegation of the complaint. The answer had attempted to deny tender. *Held* that, there being nothing to show that defendants were not defending in good faith, they should have been allowed to amend so as to deny any tender.

2. Defendants agreed to cause to be conveyed to plaintiff, by deed, certain land, payment to be made at a certain time. *Held*, that it was not necessary for plaintiff to tender to defendants a deed for execution, but only to tender the money due under the contract.

3. Defendants having refused to convey on tender of the balance of the purchase money, plaintiff could sue for money paid on the con-

tract without a demand therefor, or notice to defendants of a rescission of the contract.

In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

John Gale, for appellants. *Gray & Sexton*, for respondent.

PATERSON, J. It is alleged in the complaint that plaintiff and defendants entered into an agreement, of which the following is a copy: "Biggs, Cal., March 29, 1888. Received from C. E. Chatfield three hundred dollars, for which McDaniel & Co. agree to cause to be conveyed by bargain and sale deed to said C. E. Chatfield the following land in Butte county, California, shown on the plat of Pitt's addition, and upon the terms following, to-wit: Lot No. one (1) containing 4.45 acres in said Pitt's addition to the town-site of Biggs, as per map on file with the recorder of Butte county, payable at Biggs, as follows: \$434.25 on or before October 1st, from date, with 8 per cent. interest. Time is hereby expressly agreed to be the essence of this agreement. McDANIEL & Co." That plaintiff on October 1, 1888, tendered to defendants said sum of \$434.25, with interest, and demanded that defendants cause the lands to be conveyed to him, but they refused and still neglect and refuse to convey the same or return to plaintiff the \$300 paid by him. The prayer is for a judgment for the sum of \$300, with legal interest, and costs. The defendants in their answer admit the execution of the contract, but "deny that on the 1st day of October following, plaintiff tendered to defendants the further sum of \$434.25, with interest thereon from the 29th day of March, 1888, at 8 per cent. per annum, and demanded that defendants cause to be conveyed to him by bargain and sale deed the lands above described; that defendants failed, neglected, or refused to convey said property to the plaintiff, and still do fail, neglect, and refuse to convey the same, or to return to the plaintiff said sum of \$300 paid by him on said contract." The bill of exceptions shows that the case was regularly set for trial on September 17, 1889; that on that day both parties appeared and announced themselves ready for trial; that upon the pleadings being read to the court the plaintiff moved for judgment on the pleadings, on the ground that none of the material allegations of the complaint had been denied; that thereupon defendants asked permission to amend their answer by denying that any tender was made on October 1, 1888, or before, or at any time, and the court denied the motion.

We think the amendment ought to have been allowed. The answer was filed on April 28, 1889, and no demurrer or motion to strike out was filed, and no notice that judgment on the pleadings would be asked was given, until the parties announced themselves ready for trial,—September 17th. There was an attempt to deny the allegation as to tender, and there is nothing in the record to show that it was not made in good faith. It does not appear that any delay would have been caused by the proposed amendment; but, if there had been, the court could have required an

immediate amendment, and imposed terms commensurate to the time and expense of the continuance. The denial is verified. It may be as claimed by respondent that the learned judge had reason to believe from continuances and other proceedings that the defendants were not acting in good faith. The trial judge very often can see from the maneuvers of a party in court that his object is delay, or to annoy his adversary, and, recognizing his superior position for the detection of such tactics, we are always loth to interfere with the exercise of his discretion; but here there is nothing in the record to indicate that defendants were not trying to defend in good faith on a material issue, no affidavit of the plaintiff in opposition to the request, nothing in the bill showing any previous dilatory proceedings. Taking the record as we find it, and applying the rule of liberality in the allowance of amendments which has always prevailed in this state, we must reverse the judgment. *Bank v. Stover*, 60 Cal. 387.

As the case is going back for further proceedings, we may aid the court below by saying that the contention of appellant as to the sufficiency of the allegations of the complaint, in our opinion, are not well taken. The plaintiff was not bound to tender the defendants a conveyance for execution. It was the duty of the defendants, on tender of the balance due under the contract, to execute and deliver a deed of conveyance to plaintiffs. *Camp v. Morse*, 5 Denio, 164. Nor was it necessary to allege or show that plaintiff gave defendants notice of rescission, or that he demanded a return of the \$300. Where the vendor under such a contract, on tender of the balance of purchase price, refuses or neglects to convey, his default authorizes the vendee to treat the contract as at an end, and to recover the money which has been paid. *Gillet v. Maynard*, 5 Johns. 85; *Van Benthuyzen v. Crapser*, 8 Johns. 259; *Frost v. Smith*, 7 Bosw. 108. Judgment reversed and cause remanded, with directions to allow the defendants to amend their answer as to denials, but in no other respect.

We concur: BEATTY, C. J.; WORKS, J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.

3 Cal. Unrep. 285

VORWERK v. NOLTE. (No. 13,470.)

(Supreme Court of California. Sept. 11, 1890.)

VENDOR AND VENDEE—CONTRACT—FAILURE TO CONVEY.

1. Defendant contracted to sell land to plaintiff, and stipulated that the money paid therefor was to be returned in case he failed to execute and deliver a deed "after one year from date" of the contract. It was agreed that time was of the essence of the contract. *Held*, that the deed was to be delivered one year from the date of the contract, and a tender of it nine days after the expiration of the year was not a compliance with the contract.

2. An action to recover such purchase money is not an action for the rescission of the contract, but one for money due thereunder.

In bank. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

J. W. Mitchell, (Chapman & Hendrick,

of counsel,) for appellant. J. D. Bicknell and R. H. F. Variel, for respondent.

SHARPSTEIN, J. Action to recover \$3,750 and interest at the rate of 3 per cent. per month from June 24, 1887. The action is upon a contract in writing whereby the plaintiff agreed to pay, and did pay, to the defendant \$3,750 for a certain lot of land which the defendant agreed to convey to plaintiff one year after the date of said contract, which was dated June 24, 1887. And on the same day, and before plaintiff paid to defendant said \$3,750, defendant made and executed the following agreement, to-wit: "This agreement is to certify that I, the undersigned, promise to execute to a lot on First street, to which I executed to-day an agreement, and which has been paid in full by Mr. John Vorwerk, and, in case of failure of the undersigned to deliver and execute a deed after one year from date hereof, bind myself to refund the purchase price, three thousand seven hundred and fifty dollars, (\$3,750,) with interest at the rate of three per cent. per month. C. A. NOLTE." That this and the preceding agreement were parts of the same contract is found by the court, and conceded by counsel. And, being so conceded, the obvious meaning of the contract is that the defendant in consideration of \$3,750, to him paid by the plaintiff, would, one year after the date of said contract, execute and deliver to the plaintiff a perfect deed of the lot described in said contract; and in case of a failure of defendant to execute and deliver such a deed after one year from the date of said contract he would refund the purchase price, \$3,750, with interest at the rate of 3 per cent. a month. This construction of the agreement is not, so far as we are advised, controverted. The date of the contract, as before stated, is June 24, 1887. A deed was not tendered until July 2, 1888, which was more than one year from and after the date of said contract. But the court finds as a conclusion of law "that at the time this action was commenced, February 11, 1889, the defendant was not in default, within the terms of either of said agreements set forth in findings Nos. 10 and 12." That conclusion is probably based upon the following finding of fact: "That on the 2d day of July, 1888, the defendant made and duly signed and acknowledged before a notary public so as to entitle it to be placed of record a good and sufficient deed of grant, bargain, and sale conveying to the said plaintiff the premises described in said contract between the parties hereinbefore described in finding No. 10, free of all incumbrances; and on the said 2d day of July, 1888, and before the commencement of this action, the defendant tendered the same to the plaintiff, but plaintiff refused to receive or accept the same, and the defendant brought the said deed into court, and renewed his tender and offer therein, and did proffer in his pleadings, and at the trial of this action, to deliver the same to the plaintiff in pursuance of his aforesaid contract to do the same, and the same is now in the custody of the clerk of this court, subject to the order of the plaintiff." There is no

finding that a deed was tendered at an earlier date than July 2, 1888. From which we infer that the court regarded the tender of a deed at that time a substantial compliance with the agreement of defendant to execute and deliver to the plaintiff a deed after one year from the date of said agreement, which was June 24, 1887. Precisely how the court arrived at that conclusion, we cannot intelligently state. But counsel for respondent defends the findings of the court as follows: "But, by the express terms of that agreement, defendant only promised to pay the purchase price of \$3,750 back, with interest at 3 per cent. a month, in the event he should fail to deliver a deed after the expiration of a year. He did offer to deliver a deed on the ninth day after the year expired, and prior to the commencement of the plaintiff's action. Such tender of the deed, we submit, was only required to be made within a reasonable time after the year expired." Is that the meaning of the agreement of the defendant to execute and deliver to the plaintiff a perfect deed one year after the date of said agreement, and, in case of failure of defendant to deliver and execute a deed after one year from date of said agreement, he would refund the purchase price, \$3,750, with interest at the rate of 3 per cent. per month? We think not. It plainly appears by the language of the contract that the defendant was to deliver to plaintiff a deed one year after the 24th day of June, 1887, *i. e.*, on the 24th day of June, 1888, and defendant, failing to do that, bound himself to pay to plaintiff the sum specified in the agreement. It was agreed that time was of the essence of the contract. Nothing is better settled than that parties have a right to make their contracts as stringent as they please, and to make time of the very essence of their contract; and if one party, without the consent of the other, allows the specified time to pass, no matter from what cause, without performing the conditions, the stipulated consequences must follow. *Chrisman v. Miller*, 21 Ill. 227. We think the parties here, in employing the term "one year after the date of the contract," intended to employ it in the sense in which it is frequently employed in promissory notes, made payable at a specified time after date, as one month after date, the meaning of which is generally well understood. The object of all rules of construction is to arrive at the meaning of the parties, and not to impose one upon them.

Counsel have discussed at some length the question whether this is an action for money had and received, or for rescission of a contract. In our opinion it is neither. It is an action for the recovery of money upon an express contract. Not to rescind a contract, but to enforce it. Judgment and order reversed.

We concur: WORKS, J.; MCFARLAND, J.; PATERSON, J.; FOX, J.; THORNTON, J.
95 Cal. 48

REDD v. MURRY *et ux.* (No. 13,555.)
(Supreme Court of California. Sept. 12, 1890.)

QUIETING TITLE—DEEDS—DESCRIPTION.

1. In a complaint to quiet title, the following description of the land is not on its face incon-

sistent nor insufficient to identify it; "On the north, 240 feet on Mill street; on the east, 110 feet on a 30-foot alley; on the south, 240 feet on an alley; on the west, 110 feet by a 30-foot alley; and being all of lots Nos. 1, 2, 3, and 4, all of block No. 8, as per plat of J. & M.'s addition of the town of P.; said land being described, with reference to plats of the town of P. now on file in the recorder's office of said Tulare county, as commencing at a point on the south boundary of Mill street 30 feet east of the north-east corner of lot 5, in block 20, of the old town of P.; thence easterly along said boundary 240 feet; thence southerly at right angles 110 feet; thence westerly at right angles 240 feet; thence northerly to the point of beginning, lying and being in the S. W. corner of sec. 25, tp. 21 S., R. 27 E., M. D. M."

2. In a suit to quiet title, a deed was offered in evidence in which the land was "bounded and particularly described as follows, to-wit: On the N., 240 feet on Mill street; on the E., 110 feet on a 30-foot alley; on the S., 240 feet on an alley; on the W., 110 feet by a 30-foot alley; and being all of lot Nos. 1, 2, 3, and 4, all of block No. 8, as per plat of Johnson & Murry's addition to the town of P.; being all of said block No. 8 in said addition to P., Tulare county, Cal." Counsel offering to follow it with a plat of the addition referred to, *held*, that an objection to the deed because it described nothing was properly overruled.

3. A deed having described the land by reference to the plat of an addition to a town, an unrecorded plat is, as against the grantor and his privies, *prima facie* identified as the one referred to by evidence that he afterwards exhibited it as the plat of the addition.

4. In such case, parol evidence is competent to locate the land granted from data given in the plat, and it is not necessary as against the grantor to show that there was an actual survey of the addition.

Fox, J., dissenting.

In bank. Appeal from superior court, Tulare county, WILLIAM W. CROSS, Judge.

Brown & Daggett, for appellants. N. O. *Bradley* and G. E. *Lawrence*, for respondent.

PER CURIAM. This is a suit to quiet title to a parcel of land described in the complaint as follows: "Situate in the county of Tulare, state of California, described as follows, to-wit: On the north, two hundred and forty feet on Mill street; on the east, one hundred and ten feet on a thirty-foot alley; on the south, two hundred and forty feet on an alley; on the west, one hundred and ten feet by a thirty-foot alley; and being all of lots Nos. one, two, three, and four, all of block number eight, as per plat of Johnson & Murray's addition of the town of Porterville; said land being described, with reference to plats of the town of Porterville now on file in the recorder's office of said Tulare county, as commencing at a point on the south boundary of Mill street thirty feet east of the north-east corner of lot five, in block twenty, of the old town of Porterville; thence running easterly along said boundary line two hundred and forty feet; thence southerly at right angles one hundred and ten feet; thence westerly at right angles two hundred and forty feet; thence northerly to the point of beginning, lying and being in the south-west quarter of section twenty-five, township twenty-one south, range twenty-seven east, M. D. M." The plaintiff had judgment in the superior court, and the defendants appeal.

1. The superior court did not err in overruling the demurrer to the complaint. The two descriptions of the land therein contained are not inconsistent with each other, and together are sufficient to identify the land by reference to the recorded plats of the town of Porterville, if there are such plats agreeing with each other and conforming to such description in the delineation of Mill street, block 20, and the lots in question.

2. The court did not err in admitting in evidence plaintiff's deed, (Exhibit No. 1.) The plaintiff in this action is the grantee of the defendant J. P. Murray, whose wife, and co-defendant, is his subsequent grantee. The deed (Exhibit No. 1) offered in evidence by the plaintiff was the defendants' deed of the premises in controversy, dated and acknowledged June 20, 1871, and containing the following description of the premises conveyed: "All those certain lots, pieces, or parcels of land situate, lying, and being in the town of Porterville, county of Tulare, state of California, and bounded and particularly described as follows, to wit: On the north, two hundred and forty (240) feet on Mill street; on the east, one hundred and ten (110) feet on a thirty (30) foot alley; on the south, two hundred and forty (240) feet on an alley; on the west, one hundred and ten (110) feet by a thirty (30) foot alley; and being all of lots Nos. one, (1,) two, (2,) three, (3,) and four, (4,) all of block No. eight, (8) as per plat of Johnson & Murray's addition to the town of Porterville; being all of said block No. eight (8) in said addition to Porterville, Tulare county, California." The objection to this deed was that it described nothing; but, as counsel offered to follow it up with a plat of Johnson & Murray's addition, the objection was properly overruled.

3. The court did not err in admitting the plat, (Exhibit No. 2.) It is true that this plat contained nothing in itself by which it could be identified or located. But the defendant by his deed of June 20, 1871, admitted that there was then existing a plat of Johnson & Murray's addition, and evidence was offered by the plaintiff that as early as 1873 the defendant had this plat (Exhibit No. 2) on the ground, and that it was exhibited as the plat of Johnson & Murray's addition. It seems never to have been recorded, and there may be some doubt as to whether it is the same plat with reference to which the deed was made; but the evidence offered in connection with it was sufficient to authorize its admission in evidence. By his deed, the defendant admitted that there was a plat of Johnson & Murray's addition, and within two years of that admission he is shown to be in possession of this plat, and exhibiting it as the plat of the addition. As against him, and those claiming under him, and in favor of his grantee, this is certainly sufficient *prima facie* to identify the plat. If there was another and different plat to which the deed in fact referred he was called upon to show it. He made no such attempt, but rested upon the denial that he had ever made the deed, or any plat. It was shown, however, that he had made a prior deed for other lots on

Mill street, and in the same addition; and the finding of the court as to the genuineness and due execution of the deed is conclusive against him.

4. Most of the remaining objections relied on by appellants relate to the admission of oral testimony as to the actual location of the lots delineated on the plat, (Exhibit 2.) This plat shows various things on its face,—streets and alleys; blocks subdivided into lots; a county road; Mill street, Main street, Water street, and other streets; a river; plats marked as D. Murphey's land; J. P. Murray's land; Johnson & Keeney, etc. It is certainly not impossible that witnesses acquainted with these features of the town and vicinity of Porterville might locate the addition with reference to the main town of Porterville, and testimony for that purpose was clearly admissible. It was not necessary for the plaintiff to show that there had been an actual survey of the streets, lots, and blocks of the addition, and stakes set out on the ground. Her conveyance was of lots delineated on a plat, and if she could prove a plat showing lots and streets corresponding with the description in the deed, and other things by which, with the aid of oral testimony, the lots could be located on the ground, this was competent and sufficient as against her grantor. We find no error in the record. Judgment affirmed.

I dissent: Fox, J.

85 Cal. 609

ADAMS v. ANDROSS. (No. 12,620.)

(Supreme Court of California. Sept. 12, 1890.)

APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.

On appeal from the denial of an injunction, no affidavits used on the hearing were set out in the bill of exceptions. Some appeared in the transcript, but, in the certificate of the trial judge that certain affidavits were used at the hearing, they were only identified by the names of the parties and certain indorsements thereon. Held, that this identification was insufficient, and the judgment would be affirmed.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Whittemore & Sears, for appellant. Roger Johnson and F. W. Van Reynegom, for respondent.

WORKS, J. This is an appeal from an order denying an injunction. Neither of the parties has taken sufficient interest in the case to file a brief. It is apparent that the motion for the injunction was supported by the plaintiff, and resisted by the defendant, on affidavits. A bill of exceptions was filed which simply recites that certain affidavits, naming them, were read, but the affidavits are not set out. This, of course, furnishes nothing for this court to act upon. Certain affidavits appear in the transcript, and a certificate of the judge that the affidavits of certain persons, and other documents, were used at the hearing has been filed, but the affidavits are only identified by the names of the parties who made them, and certain indorsements. It has been held that such an authentication

of papers is insufficient. *Herrlich v. McDonald*, 80 Cal. 472, 22 Pac. Rep. 299; *Somers v. Somers*, 81 Cal. 608, 22 Pac. Rep. 967.

Order affirmed.

I concur: Fox, J.

PATERSON, J. I have considered the affidavits, and think the order of the court is correct.

83 Cal. 639

WOODS v. VARNUM. (No. 13,583.)

(*Supreme Court of California*. Sept. 12, 1890.)

REMOVAL OF OFFICERS—MISCONDUCT IN OFFICE.

1. Under Pen. Code Cal. § 772, providing that when an accusation "in writing, verified by the oath of any person," is presented against any officer, the court shall cite him to appear, and then "hear, in a summary manner, the accusation," the proceedings may be on a written charge by a private person, and need not be by indictment or information in the name of the people.

2. An accusation commencing "W. on oath presents," and duly "subscribed and sworn to before" the clerk, is "verified by oath," as required by said section 772.

3. The right to a trial by jury is excluded by the provision for a summary hearing, which is valid, Const. Cal. art. 4, § 18, providing for the impeachment of certain officers, and that "all other civil officers shall be tried for misdemeanors in office in such manner as the legislature may provide."

4. An accusation is sufficient, which charges that the accused is and was the tax collector, and that he collected taxes not due, and did not pay them into the treasury, or notify those who paid them, but fraudulently and corruptly converted them to his own use, giving the names of a number of the tax-payers and the sums paid by each.

5. Under said section 772 a tax collector may be removed for misconduct in office, who, having inadvertently and without evil intent collected taxes not due, willfully and corruptly retains them, and converts them to his own use.

6. It was the duty of a collector to pay to the treasury each month the taxes collected during the preceding month. He became his own successor, and during the last month of his first term collected taxes not due, which he corruptly converted to his own use. *Held* that, as he was not bound to account for that month's collections until his second term commenced, he was guilty of misconduct in office during that term, for which he could be removed.

In bank. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Luce, McDonald & Torrance and *Ham-mack & Mulford*, for appellant. *James L. Copeland* and *Hunsaker & Britt*, for respondent.

McFARLAND, J. This is a proceeding against appellant, under section 772 of the Penal Code, to remove him from the office of tax collector of San Diego county, for failing to perform his official duties. It is based upon a written accusation presented to the superior court by the respondent, Woods, who is a citizen and taxpayer of the county, and chairman of the board of supervisors. Appellant demurred to the accusation, and, his demurrer having been overruled, he answered denying the allegations of the accusation. The case was tried by the court without a jury, and judgment was rendered, removing appellant from the said

office, and for costs; and from this judgment defendant appeals. The record on appeal contains simply the judgment roll and three short bills of exceptions, showing that the demurrer to the accusation was overruled; that a motion to strike out and set aside the accusation was denied; that a demand for a jury trial was also denied; and that appellant excepted to these rulings.

1. The motion to set aside the accusation is based mainly on the ground that the proceeding should have been in the form of a criminal action, and brought in the name of the people. There does not appear to have been any direct adjudication of this question since the adoption of the Codes. In *Smith v. Ling*, 68 Cal. 324, 9 Pac. Rep. 171, and *Triplett v. Munter*, 50 Cal. 644, the proceeding was by written accusation made by a private citizen, while in *People v. Kirkpatrick*, 57 Cal. 353, it was in the name of the people; but each of these cases went off on other points, and in neither of them was any question raised as to the form of the proceeding, or the proper parties thereto. In *Re Marks*, 45 Cal. 199, it was expressly held that such a proceeding was properly commenced and prosecuted upon the written complaint of a private citizen. That case was before the Codes; but section 4 of the act of March 14, 1853, under which the proceeding was instituted, was substantially identical with section 772 of the Penal Code. *Hitt. Gen. Laws*, par. 4781. It is true that section 6 of that act provides that, as far as applicable, the rules of practice governing district courts in civil actions should apply to the proceeding; but we do not see how that provision could have any effect on the point under review. However, apart from authorities, the Code seems to clearly contemplate a proceeding founded upon a written accusation of a private person, and not upon a public indictment or information in the name of the people. It provides that "when an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer," etc., "the court must cite the party charged to appear before the court at a time," etc., and at the time designated "must proceed to hear, in a summary manner, the accusation," etc. It is also contended that the accusation is not properly verified. It commences as follows: "J. M. Woods, upon oath, presents to the said superior court of San Diego county the following accusation, alleging." It is signed at the end by J. M. Woods, after which is the following: "Subscribed and sworn to before me this 26th day of April, 1889. M. D. HAMILTON, Clerk. [Seal.]" This makes the whole document an affidavit, upon which perjury could be assigned; and in our judgment it sufficiently complies with the requirements of verification. We think, therefore, that the court did not err in refusing to strike out the accusation.

2. We do not think that the court erred in denying the demand for a jury trial. The provision of the constitution that "the right of trial by jury shall be secured to all, and remain inviolate," refers, gen-

erally, to those cases in which the right of trial by jury existed at common law at the time of the adoption of the constitution. *Cassidy v. Sullivan*, 64 Cal. 266; *Koppikus v. Commissioners*, 16 Cal. 249; *Grim v. Norris*, 19 Cal. 140. It probably would not include new offices created by statute after the adoption of the constitution, as held in *Tims v. State*, 26 Ala. 165, or the case where the legislature creates an office, and subjects the incumbent to a trial for his official misconduct without a jury, as held in *Boring v. Williams*, 17 Ala. 510, even though our constitution contained no other provision on the subject. But the constitution itself, after a provision for the impeachment before the senate of certain enumerated officers, expressly provides that "all other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." Article 4, § 18. The manner of such a trial is therefore clearly within the power of the legislature, and it is equally clear that the "summary manner" mentioned in said section 772 of the Penal Code excludes the right of trial by jury.

3. We think that the demurrer to the accusation was properly overruled. The general charge of the accusation is that appellant, as tax collector, willfully and corruptly refused and neglected to perform his official duties, in this: that he collected taxes not legally due, and did not pay them into the county treasury, or notify the persons from whom they had been thus collected, but fraudulently and corruptly retained the same, and appropriated them to his own use. The main points of the demurrer are that the accusation does not conform to sections 950, 951, and 952 of the Penal Code; that it is not specific enough in stating the particular circumstances of the offense, the persons from whom the taxes were collected, and the time when appellant's term of office commenced; and that no offense is charged, because the accusation does not show that appellant did the acts charged during his present term of office. The sections of the Penal Code referred to deal solely with the requirements of indictments in purely criminal actions, in which defendants may be convicted, and made to suffer the usual penalties which are imposed on convicts; and they do not, therefore, directly apply to a proceeding like the one in the case at bar, where the defendant can, at the worst, only lose an office, and have a judgment (not a fine) entered against him for \$500 in favor of the informer who makes the accusation, which judgment in this case has been waived by the informer. Of course the accusation, like any pleading in any kind of an action or proceeding, civil or criminal, must contain the substance of what is required in subdivision 2 of section 950 of the Penal Code; viz.: "A statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." This requirement is fully met by the accusation in the case at bar, for, after stating the charge generally, it gives, in detail,

the names of a number of persons from whom taxes were collected, and the amounts of such taxes. As to the point that there is no statement of the time when appellant became tax collector, or when his present term commenced, the averment is that the appellant "is, and at all times herein mentioned was, the duly elected, qualified, and acting tax collector of said San Diego county. This was a sufficient averment on that point. Of course, the proceeding lies only against one in office, and not against one whose term has expired, but the accusation sufficiently shows appellant to be in office. There are no other points presented by the demurrer which need notice.

4. The findings show that appellant was tax collector during the years 1887, 1888, and 1889, and that his present term commenced on the first Monday of January, 1889, he thus being his own successor in the office. And the findings and judgment are attacked by appellant because they take into account taxes collected before January, 1889, the point being that, as this proceeding is for the removal of appellant from office, nothing can be considered that occurred before the commencement of his present term. But, in the first place, finding 19 was evidently intended to find, and we think does sufficiently find, that part of the taxes to which the charge against appellant relates were collected in 1889 after his present term began, without considering the other findings that they were collected in the "collecting season of 1888-89." And in the second place, if the finding on that point be not specific enough, it is found, among other things, that part of the taxes with which appellant is charged were collected in December, 1888, and that the taxes collected by him in that month were not paid by him to the treasurer, nor was any report made thereof to the auditor "until on and after the 11th day of January, 1889, and during his present term of office." And if it was his duty to pay over the taxes to the treasurer, and settle with the auditor, under section 3753 et seq. of the Political Code, in January, 1889, or afterwards, his failure to do so was a failure during his present term, although they may have come into his possession as collector at the close of his previous term. If he had not been re-elected, and had failed to account, he could not have been proceeded against under section 772, Pen. Code, because he would have been beyond the reach of a proceeding by which he could be "deprived of his office." There are other provisions of the Code, however, under which he would have been then liable. But as he was re-elected, and continued in possession of the office, whatever misconduct he was afterwards guilty of occurred during his new term.

We see no defects in the findings, assuming that findings were necessary in this proceeding. It is true that it is first found that the double and illegal taxes with which appellant is charged were, in the first instance, collected by his deputies and clerks inadvertently, and without evil intent on their part, or on the part of appellant; but it is also found that afterwards he "knowingly, willfully, and corruptly re-

tained the same in his possession, and knowingly, willfully, and corruptly appropriated the same to his own use." Whether or not this last finding is a correct statement of fact, was for the trial court to determine. As there is no evidence before us, we have no means of reviewing it. It must be taken here as true. We see no reversible error in the record. Judgment affirmed.

We concur: WORKS, J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.

86 Cal. 74

McCRACKEN v. SUPERIOR COURT. (No. 13,918.)

(Supreme Court of California. Sept. 20, 1890.)

APPEAL—JUSTIFICATION OF SURETIES.

The sureties in a bond given on appeal from a justice of the peace having failed to justify in five days after exception to their sufficiency, the superior court is without jurisdiction to extend the time in which they may justify or new sureties be given; Code Civil Proc. Cal. § 978, providing that unless they or other sureties justify in five days "the appeal must be regarded as if no such undertaking had been given."

In bank. *Certiorari*.

Willis & Appel, (Z. T. Cason, of counsel,) for petitioner. *E. H. Bentley and J. Gardiner*, for respondent.

WORKS, J. This is an application for a writ of *certiorari* to review and annul the action of the superior court of Los Angeles county, in extending the time for filing an undertaking on appeal from a justice's court, and in taking jurisdiction of the cause. The petitioner brought an action in the justice's court and recovered a judgment on the 19th day of April, 1890. On the 24th day of the same month the defendant served and filed his notice of appeal to the superior court, and on the 2d day of May filed in the justice's court his undertaking on appeal. On the 3d day of May the petitioner duly excepted to the sufficiency of the sureties on the undertaking, and on the same day the defendant gave the petitioner notice that the sureties on said undertaking would justify before the justice on the 7th day of May. On that day the petitioner appeared, but the sureties did not then or at any other time appear and justify. No new undertaking was filed or deposit made by the defendant in the justice's court. On the 9th day of May, and after the expiration of the five days within which the sureties might have justified, the superior court, the respondent in this proceeding, made an order giving the defendant in that action 30 days additional time within which to have the sureties justify, or give other sureties. After the expiration of 30 days from the time of the rendition of the judgment the petitioner moved to dismiss the appeal, which motion was denied, and the defendant was then allowed to give a new undertaking.

It is contended that, in making the order giving the defendant time within which to justify his sureties, or give a new undertaking, and in permitting the defendant to file his undertaking after the expiration of 30 days from the time the judg-

ment was rendered, the respondent exceeded its jurisdiction, and that its action should be annulled. An appeal may be taken from a justice's court to the superior court at any time within 30 days after the rendition of the judgment. Code Civil Proc. § 974. To effectuate the appeal three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all of these things must be done within 30 days after the rendition of the judgment. Code Civil Proc. §§ 974, 978; *Coker v. Superior Court*, 58 Cal. 178. In *Coker v. Superior Court*, supra, it was said: "All of these are jurisdictional prerequisites. None of them can be dispensed with, nor can any of them if not done be supplied, or if fatally defective be remedied, after the time limited by the statute; for, until all the prerequisites are completed, the appeal is not effectual for any purpose." Therefore, if no undertaking had been given in this case within the 30 days, it is clear that the appeal would not have been effectual for any purpose, and the superior court would have had no power or jurisdiction to make an order extending time or take any action whatever in the case. Here an undertaking was given, but the sureties failed to justify within the time allowed by law. Section 978 of the Code of Civil Procedure provides: "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and, unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." In other words, if the sureties fail to justify within the time prescribed, the "appeal is not effectual for any purpose." *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. Rep. 200. The time within which these jurisdictional prerequisites shall be completed cannot be extended by an order of court. *Roush v. Van Hagen*, 17 Cal. 122. It is evident that the respondent acted under the belief that section 1054 of the Code of Civil Procedure gave it authority to make the order; but, in our judgment, the section referred to has no application to this case. It certainly cannot be so construed as to give the superior court the power to make an order extending the time within which to do an act which is required to be done in the justice's court, and which must be done within the time limited by the statute, in order to give the superior court jurisdiction to act in the case at all. Whether the order extending time was made before or after the time when the act must be done in the justice's court, can make no difference. The superior court had no jurisdiction to extend time within which to do an act in the justice's court while the action remained in that court, and, as we have seen, until the sureties justified the cause remained in the justice's court. The appeal was not effectual for any purpose, and the superior court had no jurisdiction whatever in the case. It may be otherwise where a defective or

informal undertaking has been given. In such cases it has been held that the superior court may allow a new undertaking to be filed. *Coulter v. Stark*, 7 Cal. 244; *Cunningham v. Hopkins*, 8 Cal. 33; *Rabe v. Hamilton*, 15 Cal. 31; *Gray v. Superior Court*, 61 Cal. 337; *Coker v. Same*, 58 Cal. 177. But, to allow the superior court to assume jurisdiction, and make the order complained of in this case as against the plain provision of the Code that, "if the sureties fail to justify within the time fixed," it must be regarded "as if no such undertaking had been given," would be to override the express and unequivocal language of the statute. It is well said in *Roush v. Van Hagen*, 17 Cal. 122: "It was necessary that the sureties should justify within five days after the notice of exception, and the failure to do so rendered the appeal a nullity. The statute provides that upon a failure to justify within the time limited, the appeal shall be regarded as if no undertaking had been given. The orders extending the time were in contravention of this provision, and were therefore inoperative. The statute is peremptory in its terms, and the consequence of a violation is that the party loses the benefit of his appeal. 'It has been repeatedly held,' says Sedgwick, 'that courts have no dispensing power, even in matters of practice, when the legislature has spoken. Thus, where a statute declares that a judge at chambers may direct a new trial, if application be made within ten days after judgment, it has been said that he can no more enlarge the time than he can legislate in any other matter. When a statute fixes the time within which an act must be done, the courts have no power to enlarge it, although it relates to a mere question of practice. So where an appeal, to be valid, must be made within ten days, it is void if taken on the eleventh.' Sedg. St. & Const. Law, 322." An undertaking required in order to perfect an appeal may be distinguished from one to stay proceedings. As to the latter it is not necessary to give the appellate court jurisdiction, and the undertaking necessary to give jurisdiction having been given, greater liberty is and should be allowed as to the giving of the stay-bond which is only necessary to preserve to the party the benefits of his appeal. *Hill v. Finnigan*, 54 Cal. 493; *Lee Chuck v. Quan Wo Chong*, 81 Cal. 228, 22 Pac. Rep. 594. Authority is given the supreme court to accept a new undertaking in lieu of an insufficient one in certain cases and on certain terms, (St. 1861, p. 589, § 3,) but we know of no such statutory authority on the part of the superior court. The respondent had no jurisdiction to make the order complained of, and its action must be annulled. It is so ordered.

We concur: FOX, J.; PATERSON, J.; McFARLAND, J.; SHARPSTEIN, J.

VISHER v. SWINNERTON. (No. 13,932.)
(Supreme Court of California. Sept. 26, 1890.)

In bank. *Mandamus*.

L. W. Elliott, for petitioner. Baldwin & Campbell, for respondent.

PER CURIAM. This is an application for a writ of mandate to compel the settlement of a bill of exceptions. Some of the facts allege, and upon which petitioner claims he is entitled to have a bill of exceptions settled, are denied by the respondent. It is necessary that the facts of the case be settled. The parties being unable to agree upon a referee, it is ordered that the matters in issue be referred to E. E. Hood, Esq., of Stockton, Cal., to find the facts, and report the same to this court; his fees therefor, and the fees of witnesses, to be paid as in cases referred by the superior court.

86 Cal. 72
In re MOORE'S ESTATE. (No. 13,851.)
(Supreme Court of California. Sept. 19, 1890.)

REMOVAL OF ADMINISTRATOR—APPOINTMENT PENDING APPEAL.

Pending an appeal from an order removing an administrator, he is merely suspended from office, and no general administrator can be appointed, but a special one only.

Department 2. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

Frank M. Stone, for appellant. Chas. B. Younger, for respondent.

SHARPSTEIN, J. This appeal is from an order appointing Helen M. Moore general administratrix of said estate. It appears by the bill of exceptions that Thomas W. Moore was duly appointed administrator of said estate on the 4th day of March, 1872, and that he continued such administrator until August 29 or September 7, 1888, when he was removed by order of the court. From that order he appealed to the supreme court, and said appeal was pending in said supreme court when said Helen M. Moore was appointed administratrix of said estate by the order of the court from which this appeal is taken. The contention of appellant is that, pending an appeal from the order removing Thomas W. Moore from the administration of the estate in question, the court had no authority to appoint other than a special administrator. In support of that contention he cites section 1411 of the Code of Civil Procedure, which provides, among other things, that "when an executor or administrator dies or is suspended or removed, the superior court or a judge thereof must appoint a special administrator." Pending the appeal of Thomas W. Moore from the order removing him he was suspended from office, and it was within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal became final. The grounds upon which we are urged to dismiss the appeal are not sufficient to justify a dismissal.

We concur: THORNTON, J.; McFARLAND, J.

86 Cal. 78
ALPERS v. HUNT. (No. 12,801.)
(Supreme Court of California. Sept. 27, 1890.)
BARRATROUS CONTRACTS—PUBLIC POLICY—PRACTICE—APPEAL.

1. Where, in an action on contract, defendant moves for a nonsuit at the close of plaintiff's

evidence on the ground that the contract alleged is contrary to public policy, and the motion is overruled, but the court grants a new trial on the ground that it erred in overruling the motion, the sufficiency of the complaint may be considered on plaintiff's appeal from the order granting the new trial, but not the evidence.

2. A contract by an attorney to pay a layman a third of his fee, if the layman procures the employment of the attorney by a litigant, is contrary to public policy, and void, under Code Civil Proc. Cal. § 287, subd. 4, declaring that an attorney may be removed or suspended for "lending his name to be used as attorney and counselor by another person who is not an attorney and counselor," as the effect of such a contract is to permit, by indirection, the use of an attorney's name by another not an attorney.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

R. Percy Wright, for appellant. *Sullivan & Sullivan*, for respondent.

THORNTON, J. This is an action brought by the plaintiff, as assignee of William L. Bolte, against John Hunt, executor of the last will and testament of George F. Sharp, to recover a sum of money claimed to be due on a contract alleged to have been made by Sharp and I. C. McCeney with plaintiff's assignor. On the trial verdict and judgment passed for plaintiff. Defendant moved for a new trial, which was granted, and, from the order granting the motion, plaintiff appealed.

The main question to be determined herein arises on the complaint. The averments of the complaint set forth that, prior to the 1st day of August, 1878, George F. Sharp and Julius C. McCeney were attorneys at law, practicing their profession in the city and county of San Francisco; that, in August, 1878, Mrs. Volina E. Harrigan was the owner of, and claimed an interest in the estate of Eliza Haskell, deceased, which claim was contested by other persons, and required the services of attorneys at law for its enforcement; that, about the time last mentioned, Sharp & McCeney agreed with one William L. Bolte that, if he, Bolte, would procure Mrs. Harrigan to employ them as attorneys at law in the matter of her interest and claim, above mentioned, he, Bolte, should be entitled to and should have one-third part of whatever should be received by them, or either of them, by reason of and under said employment; that thereupon Bolte procured Mrs. Harrigan to employ them as attorneys at law in the matter of her interest and claim; that, in pursuance of the arrangement thus brought about by Bolte, Mrs. Harrigan entered into a contract with Sharp & McCeney, whereby, in consideration of their professional services to be rendered in and about her said interest and claim, she agreed to give them one-third part of whatever share of the estate of Mrs. Haskell he might become entitled to or receive by way of compromise, or otherwise; that Sharp & McCeney duly performed all the conditions of their said contract, and by such services she became entitled to a large amount of property, a part of the estate aforesaid; that Mrs. Harrigan thereupon agreed upon a certain sum of money to be paid Sharp & McCeney in satisfaction of their

claim against her under the contract above stated, which they agreed to accept; that, in pursuance of this agreement, Mrs. Harrigan executed to them a promissory note for the sum of \$14,400, bearing date the 31st day of January, 1880, payable two years after its date, with interest, at the rate of 7 per cent. per annum; that, to secure the payment of this note, Mrs. Harrigan, with others, executed to Sharp & McCeney a mortgage upon certain real property; that afterwards McCeney assigned all his interest in the note and mortgage to Sharp; that the note and mortgage were subsequently sold by Sharp for the sum of \$17,964.18, which was paid to him; that no part of said sum of money was ever paid to plaintiff or his assignor, Bolte. Other averments are made in the complaint, setting forth the relations of the parties, and material to show plaintiff's right to maintain this action, but, as they have no bearing on the question necessary to be determined herein, need not be stated. On the trial, the plaintiff having put in his evidence and rested, the defendant moved for a nonsuit, on the ground, among others, (1) that the alleged contract between McCeney & Sharp and Mrs. Harrigan is against good morals and public policy; and (2) that the alleged contract between Sharp & McCeney and William L. Bolte is against good morals and public policy. The motion was denied, and the defendant excepted. A verdict having been rendered for plaintiff, defendant moved for a new trial on a statement. In it he assigns as an error of law occurring at the trial, and excepted to by him, the denial of his motion for a nonsuit. On the hearing of the motion for a new trial, the court granted it "on the sole ground [as appears from the transcript] that the contract sued upon is contrary to public policy." As above stated, the motion for a nonsuit has reference only to the contract alleged, and the error of law set out in the statement is of the same import. The contract is alleged in the complaint alone. The motion for a nonsuit must then be determined on the allegations of that pleading. The court must have granted the new trial for the reason that the contract set forth in the complaint was contrary to public policy, for from the complaint only can we ascertain the contract sued on. And here we may remark that, according to the well-settled practice, the court below could not, in passing on the motion for a new trial, go beyond the grounds on which the new trial was asked; and, in holding the action of the court to have reference only to the contract set forth in the complaint, we confine the course pursued by the court to the contract alleged therein, and to the grounds on which the defendant asked for a nonsuit. From the foregoing it is clear that, in passing on the question as to the character of the contract, the court is limited to what is stated by plaintiff in setting forth his cause of action, and that the evidence introduced on the trial cannot be considered.

But it is argued by counsel for appellant (plaintiff below) that, on an appeal, as

this is, from an order granting a new trial, the sufficiency of the complaint cannot be considered. To support this contention counsel make reference to several cases decided by this court, viz.: *Spanagel v. Dellinger*, 38 Cal. 283; *People v. Turner*, 39 Cal. 372; *Mason v. Austin*, 46 Cal. 385; *Jacks v. Buell*, 47 Cal. 162; *Onderdonk v. San Francisco*, 75 Cal. 534, 17 Pac. Rep. 678; and *Wheeler v. Kassabaum*, 76 Cal. 90, 18 Pac. Rep. 119. In the cases cited the question presented is entirely unlike the one presented here. In this case the defendant moved for a nonsuit on grounds that challenged the sufficiency of the complaint, in that it set forth a contract on which an action could not be maintained. The nonsuit was denied, and an exception was regularly reserved. The defendant then found himself in a position where he had a right to have the ruling of the court on his motion reviewed on a motion for a new trial. The ruling of the court on defendant's motion for a nonsuit, and his exception thereto, could be set forth in a statement or bill of exceptions as an error of law occurring at the trial, and there excepted to by him that it might be reviewed as above set forth. This right was assured to him by the provisions of the statute. Code Civil Proc. § 657, subd. 7; Id. §§ 658, 659. On the hearing of the motion for a new trial, the court *a quo* had an opportunity of reversing its former action. If it approved its previous ruling, the motion for a new trial would be denied. If its previous ruling was, in its judgment, erroneous, it was empowered to recall it, and grant a new trial. On such hearing it was in the line of the regular procedure to confirm its former action, or disapprove and recall it. Such course the law sanctions as applicable to all errors of law. An error committed in passing on a motion for a nonsuit constituted no exception to the rule. Whether the court denied or granted a new trial, its action was subject to be reversed on appeal. The plaintiff had a right to appeal from the order granting a new trial, and his appeal would bring before the court the action of the court below, as to every question germane to the inquiry whether the lower court's action was in accordance with law or not. If the court below had on the trial committed an error for which it was proper, on its being regularly brought before it, to grant a new trial this court would approve and affirm the action of such court in granting such relief. If, on the contrary, no such error had been committed, if the court below had on the trial before it ruled correctly, this court would, in accordance with such view, hold the order granting a new trial erroneous, and reverse it. This is the usual course of practice in the courts of this state, and we see nothing in it foreign to the procedure prescribed by law. It has been a practice, not unusual in our courts, to ask a trial court to instruct the jury, when the complaint did not state facts sufficient to constitute a cause of action, to find a verdict for defendant. Whether given or refused such ruling could be reviewed on motion for a new trial; and, on the hearing of this latter motion, whether favorable or

adverse to the motion, an appeal could be prosecuted from the order granting or refusing the new trial, and the action of the trial court passed on in this court, and either approved or set aside. We see nothing irregular here in having the question made on the motion for a nonsuit considered and passed on in this court, though it does go to the sufficiency or insufficiency of the complaint. The question comes before us in the regular course of procedure, and the legal exigencies of the case demand that it be considered and determined. If this court failed to pass on the point, it would in effect hold that there was error of law occurring at the trial, and there excepted to, which could not be reviewed on a motion for a new trial, and that, too, when the statute regulating the procedure in our courts had provided that all such errors should be so reviewed. There is nothing in the cases cited by counsel for appellant in conflict with what is stated above. In our judgment the question is regularly presented here for decision, and the respondent is entitled to have it determined.

Is the contract set forth in the complaint contrary to public policy or good morals. Such is the question presented to us for determination. That contract is in substance this: A third person, not an attorney and counselor at law, enters into an agreement with an attorney and counsel or at law that he will procure his employment by a litigant, and that in consideration of such procurement he is to have from the attorney and counselor so employed, one-third part of whatever remuneration the attorney receives for his services from the litigant. Is such a contract void as contended, is the point presented for consideration and decision. Courts are justified in declaring a contract void as against public policy, when it is expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. As said by CHASE, C. J., in the *License Tax Cases*, 5 Wall. 469: "This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision." The policy of the state "can be ascertained only by reference to the constitution and laws passed under it, or, which is the same thing, to the principles underlying and recognized by the constitution and laws." *Lux v. Haggin*, 69 Cal. 308, 10 Pac. Rep. 674. Though public policy is a doctrine on which courts and judges should proceed with caution, still there are many cases to be found in the books of reports in which the doctrine has been applied. Marriage brokerage bonds, contracts in restraint of trade, contracts by expectant heirs, or in consideration of illicit cohabitation, or such contracts as may injuriously affect the administration of justice, or to procure a contract from a public officer, or to pay for an appointment to office, or aiding in procuring an appointment, or to pay for obtaining a pardon, or injuriously affecting the public interest as to the location of the terminus of a railroad,—afford instances of the application of the doctrine.

See 5 Rob. Pr. c. 42, pp. 407, 433, where many cases are cited and commented on. In considering this question, our attention must necessarily be given to the statutes of this state in regard to attorneys and counselors at law. They are to be found in the Code of Civil Procedure, and in the section to which reference will be herein specially made. The following provisions will be found in the statute: Any citizen or person resident of this state, who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of 21 years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to be admitted as an attorney and counselor at law in all the courts of this state. Code Civil Proc. § 275. Every applicant for such admission must produce satisfactory testimonials of good moral character, and undergo a strict examination as to his qualifications in open court. Id. § 276. If, upon examination, he is found qualified, he shall be by the court admitted as such attorney and counselor, by an order entered to that effect upon its records, and a certificate of such record shall be given to him by the clerk of the court, which certificate shall be his license. Id. § 277. On his admission, he must take an oath to support the constitution of the United States, and the constitution of this state, and faithfully to discharge the duties of an attorney and counselor to the best of his knowledge and ability. Id. § 278. A roll of attorneys is to be kept by a prescribed public officer, which the applicant, on his admission, is required to sign. Id. § 280. Any person practicing law in any court, except a justice's court or a police court, without having received a license as attorney or counselor, is declared to be guilty of a contempt of court. Id. § 281. Section 282 of the same Code prescribes the duty of an attorney and counselor, by the provisions of which he is required, *inter alia*, to support the constitution and laws of the United States and this state, and to maintain the respect due to the courts of justice and judicial officers. Rules of duty are further prescribed in this section, which are intended to regulate and control the conduct of an attorney and counselor with regard to the public, and to those in whose behalf they appear in court, and exercise their appropriate functions. Authority is conferred on him in the discharge of his duties and functions, peculiar to his character as such. Id. § 283. He is subject to the authority of the courts, and may be, for cause shown, suspended or removed, and deprived of the right to pursue his profession by the supreme court, or either department thereof, or by a superior court. Id. § 287. One of the causes for which he may be removed or suspended is the following: "Lending his name to be used as attorney and counselor by another person, who is not an attorney and counselor." Id. § 287, subd. 4. The foregoing provisions taken from a public statute are enacted, not only in the interest of those who employ the services of attorneys, but in the interest of the community or public at large. They concern the administra-

tion of justice, always a subject of public concernment, and relate to a class of officers of courts in which the people of the state have an abiding interest. Bolte was never an attorney and counselor at law. He had never been admitted to the privileges, or authorized to exercise the rights, of an attorney and counselor. He had never assumed or been authorized to assume any of the functions of an attorney and counselor, nor was he bound by the obligations of such a position. Now, if either of the attorneys who contracted with Bolte had lent to the latter his name to be used by him as attorney and counselor, he would have been guilty of a violation of the clause above quoted from section 287 of the Code of Civil Procedure, for which he would have been liable to be removed or suspended from the practice of his profession. Was not Bolte really allowed to use their names in the prosecution of a matter in litigation? Under the employment of them as attorneys, made through Bolte's procurement, they engaged to use their faculties as attorneys and counselors at law for his benefit, and that, too, in a cause in which he had no interest as a party. By the terms of the agreement he was to derive a benefit from the rendition of their services in their professional capacity, and to receive a share of their fee, as if he had been concerned with them as a regularly admitted attorney. He is thus enabled, through their agency, vicariously, and not openly and in his own name, to aid in the prosecution of a matter in litigation, and to receive through it such a reward as is usually gained by an attorney regularly admitted to exercise his profession. An attorney is prohibited to allow the direct use of his name as an attorney and counselor at law, under the circumstances disclosed by the complaint in this case. Of what avail is such prohibition, if it can be by such indirection as is practiced in this case evaded? We are of opinion that the facts here disclose a case of indirect violation of the clause referred to, which is as much forbidden as a direct violation. If such a practice were allowed, an attorney might have a number of undisclosed associates through his agency exercising the functions of an attorney and counselor, and reaping the rewards flowing therefrom, without resting under any of the responsibilities incident to such a position, and possessing none of the qualifications which the law demands and requires. Such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person.

We have examined *Bunn v. Guy*, 4 East, 190, and *Candler v. Candler*, Jac. 225, cited by counsel for appellant to sustain the validity of the contract sued on. We do not consider them applicable to the case before us. The office of attorney in England is entirely different from that of an attorney and counselor in this state. In England the fees of an attorney are fixed by statute, or rules of court, or orders in council, and his bill of costs and

charges for disbursements are subject to be taxed by a taxing officer, and the taxation reconsidered by such officer. The decision of the taxing officer can also be revised by the judge on appeal. Weeks, Attys. §§ 324, 325, et seq. We cannot suppose that the fact that the attorney has to share the amount of his bill with an outsider, would at all affect the amount allowed him. That amount would be the same regardless of the circumstance that he was bound by his agreement to divide it with another. The laws of England regulating the appointments, duties, and conduct of attorneys have not been brought to our notice, and therefore we cannot determine how far the laws there prevailing permit or recognize as legal a contract made by an attorney to share his fees with a third person. Under such circumstances this court could not, with any confidence, pronounce any judgment how such a contract would be affected by English statutes or rules of court. In *Bunn v. Guy* the validity of a contract between attorneys was called in question. A practicing attorney (Carpenter) agreed for a valuable consideration to relinquish his business and recommend his clients to two other attorneys (*Bunn and Guy*) and that he would not himself practice within certain limits, and would permit them to make use of his name in their firm for a certain time, without any interference on his part. The question arose in chancery concerning the marshaling of assets, and a case stating the above contract was sent by the lord chancellor to the court of king's bench for its opinion. The court certified their opinion to the court of chancery that the contract above stated was good in law. In *Candler v. Candler*, Jac. 225, an agreement by an attorney to pay a share of the profits of his business to the widow of his deceased father, who had been an attorney, was held valid. The agreement was made by deed between the widow of Henry Candler, the deceased father, and their son Henry Candler. It was recited in the deed that the agreement was entered into under a due sense of the influence which his mother and family could retain with his father's clients and connections, and the widow (Mary Candler) covenanted to use her utmost endeavors and influence to induce her friends and connections to employ him. The lord chancellor, (ELDON,) in delivering his judgment, said: "I have thought that, consistently with the policy of the law, agreements could not be made by which they [referring to attorneys] contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, but for a sum of money paid and advanced. I knew that this would rip up many transactions, and I was happy that the court of king's bench was of a different opinion, though I never could entirely reconcile myself to their doctrine." The opinion in *Bunn v. Guy*, supra, was here referred to by Lord ELDON. In our judgment the remarks of Lord ELDON, quoted above, may well create a strong doubt as to the correctness of the conclusion reached in *Bunn v.*

Guy. However, for the reasons above given, we cannot follow the rulings in the cases just noticed. It is clear that the right of the plaintiff to recover herein is the same as that of his assignor, Bolte. If the latter cannot recover, neither can the plaintiff, his assignee. The considerations expressed herein have led this court to the conclusion that the contract sued on, and alleged in the complaint, is forbidden by the policy of the law, and void, and that the court below erred in denying the defendant's motion for a nonsuit. The motion for a new trial was, therefore, properly granted, and the order appealed from must be affirmed. The view taken herein disposes of the case, and it becomes unnecessary to pass on the other questions raised by counsel for appellant. Order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

88 Cal. 151

In re LAHIFF'S ESTATE. (No. 12,891.)

(*Supreme Court of California.* Oct. 9, 1890.)

HOMESTEAD—WIFE'S SEPARATE ESTATE.

1. Where testatrix dies leaving no other property than the premises which she and her husband had occupied as a homestead, although, by her will, she distributes her entire estate in the form of money bequests, and authorizes her executor to sell the whole property, the interest of the legatees is subject to the right of the husband to a homestead for a limited period, and to the authority and duty of the court to set it apart, given by Code Civil Proc. Cal. §§ 1465, 1468.

2. The power of the court to set aside the property as a homestead is not defeated by the fact that, previous to the application of the husband, the executor had negotiated a sale of the property, which had not yet been confirmed by the court.

In bank. Appeal from superior court, city and county of San Francisco; *J. V. CORREY*, Judge.

Thomas E. Curran, for appellant. *E. H. Rixford*, for respondent.

Fox, J. Catherine Lahiff died testate in November, 1887, leaving a surviving husband, Lawrence Lahiff, but no children. She owned, as her separate property, a lot of land in San Francisco, returned in the inventory as constituting her entire estate, appraised, with the improvements on it, at \$5,000. This property had been occupied by herself and her husband, during her life-time, from the date of their marriage, as their residence and homestead; the lower floor of the building on the front of the lot being leased out for a carpenter shop, the upper floor being divided into four rooms suitable for dwelling purposes; the other improvements on the lot consisting of a small building of two rooms in the rear, and a stable, once accessible from the rear of the lot, but, at the time of her death, inaccessible and unoccupied. By her will, she distributed her entire estate in the form of money bequests; devising to her husband \$600, and no more; making divers other specific bequests, amounting to \$2,600, to other relatives, and \$1,800 to priests, churches, and charities; and making Father Pendegast residuary legatee. The will also authorized

her executor to sell the whole of her property at public or private sale, with or without notice, and without obtaining an order of sale. The will having been admitted to probate, the executor negotiated a sale of the property, reported the same to the court, and petitioned for confirmation thereof. Pending the hearing upon this petition, the surviving husband applied to the court, upon petition setting out the facts substantially as above set forth, for an order setting the property apart to him as a homestead. Of this, due notice was given; and, upon the hearing, the heirs and devisees appeared, and demurred to the petition. The demurrer was overruled; when the contestants answered, setting up the facts as to the will, and the probate thereof. On this petition, and the answer thereto, a hearing was had, findings filed, and a decree entered, setting apart the property to the surviving husband as a homestead, during the period of his natural life; but requiring him, inasmuch as there was no other property of the estate, to pay to the executor the sum of \$439 65, costs and expenses of administration. From this decree, and the order overruling their demurrer, the heirs and devisees appeal.

1. The court did not err in overruling the demurrer. The petition did not disclose a state of facts such as was shown in *Maloney v. Hefer*, 75 Cal. 422, 17 Pac. Rep. 539, cited by appellants; and that case is not, therefore, in point. While the will did authorize the sale of the property, and attempted to dispose thereof in the form of money devise, it did not operate as an actual transmutation of the property into money. When the will became operative at all, the property was, in fact, land used as a homestead, though not then protected as such by selection and recording. The parties who then became interested therein took their interests subject and subordinate to all the contingencies of administration, and, among others, to the authority conferred by law upon the court to set the same apart, for a limited period, to the surviving husband as a homestead, as well as to appropriate the same for the payment of debts, if there were any. Civil Code, § 1265; Code Civil Proc. § 1474; *Sulzberger v. Sulzberger*, 50 Cal. 385.

2. No homestead having been selected and recorded during the life-time of the decedent, it was the duty of the court to designate and set apart a homestead out of the community property, if there was any such, if not, then out of the separate property of the decedent, (Code Civil Proc. § 1465; *In re Davis*, 69 Cal. 458, 10 Pac. Rep. 671;) and it might be done from any property suitable for the purpose, (*In re Sharp*, 78 Cal. 483, 21 Pac. Rep. 182.) If there was no minor child, then it was for the surviving husband alone, (Code Civil Proc. § 1468;) but, if taken, as this was, from the separate property of the decedent, it could be for only a limited period, as was done in this case. While it is true that the husband could not have selected and made a homestead of this property without the consent of his wife, while she was living, (Civil Code, § 1239,) it is

equally true that the court may set it apart as such after her death, under the provisions of sections 1465 and 1468, Code Civil Proc. The power of the court in this regard is not defeated by the action of the executor in negotiating a sale which is unconfirmed, before the decree setting apart the homestead is made. Decree and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

36 Cal. 142
HARTIGAN v. SOUTHERN PAC. R. CO. (No. 12,899.)

(*Supreme Court of California*. Oct. 3, 1890.)

DEATH BY WRONGFUL ACT—ACTION—PARTIES—
RES JUDICATA.

1. Under Code Civil Proc. Cal. § 377, permitting either the heirs or personal representative of a decedent to bring an action for his wrongful death, only one action for such cause can be brought, and a recovery by the executor is a bar to an action by the heirs.

2. Under Code Civil Proc. Cal. § 1588, giving executors and administrators power to compromise, with the approval of the probate court, debts due decedent, the executor may compromise a suit brought to enforce a claim for decedent's wrongful death.

Department 1. Appeal from superior court, Contra Costa county; J. P. JONES, Judge.

D. M. Delmas and George Lezinsky, for appellant. *W. L. Dudley*, for respondent.

Fox, J. Patrick Hartigan died June 12, 1886, from injuries alleged to have been received through the negligence of the defendant. He left a widow, the plaintiff in this action, but no children; also a will, of which he named John McCarthy as executor. The will being duly proved and admitted to probate, and letters testamentary issued to McCarthy, he brought an action against the present defendant for damages for the injuries resulting in the death of his testator. Afterwards, and before the answer was filed to the complaint in that action, the plaintiff herein brought this suit against the same defendant, and upon the same cause of action. She then filed an intervention in the suit brought by the executor, denying the right of the executor to maintain the action, and praying that he be not allowed to proceed therewith. To that intervention the executor answered, and the defendant answered to both the complaint and the intervention,—both after demurrers had been interposed thereto and overruled. In that former action a offer was made to allow the plaintiff to take judgment for the sum of \$5,000; the offer was reported to the probate court, and upon hearing of petition filed in that behalf, at which the widow appeared and was heard in the matter, the executor was authorized by the court to accept the offer, and the same was accepted, and judgment entered accordingly, and subsequently paid, and satisfaction thereof entered. Subsequently, this case came on for trial, and the plaintiff having introduced her evidence and rested, the defendant offered, and there was admitted in evidence, against the ob-

jection of plaintiff, the judgment roll and satisfaction of judgment in the former case. After argument of the case, the court charged the jury that said former judgment having been plead in bar, and having been offered and admitted in evidence, the same was a bar to this action, and that they should therefore find for the defendant. Verdict and judgment accordingly, from which plaintiff appeals.

There was no error in the instruction. The right of action is purely a statutory one, and under section 377, Code Civil Proc., could be brought by either the heirs, or the personal representative, but separate actions could not be brought or maintained by both. Under the former statute it could only be brought by the executor or administrator, (*Kramer v. Railroad Co.*, 25 Cal. 434,) but that law has been so amended in and by the Code that now it may be maintained by either the heir or the executor or administrator. On this subject this court has recently said: "But one action is permitted, and that action may be brought either by the heirs of the deceased, or by his personal representatives, and when one action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits. As, for instance, when the personal representative of the deceased brings an action to recover damages for the act or negligence causing death, if another action is afterwards brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second, action." *Munro v. Dredging, etc., Co.*, ante, 303, 305, (No. 12,481, filed June 12, 1890.) This being the language of this court in bank, and directly in point on the question involved here, it is conclusive of this case, and it becomes unnecessary to discuss any of the other points made by the appellant. The executor had authority, with the approval of the probate court, to make the compromise. Code Civil Proc. § 1588; *Moulton v. Holmes*, 57 Cal. 343. Judgment affirmed.

We concur: PATERSON, J.; WORKS, J.

86 Cal. 132

LANGAN v. LANGAN. (No. 13,593.)

(*Supreme Court of California*. Sept. 30, 1890.)

APPEAL—JURISDICTIONAL AMOUNT—DISMISSAL.

1. An order to pay \$25 per month alimony, being a continuing order under which the payment of more than \$300 may be enforced, is within the appellate jurisdiction of the supreme court.

2. An appeal from an order allowing alimony will not be dismissed on the grounds that it is vexatious, and is interposed for the purpose of depriving the plaintiff of means of support pending litigation.

In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Matthews & Morse, for appellant. *John E. Sundstrom*, (*Manuel Eyre*, of counsel,) for respondent.

BEATTY, C. J. This is an action for divorce in which the superior court has

made two orders for temporary alimony, one requiring the defendant to pay to the plaintiff \$25 each month for her support, and another requiring him to pay her \$150 for counsel fees. Separate appeals were taken from each order. The appeal from the second order was dismissed on motion of respondent, because the amount involved was too small to give the court jurisdiction. 83 Cal. 618, 23 Pac. Rep. 1084. Respondent now moves to dismiss the appeal from the first order on the same ground. But the order to pay \$25 a month is a continuing order under which the payment of more than \$300 may be enforced, and it is therefore within the appellate jurisdiction of this court. If it had been so limited by its terms that it could not be enforced for so much as \$300, the case would have been different; but, as it is, the motion to dismiss must be denied.

It has been suggested that this appeal is vexatious, and merely intended to deprive the plaintiff of the means of support, pending the litigation. This may or may not be true of this case, but it is obvious that in like cases vexatious appeals may be prosecuted, especially if it is understood that the taking of an appeal will suspend the payment of alimony for a long time, and thereby inflict great hardship upon a party having no other means of support. To prevent this inconvenience as far as possible we have determined to expedite the hearing of appeals in this class of cases. Hereafter, on application of respondent, they will be placed on the next calendar made up after the filing of the transcript, and when an appeal is found to have been taken for delay the usual penalty will be imposed. Motion denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.

86 Cal. 119

SANDERS v. RUSSELL. (No. 13,745.)

(*Supreme Court of California*. Oct. 1, 1890.)

HOMESTEAD—CLAIMS AGAINST DECEDENT'S ESTATE—PRESENTATION OF CLAIMS.

1. The homestead of a husband and wife was their community property. After the husband's death a judgment was rendered against the widow, and execution levied on the property. After the widow's death the judgment creditor instituted proceedings under Civil Code Cal. § 1245, to have the property appraised, and the excess over \$5,000, if any, applied on his judgment. *Held* that, under Code Civil Proc. § 1505, providing that, if execution is actually levied on property of decedent before his death, the same may be sold for the satisfaction thereof, but otherwise a judgment against decedent must be presented to the executor or administrator like any other claim, as the levy on the homestead created no lien, the proceeding under section 1245 could not be maintained, but the judgment should be presented to the administrator.

2. Moreover, if the levy on the homestead created a lien, the proceeding under Civil Code Cal. § 1245, could not be maintained, it being provided by Code Civil Proc. Cal. § 1475, that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate."

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Code Civil Proc. § 1475, provides that, "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate."

Grove L. Johnson and Albert M. Johnson, for appellant. *A. P. Catlin and Lincoln White*, for respondent.

Fox, J. Judgment went for defendant on demurrer to the complaint. The only question on this appeal is whether the complaint states facts sufficient to entitle the plaintiff to maintain the action. James and Mary W. Lansing were husband and wife. The premises described in the complaint were their community property, duly dedicated as a homestead. James Lansing died, when the premises became the sole property of Mary W. Lansing by operation of law, (Civil Code, § 1265,) and was protected as such to the survivor in the same manner as before it had been protected to the community by its homestead character, (Estate of Ackerman, 80 Cal. 208, 22 Pac. Rep. 141.) The death of the husband did not in any manner alter the state or character of the homestead, (Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. Rep. 116;) but upon his death the property immediately vested in the surviving wife, (Mawson v. Mawson, 50 Cal. 539; Estate of Headen, 52 Cal. 295; Gagliardo v. Dumont, 54 Cal. 496; Herrold v. Reen, 58 Cal. 443.) The property having thus vested, and being thus protected, this plaintiff, on April 9, 1885, recovered a judgment against Mary W. Lansing, for \$5,238.75. September 30, 1885, he caused execution to be issued and levied upon the property, and duly returned with the levy indorsed thereon, and the whole to be duly entered and recorded in the "Execution Book," in the office of the county clerk. It is claimed that, at the time of this levy, the value of the property was largely in excess of \$5,000, and that, as to the excess, this created a lien upon the property. But this claim is not tenable. Property impressed with the character of homestead, no matter what its value, is exempt from seizure and forced sale. There was no lien of the judgment, and the levy created no lien, but simply created a foundation for proceedings under the statute, (Civil Code, § 1245 et seq.) for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment. Barrett v. Sims, 59 Cal. 618, 619; Lubbock v. McMann, 82 Cal. 230, 22 Pac. Rep. 1145. In October, 1885, plaintiff commenced proceedings under the statute referred to, to have an appraisement of the property, and secure an order for partition or sale, and application of the excess to the satisfaction of his judgment; but these proceedings were never prosecuted beyond having appraisers appointed. They never qualified or acted, and no further proceedings were taken in that action. In October, 1887, Mary W. Lansing died, and the present defendant was appointed her administratrix, qualified as such, and entered upon the discharge of

her duties as such, in the administration of the estate.

Early in 1889 this action was commenced, which is substantially a proceeding under the same statute, (Civil Code, § 1245 et seq.) for the appraisement and sale or partition of the property, and the application of the excess above \$5,000, to the satisfaction of his judgment. No claim was presented to the administratrix, and plaintiff claims that he was not required to present any, but that, having a lien upon the property, he was entitled to proceed under section 1505, Code Civil Proc., directly to sale, were it not for the homestead, but that, the homestead intervening, his only remedy was to proceed as in this action, and it being to enforce a lien the law did not require the presentation of the claim to the administrator, he having waived in his complaint all claim against the estate for deficiency. But we have already seen that he had no lien. Even if he ever acquired one, either by judgment or levy, it expired before the institution of this proceeding. Bagley v. Ward, 37 Cal. 121; Rogers v. Druffel, 46 Cal. 654. If the levy created a lien, it did not extend it beyond the lien of the judgment. Id.; and Isaac v. Swift, 10 Cal. 81. Plaintiff therefore had a judgment, without lien, and it was his duty to present the same to the administratrix, in like manner with any other claim. Code Civil Proc. § 1505. And, even if his claim was in lien, and the property was a homestead, as he concedes it to have been, he was equally bound to present the claim for allowance against the estate. Id. § 1475; Camp v. Grider, 62 Cal. 20. It follows that the complaint did not state facts sufficient to constitute a cause of action, and the judgment must be affirmed. So ordered.

We concur: SHARPSTEIN, J.; THORNTON, J.; McFARLAND, J.

I concur in the judgment: PATERSON, J.

86 Cal. 134

ROTH v. INSLEY et al. (No. 13,596.)

(Supreme Court of California. Oct. 2, 1890.)

HOMESTEAD—INJUNCTION—CLOUD ON TITLE.

1. Under Civil Code Cal. § 1265, providing for the disposition of a homestead after the death of the person whose property has been selected as a homestead, and also that in no case shall it be liable for the debts of the owner "except as provided in this title," a homestead set apart under section 1261, subd. 3, by a son with whom his mother resides, cannot be subjected to his debts after her death.

2. Where such homestead is about to be levied on and sold, an injunction will be granted to prevent a cloud from being cast on the title, for though the sale would be void under the statute, yet, as the judgment and execution are valid, the invalidity of the sale could only be shown by extrinsic evidence in ejectment for the land by the purchaser under execution.

3. Nor could defendant have had the execution recalled, for, being valid itself, it could not be recalled on the ground that it was levied on exempt property.

Commissioners' decision. In bank. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

C. C. Hamilton, for appellants. *Ray Billingsley*, for respondent.

FOOTE, C. This appeal is taken from an order refusing to dissolve an injunction. The defendants had caused an execution to be levied upon the homestead of the plaintiff, issued under a judgment obtained against him in a justice's court by one H. C. Howard. It is charged in the complaint that the defendant Insley, as constable, has levied upon the property, and is about to sell it under execution, and that the defendant Montgomery applied to the justice of the peace and had the execution issued without authority; that Insley has been duly notified that the property he has levied upon and advertised for sale is the homestead of the plaintiff, and exempt from execution; but that nevertheless the defendants are about to, and unless restrained by the superior court "will, sell plaintiff's said homestead property at forced sale to satisfy said judgment." It is further stated that the sale contemplated would cast a cloud upon the plaintiff's title to the property, and "would irreparably injure and disturb plaintiff in the quiet enjoyment of said premises, and that plaintiff has no speedy and adequate remedy at law." The court below granted a temporary injunction as prayed for. A motion was then made to dissolve said injunction; upon that motion, which as we have seen was denied, an affidavit was read that the plaintiff's mother died on the 18th of July, 1889. It was urged by the appellants here that since the declaration of homestead showed that the plaintiff had declared a homestead upon the property as the head of a family, because his mother was then residing with him on the property, under his care and maintenance, he was such "head of a family," in contemplation of law, only during the life-time of his mother, who thus resided with him, and was maintained and cared for by him, and that, at her death, the right to the exemption of the homestead from forced sale ceased, and that it became liable as any other property of the plaintiff. Conceding that, taking the complaint and declaration of homestead together, it appears that the only claim to be the head of a family which the plaintiff ever had was as a son with whom his mother resided on the property, and under his care and maintenance under section 1261, subd. 3, Civil Code, it appears to us that, under the statute governing the present matter, and hereafter cited, the homestead levied upon was exempt from the sale about to be enforced against it. The decisions in *Revalk v. Kraemer*, 8 Cal. 73, and *Bank v. Cooper*, 56 Cal. 340, cited by the appellant in support of his contention, are not in point. At the time they were made, section 1265 of the Civil Code, as amended in 1880, was not the law. That section, at the time the declaration of homestead under consideration was made, read, and now reads: "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been

created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner except as provided in this title."

There is no question raised here that the property was not a homestead, or that it was liable for any debt of the owner at the time it was declared, or that he was not the head of a family, and entitled to it as a homestead exempt from forced sale for any such debt as that on which the execution in this instance is founded; but the contention is that it became liable, after the death of his mother, to be sold under execution, as any other property of the plaintiff might be liable for any of his debts. Under the plain language of the statute just quoted, it would appear that, when the homestead was once declared, it remained, as such, always exempt from forced sale as against any liability of the owner, except as provided in the provisions of the title of which it was a part. And, as the debt here was not one for which under that title the property was liable, it must follow that the attempt to sell the property was forbidden by law, and a sale could vest no title in the purchaser.

But it is further urged that if such be the law the plaintiff was not entitled to an injunction, since no cloud would be cast upon his title by the sale, and hence no irreparable injury could result. The authorities do not sustain this view of the matter; for, if the sale under execution had taken place, and a deed to the purchaser been made, and all other proceedings in the matter were valid, and an action in ejectment had been brought by the appellants to recover from the plaintiff the possession of the property, the proceedings and muniments of title, which the plaintiffs in that action would produce, would not show on the face thereof that such plaintiffs had no title to the property. It would be necessary, in order to defeat their action, that the defendant there, respondent here, should introduce extrinsic evidence to defeat the action; that is, he would be obliged to introduce the declaration of homestead, so as to show that an execution sale, valid on its face, and under a valid judgment against him, was not good to pass title to the property levied upon, which, by the record, was shown to be vested in him, it is true, but not subject to this debt, because it was a homestead duly and legally declared, and not abandoned. The authorities seem to assert, where such necessity might exist of the introduction in an action of ejectment of such extrinsic evidence, that a sale as here proposed would cast a cloud upon the title to the property, and entitle the owner to have it enjoined, as was done in the present instance. *Pixley v. Huggins*, 15 Cal. 127; *Culver v. Rogers*, 28 Cal. 527; *Cohen v. Sharp*, 44 Cal. 29; *Porter v. Pico*, 55 Cal. 176.

The appellants claim further error in

that they urge that respondent could have applied to the justice of the peace who issued the execution and had the same recalled; hence that no necessity for an injunction existed, and none was proper. Inasmuch as the record shows that the judgment was valid and binding against the defendant in execution and his property, save that which was exempt as a homestead, and the execution likewise; the court having jurisdiction to render the judgment and issue the execution, we perceive no reason why, at the request of the defendant therein, even if he had made such application, the justice would have been authorized to recall the execution which the constable had levied upon exempt property, but which could have been levied properly upon other property of the defendant if he had chanced to have any.

As to the point made of the insufficiency of the complaint, as setting up facts showing threatened irreparable injury, we perceive no merit in it; as the pleading in question set out the facts showing that a cloud upon the title was threatened, and would be accomplished, unless the injunction issued. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

BEATTY, C. J. I concur in the judgment. The declaration of homestead in this case did not show that the claimant was the head of a family. It merely stated that he was, at the date of the declaration, actually residing on the premises with his mother, and altogether fails to state that she was under his care and maintenance, a condition made essential by the statute. Civil Code, § 1261, subd. 2. But it was a good declaration for any person other than the head of a family, (Id. §§ 1266-1269,) and sufficient to secure a homestead right of exemption to the extent of \$1,000, (Civil Code, § 1260.) Such being the case, the homestead could not be sold under execution upon a judgment other than one of those enumerated in section 1241 of the Civil Code, without taking the steps prescribed in section 1245 et seq. For these reasons the injunction was proper. The question is not necessarily involved in this appeal, and cannot be decided here, but I think it ought not to be intimated that the homestead of the head of a family remains exempt in his hands to any greater extent than \$1,000, after he has ceased to be the head of a family.

89 Cal. 339

FOX *et al.* v. TAY *et al.* (No. 12,817.)

(Supreme Court of California. Aug. 12, 1890.)

EXECUTORS—LIABILITY AS TRUSTEES—LIMITATIONS.

1. An executor who takes possession of assets belonging to the estate, and gives to his co-executors a note secured by mortgage for the amount, is a trustee of the fund, and the statute of limitations will not run in his favor until there is an express repudiation by him of the trust.

2. The fact that such executor was appointed in a foreign jurisdiction does not affect his relation to the estate as trustee, for though he could not by virtue of such appointment enforce the col-

lection, in another jurisdiction, of the assets belonging to it, yet, where they come into his hands by voluntary payment, they are received in his capacity as trustee, and that relationship is not altered by his giving his own note and mortgage for the amount.

3. The co-executors appointed in a foreign jurisdiction to whom the note and mortgage were given as trustees, can prosecute an action in that capacity to foreclose the mortgage without taking out ancillary letters of administration.

Department I. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Taylor & Haight, for appellants. A. N. Drown, for respondents.

PATERSON, J. Charles J. Fox was associated in business with G. H. Tay, Henry Brooks, and Oscar Backus, in San Francisco, up to the time of his death, which occurred in June, 1870. In his last will and testament he appointed the plaintiffs, A. J. Fox, Enoch Ketcham, and G. H. Tay his executors. They all appeared before the surrogate of Union county, N. J., where Fox resided and died, and qualified as executors. An inventory was made out, signed, and filed by Fox and Ketcham in April, 1872, in which the estate was shown to consist of the mortgage hereinafter referred to, valued at \$33,000, and a one-fourth interest in the accounts of the partnership, amounting to \$17,802.92; but the latter, being considered nearly worthless, was valued at only \$1,000 in the inventory. After he qualified as executor, Mr. Tay returned to San Francisco, and entered into correspondence with the executors in New Jersey concerning the settlement of the interest of the deceased in the partnership business. On June 3, 1871, he executed and delivered to them the promissory note in suit for \$33,000, payable five years after date to "Enoch Ketcham and Alanson J. Fox, trustees," together with the mortgage sought to be foreclosed herein; and on the same day Fox and Ketcham gave to him the following receipt: "New York, Jan. 3, 1871. Received from Tay, Brooks & Backus \$33,000, for account of estate of Charles J. Fox. \$33,000. ALANSON J. FOX. E. KETCHAM." During his life-time Mr. Tay paid the interest every six months through his agent J. W. Sullings, who was book-keeper for E. Ketcham & Co. of New York. The last check for this purpose was given January 11, 1883, and Mr. Tay died in April following. Although the interest money was sent in the name of George H. Tay & Co., it was charged to Tay's individual account on the books of the firm. In due time, after the death of Mr. Tay, the surviving executors presented their claim to his executors, but it appearing to the latter that the claim was barred by the statute of limitations, they declined to allow it. Thereupon this case was commenced.

By its terms the note matured January 3, 1876, and, of course, unless the relations of the parties to themselves and to the fund in controversy can be looked into, it became barred January 3, 1880. We think that the defendants were not entitled to claim the benefit of the statute of limitations. It is entirely clear to our minds that Tay, in his life-time, occupied such a

relation of trust towards the *cestuis que trustent* and executors under the will of Charles J. Fox, and to the fund which constituted the consideration of the note and mortgage in suit, that he could not have pleaded the statute of limitation, and his representatives stand in no better position. In qualifying as executors before Tay left New Jersey, the executors promised on oath "to make and exhibit unto the surrogate's office of the county of Union a true and perfect inventory of all and singular the goods, chattels, and credits, as far as the same have or shall come to their possession or knowledge, or to the possession of any other person or persons, to their use, to their knowledge." Afterwards an inventory was filed, in which the estate was represented as consisting of this \$33,000 note and mortgage, and \$1,000 in accounts. It is true this inventory was signed only by Fox and Ketcham, and there is nothing to show whether Tay had any knowledge of its contents; but the evidence shows conclusively, we think, that the latter always considered that the fund represented by the note and mortgages was a portion of the assets of the estate of Fox, deceased. Upon his return to California Mr. Tay addressed a letter to Mr. Ketcham, in which he says, among other things: "My Dear Ketcham: Yours of the 4th inst. is with me this A. M. Yesterday I received a letter from A. J. Fox, dated the 2d, both of about the same tenor, referring to and approving my proposition for the settlement of Charley's interest in our business. You will please write me at once, and tell me shall I make the mortgage in favor of Enoch Ketcham, trustee, or Alanson J. Fox, trustee, or Mrs. Emma F. Fox? My advice is Ketcham or Fox. My advice as executor of what I know would be the wish of Charley, as a friend of the widow and the little ones, is Ketcham or Fox. All of my best judgment enjoins me to say Ketcham or Fox, and not Mrs. Emma F. Fox. If Ketcham, Fox, and Tay, as true friends of the dead Charley, wish the derivable income to be used economically, and to aggregate or enlarge for reinvestment, and for reaccumulation, the mortgage should be in favor of Ketcham or Fox. * * * Write at once. * * * I trust the year upon which we have entered will be fruitful of happiness and prosperity for you and yours, my dear Ketcham, and that 1871 may be followed by very many more." The letter from Fox, referred to, says: "Your proposition for the settlement of Charley's interest in the business of Tay, Brooks & Backus seems to be a liberal one, and as favorable as he could expect. I have written to Mr. Ketcham that I am satisfied with your offer, and wish him to write you about it, with such suggestions as to details, etc., as he might think best. * * * I am very glad to know that Charley's family are to have so ample a provision for their support." On the 1st of June, 1871, a statement headed "Charles J. Fox, in account with Tay, Brooks & Backus," was sent to Ketcham and Fox, as executors of the estate of C. J. Fox, and signed by Tay, Brooks & Backus, showing a balance to

the credit of the deceased of \$35,839.46, and a one-fourth interest in accounts amounting to \$46,692.21. Mr. Tay wrote on the back of the note and mortgage, which he sent to New Jersey, the following: "The within note and the mortgage given to secure its payment are held by us in trust for Emma F. Fox, widow, and ——— and ———, minor children of Charles J. Fox, deceased, and in accordance with their respective interests under the will of deceased." The names Louisa Fox and Sheridan Fox were written in the blanks by the executors. The telegrams directing payment of interest specify the purpose in various ways, and one says, "Pay Ketcham interest Fox estate," another, "Pay Tay's mortgage interest." Mr. Sullings testified that the statements were forwarded to him in letters written by Mr. Tay, in the name of George H. Tay & Co., and that he sent Mr. Tay a statement of the payments of interest; that Mr. Tay directed him at the time he gave him a power of attorney to pay the interest on the note and mortgage, and the other claims as they might arise, by giving checks on the Market National Bank, signed "GEORGE H. TAY & Co." for several years prior to the death of Fox, Backus & Tay were the only partners in the business. Mr. Backus testified that he had nothing to do with sending any telegrams, and knew nothing of any mortgage or any liability on account of any mortgage; that Mr. Tay had never spoken to him about any mortgage. The books of the firm were introduced in evidence, and Mr. Warner, one of the employes, testified that the items of interest therein pointed out were charged to the private account of Mr. Tay.

While Mr. Tay could not, by virtue of his appointment in New Jersey, administer upon any estate of Fox in this state, it was his duty to take charge of any personal asset of the estate which he found here, and send it to New Jersey for administration. Although a foreign executor may have no coercive power for the collection of assets in the jurisdiction in which he resides, yet, if assets situated in that jurisdiction come into his possession by a voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction. *Schouler, Ex'rs*, § 175; *Parsons v. Lyman*, 20 N. Y. 103; *Wilkins v. Ellett*, 108 U. S. 258; *Wyman v. Halstead*, 109 U. S. 656, 3 Sup. Ct. Rep. 417. Mr. Tay took the interest of the deceased in the partnership to himself, and gave his note and mortgage in evidence thereof. The change of form did not, in our opinion, change the real character of the property, so far as it was related to the estate of Fox. The note and mortgage were simply an asset in another form. If Mr. Tay had sold the property to another, received the money, and given this note and mortgage to the other executors, he would still have remained in possession of a fund belonging to the estate; or if he had sent the purchase money to the executors in New Jersey, and, at his request, they had returned it to him as a loan, he would not have been any more a trustee than he was by receiving and holding it without the money having changed hands. "If a trust-

tee receive any portion of the funds from a transaction, he must personally see to the application of them. He cannot pass them over to his co-trustee for investment or distribution; and, if he do so, he will be personally responsible for the acts and defaults of such co-trustee." 1 Perry, Trusts, § 418. "By this rule, trustees may be liable to great losses while they can receive no profit; and the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust funds upon the chances of trade and speculation." *Id.* § 429. If the money had been lost in speculation all the executors would have been liable therefor. It was the duty of Tay to see that the estate received the fund which he had collected. It would still be his duty to do so if he were alive, and the fact that he had given a note and mortgage would be no defense to an action therefor, and the statute of limitations would be no defense. In case of an express trust the statute does not commence to run until a repudiation of the trust. *Hearst v. Pujol*, 44 Cal. 235; *Janes v. Throckmorton*, 57 Cal. 388; *Broder v. Conklin*, 77 Cal. 339, 19 Pac. Rep. 513; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. Rep. 3; *Perry, Trusts*, § 863. Mr. Tay not only did not put himself in hostility to the trust, but recognized it by punctually paying the interest as it fell due up to the time of his death. By qualifying as trustee under the will of Fox, he became the trustee of an express trust. He was required by the terms of the will to invest the proceeds of the estate for the benefit of the wife and children of Fox, and he did so by taking the fund unto himself, and paying interest thereon. The form in which the transaction was conducted could not wipe out the fiduciary relation. If he had kept the fund without giving any written promise, he would not have been released from his obligation to account to the estate of Fox, nor could he have shielded himself behind the plea of the statute of limitations, without express, open repudiation of the trust. As stated before, it was as much his duty to protect and preserve the estate as it was the duty of his co-executors. The evidence all shows that Mr. Tay himself recognized this responsibility, and intended to live faithfully up to it. It cannot be said that he took no further action or interest in the matter than to qualify as trustee. His letters indicate the liveliest interest in the settlement of the estate, and in the welfare of the widow and children. There is no merit in the contention that the firm settled for the Fox interest in the partnership, and sent the money to the executors in New Jersey. It is true that the receipt given by the executors would, unexplained, indicate that such was the fact, but the evidence in the case, considered as a whole, shows beyond a doubt that the executors never received anything on account of the \$33,000 interest in the partnership, except the note and mortgage.

We do not think it was necessary for the plaintiffs to take out letters testamentary here. They are endeavoring herein to secure trust moneys which came into the hands of their co-trustee since the death

of the decedent, and are prosecuting the suit as mortgagees under the terms of the mortgage made by the co-trustee himself. A trust will be enforced, if at all, only indirectly, and by the application of the rule of equitable estoppel. *Barton v. Higgins*, 41 Md. 546; *Brown v. Gas-Light Co.*, 58 Cal. 426; *Hall v. Harrison*, 21 Mo. 227. The case of *Lewis v. Adams*, 70 Cal. 403, 11 Pac. Rep. 833, does not hold contrary to this view. It is authority simply for the proposition that the executor cannot, as such, prosecute an action in a foreign jurisdiction on a cause of action accruing to his testator. Here the claim is not one which accrued to the testator, but it accrued to his executors after his death. It is an asset which came into the hands of the co-trustee without administration. He was entitled to receive it, and, there being no claim of any kind, either by creditor or distributee in this state, it was his duty, and is the duty of his representatives, to turn it over for distribution according to the laws of the state of New Jersey. *Estate of Apple*, 66 Cal. 432, 6 Pac. Rep. 7.

The court did not err in excluding the depositions. The appellants were precluded by the statute from being examined as witnesses "as to any matter of fact occurring before the death of Tay." The incompetency thus created is only limited, and partial, and the parties could testify to any facts occurring subsequent to the death of Tay. We see nothing in the stipulations which operated as a waiver of the objections made at the trial. In view of what has been said, it is unnecessary to pass upon the question as to whether the acknowledgments alleged and proved had the effect claimed for them by the appellants. Judgment and order reversed, and cause remanded for a new trial.

We concur: FOX, J., WORKS, J

85 Cal. 432

PEOPLE v. TURNER. (No. 20,667.)

(*Supreme Court of California.* Sept. 2, 1890.)

INFORMATION—SIGNATURE—DE FACTO ASSISTANT
—DISTRICT ATTORNEY.

1. An information for murder signed and presented by a *de facto* assistant district attorney appointed by the board of supervisors without authority, but recognized as such by the district attorney, and acting under his directions, is good, as being the act of the proper officer.

2. The fact that both defendant and decedent were Indians does not deprive the superior court of jurisdiction of the crime.

In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Spencer & Raker and *C. A. Raker*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOX, J. Information for murder, conviction of manslaughter.

1. The first point made is that the court erred in refusing to strike the information from the files: (a) Because it had not been preceded by an examination before a committing magistrate; (b) because it had not been signed, presented, or filed in open court by the district attorney of the county. The first information filed had been set aside, and before the filing of the

information upon which the trial and conviction was had, an examination had been regularly had before the judge of the superior court sitting as a committing magistrate. J. H. Stewart was the district attorney of the county. He had never made any formal appointment of a deputy or assistant district attorney, but the board of supervisors of the county had, before that time, under a provision of the county government act as it then stood, authorizing them to provide for the appointment of an assistant district attorney, whenever in their judgment they should deem it necessary, not only provided for the appointment of one, but believing that the board was the proper party to make the appointment, had appointed J. J. May to that position. He had duly qualified, and was by the district attorney recognized as duly appointed his assistant, and was acting as such, with the knowledge and approval of the district attorney. Shortly before the examination was held the district attorney left the county, and was absent until after the information was filed. Before leaving he told May, the assistant, if the defendant was held to answer to prepare and file the information. After the examination, and the order holding the defendant to answer, May took a blank information, which had been signed by the district attorney, filled it out, added to the signature of the district attorney which was already attached as such his own signature as assistant district attorney, and having completed the same filed it in open court. He was at the time assistant district attorney *de facto*, if not *de jure*. No other person was claiming the office. He was acting under and by the directions of the district attorney. His acts were valid and it was not error to deny the motion.

2. Defendant then moved to set aside the information on the same grounds upon which the other motion had been made. The motion was denied, and this is also assigned as error. There was no error in this ruling.

3. The next error assigned is that the court erred in overruling defendant's demurrer to the information. The information was complete and sufficient, in all the particulars referred to in the demurrer; it charged the offense in the language of the statute, and was sufficient in that regard. It is claimed in and by the demurrer that the court had no jurisdiction, because both the decedent and the defendant were Indians. We know of no law, and are cited to none, which supports such a position, on the facts as shown in this record. There was no error in overruling the demurrer.

These are the only errors assigned, or specifications made, in the bill of exceptions, and consequently the only points which demand our consideration. Upon the argument, however, counsel criticises some of the charges given by the court to the jury, and some of the proceedings had in the course of the trial, as well as the form of the judgment. No exception was taken to any of the matters so urged in argument, but we have examined the record, and find that the instructions and

proceedings, in the matters referred to, are free from error. Judgment affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

85 Cal. 251

WALDRON V. WALDRON. (No. 13,503.)

(Supreme Court of California. Sept. 1, 1890.)

On petition for rehearing. For former opinion, see ante, 649.

WORKS, J. A rehearing is denied. The petition in this case is discourteous and disrespectful in some of its language. However individual members of the court may regard such conduct on the part of attorneys as affecting them, personally, it is an offense against the court that cannot be allowed to pass without rebuke. An attorney who has a sufficient understanding of his high calling, and the respect due to the court, as well as the respect due to his profession, should not so far forget himself as to use such language. Because of the important question presented we have carefully considered the points made, notwithstanding the manner in which they were presented in the petition. But, having done this, out of consideration for the better feelings of counsel who filed it, as well as to prevent a recurrence of a like offense, the objectionable language should not be perpetuated as a part of the records of the court. It is therefore ordered that the petition for a rehearing be and the same is hereby stricken from the files.

We concur: THORNTON, J.; FOX, J.; SHARPSTEIN, J.

BEATTY, C. J., (*dissenting*.) I did not participate in the decision of this case, owing to want of opportunity to examine it within the time allowed for a decision. Since the petition for rehearing, I have considered it carefully, and I am unable to concur in the judgment or the order refusing a rehearing. I think section 94 of the Civil Code defines extreme cruelty, and that by such definition it consists of either—*First*, the infliction of grievous bodily injury; or, *second*, the infliction of grievous mental suffering. This definition was, I think, intended by the legislature to be complete, and this conclusion is not invalidated by what must be conceded to be true, viz.: That the acts or words causing the mental suffering or bodily injury must be not only intended but unjustifiable. These qualities of the acts of cruelty are sufficiently implied in the word "infliction." In this view the finding of the superior court comes up to the law, and nothing more can be required. The testimony, in my opinion, is sufficient to support the finding. It is possible that the application of the epithets testified to by a man to his wife in the presence of third parties might not cause her grievous mental suffering, but, on the other hand, they probably would; and in this case the superior court has found that they did, in fact, cause such suffering, unless this conclusion is negated by the other fact found that her bodily health was not af-

fect. But this, in my opinion, was not essential as a test of the degree of suffering contemplated by the statute. While dissenting from the judgment of the court and the order refusing a rehearing, upon the grounds thus briefly indicated, I concur in the view that some of the language employed by counsel in their petition for rehearing was intemperate, and improper to go upon the records of the court.

McFARLAND, J. I dissent from the order denying a rehearing, and adhere to the views expressed in my former dissenting opinion. I concur in the views of the majority of the court as to the objectionable language used in the petition for rehearing.

86 Cal. 122

LANDREGAN v. PEPPIN. (No. 13,526.)

(Supreme Court of California. Oct. 1, 1890.)

TAXATION—ASSESSMENTS—NOTICE TO REDEEM FROM SALE.

1. Under Pol. Code Cal. § 3628, providing that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid," an assessment to M. & Co. of property standing in the name of M., but in fact owned by a third person, is binding on the property.

2. Under Pol. Code Cal. § 3785, (as amended March 12, 1885), providing that, prior to obtaining a deed of land purchased at delinquent tax-sale, the purchaser thereof "must, thirty days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve upon the owner * * * a written notice stating * * * the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner shall have the right of redemption indefinitely, until such notice shall have been given," the purchaser gets no title under a tax-deed which affirmatively states that the land was sold for a certain amount, and that the notice to redeem stated that it had been sold for a less amount.

3. Under Code Civil Proc. Cal. § 12, providing that the computation of time in which an act provided by law is to be done shall exclude the first day and include the last day, a notice, July 25th, fixing August 23d as the time when the purchaser would apply for a tax-deed, is only a notice of 29 days "previous to," etc.

4. The recital in the deed that a 30-days notice was given will be controlled by the statement that it was given July 25th, and fixed August 23d as the last day for redemption.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Goodwin & Goodwin, for appellant.
Edward C. Robinson and W. W. Kellogg, for respondent.

FOOTE, C. This action is brought to quiet title to a certain piece of land in Plumas county. The court below rendered judgment as prayed for, from which, and an order refusing a new trial, the defendant takes this appeal. From the record it appears that in the year 1881 William Minto obtained the land by deed of conveyance from one Ward; that Minto afterwards, in January, 1886, made a deed of it to certain parties, which conveyance was not placed upon record until September, 1886. Through mesne conveyances from these parties the plaintiff claimed

title. Since about March, 1887, the defendant has been in possession of the property in dispute. The state and county taxes on it for the year 1886 were assessed to William Minto & Co. The taxes becoming delinquent the property was sold in February, 1887, to satisfy the same. At that sale one Hall became the purchaser, and he assigned his certificate of purchase to the defendant. In August, 1888, the latter obtained a deed to the premises from the tax-collector, through which the defendant claims to be the owner of the land. Upon the validity of this tax-deed to pass title to the land, this controversy depends. It does not satisfactorily appear from the record upon what precise ground the trial court deemed the deed invalid. The respondent contends that it is so upon several grounds. His first position is that the assessment to William Minto & Co. is void as respects the real property, which then appeared upon the record as that of William Minto. The decisions which he cites in support of his position were made prior to the amendment of 1880, to section 3628 of the Political Code. To that section, as amended, construction was given by the appellate court in *Lake Co. v. Mining Co.*, 66 Cal. 19, 4 Pac. Rep. 876, where it is said: "The assessment put in evidence shows property assessed to 'Sulphur Banks Q. S. M. Co.' Section 3628 of the Political Code provides: 'No mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid.' There is nothing in the language of the section to indicate that the clause quoted can be given effect only when an attempt is made to enforce the lien for the tax. The effect of the clause in section 3628 is but to give a more enlarged operation to a rule already established. Prior to the adoption of that clause it has been frequently held that a defendant sued for a tax assessed to 'unknown' owners could not be permitted to prove that the assessor might, with more diligence, have ascertained the real owner of the property. On behalf of the defendant in those cases, it was urged that, unless inquiry was permitted, with respect to care and diligence of the assessor, that officer would have it in his power entirely to neglect his duty, and to assess to unknown owners property, the ownership of which he should use no effort to ascertain, or which he might even know to belong to a particular person. So here, it is said that, if he is allowed to assess the property to a person other than the real owner, he may abuse the power. But the ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned. In the case before us the defendant was sued as the owner of the property assessed to the 'Sulphur Banks Q. S. M. Co.' If the defendant is not the owner of such property, it had full opportunity to establish that fact; but it is not a defense to the payment of the taxes upon the real estate that the assessor mistook the name of the owner of it." The assessment here was therefore binding upon

on the property, and, so far as it goes, the deed was valid.

But it is further claimed that the notice to redeem, prescribed by section 3785 of the Political Code, which was offered in evidence and excluded, was insufficient. With that matter, upon this appeal, we have no concern. The appellant here is not complaining of any error of the trial court when it excluded the evidence offered upon that point by the respondent. The evidence is not, therefore, before us.

From the tax-deed, which was in evidence as the basis of defendant's title, it appears that, at the sale of the land for taxes, the amount due therefor was the sum of \$49.64, and that Hall, the purchaser, bid that sum for it; that it was sold to him for that amount, which he paid, and that he therefore became the purchaser thereof. But it is further stated in the deed that in the notice to redeem, which Peppin, the assignee of the certificate of sale, served upon William Minto & Co., those to whom the assessment was made, the land was sold for \$45.90, and that such amount was due thereon for delinquent taxes. Thus, the amount mentioned in the deed for which the land was sold for taxes differs from the sum mentioned in the notice to redeem, in that the latter amount is less than the former by \$3.74. Section 3785 of the Political Code (as amended March 12, 1885) provides, among other things, that, prior to his obtaining a deed to the land he has purchased at delinquent tax-sale, the purchaser thereof "must, thirty days previous to the expiration of the time for the redemption, or thirty days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice stating that said property or a portion thereof has been sold for delinquent taxes, giving the date of the sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of said property shall have the right of redemption indefinitely, until such notices shall have been given, and said deed applied for, upon the payment of the fees, percentage, penalties, and costs required by law." Since it appears affirmatively from the deed itself that the notice thus required did not contain the amount for which the land was sold for taxes, but notified the owner of the land that it had been sold for a different amount of money, it would seem as if the purchaser was not entitled to have the deed made to him, and that it conveys no title to the land in dispute.

The recitals of the deed further show that the notice to redeem was served on the 25th day of July, 1888, and that it fixed August 23, 1888, as the time when the purchaser would apply to the tax-collector for a deed. This was giving the notice only 29 days "previous to the expiration of the time for the redemption," at which time the application for a deed was to be made, under the rule declared in section 12 of the Code of Civil Procedure,

which, in the computation of time in which an act provided by law is to be done, excludes the first day, and includes the last. *Misch v. Mayhew*, 51 Cal. 516.

The law requires that such notice must be served "thirty days previous to the expiration of the time for the redemption, or thirty days before he [the purchaser] applies for a deed." Pol. Code, § 3785. It is true that one of the recitals of the deed is that this 30-day notice was given, but, in the same sentence in which that occurs, it is further stated that the date of service was the 25th day of July, 1888, and that the time for the redemption of the land sold for taxes, and when the purchaser would apply for his tax-deed, was the 23d of August, 1888, so that taking the whole sentence together it appears beyond dispute that the first recital, as to 30 days' notice having been given, is not true. For this reason also the purchaser was not entitled to a deed, and that which he obtained is invalid. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

WORKS, J., dissenting.

86 Cal. 144

PEOPLE v. AH GEE YUNG. (No. 20,682.)
(*Supreme Court of California*. Oct. 5, 1890.)

CRIMINAL LAW—MURDER—INTENT—BURDEN OF PROOF—INSTRUCTIONS.

1. Under Pen. Code Cal. § 1105, providing that after the commission of the criminal act is shown by the prosecution, the burden of proof then rests on defendant to show the absence of criminal intent, it is only necessary for defendant to introduce such evidence as will create a reasonable doubt of his guilt. He need not prove the circumstances of mitigation by a preponderance of evidence.

2. Where the court instructs the jury as to the various degrees of murder, and also as to the forms of the verdict proper in case they convict of any of the different degrees, or acquit, there is no prejudicial error in the fact that one sentence of the instruction taken separately may be construed to imply that defendant is guilty of murder or manslaughter.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

G. W. Jones, M. Farley, and Graham & Monson, for appellant. Atty. Gen. Geo. A. Johnson, W. D. Tupper, and H. H. Welsh, for respondent.

FOOTE, C. The defendant was convicted of murder in the first degree. From the judgment rendered against him, and an order denying a new trial, this appeal is prosecuted. It is argued, on behalf of the defendant, that the court, among others, gave an erroneous instruction to the jury, reading thus: "In every crime or public offense, gentlemen of the jury, there must exist a union or joint operation of act and intent or criminal negligence. But, when the act committed by the accused is of itself an unlawful act, the law, in the first instance, presumes the criminal intent, and

the *onus* or burden of proof falls upon the defendant to show the absence of criminal intent. In this case, if you find from the evidence that the defendant struck the fatal blow, then the burden of proving circumstances of mitigation, or that justify or excuse the homicide, devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Following this it is stated: "The law presumes every man to be innocent until his guilt is established beyond any reasonable doubt, and this presumption attaches at every stage of the case, and to every fact essential to a conviction." And throughout the instructions asked by the defendant, and given by the court, the principle is enunciated that at all times, and under all circumstances, it is incumbent upon the people to establish the guilt of the defendant by evidence beyond any reasonable doubt. Nowhere, either in the charge or in the instructions, is it even hinted that the lifting the burden, by showing the absence of criminal intent thrown upon the defendant by the proof that he struck the fatal blow, must be done by any preponderance of proof. The instruction in this respect, substantially, is in the language of section 1105 of the Penal Code, and the meaning to be attached thereto is expressly stated in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, as follows: "The section [1105, Penal Code] casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound under this rule to produce such evidence as will create, in the minds of the jury, a reasonable doubt of his guilt of the offense charged." When such reasonable doubt is thus raised, the presumption of criminal intent is overcome, the burden or *onus* is lifted, and the jury must presume an absence of such criminal intent. An unlawful act is presumed to have been committed with unlawful intent. Section 1963, Code Civil Proc., subd. 2. But such intent may be controverted by other evidence, and, in a case like the present, that intent may be rebutted, and its absence shown by any evidence which may raise, in the minds of the jury, a reasonable doubt of its existence; but such rebuttal it is incumbent upon the defendant to make, somewhere in the evidence. After such a plain declaration by the appellate court as to the meaning of the statute, it is not perceived how the giving of an instruction which embodied its provisions, coupled with others which so fully and clearly enforced the right of the defendant to have, in every step of the case, all reasonable doubts as to his guilt, or as to any fact essential to show guilt, resolved in his favor, could have prejudiced him, and we are unable to perceive any

force in the argument of counsel that an instruction virtually in the language of the statute is in itself misleading.

The further point is made that the following instruction is wrong. It is, (the italics being our own:) "Under the information in this case, the jury may, if the evidence warrant, find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter. Should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, *if any*, they will give the defendant the benefit of such doubt, and acquit him of the higher offense. That is to say, gentlemen of the jury, should you be convinced by the evidence, beyond a reasonable doubt, that the defendant is guilty of murder, and yet have a reasonable doubt as to whether he is guilty of murder in the first or second degree, you can only find him guilty of murder in the second degree. So, if the doubt in your mind be as to whether he is guilty of murder in the first or second degree, or of manslaughter, you can find him guilty of manslaughter only." The reason given by the appellant why the instruction is erroneous is that he claims it carries with it the impression to the jury that the defendant is guilty of some offense; that the jury are told that they may find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter, as the evidence may warrant, but they must find him guilty of some one of them, and they cannot find him not guilty. The jury is instructed: "Should your judgment be one of conviction, you should state the degree of the offense for which you convict. Should your verdict be one of acquittal, you will simply say, 'We, the jury, find the defendant not guilty.'" And by consent, the court instructed the jury particularly as to what the form of their verdict should be in the event they found the defendant guilty of murder in the first degree, and how the form should be on that verdict if they should fix his punishment at imprisonment for life in the state-prison. Also, as to what the form should be for murder in the second degree, for manslaughter, and for a verdict of not guilty. It does not seem possible, from what we have quoted, and from the general tenor of the very full and clear charge and instructions, that the jury could have been misled in any degree into the belief that the court was of the impression, and so instructed them, that the defendant was necessarily guilty of some crime, and that they could not, if the evidence warranted, find him not guilty. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

THORNTON, J. I concur in the judgment.

McFARLAND, J. I concur in the judgment, but do not wish to be understood

as commending or approving the first part of the instruction first quoted in the opinion of the commissioner. It is always dangerous to inject new language into the statement of old propositions. After all that has been said by this court in the Bush-ton Case, and since then, about requiring defendants to prove certain things by a preponderance of evidence, it would seem that trial courts might exercise some caution not to state the rule stronger against a defendant than it is stated in section 1105 of the Penal Code.

88 Cal. 110

JOHNSON V. VANCE. (No. 13,569.)

(Supreme Court of California. Sept. 30, 1890.)

RES ADJUDICATA—PLEADING AND PROOF.

1. Plaintiff in ejectment alleged ownership of a certain section of land, and that she had been ousted therefrom by defendant, who admitted in his answer that he held possession of the east half of the section, but denied holding possession of a portion of the west half. Judgment was rendered declaring plaintiff to be the owner of the east half, but no decree was made in reference to said portion of the west half. *Held*, in a subsequent action of ejectment against defendant for said portion of the west half, that plaintiff's right to the possession thereof was not *res adjudicata*, as no decree was made in the former action in reference to it.

2. Where issue is not joined as to the damages alleged to have been sustained, no proofs upon the subject are required.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county: J. G. SWINNERTON, Judge.

Amos H. Carpenter, for appellant. *Baldwin & Campbell*, for respondent.

BELCHER, C. C. This is an appeal from a judgment entered against the defendant on the pleadings, and the case is brought here on the judgment roll. The action is ejectment. The complaint alleges that on the 9th day of October, 1888, the plaintiff was the owner and in possession of the N. W. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 31, in township 3 N., range 9 E., Mount Diablo base and meridian; and that, on the day named, the defendant entered and ousted the plaintiff from the said land, and has ever since continued to withhold the possession thereof from the plaintiff, to her damage in the sum of \$1,500. For answer to the complaint the defendant pleads, in bar of the action, a judgment entered in a former action between the same parties; and this is his only attempted defense. The answer alleges that the complaint in the former action was filed on the 8th day of June, 1888, and that the judgment therein was made and entered on the 2d day of October, 1888. It then sets out a copy of the complaint, answer, findings, and judgment in the former action, from which it appears that the plaintiff alleged that in June, 1887, she was the owner in fee-simple, and entitled to the possession, of the above-described section of land; and that afterwards, in the same month, the defendant ousted and ejected her from the possession thereof; that the defendant admitted his possession of the E. $\frac{1}{2}$ of the said section, but denied that he was ever in possession, or claimed to be in posses-

sion, or ever ousted or ejected the plaintiff from the possession, of the W. $\frac{1}{2}$ of the section, except the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ thereof, which it was alleged that he owned, and was entitled to the possession of; that the court found that the plaintiff was the owner of all the land described in her complaint, except the 40 acres alleged by defendant to be owned by him; and that, during the time mentioned in the complaint, defendant withheld from plaintiff the E. $\frac{1}{2}$ of section 31 described in said complaint; and that judgment was entered that the plaintiff recover from the defendant possession of the E. $\frac{1}{2}$ of said section 31. The answer then further alleges that the possession of exactly the same land is demanded in the complaint in this action as was demanded in the complaint in the former action, and that the parties, plaintiff and defendant, are the same in both actions; that the judgment in the former action finally determined and decided that the plaintiff was the sole owner of all the land described in her complaint in this action, and that the said judgment is now in full force and effect, and binding upon plaintiff and defendant in this action; "that the defendant herein has acquired no title, and claims to have acquired no title to any of the land described in the plaintiff's complaint herein, since the commencement of said former action for the possession of the said land in controversy; that the title to the land described in plaintiff's complaint herein, and the right of possession thereof, has become and is *res adjudicata* by and between the parties to this action, by reason of said judgment duly made and rendered in this court in favor of the plaintiff herein, and against the defendant, on said 2d day of October, 1888." Wherefore defendant prays that the action be dismissed, and that he have judgment for his costs. When the case was called for trial counsel for plaintiff moved for judgment on the pleadings, and the motion was granted on the ground that none of the allegations of the complaint were denied. The judgment was that the plaintiff recover from the defendant possession of the demanded premises and \$1,500, with costs.

Only two questions are presented here for decision. The first relates to the plea in bar, and the second to that part of the judgment which awards the plaintiff \$1,500.

1. It is not controverted that a plaintiff is entitled to a judgment on the pleadings, if his complaint states a cause of action, and the answer presents no defense. And it is true that a judgment rendered in an action to recover the possession of real property is, as to all matters put in issue and passed upon in the action, conclusive between the parties and their privies, and a bar to another action between the same parties, or their privies, where the same matters are directly in issue. *Caperton v. Schmidt*, 26 Cal. 479; *Thrift v. Delaney*, 69 Cal. 189, 10 Pac. Rep. 475. But does that rule apply here? It must be observed that this is an action to recover possession of a part of the W. $\frac{1}{2}$ of a section, and that the judgment pleaded in bar was for the possession of the E. $\frac{1}{2}$ of the section. The plaintiff in the former action alleged own-

ership of the whole section, and that she had been ousted therefrom by the defendant, but he denied that he had ever been in possession of, or had ever ousted the plaintiff from, the land here sued for; and, while the court found that the plaintiff was the owner of the land here in controversy, still as to it no judgment was rendered, presumably because the court was of the opinion that the defendant's denials in regard to it were true. In this case the plaintiff alleged that the defendant entered upon the land and ousted her therefrom seven days after the former judgment was rendered, and this, not being denied, must be taken as true. Under such circumstances how can the former judgment be a bar to this action? If it can, then the plaintiff, though having an unquestioned right to the possession of her property, must be denied all relief by the courts. We think it clear that the case does not come within the rule above stated, and that the action was not barred.

2. It is contended that the judgment for \$1,500 cannot be sustained, because it was for unliquidated damages, and no proofs were taken as to the amount which should be allowed. But there was no issue as to the damages alleged to have been sustained by the plaintiff, and no proofs upon the subject were therefore required. It has been so held in this state from the earliest times. *Hartman v. Williams*, 4 Cal. 254; *Patterson v. Ely*, 19 Cal. 29; *Dimick v. Campbell*, 31 Cal. 239; *Huston v. Turnpike Road Co.*, 45 Cal. 550. We find no error in the record, and advise that the judgment be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

86 Cal. 128

JOHNSON v. VANCE. (No. 13,570.)

(Supreme Court of California. Oct. 1, 1890.)

EJECTMENT—PLEADING—FINDINGS.

1. A complaint, which avers that plaintiff is "the owner in fee-simple" of a certain tract of land, is not demurrable on the ground that the averment is a conclusion of law and not of an ultimate fact.

2. Where the complaint in ejectment alleges that defendant is in possession of the whole of a section of land, and the answer alleges he is in possession of only the east half, a judgment declaring plaintiff owner of the east half will not be reversed because it fails to find as to the west half, as it is an immaterial issue.

3. A finding in ejectment that "defendant withheld the east half of section 13," is a sufficient finding that he withheld the east half of section 31, where that is the only section mentioned in the complaint.

4. Where plaintiff in ejectment alleges possession by defendant, and he admits it, it is not necessary that the court should find that defendant was in possession, as findings as to admitted facts are not required.

5. While the *gravamen* in an action of ejectment is the wrongful withholding, it is not necessary that the words "wrongful" or "wrongfully" should be used in a finding that defendant ousted plaintiff.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Amos H. Carpenter, for appellant. *Baldwin & Campbell*, for respondent.

BELCHER, C. C. This is an action of ejectment. It is alleged in the complaint that on the ——— day of June, 1887, plaintiff "was the owner in fee-simple, and entitled to the possession," of the land described as section 31, township 3 N., range 9 E., Mount Diablo base and meridian, and that afterwards, in the same month, the defendant entered on the land, and ousted and ejected the plaintiff therefrom. A general demurrer to the complaint was interposed, and overruled. The defendant, Vance, then answered. The answer denied that defendant ever was in possession, or claimed to be in possession, or ever ousted or ejected the plaintiff from the possession, of the west half of the section described, except the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ thereof, which, it alleged, the defendant owned, and was entitled to the possession of. It then alleged that in the month of April, 1880, defendant came into possession of the east half of the section, and that he "is now, and ever since has been, continuously, in possession of said land, to the exclusion of every other person, and especially the plaintiff." It further alleged that the plaintiff's cause of action was barred by the statute of limitations. The court found that the plaintiff was the owner of the land described in the complaint, except the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ thereof, and "that defendant has, during the time mentioned in said complaint, withheld from plaintiff the east half of section thirteen, described in said complaint." It further found that the action was not barred. Judgment was entered that the plaintiff recover from the defendant the east half of section 31; and from this judgment the defendant has appealed on the judgment roll.

1. It is claimed that the demurrer should have been sustained, because the only averment in the complaint as to the plaintiff's title to the demanded premises was that she was "the owner in fee-simple," etc. It is urged that this was an averment of a conclusion of law, and not of an ultimate fact; and hence that it was insufficient. This position cannot be maintained. In *Payne v. Treadwell*, 16 Cal. 243, the same objection to the complaint was made, and overruled, and the law there declared as to the sufficiency of an averment, like that here called in question, has been approved and followed in numerous subsequent cases. *Garwood v. Hastings*, 38 Cal. 217; *Turner v. White*, 73 Cal. 299, 14 Pac. Rep. 794; *Heeser v. Miller*, 77 Cal. 192, 19 Pac. Rep. 375; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. Rep. 183.

2. It is contended that a material issue was raised by the answer as to whether or not the defendant was in possession of the west half of the section, and that the court wholly failed to find upon this issue; and hence that the judgment should be reversed. The obvious answer to this point is that, while the court found that the plaintiff was the owner of all of the sec-

tion, except 40 acres, it gave judgment against the defendant only for the restitution of the east half thereof. When, therefore, the judgment was entered, the issue as to the possession of the west half of the section became wholly immaterial, so far as the defendant was concerned. And the rule is well settled that a judgment will never be reversed for a failure to find upon an immaterial issue.

3. It is further contended that the court failed to find that defendant was ever in possession of, or ousted and ejected the plaintiff from, the east half of section 31. But the answer affirmatively alleged that the defendant, since April, 1880, had been continuously, and then was, in possession of the east half of that section "to the exclusion of every other person, and especially the plaintiff." And, as shown by the record here, the court did find that defendant "withheld from plaintiff the east half of section thirteen, described in said complaint." The word "thirteen" is evidently a mistake, and should be read as "thirty-one," that being the only section described, or referred to, in the pleadings. Under these circumstances, it was not necessary that there be any finding as to defendant's possession, the rule being that findings are never required as to facts admitted by the pleadings.

It is urged, however, that the finding as to the ouster was insufficient, because the court did not find that the defendant wrongfully withheld the property. It is true, as said in *Marshall v. Shafter*, 32 Cal. 194, that "the *gravamen* of the action [ejection] is the wrongful withholding of the possession. * * * and the wrongful withholding is an ouster." But, though this be so, still it is not necessary that the words "wrongful" or "wrongfully" be used either in the complaint or the findings. In *Payne v. Treadwell*, supra, the court, speaking by FIELD, C. J., on this subject, said: "The possession of the defendant is, of course, a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negating its possible rightful character. * * * If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively in defense. The right of possession accompanies the ownership, and, from the allegation of the fact of ownership, which is the allegation of seisin in 'ordinary language,' the right of present possession is presumed as a matter of law. We do not think, therefore, any allegation beyond that of possession by the defendant is necessary, except that he withholds the possession from the plaintiff. The allegation that the possession is 'wrongful or unlawful' is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and, though they do not vitiate, they do no good. The withholding of the possession from one who is seised of the premises is presumptively adverse to his right, and wrongful. It is by force of this presumption that the plaintiff can rest, in the first instance, his case at the trial upon proof of his seisin, and of the possession by the defendant. From these facts, when established, the law implies a right to the pres-

ent possession in the plaintiff, and a holding adverse to that right in the defendant." We are not aware that the law as thus declared, has ever been questioned in this state, and it follows, therefore, that the appellant's contention cannot be sustained. The foregoing being in substance all the points made for a reversal, we advise that the judgment be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

91 Cal. 432

SAN LUIS OBISPO COUNTY v. WHITE. (No. 13,556.)

(Supreme Court of California. Oct. 2, 1890.)

TAXATION—BRIDGES—COUNTIES—TRIAL.

1. Pol. Code Cal. § 3671, provides that taxes upon road-districts shall be collected in the same manner as county taxes. St. 1880, p. 136, provides that a county may maintain an action, in its own name, for the recovery of delinquent taxes. *Held*, that a county can maintain an action in its own name to collect delinquent taxes which were levied upon a road-district.

2. St. Cal. 1883, p. 299, provides that the board of supervisors of a county shall have power to levy taxes upon the taxable property in any district, in their county, for the construction and repair of roads, provided the proposition be submitted to and received by a majority of the qualified voters. Pol. Code, § 2618, defines a bridge to be a highway. *Held*, that it is within the power of the board, provided the proposition is approved by a majority of the voters, to levy a tax on a road-district to build a bridge.

3. An election proclamation, ordered published by the board of supervisors, pursuant to Pol. Code Cal. § 1056, is not invalid because the clerk affixed a scroll thereto, instead of his official seal, though the county government act (St. Cal. 1883, p. 299, § 20, subd. 8) makes it the duty of the clerk to place his seal upon all proceedings of the board, whenever the same are ordered published.

4. If the clerk of the board of supervisors neglects to enter an order for the publication of a special election proclamation upon the minutes, as he is required to do by law, parol evidence is admissible to prove that such an order was made.

5. Code Civil Proc. Cal. § 2010, provides that evidence of the publication of a notice required by law may be given by the printer's affidavit annexed to a copy of the notice. *Held*, that an objection that the contents of an election proclamation could not be proven by a printed copy with the affidavit of publication annexed, on the ground that the original had not been sufficiently accounted for, was properly overruled, where the court was not requested to limit such evidence to the purpose for which it was admissible.

6. Pol. Code Cal. § 1055, provides that the board of supervisors, upon the receipt of the governor's proclamation of a general or special election, shall cause a copy of the same to be published in some newspaper printed in the county, and posted in each place of election, and in the case of a special election to fill vacancies in certain state offices, they shall post or publish a copy of such proclamation upon the receipt thereof. Section 1056 provides that whenever a special election is ordered by the board of supervisors they must publish and post a proclamation in the same manner as a proclamation issued by the governor. *Held* that, if a proclamation by the board of supervisors, of a special election on a proposition to levy a tax to build a bridge, was published in a county newspaper, it was not necessary that it be posted also.

7. Upon an assessment roll, the decimal parts

of the dollar were separated from the units and tens by the subdivisional account-book lines instead of the decimal point, and the word "cents" was omitted from the top of the column. *Held*, that an objection that the tax was not entered upon the assessment roll, on the ground that the decimal point and word "cents" were omitted, is untenable, and that it was competent for the district attorney to permit the assessor to add the abbreviation "cts." at the top of the column, over the space intended for the decimal parts.

5. Pol. Code Cal. § 3881, provides that omissions, errors, or defects in an assessment book may, with the consent of the district attorney, be supplied or corrected by the assessor at any time before the sale for delinquent taxes. *Held*, that it is competent for the assessor, under the written instructions of the district attorney, to supply the omission on the original roll of the "total tax" in the column provided for it, where the total tax appeared in the column headed "Road Tax."

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Venable & Goodchild and W. H. Spencer, for appellant. *J. M. Wilcox, Graves, Turner & Graves*, and *F. A. Dorn*, for respondent.

GIBSON, C. Action to recover of the defendant his proportion of a special tax levied in road-district No. 2, of San Luis Obispo county, in the year 1888, for the purpose of raising the sum of \$10,000, to erect a bridge across the Salinas river at San Miguel in said district. Judgment passed for plaintiff, from which, and an order denying a new trial, the defendant appeals. The appellant's principal points are that there is no law authorizing respondent to collect the taxes in question by suit, and that the assessment of the taxes was illegal.

1. The authority for any county or city and county to maintain an action in its own name for the recovery of delinquent taxes for any fiscal year, collectible in such county or city and county, is to be found in the act of April 23, 1880, (St. 1880, p. 136.) This act, it is to be observed, does not include in express terms a local or special tax; but by the act of March 9, 1883, (St. and Amend. 1883, p. 65,) a new section, viz., 3671, was added to the Political Code, which prescribes the basis of taxation, and that "all taxes upon townships, road, school, or other local districts, shall be collected in the same manner as county taxes." The taxes involved here were levied upon a road-district, therefore they can be recovered in the same manner as county taxes, under the act first above referred to.

2. The taxes here, appellant claims, were void because—*First*, the board of supervisors had no power to levy them; *second*, the election upon the proposition to make the levy was void; and *third*, they were not entered upon the assessment roll. That the board of supervisors had ample power to levy the taxes is made apparent from an inspection of the county government act of March 14, 1883, (St. and Amend. 1883, p. 299.) It is therein provided: "The boards of supervisors in their respective counties have jurisdiction and power under such limitations and restrictions as are prescribed by law * * * to levy taxes upon the taxable property of their respect-

ive counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways, and other district purposes: provided that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district, and received a majority of all the legal votes cast upon such proposition." Section 25, subd. 13. Highways include bridges. See Pol. Code, § 2618.

Appellant contends that the election was void because the board of supervisors failed to make, publish, and post a proclamation of the election. "Whenever a special election is ordered by the board of supervisors, they must issue an election proclamation containing the statement provided for in subdivision 1 of section 1054, and must publish and post it in the same manner as proclamations issued by the governor." Pol. Code, § 1056. That portion of the section referred to, as far as applicable here, provides that such proclamation shall contain a statement of the time of the election; and, as to the manner in which proclamations must be made and published by the governor, he is, by section 1053, Id., required, at least 30 days before a general election, and 10 days before a special election, to issue a proclamation, under his hand and the great seal of the state, and transmit copies thereof to the boards of supervisors of the counties in which the elections are to be held. Upon the receipt of such proclamation the board of supervisors may, in case of a general or special election, cause a copy of the same to be published in some newspaper printed in the county and to be posted at each place of election at least 10 days before the election; and, in case of a special election to fill a vacancy in the office of state senator or assembly-man, the board of supervisors, in their discretion, may cause a copy of the proclamation to be published or posted in the manner above stated, except it need not be published or posted for a longer period than five days before such election. Id. § 1055. The board of supervisors in this case made an order which was duly entered upon the minutes of the board that the proposition to levy a special tax for the construction of a bridge across the Salinas river at the town of San Miguel should be voted upon at a special election, to be held for that purpose, in road-district No. 2, on the 24th of March, 1888, in conformity with the general election laws of the state; and that the clerk of the board should issue an election proclamation to that effect, under his hand and the seal of the board. The board also ordered that the proclamation should be published in a paper known as the "San Miguel Messenger." This order was not entered upon the minutes. The clerk of the board wrote, in the presence of the latter, a proclamation embodying the substance of the order for the election, and signed it; but, instead of affixing his official seal to it, he made a scroll for a seal, and then sent it to the San Miguel Messenger for publication, in which paper it was published once a week for five consecutive weeks prior to the election. It is

objected that the so-called proclamation was not properly authenticated because the seal was omitted, but we do not think that the validity of the acts of the board of supervisors depends upon the care with which they may be authenticated by the clerk of the board. The board undoubtedly had the authority to issue the proclamation, and it ordered that it should issue and be authenticated in a certain manner; but, as we have seen, the clerk failed to observe the requirements of the order in one respect. Such a failure, however, could not defeat the proclamation, for, while it is made the duty of the clerk, by subdivision 8, § 20, of the county government act, to authenticate with his signature and the seal of the board the proceedings of the board, whenever the same are ordered published, still an omission to affix the seal cannot defeat any of the actions of the board. Subdivision 9 of the same section requires all ordinances to be authenticated in the same way by the clerk, and to be by him recorded at length, in the ordinance book. Yet, it has been held that a failure to so record an ordinance does not affect its validity. *Irrigation Dist. v. De Lappe*, 79 Cal. 358, 21 Pac. Rep. 825. See, also, *County of Santa Clara v. Railroad Co.*, 66 Cal. 644, 6 Pac. Rep. 744, in which it was held that the validity of an ordinance imposing county licenses, which had been properly passed by the board of supervisors, was not affected by the omission of the clerk to add the seal of the board to the record of it, in the ordinance book. Besides, in the present case, as far as the electors of the district were concerned, the proclamation, as published, was complete as to them, as the scroll which appeared thereon in place of the seal was all that could appear, even if the seal had been affixed to the original.

The objection to oral evidence of the order of publication of the proclamation was properly overruled. It is true the order, as part of the proceedings of the board, should have been entered upon the minutes, the same as the order for the election and the issuance of the proclamation, which was made at the same time. But, as appears by the case last referred to, the failure of the clerk to record an ordinance will not defeat it, neither do we think the failure to enter the order in this case precluded proof of it by oral evidence. The power of the board to act exists independently of any action of the clerk, and the validity of an exercise of it does not depend upon the diligence of the clerk. Were it otherwise, the clerk would have it in his power to either by carelessness or design defeat any of the actions of the board.

It is further objected that proof of the contents of the proclamation could not be made by the published copy, because the absence of the original was not sufficiently accounted for. This objection, as far as it went, was well founded, because there was no showing of any attempt to recover the original proclamation from the printer, to whom it had been sent for publication, nor was it shown that it had been lost or destroyed. But as the printed copy, with the affidavit of its publication

annexed thereto, was relevant and competent to prove the publication of the proclamation, (Code Civil Proc. § 2010,) and as the court was not requested to limit the evidence to the purpose for which it was admissible, the objection was properly overruled. *Williams v. Insurance Co.*, 54 Cal. 449.

Before the proof of publication of the proclamation had been received, the clerk testified without objection, as follows: "After the making of the order contained in the minutes just read in evidence, I made, in the presence of the board of supervisors, and pursuant to said order, a pencil draft of a notice for publication, of which draft the printed advertisement annexed to the affidavit which I hold in my hand is a copy." Now, taking this testimony in connection with the copy referred to, which we have seen was admissible in evidence, there appears to have been sufficient proof of the contents of the proclamation.

It is argued that as the proclamation was only published in the newspaper, but not posted, the notice intended to be given by it was incomplete. Section 1055 of the Political Code provides that in cases of general or special elections the proclamation may be published and posted; but, in cases of special elections to fill vacancies in certain offices, it may be, in the discretion of the board, published or posted for a period of not longer than five days before the election. Thus there was one of two methods for the board to adopt in the present case, and they having decided to simply publish it for five weeks before the election, their action must be sustained. *Comstock v. County of Yolo*, 71 Cal. 599, 12 Pac. Rep. 728.

It is claimed the tax was not entered upon the assessment roll, because, in the column of the assessment roll headed "Road Tax," the amount of such tax upon the real estate was entered as \$12.00, and upon the personalty as \$4.60, without any mark to indicate the portions intended for cents, instead of as \$12.00 and \$4.60, respectively. An inspection of the copy of the roll in the transcript shows that there are the usual subdivisional account-book lines between the decimal parts of the dollar and the units and tens of dollars in each instance, so that the value of the sums entered in the decimal column is plain enough without the word "cents," or the abbreviation thereof, at the top of the column. Since this is so, the point made as to the error committed by the district attorney in granting permission to the assessor to add the abbreviation "cts." at the top of the column, and in the space intended for the decimal portions of dollars, need not be further noticed.

In the original roll the special bridge tax was not carried to nor entered in the column headed "Total Tax;" but, after the roll was made up and placed in the hands of the tax collector, no sale for delinquent taxes having been made, the district attorney gave his consent in writing to the assessor to enter the said tax in the column last mentioned, whereupon the assessor made the proper entries in that column. This is now urged as error. The

total tax appeared in the column headed "Road Tax," and consequently it was clear what the omitted total tax was. It was therefore competent for the district attorney to authorize the assessor to supply the omission under section 3881 of the Political Code, which provides: "Omissions, errors, or defects in form in any original or duplicate assessment book, when it can be ascertained therefrom what was intended, may, with the written consent of the district attorney, be supplied or corrected by the assessor at any time prior to the sale for delinquent taxes, and after the original assessment was made."

We do not see any cause for a reversal of the judgment or order appealed from, and therefore advise that they be affirmed.

We concur: VANCIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

86 Cal. 149

TRIPP v. DUANE *et al.* (No. 9,631.)

(*Supreme Court of California.* Oct. 8, 1890.)

APPEAL—DISMISSAL—LACHES.

On motion to dismiss an appeal for want of prosecution, it appeared that the transcript was filed in manuscript, and was never printed, appellant having failed to furnish funds therefor; that, after being on the calendar for argument, it was dropped several years before the motion to dismiss; that no motion to restore to the calendar was ever made. *Held* that, both parties having been guilty of gross laches, one would not be allowed to take advantage of the laches of the other to prevent a hearing on the merits, provided the matter was now prosecuted with diligence.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Moses G. Cobb, for appellant. *P. G. Galpin*, for respondent.

Fox, J. This is a motion to dismiss the appeal of the defendant Ellis. The notice does not state upon what ground the motion will be made, but does state that it will be made upon affidavit, a copy of which is served with the notice. The affidavit shows no ground for dismissal, except that of laches or want of prosecution. It, and the files and records of this court, show that the appeal was taken prior to, and the transcript filed in this court on, June 24, 1884. It was filed in manuscript, and has never been printed, the appellant having failed to furnish the clerk with funds to pay for the printing. The case was on the calendar for argument several years ago, but was dropped from the calendar. It could not thereafter be restored except upon notice, and it does not appear that any notice has ever been given to restore it to the calendar, and so get it in position to be heard. Both parties have been guilty of gross laches in the matter, and the court does not think that under all the circumstances it ought to allow one of the parties to take such advantage of the laches of the other as to cut her off from a hearing upon the merits, if she desires it, and will now prosecute the matter with due diligence.

The present motion to dismiss will be denied. If the transcript is printed and served 40 days or more before the commencement of the next January term of this court, the case will be placed on the calendar of that term for argument; otherwise respondent may then renew his motion to dismiss.

We concur: BEATTY, C. J.; PATERSON, J.

86 Cal. 114

DALEY v. RUSS *et al.* (No. 12,036.)

(*Supreme Court of California.* Oct. 1, 1890.)

ACTIONS ON CONTRACTS—PLEADING AND PROOF—NONSUIT.

1. Defendants agreed to pay plaintiff \$4,000 brokerage for negotiating a loan of \$4,000 for them, "on the security of said Jupiter Mining property." The complainant set out the contract, and averred that plaintiff, "in accordance with the terms of said contract, procured said sum," but the evidence showed that defendants had to give other security than the mining property, and \$3,600 additional brokerage, to another person, in order to secure the \$4,000. *Held*, that the evidence did not prove the case made by the complaint.

2. In an action to recover \$4,000, the residue of \$7,600 brokerage for negotiating a loan of \$4,000 for four months, the evidence did not support the allegations of the complaint, and plaintiff was nonsuited. *Held*, that it was immaterial that defendant did not specify the grounds for his motion to nonsuit, as the complaint could not be corrected, except by an amendment, and that could not be granted, because the demand in the complaint is unconscionable.

WORKS and THORNTON, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge. *R. B. Mitchell*, for appellant. *Nagle & Nagle*, for respondents.

HAYNE, C. This was an action to recover \$4,000, as brokerage, for negotiating a loan. The plaintiff was nonsuited, and he appeals from an order denying his motion for a new trial.

We think that the plaintiff failed to prove the case set forth in his complaint. The contract, which was annexed to the complaint, was as follows: "This agreement, made this the 19th day of November, 1881, by and between C. C. E. Russ and F. M. Biber, parties of the first part, and John H. Daley, party of the second part, witnesseth: That whereas, said parties of the first part are in want of the sum of four thousand (4,000) dollars to make improvements, and pay out money on account of a certain property known as the 'Consolidated Jupiter Mines,' etc., in Sierra county, of which the said parties of the first part are the owners, and the said party of the second part is willing to procure them said amount on the security of said Jupiter Mining property: Now said parties of the first part hereby agree that, if said Daley procures them said money as aforesaid for the term of four (4) months, they will pay him four thousand dollars as brokerage for his trouble in procuring the same; if the sum loaned is less, his brokerage shall be in the same proportion; if the money is not loaned and received by them, no brokerage is to be paid." A material condition of the above

contract is that the money should be procured upon certain named security, viz., the property known as the "Consolidated Jupiter Mines." The complaint alleges that the money was so procured. Its averments in this regard are that John H. Daley "in accordance with the terms of said contract procured the said sum," etc., and that he "performed all the conditions of said contract to be by him performed." The complainant, therefore, relied upon performance of the contract,—in other words, upon the proposition that Daley had procured the money upon the security of said Consolidated Mining property,—and as this was denied, it was incumbent upon the plaintiff to prove it. But the evidence does not prove it. The principal witness called by the plaintiff was the defendant Russ, who testified, among other things, as follows: "Question. Was there any other property besides mining property conveyed? Answer. Yes, sir. Q. What was it? A. The parties were not satisfied with that property, and we gave them some more, and the whole crop as security. Q. They were not satisfied with the Consolidated Jupiter property? A. No, sir. Q. Wouldn't take that as security? A. No, sir." And not only so, but it appears that John H. Daley was not able to negotiate the loan by himself, but had to obtain assistance for which the defendants became responsible. The money was to be obtained from a certain Miss Peltret, and the transaction could not be closed without an additional commission of \$3,600, to an attorney,—one Linforth. This seems to be conceded by the counsel for the appellant. For he says: "Before Miss Peltret could be brought to the point of loaning the money, however, it became necessary to enlist the services of a Mr. E. J. Linforth, an attorney at law. * * * He was introduced to the defendants by Daley, and bargained with them for an extra commission on his own account." The evidence, therefore, did not show performance of the contract set forth in the complaint. And if the conduct of the defendants amounted to a modification of the contract, it should have been declared on as modified. This was the rule of the common law. See *Littler v. Holland*, 3 Term R. 590; *Phillips v. Rose*, 8 Johns. 392; *Freeman v. Adams*, 9 Johns. 115; *Baldwin v. Munn*, 2 Wend. 403. And it prevails in California. (*O'Connor v. Dingley*, 26 Cal. 21.) and in other states which have the reformed procedure, (*Evarts v. Smucker*, 19 Neb. 43, 26 N. W. Rep. 596; *Lanitz v. King*, 93 Mo. 519, 6 S. W. Rep. 263.) The rule is fundamental that the complaint must allege either performance or a valid excuse for non-performance. One is not the same as the other. And if the plaintiff did not perform the contract, but relies upon the consent of the defendants as an excuse, he must set forth the excuse in his complaint. *Purdue v. Noffsinger*, 15 Ind. 388; *Armstrong v. Rockwood*, 53 Ind. 506; *Garvey v. Fowler*, 4 Sandf. 665; *Bogardus v. Insurance Co.*, 101 N. Y. 329, 4 N. E. Rep. 522; *Jerome v. Stebbins*, 14 Cal. 457. The plaintiff's idea that it was for the defendants to set up the excuse for non-perform-

ance of the contract is without foundation. It results that the evidence does not prove the case made by the complaint.

It is objected, however, that the defendants did not specify this as a ground of their motion for nonsuit. It is undoubtedly the settled rule that a motion for nonsuit should specify the grounds upon which it is made, and ordinarily a ground which is not stated cannot be considered. *Kiler v. Kimbal*, 10 Cal. 268; *McGarrity v. Byington*, 12 Cal. 429; *Holverstot v. Bugby*, 13 Cal. 44; *Baker v. Joseph*, 16 Cal. 180; *People v. Banvard*, 27 Cal. 474; *Sanchez v. Neary*, 41 Cal. 487; *Raimond v. Eldridge*, 43 Cal. 508; *Silva v. Holland*, 74 Cal. 530, 16 Pac. Rep. 385; *Loring v. Stuart*, 79 Cal. 201, 21 Pac. Rep. 651; *Miller v. Lugo*, 80 Cal. 261, 22 Pac. Rep. 195. But the reason of the rule is to afford an opportunity to correct such defects as admit of correction. It is plain that this reason does not apply where the defects do not admit of correction. As to such cases the rule does not apply. Or, if the phrase be preferred, where the defects cannot be corrected the error of not specifying the grounds of the motion is immaterial. In the case before us the defect is that the cause of action shown by the evidence is not the cause of action stated in the complaint. This could only be corrected by an amendment to the complaint which could only be made by leave of the court. In passing upon an application for leave to amend, the controlling principle must be whether the amendment is in furtherance of justice. And where, as here, the demand is unconscionable, (being for part of a brokerage of \$7,600 for obtaining a loan of \$4,000 for four months,) we think that leave to amend should be refused. A party who seeks to enforce a liability like that must stand upon his legal rights. The court should not interpose its discretion to save such a case. The defect therefore could not be cured. A reversal will not be ordered for the purpose of allowing plaintiff to make an application which should, and presumably would, be refused. It is immaterial therefore that the motion for nonsuit did not specify the grounds upon which it was made. We advise that the order appealed from be affirmed.

WE CONCUR: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

THORNTON, J., dissents.

WORKS, J. I dissent. The ground for a nonsuit must be specifically stated, and this case presents no exception to the rule.

85 Cal. 408

FARRELL V. BOARD OF TRUSTEES OF THE CITY OF SACRAMENTO *et al.* (No. 13,480.) (Supreme Court of California. Sept. 1, 1890.)

CONSTITUTIONAL LAW—SPECIAL LAWS.

Const. Cal. art. 4, § 25, subd. 28, provides that the legislature shall not pass local or special laws, "creating offices, or prescribing the powers of officers, in counties, cities," etc. St. 1871-72, §§ 1, 6, pp. 243, 244, provides for a board of police

commissioners of the city of Sacramento, and the appointment of not over 15 policemen. St. 1889, p. 148, amends the act of 1871-72 by authorizing the police commissioners to appoint any number of police not exceeding 30. *Held*, upon *mandamus* to compel the levy of a tax to raise a sum of money to pay the salaries of the extra policemen appointed under the act of 1889, that said act was a special act, and therefore unconstitutional. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

W. S. Church and Johnson, Johnson & Johnson, for appellants. Hart & Davis and Catlin & Blanchard, for respondent.

THORNTON, J. Action for a writ of mandate to the board of trustees and others, above mentioned, to compel them to levy a special tax to raise a sum of money to pay the salaries of policemen, etc. Judgment was rendered for the petitioners, and the respondents appealed.

The city of Sacramento is a municipal corporation, organized in 1863, under an act of the legislature. St. 1863, p. 415 et seq. The board of trustees is, under that act, the governing body of the corporation, (St. 1863, § 2, p. 416,) and by it the board was invested with power to create and establish a city police, to prescribe their duties and compensation, and to provide for the regulation and government of the same; to create the office of chief of police, and elect such chief and eight policemen, (Id. § 2, subds. 1, 9, pp. 416, 417.) In 1872, an act was passed amendatory of and supplementary to the act of 1863, by which the office of chief of police was created, and a board of police commissioners. St. 1871-72, §§ 1, 6, pp. 243, 244. This board was to consist of the president of the board of trustees, the chief of police, and the police judge. Section 6. The board was authorized, immediately on entering upon their duties, to appoint a permanent police force for the city, which was to consist of a captain of police, and such number of policemen, not exceeding 15, as they might deem necessary for the protection and good government of the city. By the fourteenth section of this act it was provided that, at the time of the levy of the annual city taxes, the board of trustees should estimate the amount of money that will be required for police purposes during the fiscal year, and shall cause this money to be kept as a separate distinct fund; to be called the "Police Department Fund," which shall be used for no other purpose whatever, except the payment of the salaries and expenses of the police department, and shall levy a special tax to meet these estimated expenses to pay the officers and expenses provided for in this act. The former act, as regards the police, was repealed. Section 15, St. 1871-72, p. 246. In March, 1889, an act amending the act of 1872 was passed. By it the board of police commissioners was authorized to appoint policemen, not exceeding 30 in number. St. 1889, p. 148. This act went into effect immediately, and on the 1st day of April, 1889, the board of police commissioners, by authority of the last-mentioned act, appointed 25 policemen. The petitioner and the others

named in his petition are the 25 so appointed. The board of trustees on February, 1889, made the estimate and levy required by the fourteenth section of the act of 1872, basing this estimate and levy on the police department as it then stood, consisting at that time of a chief of police, a captain of police, and 15 policemen. The sum raised by the levy of February was insufficient to pay the force subsequently appointed in April, and the board was requested, on behalf of the petitioner and the other appointees to the police force, to levy a tax to raise the sum required. The board refused, and this proceeding was instituted to compel it to do so.

The contention here made on behalf of appellants is that the act of 1889, amending section 6 of the act of 1872, is unconstitutional and void, and hence it imposed no obligation on the board of trustees to proceed to levy a tax under it. It is said that the act is special, and forbidden by the twenty-fifth section of the fourth article of the constitution of 1879. There can be no doubt that the act of 1889 is a special law. It relates to a special board of trustees of one particular city, and a particular class of men to be appointed by this special board to perform the duties of their office in the one city above mentioned. Is it forbidden by the constitution? Among other cases in which the legislature is forbidden to pass special laws is the following: "Creating offices, or prescribing the powers and duties of officers, in counties, cities and counties, townships, election or school districts." Article 4, Const. Cal. § 25, subd. 28. Conceding, as is contended, that a police officer is an officer of the state, and not of the municipality in which he exercises his office, it does not follow that the provision above quoted does not apply to them. We think it applies to all officers who are appointed to exercise their duties in either of the particular political divisions above mentioned. It is not limited to officers of such political divisions, but embraces officers in such divisions. This interpretation gives to the language of the clause its usual and ordinary meaning, which is the true rule where the words are not employed in any technical or peculiar sense. *Weill v. Kenfield*, 54 Cal. 113. The preposition "in" qualifies the entire clause, and is used as denoting officers who exercise their office and perform their duties within the limits of either political division mentioned in the clause. There is nothing in the context to indicate that it is used in any other sense. That the people of this state had power to put this restriction on the legislative power cannot be doubted. This power was ample as regards the police power of the city, conceding that they were state or municipal officers. The act of 1889 creates the office of policeman in the city of Sacramento. There can be no doubt of this, as to the additional number of policemen whose appointment is authorized by the act. This creation of offices, in our judgment, is forbidden by the provisions above quoted of the organic law of the state.

It is urged that "the act complained of here [referring to the act of 1889] is not

an act creating offices, within the meaning of subdivision 28, of section 25, of article 4, of the constitution. It merely gave the city permission to have more policemen than she had before, if it was deemed necessary for the protection and good government of the city. To say that such a permission is the creation of offices, implies a misconception of the meaning of the term 'creating offices.' This has been ruled against appellants' contention in *Ford v. Board*, 81 Cal. 19, 22 Pac. Rep. 278." In that case there was no reference in either opinion to the clause of the constitution referred to. The act under consideration did not require it. No point was theremade that the act was a special act, or that it was as such inhibited by any provision of the constitution. Section 2521 of the Political Code, as amended in 1883, was there considered, which provided that the board of state harbor commissioners must, on entering on the duties of their office, appoint the following officers, viz.: "A secretary, an assistant secretary, an attorney, a chief engineer, a chief wharfinger, and such number of wharfingers and collectors as they may deem necessary." It provided further that "such officers shall hold for a term of four years from the dates of their respective appointments, but may be removed by the board at any time, after due investigation, for causes affecting their official character or competency. The order for such removal, stating distinctly the causes therefor, must be entered on their minutes. In case of a vacancy in such offices by the expiration of a term, or for any other cause, the board must fill the same by an appointment for four years." The action was brought by Ford to compel, by writ of mandate, the allowance and payment of a balance of his salary as collector for the month ending 24th July, 1889. It appeared by an agreed statement of facts that Ford had been appointed by the board under the act to the office of collector on the 9th of June, 1887; that he had duly entered upon and continued to discharge the duties of his office until he was removed in July, 1889, for no cause affecting his official character or competency. It further appeared that the board had in July, 1889, abolished the office. It was held by three of the judges of this court (FOX, MCFARLAND, and SHARPSTEIN) that the board had authority, under the statute, to create the office of collector, and consequently had power to abolish it, at its pleasure. BEATTY, C. J., filed an opinion, in which he concurred in the judgment, in which he repudiates the view taken in the opinion concurred in by the three justices just referred to, and places his concurrence on the ground that the statute under consideration was unconstitutional, for the reason that it delegated to the board the power of creating an office, which pertained to the legislature, and which power the legislature could not delegate. In this opinion WORKS, J., concurred. PATERSON, J., concurred in the judgment, and THORNTON, J., dissented. It thus appears that only three of the justices agreed in the holding that the office of collector was created by the board. This ruling, though

worthy of great consideration by reason of the ability and learning of the three distinguished judges who concurred in it, cannot be regarded as the decision of this court, and binding in any case as authority. If the offices mentioned in the statute were created by the board of harbor commissioners, the conclusion reached by BEATTY, C. J., and WORKS, J., is supported by the sounder and better reason. According to that conclusion, the office of collector never existed, there never was a lawful incumbent, and the dismissal of Ford furnished no cause of action or ground of complaint.

Why is not the power to create an office a legislative power? Of course no reference is made here to offices created by the constitution. But as to all other offices, how can they be created other than by an act of the legislature? If the legislature cannot create offices, why the restriction on its power in subdivision 28, § 25, art. 4, of the constitution? Why is the legislature forbidden to create the offices embraced in the subdivision cited, by special or local laws, if they cannot do it in the exercise of the power granted it by the constitution by a general law? There are other provisions of the constitution which show that the creation of an office is to be accomplished by legislative action. See article 20, §§ 4, 16. The sections cited are meaningless, unless the creation of office is a legislative function. The legislature, having created the office by statute, may vest the appointment to such office in such individual or officer or board as it may think proper. Article 20, § 4. As in the case before us, the legislature, by the act of 1889, created the office of policeman, including captain of police, to exercise their office in the city of Sacramento, and vested the appointment of these officers in the board of police commissioners of that city.

Further, if the legislature cannot create an office by special act it certainly cannot accomplish the same thing through a special act which vests the power to appoint to such office in any board whatever. This would be a clear evasion of the constitution. Our conclusion is that the act of 1889 is unconstitutional and void. As this conclusion has been reached, it is unnecessary to consider the contention so earnestly made by counsel for petitioner, that the charter of the city of Sacramento can be controlled by a special law. But, conceding that it can be so controlled, we cannot hold that it can be controlled by an act which is violative of the constitution. The act under consideration is unconstitutional, and cannot be held valid for any purpose. The judgment in this case must be reversed, and the cause remanded, with direction to the court below to enter judgment for the defendants. Ordered accordingly.

I concur: PATERSON, J.

I dissent: BEATTY, C. J.

We concur in the judgment: SHARPSTEIN, J.; MCFARLAND, J.

WORKS, J.; Fox, J. We concur in the judgment on the ground that, by providing that additional policemen might be appointed by the city authorities, the legislature attempted to do indirectly, by a special statute, what it was forbidden to do directly by subdivision 28, of section 25, of article 4, of the constitution. I do not understand, however, that this point is decided against the appellant in *Ford v. Board*, 22 Pac. Rep. 278. We do not wish to be understood as holding that the legislature may not amend a special charter of a city, such as the city of Sacramento is acting under, by a special statute, except where, as in this case, the law enacted is forbidden by the constitution for other reasons.

88 Cal. 568

PEOPLE v. CHRISTENSEN. (No. 20,650.)
(Supreme Court of California. Sept. 8, 1890.)

CRIMINAL LAW—LARCENY—INSTRUCTIONS.

1. On a trial for grand larceny it is within the discretion of the court to grant or refuse defendant's request to be allowed to testify in her own behalf, when the request is made after the court has begun to charge the jury; and a refusal cannot be considered an abuse of discretion.

2. A charge that "unless the prosecution has proved beyond a reasonable doubt that the defendant feloniously stole the money of the complaining witness it is your duty to acquit the defendant," is not erroneous, as being an insufficient definition of larceny, when no further instruction was asked.

3. A charge that "it is not a matter of the number of witnesses, but the preponderance; and you may, if you retain a reasonable doubt, give the defendant the benefit of it,"—while not specially clear and perspicuous, is yet not erroneous.

4. It is improper for the court in its charge to use expressions calculated to impress the jury with the idea that defendant's witnesses are a disreputable class of people whose evidence may well be disregarded.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

P. F. Dunne, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was convicted of grand larceny, and she appeals from the judgment therein rendered, and from an order refusing a new trial. It is primarily claimed in her behalf that the evidence is entirely insufficient to support the verdict. The record shows very clearly that the defendant was positively identified by the prosecuting witness as the person who stole his money, although he was somewhat intoxicated at the time, and Annie O'Farrell, a witness for the defend-

ant, although she positively swears that the defendant stole nothing, nevertheless states that she, the defendant, and the prosecuting witness were in company with each other at saloons (naming them) at the time when the money is alleged to have been stolen, and, although several witnesses for the defense swore to facts which negatived such statement of the prosecuting witness, yet, as the jury saw and heard those who testified before them, and resolved the conflict between them against the innocence of the defendant, we are not prepared to say that the verdict was clearly wrong. It is also very earnestly urged that the court erred in not permitting the defendant to testify in her own behalf when she desired to do so. The evidence had all gone to the jury, and the court had proceeded with its charge to that body as to the law governing the case, when this offer was made. It thus became discretionary with the court to grant or refuse the request, and we cannot declare that its action was an abuse of its discretion. *People v. Ross*, 65 Cal. 105, 3 Pac. Rep. 491; *Pen. Code*, §§ 1093, 1094.

Error on the part of the court is alleged in its instruction to the jury that "unless the prosecution has proved beyond a reasonable doubt that the defendant feloniously stole the money of the complaining witness it is your duty to acquit the defendant." This, it is said, was not a definition of larceny, unless of larceny in general, and that, as larceny consists of grand and petit larceny, the instruction was defective. In answer to this it may be said that the defendant asked for no further definition of the offense; the information charged grand larceny, and the proof showed beyond cavil or question that if any larceny was committed it was grand larceny. This being so, the defendant could not have been prejudiced. Further, it is said that the court assumed that the prosecuting witness had money on the occasion of the alleged theft. We do not so understand the instruction. In effect, it conveyed the idea that, unless it is proved beyond reasonable doubt that the prosecuting witness had money which was stolen by the defendant as charged, they should acquit. This was entirely proper. It is also said that the court did not define what a reasonable doubt is. If the defendant had desired such a definition, she should have asked for it; but she did not choose to do so, being seemingly satisfied that the jury knew what a reasonable doubt was. *People v. Gray*, 66 Cal. 277, 5 Pac. Rep. 240, and cases cited. Further, complaint is made that the court instructed the jury:—"It appears that these saloon-keepers, who were in the Louisiana saloon at this time, on the way from their ordinary places of business, according to their testimony; that they engaged in playing cards, and the prosecuting witness says that on this occasion he was robbed of his money, and there is no explanation why this defendant was there except that she was the wife of the witness, or was with the other woman who was there." It is claimed that by this the court prejudicially told the jury that, as a matter of fact, the Louisiana saloon was the place

where the alleged larceny took place. This is a mistake. The court stated that the prosecuting witness said that it was on the occasion when the saloon-keepers were playing cards in the Louisiana saloon that he was robbed of his money, but the court did not state to the jury that such was the fact. As to the statement about the explanation given why the defendant was present, it cannot be prejudicial to her even if it was a fact that she was present as a wife with her husband, or with a female companion; and there does not seem to have been any other explanation consistent with her innocence why she should have been there.

Again, it is said that error was committed in giving this portion of the charge: "It is not a matter of the number of witnesses, but the preponderance, and you may, if you retain a reasonable doubt, give the defendant the benefit of it." The first clause of the language is the part at which condemnation is directed. Evidently the court meant to say, and the jury must have so understood it, that the number of witnesses either upon one side or the other was of no controlling force, but that the preponderance of evidence which would show her guilt beyond a reasonable doubt must be against the defendant, else they must acquit her. It is true the language used, and its connection, is not specially clear and perspicuous, but it is not susceptible of any other rational construction than that which we have given it.

There is another portion of the charge to which strong objection is made. It is this: "You may consider the probabilities of this class of witnesses of telling the truth." The connection in which the language was used in the charge can be best appreciated by stating that portion of the charge which immediately precedes, and another portion which occurs in a latter part of the charge, thus: "There is nothing calling for any particular enumeration of witnesses, or the statement of their testimony. It appears that these saloon-keepers, who were in the Louisiana saloon at this time, on the way from their ordinary places of business, according to their testimony, that they engaged in playing cards, and the prosecuting witness says that on this occasion he was robbed of his money, and there is no explanation given why this defendant was there except that she was the wife of the witness, or was with the other woman who was there. If you consider the probabilities of the story,—the complaining witness pointing out this woman as being the guilty one, as the officer states,—you may consider the probabilities of his making a mistake, and whether he tells the truth, or intends to tell the truth, of what he himself believes, or he saw there, and also of this class of witnesses on the other side, of telling the truth. * * * As to the matter of policy, as to bringing in a verdict of guilty in regard to these places, that is a matter for you to take into consideration as citizens rather than as jurors here." It must be borne in mind that the witnesses "on the other side," that is, those for the defendant, were, according to the record, a wo-

man who frequented saloons on the Barbary Coast, (well known in San Francisco, and throughout this state, perhaps, as a rather disreputable locality,) and who was in company with the defendant and the prosecuting witness at these saloons, and of saloon-keepers from that unsavory locality. Therefore, it is plain from the language of the court that it contrasted the probabilities of the defendant's story of the prosecuting witness, and his pointing out the woman as the guilty one to the policeman, as against the witnesses for the defense, whom it unnecessarily denominates witnesses of "that class." "That class" evidently conveyed the idea to the jury that it was a disreputable class, the probabilities of whose testimony they were to weigh, while nothing was said tending to throw any discredit upon the prosecuting witness. And then, at the close, the statement, as to the policy of bringing in a verdict "in regard to these places, that it was a matter for consideration as citizens rather than jurors," was likely to convey the idea that "these places"—that is, saloons on the Barbary Coast—were very bad places, where such crimes as was here charged probably took place, and which the jury were told that as such they had nothing to do with it in their verdict as a matter of policy, yet as citizens they had a right to take the matter into consideration, the court evidently thinking that "these places," being "bad places," needed good citizens to look after, and at least condemn, if not suppress, them; all of which certainly tended to discredit the witnesses by the court, which ought never to be done. In this case the testimony of the prosecuting witness alone was depended upon to identify the defendant as having stolen his money, and he was evidently also a drunken man at the time the theft is alleged to have taken place, and an utter stranger before that to her. Against him were the defendant's witnesses, designated by the court as heretofore stated. We are constrained to say, therefore, that the portion of the charge in question was erroneous, being well calculated to impress the jury with the idea that her witnesses were a disreputable class of people, whose evidence might well be disregarded, and for that reason the judgment and order should be reversed, and we so advise.

We concur: GIBSON, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(85 Cal. 418)

GRANT V. EDE. (No. 12,784.)

(*Supreme Court of California.* Sept. 1, 1890.)

REAL-ESTATE AGENT—AUTHORITY TO SELL.

A letter to an agent, saying: "As you stated you could get \$30,000 for the place you occupy, * * * and if you can, we will sell at that price, * * * and allow you two and one-half per cent. on said price,"—merely authorizes the agent to find a purchaser, but not to sell; and a contract by the agent to sell confers no rights on the purchaser.

In bank. Appeal from superior court, city and county of San Francisco.

Hall & Rodgers, for appellant. *J. C. Bates*, for respondent.

PATERSON, J. It is alleged in the complaint herein that the defendant, being the owner of certain real estate, gave to Martin the following authorization to sell the same: "San Francisco, August 3, 1867. Mr. Wheeler Martin: As you stated you could get \$30,000 for the place you occupy on Market street, and if you can, we will sell at that price any time before the 1st day of September, 1887, and allow you two and one-half per cent. on said price, and if no sale is made no expenses made to us. Yours, truly, [Signed] WILLIAM EDE." Thereafter Martin executed and delivered to the plaintiff an agreement in the following words: "By virtue of the within and foregoing authority, I, Wheeler Martin, have, this 23d day of August, 1887, sold unto George Grant, of San Francisco, the land in said authority mentioned, situated in the city and county of San Francisco, state of California, and particularly described as follows, * * * for the sum of \$30,000, of which \$500 was paid by check dated August 23, 1887, payable to said William Ede, and \$29,500 in cash to be paid with said check upon the execution by said Ede of a deed conveying said property to said Grant, purchaser, as aforesaid. [Signed] WILLIAM EDE. By MARTIN, His Agent." It is further alleged that, on the execution of this agreement, plaintiff paid to the defendant \$500, as a deposit and part payment of the purchase money; that plaintiff has duly performed all the conditions on his part to be performed, and is ready and willing, on having a good and marketable title made to him of said premises, to pay the balance of the purchase money; and that, on the day named in the agreement, he tendered to the defendant the sum of \$30,000, and requested such a conveyance, but the defendant refused to execute or deliver such conveyance. Plaintiff asks judgment against the defendant that, on payment by him to the defendant of the amount of the purchase money, he, said defendant, be required to execute and deliver a good and sufficient deed. It is admitted by the appellant that the power of a broker is merely to find a purchaser, but he claims that this rule cannot apply here, because the purchaser had already been found. The case cited by him (*Rutenberg v. Main*, 47 Cal. 220) is not like the case at bar. In that case the written instruments and corroborative circumstances showed the parties intended that on the receipt of the dispatch affirming the preliminary action of Meinecke, he, the agent, should be clothed with power to make the sale binding on his principal. The contention of appellant that the authority to find a purchaser had been given before the letter was written to Martin, and that the latter had already found a purchaser, and reported the fact to the defendant, is not sustained by the record. The object of the writing, doubtless, was to fix the price which the defendant was willing to take for the land, and the com-

pensation he was willing to allow Martin for making the sale. Without this written memorandum, signed by the party to be charged, Martin could not have recovered compensation for negotiating the sale of the property. The language of the letter is: "We will sell." It does not say that Martin is authorized to sell and convey for the price named; nor is any form of deed, or time of payment, or of delivery of possession, specified. Martin was authorized simply to find a purchaser who would pay \$30,000, and if he should succeed in finding such purchaser, he was to receive a commission of 2½ per cent. The interpretation put upon the agreement by the court below is sustained by the following authorities: *Duffy v. Hobson*, 40 Cal. 244; *Treat v. De Celis*, 41 Cal. 202; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. Rep. 758. The demurrer, therefore, was properly sustained. Judgment affirmed.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.; MCFARLAND, J.

85 Cal. 402

GILLESPIE v. LAKE *et al.* (No. 12,758.)
(Supreme Court of California. Sept. 1, 1890.)

LIABILITY OF MAIL CONTRACTOR'S BONDSMEN.

A contractor for carrying the mails sublet the contract to plaintiff; and afterwards, on receiving a quarterly payment, absconded, without paying plaintiff his last quarterly dues. The contractor's bondsmen proposed to the post-office department that they be allowed to fulfill the contract, and received, as an answer, from the department: "An order has been issued this date to recognize your services on said route, and pay for the same from" the date up to which the contractor had drawn pay. The bondsmen hired plaintiff to continue to carry the mails, which he did for about a year longer. *Held*, that the bondsmen were not liable for plaintiff's dues with which the contractor absconded.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

L. F. Cooper and Sawyer & Burnett, for appellant. *Lucas & Miller*, for respondents.

BELCHER, C. C. In April, 1882, W. H. Otto entered into a contract with the government to carry the mails twice a week between Crescent City, in California, and Ellensburg, in Oregon, for the term of four years, commencing July 1, 1882, and the defendants became sureties for the faithful performance of his contract. In June, 1882, Otto employed A. K. Russ to convey the mails over a portion of his route during the whole term of four years, and the agreement between them was put in writing, and signed by them. In pursuance of this agreement Russ carried the mails until April 1, 1884, when he gave up his contract. Otto then employed the plaintiff to take the place of Russ, and carry the mails over the same portion of the route, during the balance of the four years, and agreed to pay him for so doing the sum of \$1,300 per year, payable in quarterly installments of \$325. Under this employment the plaintiff at once commenced to carry the mails, and continued to carry them until January 1, 1886. Otto was paid by the government quarterly, for the service rendered under his contract up to the end

of the year 1884, and he paid the plaintiff the first two installments due him, but failed and neglected to pay the third one, due for the quarter ending December 31, 1884. Early in 1885, Otto absconded, and no further payments were made by the government to him. A correspondence was then commenced with the post-office department in reference to Otto's contract and the payment of the carriers, and, among others, the following letters were written:

"Ellensburg, Or., June 22d, 1885. To the 2d Asst. Postmaster Gen.—Dear Sir: The postmaster at this place handed me a letter from you to him last night, in which letter you stated that W. H. Otto, the contractor on route 46,141, from Smith River, Cal., to Ellensburg, Or., had notified you that he (Otto) had never employed me to carry the mail on said route, which statement on the part of Otto is false. It is true that I took the place of Mr. Russ on the route, but with an understanding that I was to receive my pay from Mr. Otto direct, at the rate of \$325 per quarter, which was the same as Mr. Russ had been receiving. This agreement was verbal, but in the presence of witnesses; and, upon this agreement, I received two quarters' pay direct from Mr. Otto, and the third quarter's pay he left with the postmaster at Crescent City about ten days, stating to the P. M. that the money was mine, but finally drew the money, and left the country before I found out that he had received the check. * * * Very respectfully, A. M. GILLESPIE.

"P. S. The quarter's pay on route 46,141, due April, 1885, is overdue, and we need our pay in order to pay the running expenses of the route. I cannot get a sub-contract from Otto, from the fact that he is not here to sign it. Now, in case the department cannot issue the checks to us carriers, instead of Otto, cannot the check be issued to the bondsmen of Otto, on said route, and let his bondsmen settle with us carriers for our services? But from the overplus which Otto was receiving I think I should receive my back pay, which Otto got away with, (which was the quarter ending January 1st, 1885.) If I did not have faith to believe that your department would stand by us carriers, and see that we got our pay, I should take my stock from the road immediately, and let Otto's bondsmen look out for the route. Yours, truly, A. M. GILLESPIE."

"Smith River, Del Norte Co., Cal., July 2d, 1885. To the Second Assistant Postmaster Gen., Washington, D. C.—Sir: W. H. Otto, contractor on route 46,141, Smith River, Cal., to Ellensburg, Or., having left the state, we, J. L. Lake and Daniel Haight, his bondsmen, do hereby ask that all warrants for service rendered on said route shall be made payable to us, as we are at present responsible, and intend to see that said mail is carried according to contract; that is, with full understanding between ourselves and carriers, we pledge ourselves to settle with carriers for the last quarter, which pay was withheld, at the request of Mr. Gillespie, and ask that said warrant be issued

to us. J. L. LAKE and DANIEL HAIGHT, Bondsmen for W. H. Otto."

"Office of the Second Asst. Postmaster Gen., Washington, D. C., Aug. 19th, 1885. Gentlemen: W. H. Otto having abandoned service on route No. 46,141, from Smith River to Ellensburg, and in response to your proposition of July 20, 1885, an order has been issued this date to recognize your service on said route, and pay for the same, from January 1, 1885, to June 30, 1886, at contract rate of pay, viz., \$2,114.34 per annum. Very respectfully, G. M. SWENEY, Acting Second Asst. P. M. Gen'l."

"Messrs. J. L. Lake and Daniel Haight, Smith River, Del Norte Co., Cal."

Under the new arrangement, resulting from the correspondence, the service was continued, and the defendants were paid at the rate named, until January 1, 1886, when the number of trips, and the amount of the quarterly payment to be made therefor, were reduced by the government for the balance of the term. The plaintiff was unwilling to accept a reduced compensation for his service, and thereupon gave it up. The first payment to the defendants was made in September or October, 1885, and they thereafter paid the plaintiff \$325 for each quarter, from January 1, 1885, to January 1, 1886. The plaintiff claimed that the defendants ought also to pay him the \$325 due for the quarter ending December 31, 1884, which Otto received from the government and appropriated to his own use; but they refused to make the payment, and in March, 1887, he brought this action to recover from them the amount claimed. The case was tried before the court, sitting without a jury, and the findings and judgment were in favor of the defendants. The plaintiff moved for a new trial, which was denied, and then appealed from the judgment and order. It was alleged in the complaint that the defendants, on their application, were authorized and undertook to fulfill the contract abandoned by Otto, upon the express condition that they would pay the plaintiff whatever was due him from Otto, and that \$325 of the money paid them by the government was for the plaintiff's use. The answer denied that defendants accepted any employment for carrying the mails upon an express, or any, condition that they would pay plaintiff any amount whatever due him from Otto prior to January 1, 1885; and further denied that they had received any money from the government for the use of the plaintiff, which had not been paid to him. It is contended for appellant that the issue as to whether defendants accepted their employment to carry the mails, upon the express condition that they would pay the plaintiff whatever was due him from Otto, was a material one, and that the court failed to find upon it, to his prejudice. But the court did find "that the contract of the defendants was with the government of the United States alone, and not with the plaintiff in this action;" "that the defendants herein have never received any moneys for the use and benefit of the plaintiff herein, arising out of this cause of action;" and that there is "no existing obligation, past, present, or future,

binding said defendants to pay to plaintiff the sum of three hundred and twenty-five dollars, which has not been complied with, and which has not been fully met."

These findings were not as full as they might and perhaps should have been, but we think they should be treated as sufficient. Besides, whether sufficient or not, we are unable to see that the plaintiff was in any way prejudiced by the failure complained of. In the evidence presented in the record, there is nothing tending to show that the defendants ever accepted the employment upon the condition named, or ever agreed to pay plaintiff the money sued for. If, therefore, a more complete finding upon the issue had been made, it must necessarily have been adverse to the plaintiff; and in such case the failure to find is not a ground for the reversal of the judgment. *People v. Center*, 66 Cal. 564, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. Rep. 738. It is further contended that the court erred in the admission of evidence. The plaintiff alleged and sought to prove that he was employed by Otto to carry the mails after April 1, 1884. The defendants denied this averment and offered in evidence the written contract between Otto and A. K. Russ to show that plaintiff was in the employment of Russ and not Otto. Defendants also called two witnesses to prove certain conversations in support of their position. Plaintiff objected to all of this evidence as irrelevant and immaterial, and the objections were overruled, and exceptions reserved. After hearing all the evidence, the court found upon the issue thus raised in favor of the plaintiff, and against the defendants. If it be conceded, therefore, that the rulings complained of were erroneous, still they were rendered harmless and immaterial by the finding; and for such errors judgments are never reversed. No other points are made, and we, therefore, advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

85 Cal. 515

POPLE V. MORINO. (No. 20,716.)

(Supreme Court of California. Sept. 6, 1890., CRIMINAL LAW—SPEEDY TRIAL—DISMISSAL—LARCENY—INSTRUCTIONS.

1. Const. Cal. art. 1, § 13, guaranties a speedy trial to every person charged with crime, and Pen. Code Cal. § 1382, provides that, unless good cause is shown, the court must order the prosecution to be dismissed, "if a defendant whose trial has not been postponed upon his own application is not brought to trial within 60 days after the filing of the indictment or filing of the information." *Held*, that a prisoner against whom an information was filed on August 7th, and who was arraigned, and pleaded not guilty five days later, was entitled to a dismissal of the case for want of prosecution, on motion made in the following March, when it appeared that he had made no application for a continuance, and no cause for the delay was shown by the prosecution.

2. On a trial for larceny a charge that, "if the jury believe that the defendant had no felonious intent to steal the property at the time he

took it, they must acquit, even if they should believe that he subsequently conceived the intent to appropriate it," being applicable to the evidence, was improperly rejected.

Department 1. Appeal from superior court, city and county of San Francisco; EUGENE R. GARBER, Judge.

Barclay Henley and Clitus Barbour, for appellant. *Atty. Gen. Geo. A. Johnson*, for the People.

WORKS, J. The defendant was convicted in the court below of the crime of larceny, and sentenced to the state's prison for the term of four years. In support of his appeal to this court he contends that the court below erred in overruling a motion made by him to dismiss the case. The motion to dismiss was made on the ground that he was not given a speedy trial. It was shown, or stipulated, in support of his motion, that the information against him was filed on the 7th day of August, 1888; that he was arraigned, and entered his plea of not guilty on the 12th day of the same month; and that he had never made any application for, nor was there any postponement of, the action in his behalf, or on his application. The motion to dismiss was made on the 19th day of March, 1889. No showing was made on the part of the people, or any attempt made to show any valid reason for the delay. The constitution guaranties a speedy and public trial to every person charged with crime. Const. art. 1, § 13. The legislature has provided what shall constitute a reasonable time within which a defendant shall be brought to trial. Section 1382 of the Penal Code provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him, within thirty days thereafter; (2) if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the filing of the indictment or filing of the information." The court below, in denying the defendant's motion, said: "The question you raise I have considered before, and, under my construction of the law, it is discretionary and not mandatory, and I will presume that the court was engaged in the trial of other causes." We think this is not a proper construction of the law. A party charged with crime has the constitutional right to a speedy trial, and the court has no discretionary power to deny him a right so important, or to prolong his imprisonment without such trial beyond the time provided by law. The statute is imperative. "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed." Here no cause for delay was shown. It was enough for the defendant to show that the time fixed by the statute, after information filed, had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial it was for the prosecution to show it. The court could not presume

it. Under the facts, as shown, the case should have been dismissed, and it was error to deny the motion. As to what is meant by a speedy trial, independent of a statute like ours, see *Nixon v. State*, 41 Amer. Dec. 601, and note, 604. Under a statute similar to ours the supreme court of Kansas held that a defendant was entitled to be discharged on a writ of *habeas corpus* where his case had not been tried as required by the statute. In *re McMicken*, 18 Pac. Rep. 473. Certain rulings of the court upon the evidence are complained of, but the proper exceptions were not reserved, and the questions cannot, for that reason, be considered by this court.

The defendant requested the court to instruct the jury: "If the jury believe that the defendant had no felonious intent to steal the property at the time he took it, they must acquit, even if they should believe that he subsequently conceived the intent to appropriate it." The court gave the first clause of the instruction, but refused to give that part of it in italics. The instruction was correct as an abstract proposition of law. *People v. Jersey*, 18 Cal. 337; *People v. Salorse*, 62 Cal. 139; *State v. Homes*, 57 Amer. Dec. 269, note, page 273; *Starck v. State*, 63 Ind. 235. And the evidence was such as to render such an instruction applicable to this case, and it should have been given. Whether the felonious intent existed at the time the property was taken was a question which should have been left to the jury under the instruction asked. The judgment and order appealed from are reversed, and the court below is instructed to dismiss the information unless good reason for the failure to bring the defendant to trial is shown.

We concur: PATERSON, J.; FOX, J.

3 Cal. Unrep. 288

ELLIS v. WOODBURN. (No. 13,533.)

(Supreme Court of California. Oct. 2, 1890.)

ACTION FOR ATTORNEY'S FEE—CONTINGENT FEE—EVIDENCE—INSTRUCTIONS.

1. In an action for the recovery of attorney fees, the first count of the complaint was on a *quantum meruit*. The second count alleged that defendant promised to pay plaintiff an absolute fee of \$500 for conducting certain litigation, and \$1,000 in addition upon the contingency that plaintiff conducted said litigation successfully. The answer admitted that defendant promised to pay the absolute fee, but denied that he promised to pay any contingent fee. *Held*, that expert testimony was inadmissible to prove what would be a reasonable contingent fee, as the reasonableness of said fee was not in issue. The right to recover such fee depended entirely upon the proof of the alleged promise to pay it, and the performance by plaintiff of his part of the contract.

2. The court instructed the jury that it was admitted that plaintiff did render some service, and "if you do not find that there was an express contract, as stated by either plaintiff or defendant, the services being admitted, and it being admitted that plaintiff has been paid \$500 for his services, if you are satisfied that plaintiff's services were worth more than the \$500 you will render a verdict for plaintiff for any amount above \$500 that you find such services to be worth, not exceeding the sum of \$1,000." *Held*, that the testimony having been as to what would have been a reasonable contingent fee under all the circumstances, and as to what would be a reason-

able attorney's fee, in the case, taking into consideration not only the services actually rendered, but others which the plaintiff agreed to render, and there being no evidence as to what the services actually rendered were worth, it was error to give the instruction.

BEATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

Blanchard & Swisler, for appellant. *Roger Johnson, Geo. H. Ingham, A. C. Ellis*, and *B. Morgan*, for respondent.

VANCLIEF, C. The plaintiff is an attorney at law, and brought this action to recover a balance of \$1,000, alleged to be due him from the defendant for professional services. The case was tried by a jury, and the trial resulted in a verdict and judgment in favor of the plaintiff for \$1,000. The defendant appeals from the judgment, and also from an order denying his motion for a new trial. The complaint consists of two counts for services rendered in defense of an action prosecuted by the Lake Valley Railroad Company, a corporation, against this defendant, to condemn a right of way over defendant's land, and in conducting negotiations for a compromise of that action. The first count is for the recovery of *quantum meruit* for such services, alleging them to have been reasonably worth \$1,500, and that only \$500 had been paid, and praying judgment for the balance of \$1,000. The second count is for the recovery of a contingent fee of \$1,000 in addition to the \$500 admitted to have been paid upon an alleged express agreement between the plaintiff and defendant, to the effect that plaintiff was to defend the action to condemn defendant's land, and at the same time to assist defendant to compromise that action, by selling to the plaintiff therein the land over which the right of way was sought; and in case the compromise failed, and the defense should be unsuccessful, the plaintiff was to commence proceedings to forfeit the right of the railroad company to operate the proposed road, on the ground of non-user, if that could be proved. For all these services the defendant was to pay the plaintiff \$500 absolutely, and the further sum of \$1,000, on the condition of success, either in negotiating a compromise by sale of the land, or in the defense of the action, or in procuring a judgment forfeiting the franchise of the railroad company. As a performance of this condition it is alleged that, by the advice and assistance of the plaintiff, a compromise of the action to condemn the right of way was effected by a sale of defendant's land to the plaintiff in that action. It is admitted that defendant paid \$500 before the commencement of this action, but it is alleged that he has refused to pay the contingent fee of \$1,000, or any part thereof. The answer of the defendant admits his express promise to pay \$500, for plaintiff's services in defending the action, and in assisting to negotiate a compromise by selling his land, etc., but denies that he agreed to pay \$1,000, or any further sum, upon any condition or contingency whatever; and

alleges, on the contrary, that plaintiff expressly agreed to accept \$500 in full satisfaction for all his services in the defense of that action, and in assisting to negotiate a compromise thereof; and also denies that the agreement extended to services in any contemplated proceeding to forfeit the right of the Lake Valley Railroad Company to operate its road. It appears, and is admitted, that, on the day when the trial of the action to condemn defendant's land was about to be commenced, the case was compromised, through the advice and assistance of the plaintiff in this action, by a sale of the defendant's land to the plaintiff in that action, for a price (\$36,500) which the defendant consented to take, and which was then paid. As to the existence and terms of the express agreement alleged in the second count of the complaint, the plaintiff and defendant were the only witnesses. The plaintiff testified positively to such a contract in all its details; and the defendant testified as positively to the express agreement alleged in his answer, and that there was no agreement or promise to pay any conditional or contingent fee in addition to the absolute fee of \$500. It thus appears that each pleaded and testified to a special express agreement covering the whole subject-matter of the services to be rendered, and the fees or compensation to be paid therefor; but as to the existence of that part of the agreement, as alleged in the complaint, providing for a contingent fee or any compensation in addition to the absolute fee of \$500, their testimony was squarely and irreconcilably conflicting. If the testimony of either is wholly true, there could have been no implied contract as to the compensation to be paid for any part of the services rendered, and consequently no recovery upon the first count of the complaint, since, to justify a verdict for the plaintiff on the first count, the jury must have found (1) that there was no valid express agreement as to what compensation should be paid for the services, or for some part thereof; and (2) that the value of the services actually rendered exceeded the sum of \$500, which had been paid. On the trial of this case, M. P. Bennett, W. S. Wood, and Patrick Reddy were examined as expert witnesses for the plaintiff to prove what would be a reasonable contingent attorney's fee to be paid by defendant to plaintiff, in the action to condemn defendant's land, upon hypothetical statements of facts, embracing all the facts stated in the second count of the complaint, and some others, which were entirely irrelevant. Upon these hypothetical statements Mr. Reddy and Mr. Wood were asked what would be a reasonable contingent fee. To these questions, the attorneys for the defendant objected, on several grounds, among them, that the questions were irrelevant to any issue made by the pleadings. The court overruled the objections, and the witnesses answered, in substance, that, in addition to the absolute fee of \$500, a contingent fee of \$1,000 to \$1,500 would have been a reasonable contingent fee.

1. The appellant's counsel insist that the court erred in overruling their objec-

tion to these questions. I think the objection should have been sustained, for, while there was an issue as to the value of the actual services alleged in the *quantum meruit* count, there was no issue as to the value or reasonableness of the conditional or contingent fee which is the subject of the second count. An obligation to pay a contingent fee is necessarily the creature of an express agreement, and is not implicated in the mere rendition of valuable services by request, as is the unconditional obligation to pay the reasonable value of such services. Nor does the amount of a contingent fee depend upon, or necessarily coincide with, the value of the services for which it is to be paid; nor in the absence of fraud upon its reasonableness. Whether or not the plaintiff was entitled to recover a contingent fee of \$1,000, depended entirely upon proof of the express contract alleged in the second count, and performance of the express conditions of that contract, on his part. That the evidence objected to may have confused the jury to the prejudice of the defendant seems probable from the fact that there was no evidence of the value of the distinct services actually rendered, considered in connection with the fourteenth instruction to the jury.

2. Counsel for appellant further contend that the court erred in giving to the jury the instruction numbered 14, of which the following is a copy. "It is admitted that plaintiff did render some service, and if you do not find that there was an express contract, as stated by either plaintiff or defendant, the services being admitted, also it is admitted that plaintiff has been paid \$500 for his services. If you are satisfied that plaintiff's services were worth more than the \$500, you will render a verdict for plaintiff for any amount above \$500 that you find such services to be worth, not exceeding the sum of \$1,000." I think this instruction erroneous for the reason that there was no evidence tending to prove that the services actually rendered "were worth more than \$500," or any sum whatever. The testimony of Messrs. Wood and Reddy was expressly applicable to a contingent fee alone, in answer to the question, what would have been a reasonable contingent fee under the circumstances stated? And the circumstances stated in this hypothetical question included, not only the conditions upon which it was alleged, in the second count, that the contingent fee was to be paid, but others not alleged in either count. Messrs. Wood and Reddy expressed no opinion as to the distinct value of the services actually rendered. Mr. Bennett expressed the opinion that "\$2,000 would be a reasonable attorney's fee in the case;" but this opinion is not based solely upon the services actually rendered, but partly upon the consideration of plaintiff's "agreement to follow the case throughout, into whatever court it might be taken, and his agreement to prosecute *quo warranto* proceedings for a forfeiture of the charter of the Lake Valley Railroad Company in case of a defeat in the condemnation case." Yet it appears that no services were rendered under these parts of the agree-

ment. Mr. Bennett's opinion was evidently intended to be applicable to the second count alone; but, whether so intended or not, it is not applicable to the first count. Upon what evidence, under the fourteenth instruction, was the jury to become "satisfied that plaintiff's services [actually rendered] were worth more than \$500," if not upon the irrelevant testimony of Messrs. Wood, Reddy, and Bennett? The case seems to have gone to the jury in a tangled state; and, to say the least, it does not appear that the jury may not have been confused and misled to the prejudice of the defendant by the erroneous instruction given, and the irrelevant evidence admitted. I therefore think the judgment and order should be reversed, and a new trial granted.

We concur GIBSON, C.; FOOTE, C.

PER CURIAM For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

I dissent: BEATTY, C. J.

chase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant or his assigns, upon his making full payment therefor, provided that no other application has been made for the purchase of the same lands prior to the issuance of said certificate of purchase," the complaint of an applicant to purchase swamp lands from the state, alleging that at the time the certificate of purchase therefor was issued to defendant the lands had not been surveyed, and were not subject to sale, but also showing that complainant's application to purchase said lands was not filed until after the passage of said act, and after the certificate had been issued to defendant, is bad on demurrer.

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and *E. Rousseau*, (*Lamar & Castle*, of counsel,) for appellant. *Haggin & Van Ness*, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

SHARPSTEIN, J. This case originated in a contest instituted in the state land-office by an application of the plaintiff, in 1888, to purchase a tract of swamp and overflowed land, of which defendant, upon an application in due form, obtained in 1871 a certificate of purchase from the register of the state land-office. The contest was duly referred to the proper court for adjudication. Plaintiff filed his complaint. Defendant demurred to it, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment entered for defendant. Plaintiff appeals. The contention of the respondent is that the complaint does not allege facts sufficient to show that the certificate issued to him in 1871 is invalid. Appellant insists that the facts alleged do show that it is invalid. The allegation upon which appellant relies is that at the time of the issuing of said certificate of purchase to defendant, on the 23d day of January, 1871, said land had not been surveyed, and was not subject to sale. This contention is based upon a clause in the act of the legislature of the 28th of March, 1868, which reads as follows: "The swamp and overflowed salt marsh and tide-lands belonging to the state shall be sold at the rate of one dollar per acre, in gold coin; payable, fifty per cent. of the principal within fifty days from the date of the approval of the survey by the surveyor general." The demurrer admits that no survey had been made at the time of the issuing of the certificate to the defendant. Conceding that the application filed before the approval of the survey by the surveyor general was invalid, it appears by the complaint that the application of the appellant to purchase the land was not filed before the year 1888, and the legislature, by the act of March 27, 1872, enacted that "when application has been made to purchase lands from this state, and payment made to the treasurer of the proper county for the same, in whole or in part, and a certificate of purchase or patent has been issued to the applicant, the title of the state to said lands is hereby vested in said applicant, or his assigns, upon his making full payment therefor, provided no other application

85 Cal. 533

BARKER v. FREEMAN. (No. 13,506.)

(*Supreme Court of California.* Sept. 8, 1890.)

SWAMP LANDS—RIGHT TO PURCHASE.

Under Act Cal. March 27, 1872, providing that "when application has been made to pur-

has been made for the purchase of the same lands prior to the issuance of said certificate of purchase." This act of the legislature was considered and construed by this court in *Yoakum v. Brower*, 52 Cal. 373, and again in *Rowell v. Perkins*, 56 Cal. 219. In the former case, we said: "The act is operative, not only upon applications which were defective in form, but upon those which were defective in substance, or were invalid for any other reason. * * * If those steps in the proceedings for the purchase had been taken prior to the passage of the act, the act operated to validate and confirm the certificate." In the latter case, the court says: "From what has been said, it sufficiently appears that the defendant, who made first payment in the proper county, has, by virtue of the act of 1872, acquired a right to complete his purchase in the land-office, even if the lands applied for were not the property of the state, or were not subject to location or disposition when he filed his application." That construction of the act is quite satisfactory to us, and leaves little or nothing more to be said in this case. Upon the authority then of those cases, the demurrer was properly sustained. The demurrer was sustained without leave to plaintiff to amend his complaint. It does not appear that plaintiff asked leave to amend his complaint, and we cannot reverse the judgment on the ground that leave was not granted when none was asked. Judgment affirmed.

We concur: WORKS, J.; THORNTON, J.; MCFARLAND, J.; FOX, J.; PATERSON, J.

STONER v. FREEMAN. (No. 13,509.)

(*Supreme Court of California*. Sept. 8, 1890.)

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (*Lamar & Castle*, of counsel,) for appellant. *Haggin & Van Ness*, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

PER CURIAM. On the authority of *Barker v. Freeman*, ante, 926, (No. 13,506, this day filed,) the judgment is affirmed.

ETZENHOUSER v. FREEMAN. (No. 13,508.)

(*Supreme Court of California*. Sept. 8, 1890.)

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (*Lamar & Castle*, of counsel,) for appellant. *Haggin & Van Ness*, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

PER CURIAM. On the authority of *Barker v. Freeman*, ante, 926, (No. 13,506, this day filed,) the judgment is affirmed.

WILSON v. FREEMAN. (No. 13,507.)

(*Supreme Court of California*. Sept. 8, 1890.)

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

J. B. Lamar and E. Rousseau, (*Lamar & Castle*, of counsel,) for appellant. *Haggin & Van Ness*, (*Geo. C. Gorham, Jr.*, of counsel,) for respondent.

PER CURIAM. On the authority of *Barker v. Freeman*, ante, 926, (No. 13,506, this day filed,) the judgment is affirmed.

3 Cal. Unrep. 293

NOYES v. SOUTHERN PAC. R. CO. (No. 13,840.)¹

(*Supreme Court of California*. Oct. 8, 1890.)

RAILROAD COMPANIES—ACCIDENTS TO PERSONS ON TRACK.

In an action against a railroad company for the wrongful death of an employe of one of its contractors, it appeared that deceased, with the knowledge and consent of the company, was walking to his work on the right of way, in a narrow place between a bluff and the sea traversed by two parallel tracks, with knowledge that two locomotives, one on each track, would shortly follow him in the same direction; that he received warning by the bell of one, and then perceived that they were approaching at such relative rates of speed as would probably bring them together at the moment of passing him; that he at first took refuge between the tracks where there was barely room to escape unharmed, but a moment later attempted to cross the track towards the bluff, where there was ample room, and was struck and killed while so doing. Held, he was guilty of contributory negligence, and a nonsuit was properly directed.

Department 1. Appeal from superior court, Contra Costa county; J. P. JONES, Judge.

Henry C. McPike, and D. M. Delmas, for appellant. L. D. McKissick and Fred B. Lake, (*Harvey S. Brown*, of counsel,) for respondent.

WORKS, J. This is an action by the appellant, as administrator, against the respondent for damages for injuries resulting in the death of Manuel F. De Mattos. The evidence on the part of the plaintiff being in, the defendant moved for a nonsuit, which was granted. The only question on this appeal is as to the correctness of this ruling. The facts disclosed by the pleadings and evidence are substantially as follows: The defendant owned and operated a railroad. At a point on its road, between Port Costa and what was known as the "Nevada Docks," there was a double line of tracks. The road at this point ran along the straits of Carquinez, and the width of the road-way was about 24 feet; on one side of the two tracks, and about four feet from the end of the ties, was a steep bluff rising from the road-bed, and on the other side the ends of the ties projected to the water's edge. There was a space of 8 feet between the rails of the two tracks in the center. One Edgar De Pue had been for more than two years engaged by the defendant as a contractor to load and unload its cars at the Nevada docks. In doing this work he kept in his employ a large number of men, many of whom resided at Port Costa. The road-bed of the defendant furnished the only convenient way for foot-passengers between these two points, and the men who lived at Port Costa had for a long time been accustomed to and did pass along this road-way daily, in going to and coming from their work. To facilitate the operation of loading and unloading the cars, the defendant had been in the habit of sending, daily, two locomotive engines from Port Costa to the docks. On their way

¹ Reversed in banc. See 28 P. 288, 92 Cal. 285.

to the docks, the locomotives frequently carried some of the workmen, and others would walk along the road-way of the defendant. On the morning of the accident, resulting in the death of De Mattos, a crew of men, under De Pue, started for Port Costa for their work at the docks. They were accompanied, as usual, by two locomotives. Some of the men took the locomotives, but about 20 others, including De Mattos, started on ahead of the engines on foot. They had gone but a short distance when they were followed by one of the engines, on the switch track, running at a slow rate of speed. They were overtaken while traveling the narrow part of the road-way above mentioned. They were warned of the coming of the first engine by the sound of its bell, and then beheld the second engine coming at a much greater rate of speed about 40 yards distant. It was reasonable to suppose that at the rate the two engines were coming they would be abreast of each other at about the point where the men were, and both of the tracks, and much of the space of the road-way, be thus taken up. The men were called upon to save themselves by some means without delay. Most of them succeeded in reaching the space between the track on the land side and the bluff, and were saved. One of their number jumped into the water on the other side, and escaped with but slight injuries; two others chose to occupy the space in the center between the tracks, and one of them was struck by one of the engines but not injured. De Mattos was in this space between the tracks, and, if he had remained there, would have escaped, but when the second engine was nearing him he made the hazardous attempt to cross in front of it, evidently with the intent to reach the space near the bluff, and in the attempt was struck by the engine, run over, and killed. As the second engine was coming, the track upon which it was moving was clear until the deceased stepped upon it, and then it was too late to stop the engine in time to save him. It is contended by the appellant that, the road-way having been used for so long a time by foot-passengers, it must be presumed that it was so used with the consent and acquiescence of the railroad company, and that therefore the deceased was not a trespasser, or wrongfully upon the respondent's road-way, and not guilty of contributory negligence, and that, for the same reason, the employes of the company were guilty of negligence in not sounding the bell of the engine, and in running at too high a rate of speed. It may be conceded for the purposes of this case that the continued use of the road-way of the respondent as a footway was sufficient to establish the fact that it was being so used with the consent and acquiescence of the company, and that therefore the deceased was not a trespasser. There are authorities holding such a doctrine. *Delaney v. Railroad Co.*, 33 Wis. 67, 70; *Troy v. Railroad Co.*, 99 N. C. 298, 6 S. E. Rep. 77; *Davis v. Railroad Co.*, 58 Wis. 646, 17 N. W. Rep. 406. But, if this be conceded, it does not follow that the deceased was not guilty of neg-

ligence. The evidence shows conclusively that he started out on the road-way knowing that the two locomotives would follow immediately. It was also known by the employes in charge of the engines that the workmen were in front of them. The first engine warned the men of their coming. As the second engine came on, the track upon which it was moving was clear, and the men had notice of its coming. The engine was not running at an unusually high rate of speed,—some of the witnesses say not more than 10 miles an hour. Conceding that the deceased was rightfully on the road-way, it was not necessary that he should have been on the track upon which the locomotive was coming, and as he had knowledge that the engine was following, and must necessarily overtake him on the way, it was negligence for him to travel on the track, or to attempt to cross the track in front of the moving engine. There was evidence sufficient to show that there was ample room for him to have traveled along the road-way, either between one of the tracks and the bluff or between the two tracks, and that, if he had done so, he would not have been injured. It is true, as counsel for appellant contend, that when the danger was upon him, and he was called upon to act instantly, and without time to reflect and choose the safest means of escape, it was not negligence on his part that he made a mistake in attempting to cross in front of the engine. *1 Shear. & R. Neg. § 89*; *Karr v. Parks*, 40 Cal. 188, 193; *Lawrence v. Green*, 70 Cal. 417, 421, 11 Pac. Rep. 750; *Smith v. Railway Co.*, 30 Minn. 169, 14 N. W. Rep. 797; *Wilson v. Railroad Co.*, 26 Minn. 278, 3 N. W. Rep. 333. But this doctrine only applies where the party injured is placed in imminent peril without his fault. Such was not the case here. The deceased, knowing that the engines were following him, if he had acted the part of a prudent man, would not at the time of their coming, have been in a position where he would have to run risks in attempting to escape. He could have been in a place on the road-way where no choice, in the face of imminent danger, would have been necessary. His negligence consisted, not in mistaking the safest means of escape from danger, but in placing himself, beforehand, where a choice of different means of escape became necessary. It seems to us, also, that the very same facts which show that the deceased was negligent show also that the employes of the respondent were not guilty of negligence. They knew that the men who had preceded them had knowledge of their coming, and had a right to suppose that they would not be on either of the tracks when there was room for them to pass along safely at the side of the track. Besides, the evidence shows that, up to the instant the deceased was struck by the engine, the track upon which the engine was moving was clear, and there was no apparent reason for stopping or slowing up. The men in charge of the locomotive could not be expected to anticipate the fact that the deceased, who was then in a place of safety between the tracks, would place himself in danger by

stepping in front of the engine. We think the nonsuit was properly granted. Judgment affirmed.

We concur: FOX, J.; PATERSON, J.

84 Cal. 214

DOUTHITT v. FINCH. (No. 12,033.)

(Supreme Court of California. May 31, 1890.)¹

COSTS—OFFER OF JUDGMENT.

Code Civil Proc. Cal. § 997, provides that if, after an offer of judgment, "plaintiff fails to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." Held that, where defendant, before the trial, served on plaintiff an offer to allow judgment to be taken for \$500, which offer was not accepted, and on the trial plaintiff obtained a judgment for \$400, the trial court properly allowed plaintiff the costs which he had incurred before the offer, and charged him with the costs which accrued after the offer.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Tyler & Tyler, for appellant. D. William Douthitt, in pro. per.

VANCLIEF, C. This appeal presents only a question of costs. Before the trial, and after plaintiff had incurred and paid \$26 costs, the defendant regularly served upon the plaintiff an offer, in writing, to allow judgment to be taken for \$500, which was not accepted. Upon the trial the plaintiff recovered only \$400. The court allowed the plaintiff's cost-bill for the \$26 incurred before the offer of defendant to allow judgment for \$500, but charged plaintiff with costs after that offer. The appellant contends that no costs incurred before the offer should have been allowed. The solution of the question depends upon the meaning of the following language: "And if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer." Code Civil Proc. § 997. Precisely this language in section 385 of the New York Code of Procedure has been construed by the courts of that state as it was construed by the trial court in this case, (*Burnett v. Westfall*, 15 How. Pr. 432; *Magnin v. Dinsmore*, 15 Abb. Pr., N. S., 331;) and I think this construction accords with the general understanding of the profession, and with the practice in the superior courts, and therefore that the judgment and order appealed from should be affirmed.

BELCHER, C. C., and GIBSON, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

84 Cal. 590

DURKEE v. GARVEY. (No. 12,771.)

(Supreme Court of California. June 19, 1890.)

COSTS OF APPEAL—REVERSAL ON CONDITION.

The supreme court, on appeal, ordered that "the judgment and order of the superior court * * * be, and the same are, reversed, and cause remanded for a new trial, unless the plaintiff shall, within 30 days after the going down of the *remittitur*, file in the court below a release of \$150, and his

costs in that court, and, if he does file such release, then the judgment and order shall stand affirmed." On the going down of the *remittitur*, plaintiff filed the release prescribed. Held, that a motion to recall the *remittitur* and modify the judgment of the supreme court, so as to require plaintiff to pay the costs of appeal, on the ground that the judgment of the trial court had been reversed, would be denied, as the judgment was reversed on condition, on compliance with which it was to stand affirmed, and plaintiff had complied with the condition. Defendant's remedy was to move for a rehearing within 30 days.

In bank. Motion to recall *remittitur* issued to superior court, Los Angeles county.

Smith & Clark and Shaw & Damron, for appellant. Bicknell, White & Barclay and Wilson & Reddick, for respondent.

WORKS, J. This cause was decided by this court, and the following judgment rendered: "It is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Los Angeles, in the above-entitled cause, be, and the same are, reversed, and cause remanded for a new trial, unless the plaintiff shall, within 30 days after the going down of the *remittitur*, file in the court below a release of \$150, and his costs in that court, and if he does file such release then the judgment and order shall stand affirmed." 21 Pac. Rep. 304. Upon the going down of the *remittitur*, the plaintiff, in compliance with the judgment of this court, filed his release of \$150 of his judgment and his costs in the court below. The defendant now moves this court to recall the *remittitur*, and so modify its former judgment as to require the plaintiff to pay the costs in this court. This is placed on the ground that the case was reversed, and, under the rules of the court, judgment for costs should have gone against the respondent. But the judgment was reversed on condition, and upon the performance of the condition named, the judgment was to stand affirmed. The condition was complied with, and therefore, from that time, the judgment was, and continues to be, affirmed, and must be enforced by the court below. This court imposed a penalty upon the plaintiff, which was the release of his costs below. If this had not been done, he would have been liable for the costs in this court, but might, upon a retrial of the case, have again recovered his costs in the lower court. This being so, it would hardly be just to recall the *remittitur*, and impose a new and additional penalty upon him. If the defendant had been put to the expense of a retrial in the court below, his claim for the costs in this court would be just, but, as it is, he was avoided a new trial, and escaped the costs of a former trial, and should be content. Besides, if the appellant was not satisfied with the judgment as rendered, his remedy was to ask for a rehearing, or a modification of the judgment within 30 days, and before the *remittitur* went down, which was not done. The present application comes too late. Motion denied.

BEATTY, C. J., and FOX, McFARLAND, and SHARPSTEIN, J. J., concurred.

5 Cal. Unrep. 748

HEILBRON v. CAMPBELL, Judge. (No. 13, 478.)

(Supreme Court of California. Sept. 3, 1890.)

JUDGE—DISQUALIFICATION.

The answer of a judge to a petition to restrain him from further acting as judge in a case pending before him admitted that he claimed to be the owner of certain land. The petitioner, who was a party to such pending action, claimed in his petition that said land was involved in the said action pending before the judge. *Held*, that a prohibitory order would issue to such judge, though by his answer he declared that, his attention having been called to the fact that the land claimed by him was claimed to be involved in the suit, he would not further act in it. PATERSON, J., dissenting.

In bank. For former report, see 23 Pac. Rep. 122.

S. C. Denson, Geo. R. B. Hayes, and A. L. Hart, for petitioner. *Garber, Boalt & Bishop, (Craig & Meredith, of counsel)*, for respondent.

PER CURIAM. This case was originally heard upon demurrer to the petition, an answer being filed at the same time. The demurrer, though not in terms, was in legal effect, overruled, and a judgment final entered which was open to the construction that the same was given upon the petition and answer. Subsequently, upon motion, this decision was set aside, and the defendant was allowed to file an amended answer, and the case was placed on the Sacramento calendar for such further proceedings as counsel should be advised. Upon the call of the case, defendant moved the court for an order of reference to take testimony. This was met by a counter-motion for judgment in favor of plaintiff on the pleadings. Both motions were argued at some length, and the matter was submitted with the understanding, on the part of court at least, that counsel would confer, and see if they could agree upon issues which they deemed necessary to try, and if so upon a referee to be appointed; the plaintiff, however, insisting that he was entitled to judgment, as prayed, upon facts admitted in the amended answer.

We have not been advised of any agreement between counsel, and have therefore examined the case upon the motion for judgment. By his amended answer the defendant admits that in September, 1888, he purchased, and claims to be now the owner of, the lands embraced in swamp-land location No. 2,770. This tract of land plaintiff, in his petition, claims is a part of the lands in controversy in the case of *Clarke et al. v. Heilbron et al.* Defendant denies that it is a part of said tract. It is thus apparent that there is a direct conflict between the parties, at least on one side, of the case of *Clarke et al. v. Heilbron et al.* and the judge before whom the case is pending, as to the ownership of a portion of the land included in that suit. For the reasons stated in the former opinion filed herein, December 28, 1889, (23 Pac. Rep. 122,) it would therefore be highly improper for him to act as judge in the case. He admits that it was his intention to act upon the hearing of any motion or proceeding that might be taken in the case,

but says that now that his attention is called to the fact that it is claimed by one of the parties that the land which he claims is a part of the land involved in the suit, he will not further act in the premises, and, upon the faith of this statement, it is claimed in his behalf that this proceeding should be dismissed. Such a statement might be persuasive to the other party to make a voluntary dismissal of the case, but it does not authorize the court to order a dismissal. In view, therefore, of the fact that it appears from the answer that the defendant, Campbell, judge of the superior court of the county of Fresno, claims to be the owner of certain property claimed by the defendants, in the suit of *Clarke et al. v. Heilbron et al.*, now pending before him, to be a part of the property constituting the subject-matter in controversy, it is by the court now here ordered and adjudged that the writ of prohibition issue in this cause, as prayed, commanding the said J. B. Campbell, judge of the superior court in and for the county of Fresno, to absolutely desist and refrain from sitting or acting as judge in any proceeding had or to be had in the case of *Charlotte F. Clarke et al. v. August Heilbron et al.*, now pending in said superior court, or from making any further or other order in the cause, except such as may pertain to the arrangement of the calendar of his court, or for the transfer of the cause to some other court or judge, or such as may be agreed upon by counsel on both sides. It is further ordered that neither party recover costs in this case.

BEATTY, C. J., being disqualified, did not participate in the consideration or decision hereof.

PATERSON, J. I dissent. There is no necessity for a prohibitory order. The judge has declared in his answer herein that he "does not intend to, and will refuse to, hear or determine any motion, or to sit or act in any proceeding whatever," in the cause. Any prosecution of this proceeding after such a declaration is liable to be construed as an attempt to punish the judge for his past acts. I am at a loss to understand the object of the order.

85 Cal. 488

WARD v. WATERMAN *et al.*, (STANFORD, Intervenor.) (No. 12,662.)

(Supreme Court of California. Sept. 5, 1890.)

EQUITY—REFORMATION—MUTUAL MISTAKE—LIMITATION OF ACTIONS.

1. A declaration of trust recited that the title to certain land had been caused to be conveyed to one S. by the persons thereafter named as beneficiaries, to be by him managed and sold, and the proceeds to be divided among the beneficiaries in certain proportions. This declaration was executed by S. and the beneficiaries. In a suit by a judgment creditor of W., one of the beneficiaries, against him, and S., the trustee, to reach the interest of W., another of the beneficiaries, L. intervened and sought to have the declaration reformed to correspond to his agreement with W., that it should show that the proceeds of W.'s interest were to be paid to L. until W.'s debt to L. was satisfied. *Held*, that the other beneficiaries were not necessary parties to the proceeding for reformation.

2. The complaint of the intervenor alleged that, at the time of the conveyance of the land to S., the parties named in the declaration of trust were the equitable owners thereof in the proportion named in the declaration; that, at the time of the execution thereof, he was absent; that, before he went away, it was agreed between him and the other parties in interest that the title should be vested in some person to manage, sell, and distribute the proceeds, and that a declaration should be executed showing the nature of the trust, and the relative interests of the respective parties; and that it was agreed between him and W. that when such declaration was made, W. should have it show that the proceeds of W.'s interest were to be paid to L. until W.'s debt to L. was satisfied; that when the declaration was executed it was executed on behalf of L. by his attorney in fact, who knew nothing of the arrangement between L. and W., and, by a mutual mistake on the part of L., by his representative, and of W., the declaration failed to state the truth in regard to W.'s interest, and, on its face, showed that the proceeds thereof were to be paid to W. *Held*, that these facts showed a mutual mistake between L. and W. as to the instrument warranting a revision, it appearing that their minds had met as to what should be done when it should be executed, and it not being necessary that the trustee or the other beneficiaries or the attorney in fact of L. should have shared in the mistake.

3. The claim on which plaintiff obtained judgment was a note given by W. several months after the execution of the declaration of trust in renewal of a note which had for years been barred by limitation. *Held* that, even if any interest in the land subject to levy had remained in W. after the conveyance to S., and the declaration of trust, plaintiff could not avail himself of the fact that the debt of W. to L. was barred by the statute before the declaration of trust, the plea of limitation being in such case personal to the debtor.

Department 1. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Stanly, Stoney & Hayes and *J. Walter Ward*, for appellant. *J. E. Foulds*, for respondents Waterman et al. *Rhodes & Borden*, for respondent Stanford.

Fox, J. On the 11th day of February, 1885, the plaintiff commenced a suit against the defendant Waterman for the recovery of the sum of \$21,404.16, with interest, due from said defendant upon a promissory note, which suit was brought in the superior court in and for the city and county of San Francisco. At the time of commencing the action he caused a writ of attachment to be issued, directed to the sheriff of the county of Alameda, and, under it, caused the sheriff to attach all the right, title, and interest of the said Waterman in and to certain lands situate in said county of Alameda, standing of record in the name of the defendant S. P. Smith. In that suit such proceedings were had as that in due course the plaintiff recovered judgment, and caused execution to be issued directed to the sheriff of the city and county of San Francisco, who in due time returned the same *nulla bona*. Thereupon the plaintiff instituted this action, in the nature of a creditors' bill, in the superior court in and for the county of Alameda, against the defendants Waterman and Smith, alleging, among other necessary and proper things, that the defendant Smith held the legal title in and to the lands so attached as aforesaid, to the ex-

tent of one undivided eighth thereof, in secret trust for the said Waterman; that Smith paid no consideration therefor, or for any interest in the said land; that the purchase price of said land had been wholly paid by other parties, one-eighth thereof having been paid by the said Waterman, and that as to said eighth interest Waterman was the equitable owner thereof, but he had caused the legal title thereof to be vested in said Smith, to prevent the same from being subjected to the payment of the indebtedness of said Waterman, and thereby to defraud the plaintiff and the estate represented by him; that Waterman had no personal property out of which to make the judgment in favor of plaintiff; and that there was no real estate standing in the name of said Waterman in this state; and praying a decree adjudging the said Waterman to be the owner of said one-eighth interest in said land, and subjecting the same to the lien of plaintiff's judgment. The defendants answered jointly, setting up that, long prior to the conveyances by which Smith became vested with the title to said lands, the defendant Waterman was the owner of a contract for the purchase of an interest in said lands, amounting to an undivided eighth thereof, and had become entitled to a conveyance of said undivided interest; that while so entitled, and on the 14th day of March, 1877, at his request, Stanford had become accommodation indorser on promissory notes of Waterman to the amount of \$16,500, and that, to secure Stanford against loss by reason of such indorsements, Waterman had, in writing, assigned to Stanford his interest in said contract, and all his rights thereunder; that Waterman made default in paying the notes so indorsed, and Stanford had been compelled to pay the same; that subsequently, and on September 6, 1878, Waterman made a new note to Stanford for the amount which he had been compelled to advance as aforesaid, with interest, then amounting to the sum of \$19,315, payable March 15, 1879, with interest at the rate of 10 per cent. per annum, payable monthly in advance, and if not so paid to be added to the principal, and bear interest at the same rate, which said note was in like manner secured by said assignment; that no part of said note or the interest thereon had been paid except \$2,536 paid August 11, 1882; that, within two years next preceding the filing of said answer, and of the judgment referred to in the complaint, Waterman had, in writing, promised to pay said note and interest, and declared said assignment to be a subsisting lien upon any interest he had in the lands described in the complaint as security for such payment; that the said Waterman and other parties beneficially interested therein had caused said property to be conveyed to said Smith in good faith, and not for the purpose of defrauding the plaintiff or any other creditor of said Waterman, or of concealing said property, or placing the same beyond the reach of plaintiff, or of hindering or delaying the plaintiff, or of preventing the said Waterman's alleged interest from being subjected to the payment of said indebted-

ness; that the same was made to said Smith for the purpose of more conveniently making sales of said property, and in trust to divide the proceeds of such sales, after paying the expenses thereof, among the parties thereunto beneficially interested, and that the interest of said Waterman therein is now held in trust by said Smith for the purpose of paying the indebtedness of Waterman to Stanford, so far as the same can be applied to such payment. In this suit Stanford by leave of the court intervened, and set up substantially, among other things, that, at the time of and for a long time prior to the conveyance of said property to defendant Smith, certain persons named in the declaration of trust, a copy of which was annexed to said intervention, were and had been the equitable owners of the lands and premises described in the complaint, in the proportions in said declaration named; that they caused and procured the legal title to be conveyed to and vested in said Smith for the purposes expressly set forth in the said declaration of trust, or intended to be so stated; that, at the time of the execution of such conveyance and declaration of trust, the said Stanford was absent from the state, and in Europe; that, before he departed for Europe, it was understood and agreed between himself and the others in interest that the title should be so vested in some one person, for convenience of management and sale, and distribution of the proceeds, and that a declaration should be made and executed showing the nature and character of the trust, and the relative interests of the respective parties, and that it was agreed between himself and Waterman that when such declaration was made Waterman should have it show that the proceeds of the interest of Waterman were to be paid to Stanford until the debt from Waterman to Stanford was satisfied; that when the declaration of trust came to be executed it was executed on behalf of Stanford by his attorney in fact, who knew nothing of the arrangement between his principal and Waterman, and by a mutual mistake on the part of Stanford, by his representative, and of Waterman, the declaration failed to state the truth in this regard, and showed upon its face that one-eighth of the proceeds of the sale of said property less the costs and expenses of the trust was to be paid to said Waterman; and prayed that the declaration be reformed accordingly. This is a substantial, though not a literal, statement of the allegations of the complaint in intervention, as it was finally amended. The declaration of trust attached recited that the title had been caused to be conveyed to the defendant Smith by the persons hereinafter named as beneficiaries, to be by him managed and sold off for the best prices to be obtained, in such subdivisions as might be determined upon, and the rents and profits, and proceeds of the sales thereof, less the costs and expenses of the trust, be divided between the said beneficiaries in the following proportions, to-wit: To Leland Stanford one-fourth; to D. O. Mills one-fourth; to James B. Haggin one-fourth; to Fred H. Waterman one-eighth; to Ephraim Dyer one-six-

teenth; and to Eben H. Dyer one-sixteenth. And the same was executed by the said beneficiaries and the said Smith. The plaintiff demurred to the complaint of intervention, and, this being overruled, he answered, denying the material allegations thereof, and pleading the statute of limitations against the claim of the intervenor. A trial being had, the court found the facts substantially as stated in the complaint of intervention, and by its decree reformed the said declaration of trust, so as to make the proceeds aforesaid payable by said Smith to the beneficiaries as follows: To Leland Stanford one-fourth; to D. O. Mills one-fourth; to James B. Haggin one-fourth, to Leland Stanford one-eighth thereof until the debt of said Waterman aforesaid shall be fully paid and discharged, and thereafter to said F. H. Waterman; to Ephraim Dyer one-sixteenth; and to said Eben H. Dyer one-sixteenth. And decreed, among other things, that the proceeds of the sales of the said one-eighth interest should be paid by said Smith to said Stanford until said indebtedness should be fully paid, thereafter to the plaintiff in this suit until the debt of Waterman to the plaintiff is satisfied, the residue, if any, to said Waterman. From this judgment the plaintiff appeals, and the case comes up on the judgment roll and a bill of exceptions. The first point made by the appellant is that the court erred in overruling the demurrer to the complaint in intervention.

1. For that the declaration of trust could not be reformed in the absence of the other beneficiaries, Mills, Haggin, and the two Dyers. Mills, Haggin, and the Dyers were not necessary parties to an action to reform the declaration in the particular in which reformation was sought. They were not parties to the arrangement between Stanford and Waterman; did not necessarily or in fact have any knowledge of that arrangement, and the proposed reformation would not in any manner affect any of their interests. *Story, Eq. Pl. §§ 72, 151; Settembre v. Putnam, 30 Cal. 490*. As to each of these separate interests, the contract or declaration was several and not joint, and to reform it as to one of these interests it was only necessary to make those persons parties who were interested in that interest. *Moss v. Wilson, 40 Cal. 159*.

2. For that the complaint failed to show that there was any mistake, or mutual mistake, in the instrument; or that there was any intention of Stanford and Waterman, or either of them, at the time of the execution of the instrument, to create a trust in favor of Stanford; or that if there was any such intention it was known to Smith; or that as to him any mistake was made in its terms. We think the complaint in intervention sufficiently shows upon its face a mutual intention on the part of Stanford and Waterman to establish that trust as to that one-eighth interest, and that, by the oversight of Waterman, who had undertaken to see it done in the absence of Stanford, the instrument failed to correctly state the true intent of the parties in that regard. As to the trustee Smith, it was a matter of

entire indifference to him, and it made no difference whether he shared in the intention, or knew of the mistake, or not. He was the holder of a mere naked trust, not coupled with any interest, and will be entirely unaffected by the reformation asked for. An objection to the reformation on the ground that he had not shared in the alleged mistake, if made, is one purely personal to himself. He is a party to the suit, and has not made the objection. It does not lie in the mouth of Waterman, who did share in the mistake, or of his attaching creditor, to make it.

The next point made by appellant is that the facts found by the court were not such as entitle the intervenor to a revision of the declaration of trust. Upon this point the counsel argue that, to warrant a revision or reformation of the contract, the mistake must be not only mutual, but one which is common to all the parties who executed the instrument. This contention might be correct if the revision was sought as to a matter which affected all the parties: but, in a case like this, where the interests were several and not joint, and the mistake was as to one interest, not as to all, and affected only two of the parties, it is not perceived upon what principle the instrument may not be reformed in that particular, if there was a mistake common to the parties interested in that particular interest, whether the others had knowledge of it or not. It was the duty of the court to inquire what the instrument was intended to mean, and what were intended to be its legal consequences. Civil Code, § 3401. If it fails to speak the truth only as to one particular, why may it not be revised and corrected as to that particular without the presence of persons who will not be in any manner affected by the revision? The province of equity is to make the instrument conform to the agreement of the parties. This instrument contains the several and separate agreements of many parties. It is proposed to revise it only as to one of those agreements. This may be done without bringing in any but the parties to that particular agreement. It is also contended in this connection that the mistake must be as to the intention of the parties at the very moment of the execution of the instrument, and that the court does not find that such was the fact in this instance. The court finds, in substance, that before Stanford left for Europe his mind and Waterman's met as to what was to be put into this instrument when made, in regard to this one-eighth interest, and it was left to Waterman to see it carried out. The failure to carry it out was through oversight, not through design, on the part of Waterman. It being shown that the minds of the parties had met and agreed upon what was to be done when the time came to act, in the absence of proof to the contrary, the law presumes that they remained in the same condition of agreement until the act was done. Code Civil Proc. § 1963, subd. 32. It is a mistake to say that the minds which were required to meet at the time of the signing of the instrument, and whose condition at that time controls the question

of the right to revise, were not those of Stanford and Waterman, but were those of Lathrop, the attorney in fact of Stanford, and of Waterman. Lathrop was not thinking or bargaining for Stanford in that matter, but was acting as the mere hand of Stanford. He was charged with no discretion as to terms, and with no other power than to affix Stanford's name to the instrument which should be prepared and presented by Stanford's associates. Therefore, the intention to be considered was and is the intention that was in the minds of Stanford and Waterman, not that which was in the minds of Lathrop and Waterman. As to Smith, the court finds that his intention was to declare such a trust as the parties beneficially interested should agree upon, and this he supposed he had done. As we read it, the court does substantially find all the facts showing that *quoad* this one-eighth interest there was a mistake, mutual between Stanford and Waterman; that it was a mistake in and as to the instrument itself, and such a one as may by the court "be revised, on the application of a party aggrieved, * * * so far as it can be done without prejudice to the rights acquired by third persons, in good faith and for value," as provided in section 3399, Civil Code.

Appellant also makes the point that the evidence was insufficient to justify the decision of the court below, and upon this point insists that a written instrument will not be reformed by a court of equity on the ground of mistake, unless the proof "be so clear and convincing as to leave no room for doubt;" citing *Cox v. Woods*, 67 Cal. 317, 7 Pac. Rep. 722; *Leonis v. Lazzarovich*, 55 Cal. 54; and *Lestrade v. Barth*, 19 Cal. 674. In each of the cases cited, the court does use substantially the language above quoted, but in none of them is it used in such connection, or under such circumstances, as to justify this court in disregarding the finding of the court below, where there is any evidence to support it. In each of the cases it is apparent that the mind to which the evidence is to be "clear and convincing" is the mind of the court below,—the court which heard the evidence, and is especially charged with the duty of passing upon the credibility of the witnesses,—a duty which is not imposed upon, and a right which is not vested in, this court. In *Lestrade v. Barth*, the court says: "The form in which relief will be given, when a mistake in a material particular is established in a written agreement, must necessarily depend upon the circumstances in the particular case. Courts of equity have a wide discretion in such matters, their object being to give the parties the same beneficial result which would have flowed from the agreement had the mistake never existed." And taking the whole case together, and the conclusion reached, it is an authority strongly supporting the decision of the court below in this case. In *Leonis v. Lazzarovich*, there was a sharp and direct conflict in the evidence as to whether there was a mistake in the deed or not, the witnesses being about equally divided on the subject. The court found in favor of the al-

leged mistake, and reformed the deed. This court reversed the judgment, but refused to rest its opinion, on the ground that the decision of the court below was not sustained by the evidence. In *Cox v. Woods*, the only testimony offered in support of the allegation of mistake was that of a single witness, and his testimony was contradictory in itself. On it the court below was not satisfied that a mistake had been made, and this court refused to reverse its decision. In *Jarnatt v. Cooper*, 59 Cal. 706, this court again uses the words "clear and convincing," but in that connection shows very clearly what is meant by their use. It says: "It is doubtless a well-settled rule that the party alleging fraud or mistake is bound to prove his allegation by clear and convincing evidence; that is, that the evidence which tends to prove the alleged fraud or mistake, if standing alone, uncontradicted, would establish a clear *prima facie* case of fraud or mistake. If it does not, this court may reverse the judgment on the ground of insufficiency of the evidence to justify the decision. But, where the evidence which tends to prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we cannot reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this court. The only question which we have to decide in respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a *prima facie* case." Applying that principle to the present case, there is no conflict whatever in the evidence tending to prove the alleged mistake. It is all one way. The credibility and appearance of the witnesses would necessarily have much to do with determining the weight to be given to this evidence, and, consequently, its sufficiency. The court below has found it sufficient to establish a *prima facie* case, and we cannot say that it erred in such finding.

It is claimed by appellant that the decision of the court below is against law, in several particulars, but we do not deem it necessary to discuss them all in detail. One is that the conclusion of law that Stanford's claim against Waterman was not barred by the statute of limitations, and that the plaintiff could not avail himself of the statute as far as the attached property was concerned, was error. Prior to the conveyance of the property to Smith, the defendant Waterman was the equitable owner of this one-eighth interest. He had purchased and paid for it, but had not received a conveyance thereof. He had assigned his interest in the contract of purchase to Stanford as security for the payment of his said indebtedness. For the purposes of this case it may be conceded that this assignment operated as a mortgage of his equitable interest as security for that indebtedness. The note therefor had become barred by the statute of limitations, and the court correctly held that the mortgage lien created by that assignment was extinguished by lapse of time be-

fore the declaration of trust was executed. But the court also correctly held that the plea of the statute of limitations was a personal privilege, and that the debt of Waterman to Stanford was not extinguished by lapse of time, unless he, Waterman, availed himself of the plea, which he did not do. Lord v. Morris, 18 Cal. 490, afterwards many times affirmed. Instead of that, it appears from the pleadings, the findings, and the evidence, that, after the time had arrived when he could have availed himself of that plea, he acknowledged the continued existence of the debt, and united with the other equitable owners in causing the property to be conveyed to Smith, and in the creation of the express trust evidenced by the declaration here under consideration. In and by that trust the court finds that it was intended to provide that the proceeds of the rents and profits, and of the sale, of that one-eighth interest, should be paid to Stanford, until his claim against Waterman was paid, and that the failure to so provide was through mistake, and not design; and it orders that the declaration be revised and corrected to read accordingly. This finding and judgment proceeds upon the theory that it ought to have been so written in the first instance, and if the judgment is sustained it will and must so read and operate as and from its original date. Equity presumes that that which ought to have been done was done, and gives it force and effect as if done. The right of Waterman to renew his personal obligation to Stanford, in any form that they might agree upon, cannot and will not be disputed. And it does not appear that, at the date of the creation of this trust, there was any legal or even moral objection to his incumbering, or (as he did do) actually and forever disposing of and parting with his interest in this real property. At that time the plaintiff had no enforceable claim against the defendant Waterman. It was not until several months after the creation of this trust, and after Waterman had parted with all title, legal or equitable, to, and all interest in, this land, that the note was given upon which plaintiff's action was brought. It was then given, as appears from the face of the complaint, in renewal of an obligation originally given to plaintiff's testator, and which had been barred by the statute of limitations for more than 10 years. At the time it was given, Waterman had no interest, and has never since acquired any, legal or equitable, in the property which plaintiff subsequently attached. It is true that plaintiff has proceeded upon the theory that Waterman had, at the time of the attachment, and still has, an equitable interest in that property, and that the claim of Stanford is in the nature of a mortgage upon that equitable interest, and is extinguished by the lapse of time. But this is a mistaken theory which has run all through the discussion of this case, and led to much confusion. The trust created in Smith is an express trust, under subdivision 1, § 857, Civil Code. It vests in Smith the whole title, legal and equitable. *Id.* § 863. By the very terms of the trust, whether we read

it as originally written or as revised, Waterman had no interest in the property, and could never acquire any interest, unless he purchased it, as any stranger might do. The only right that any beneficiary under the trust had or has, was to share in the proceeds of the rents and profits when realized, and of the sale of the land when sold, and the only remedy that of proceedings to enforce the execution of the trust. On either theory, however, the court was correct in holding that the plaintiff could not avail himself of the plea of the statute of limitations, since Waterman declined to make the plea. Even if Waterman had an interest in the attached property, the lien of the attachment would be subject to all equities. *O'Rourke v. O'Connor*, 39 Cal. 442; *De Celis v. Porter*, 59 Cal. 464. Even an unrecorded deed would prevail against the lien of the attachment. *Plant v. Smythe*, 45 Cal. 161; *Le Clerc v. Oullahan*, 52 Cal. 252; *Hoag v. Howard*, 55 Cal. 564. It is held that a subsequent purchaser or mortgagee in good faith, and for value, may avail himself of the statute of limitations for the protection of his interest, even if his grantor or mortgagor does not make the plea. *Lord v. Morris*, supra; *McCarthy v. White*, 21 Cal. 496; *Grattan v. Wiggins*, 23 Cal. 16; *Coster v. Brown*, Id. 142; *Lent v. Shear*, 26 Cal. 362; *Wood v. Goodfellow*, 43 Cal. 185. But this is upon the principle that, *quoad* the property, the common debtor has for valuable consideration placed his grantee or mortgagee in his own shoes, and authorized him, for the purpose of protecting the property, to make any plea which he himself could have made. Not so with a mere creditor, who has acquired no contract lien, and parted with no value. He gets nothing but what is given him by the strict letter of the law, and it does not lie in his mouth to defeat the equities of third persons by means of that which is at best a mere personal privilege of his debtor. But, in addition to this, upon the true theory of this case, the plaintiff took nothing, and acquired no right, by the levy of his attachment. According to the allegations of his complaint the writ was levied, not by garnishment, but by direct levy, as upon real estate, upon all the interest of Waterman in the land. As we have already seen, Waterman had no interest in the land, legal, equitable, present, or prospective. "An attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost its power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt." *Howell v. Foster*, 65 Cal. 173, 3 Pac. Rep. 647.

It is also claimed that the claim of the intervenor to have the declaration revised or reformed is barred by subdivision 4, § 338, Code Civil Proc. According to the pleadings, the findings, and the proof, this point is not well taken, for the mistake was not discovered until the attachment was levied, and that was less than three years before the commencement of this

suit, and the filing of the complaint of intervention.

There was no error in allowing the intervenor to amend his complaint at the trial, to conform to the proofs. This was a matter entirely within the discretion of the court, and fully authorized by section 470, Code Civil Proc. Judgment affirmed.

We concur: BEATTY, C. J.; PATERSON, J.

(85 Cal. 593)

MILNER v. REIBENSTEIN *et al.* (No. 13,769.)

(Supreme Court of California. Oct. 8, 1890.)

MUNICIPAL OFFICERS—SALARIES—CONSTITUTIONAL LAW.

St. Cal. 1889, p. 578 *et seq.*, (charter of the city of Stockton,) framed and adopted under Const. Amend. No. 6, provides for a "municipal court" to be held and presided over by a city justice of the peace to be appointed by the mayor. The charter does not attempt to abolish the office of city justice, but adds thereto the duties theretofore performed by the police court, gives it a clerk, makes it a court of record, and declares that it shall not be deemed a new court, but a continuation of the courts theretofore existing. It further provides that the compensation of the municipal judge shall be fixed by the city council not to exceed \$1,500 per year, but provides that for the first two years it shall be \$1,200 per year. Code Civil Proc. Cal. § 103, fixes the tenure of office of justices of the peace, and provides \$2,000 per year as the compensation. Const. Cal. art. 11, § 9, provides that the compensation of a city or municipal officer shall not be increased during his term of office. Article 4, § 25, subd. 29, provides that the legislature shall not pass local or special laws affecting the salary of any officer. *Held*, that the salary of the justice remained \$2,000, as the charter did not intend to add thereto a compensation for the office of municipal judge, and could not change the compensation for the office of justice. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Ansel Smith, Wesley Minta, and Nicol & Orr, for appellant. F. T. Baldwin and E. I. Jones, for respondents.

Fox, J. Application to the superior court of the county of San Joaquin for a writ of mandate requiring the defendants, the mayor and clerk and comptroller of the city of Stockton, to issue a warrant upon the treasury of that city, in favor of the plaintiff, who is city justice of the peace in said city, for the sum of \$100, as and for his salary as judge of the municipal court, for the month of December, 1889. Upon a hearing of the cause, the court denied the writ, and entered judgment for defendants, from which plaintiff appeals.

The case is argued and presented as if it involved the question of the legal existence of the municipal court of the city of Stockton, and a reconsideration of the question passed upon in *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. Rep. 652; *Ex parte Ah You*, 82 Cal. 339, 22 Pac. Rep. 929; and *People v. Toal*, 23 Pac. Rep. 203. In our judgment no such question is involved.

The sole question in this case is whether or not the plaintiff, who is regularly drawing and receiving his salary of \$2,000 per annum, as city justice of the peace, is entitled to draw and receive an additional

salary of \$1,200 per annum as judge of the municipal court. In 1884, the city of Stockton, then a municipal corporation under a special charter passed prior to the adoption of the present constitution, reorganized, as a city of the fourth class, under the "Act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883, (St. 1883, p. 223 et seq.) Of this corporation J. H. Tam was elected police judge, and the plaintiff, Milner, was elected city justice of the peace, each for the term of two years, commencing January, 1889. On the 2d of March, 1889, a charter framed and adopted under Const. Amend. No. 6, became, and ever since has been, the organic law of said city. St. 1889, p. 578 et seq. By the terms of this charter, the police court under the old charter, and the court of the city justice of the peace, were practically consolidated, (see sections 104-130,) under the title of "Judicial Department," to be held and presided over by a city justice, to be designated and appointed by the mayor. The city justice of the peace is an officer provided for by the constitution, and his election, term of office, and compensation are prescribed by the Codes. The charter does not attempt to abolish the office or the court of the city justice, but adds the duties which theretofore in the municipality were performed by the police court, gives it, for the performance of those duties, and the administration of the judicial department of the local government, a clerk and seal, makes it a court of record, calls it "Municipal Court," and declares that it shall not be deemed a new court, but a continuation of the courts theretofore existing. After the organization of the municipality under the new charter, and in May, 1889, Tam resigned the office of police judge, and the municipal court was organized, by the appointment of Tam, as clerk, and of the city justice, plaintiff, as judge thereof. This gave the plaintiff no new term, and no new office. It simply made him *ex officio* judge of the new court. No other person was eligible to act as such, as none but a city justice of the peace could be designated to act as such, except in a case in which he might be disqualified, when any justice of the peace in the county could be designated to act in his stead, (section 108;) and he was the only city justice of the peace. The compensation of plaintiff as city justice of the peace was and is prescribed by section 103, Code Civil Proc., and he was and is in the regular receipt thereof. Section 50 of the charter provides that the compensation of officers and employes of the city shall be fixed by the city council, not to exceed a certain limit therein named. This mentions municipal judge, and prescribes the limit at \$1,500 per annum. By a proviso to the section the salaries of all the officers of the city are fixed by the charter itself for the first two years, and in this proviso the municipal judge is mentioned, and his salary fixed at \$1,200 per annum. On the 8th of May, 1889, before the organization of the municipal court, the city council passed an ordinance fixing the salary of the municipal judge at the same sum named in this pro-

viso. The court below, after finding the facts in the case, found, as conclusion of law, that the plaintiff "herein is not entitled to have or receive from the said city of Stockton any salary as municipal judge of said city." In this conclusion we think the court was correct. To our minds, it was not the intention of the framers of the charter, or of the people in adopting, or the legislature in approving, it, to increase the salary of the city justice. It was not in the power of the legislature to do it, during his term of office, (Const. art. 11, § 9,) or by local or special law, (Id. art. 4, § 25, subd. 29.) The city justice of the peace is one of the justices of the peace of the state, an officer provided for by the constitution. The tenure of his office and his compensation is fixed by general law, and is prescribed in section 103, Code Civil Proc. If it is desired to change the measure of his compensation, it must be done by amendment of that general law, and cannot be done by special legislation; nor has the power been delegated to the people to do it by charter provision. The language of the charter, taken as a whole, does not justify the conclusion that it was intended to create a new and independent office, to be compensated by a new and added salary. On the contrary, it seems to us that the intention of the framers of the charter was to reduce the salary of the city justice of the peace, to make it \$1,200 per annum for the first two years, and then leave it to be fixed and regulated by the city council thereafter, but not to exceed \$1,500 per annum. But if such was the intention, as we think it was, it must fail of accomplishment, for that salary can only be changed by an amendment of the Code. Until the Code is amended, the city justice of the peace will be entitled to receive the salary of \$2,000 per year, and will not be entitled to receive other or more by reason of any added duties that may be imposed upon his office. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.; WORKS, J.

PATERSON, J. I concur in the judgment.

BEATTY, C. J., (*dissenting*.) If the decision, filed August 4th, in *People v. Toal*, ante, 603, from which I dissented, is to stand, the judgment in this case must be affirmed. For, under the doctrine there announced, all the provisions of the present charter of Stockton relating to its municipal court are null and void. But, if the validity of those provisions is assumed, I cannot see how the conclusion can be avoided that the plaintiff is entitled to the compensation provided in the charter. It is not increasing his salary as city justice to pay him the salary of another office, the duties of which are cast upon him by a new appointment

86 Cal. 159

FLOYD *et al.* v. RANKIN *et al.* (No. 13,838.)
(Supreme Court of California. Oct. 17, 1890.)

TRUST-DEED—CONSTRUCTION—DUTY OF TRUSTEES.

1. A deed of a large amount of property was made to certain persons named, in trust "to con-

vert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed; * * * and in further trust to found and endow, at a cost of \$540,000, an institution to be called 'The California School of Mechanical Arts.' * * * The institution shall be founded and endowed under the direction of [six persons named,] who are directed to acquire the site thereof, and to form a corporation, the only corporators being themselves; to own, control, and manage the said institution, the members of said corporation never to exceed seven, and vacancies in the membership to be filled from time to time by the survivors." Held, the persons last named, and not the trustees, are to have the active control of the founding of the institution, the selection and acquiring of the site, the erection and furnishing of the buildings, and the control of the expenditures. The power and duty of the trustees end with furnishing the money therefor.

2. The persons named cannot call for all the money at one time, and expend it themselves; but it is the duty of the trustees, whenever any money is required or directed to be expended by such persons, or the corporation to be formed by them, to furnish it as directed, so long as the expenditures are within and for the purposes named in the deed.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

John H. Boalt, for appellants. *Cope, Boyd & Ffield* and *Nathaniel Holland*, for respondents.

WORKS, J. James Lick executed a deed of trust to certain persons named therein, by which large sums of money were to be realized from the property conveyed, and applied to various charitable and other beneficial purposes. Some changes were subsequently made in the trustees, which it is unnecessary now to notice. The plaintiffs in this action are the present trustees under the trust-deed, and bring this suit against the beneficiaries under the deed, and various persons appointed thereby to assist in carrying its provisions into effect, to have certain parts of the deed construed for their guidance. The deed recites certain facts necessary to a correct understanding of its objects and purposes, and to give it the proper legal effect names the trustees to act under it, describes the property, real and personal, conveyed by it, and provides that the property so conveyed shall be for the "uses and purposes hereinafter mentioned, and to have and hold the same unto the said parties of the second part, their successors and assigns, in trust for the following purposes, to-wit." The first clause defines the general powers and duties of the trustees, with reference to the property conveyed, and is as follows: "First. To enter into possession of, have, receive, and recover, the said property, and rents and profits thereof, (except as herein excepted,) and to let and to lease, until sale, and to sell, convey, and dispose of the same, and to convert the same into money, (except as herein excepted,) as rapidly as judicious management will permit; and out of the proceeds to make the payments hereinbelow directed; and a majority of said trustees shall determine when, on what terms, and what price, and on what credit the same shall be disposed of. And a majority of said trustees may

likewise execute, acknowledge, and deliver all deeds, transfers, conveyances, assignments, and other instruments necessary and proper for the purposes aforesaid, and in all other matters in the execution of the trusts herein declared. And in case of the absence from the state of any of the said parties of the second part, trustees aforesaid, a majority of them shall be capable of executing the trusts herein created, without any notice to such absent trustee or trustees." The second clause provides for the payment of certain sums named to relatives of the donor. The third clause provides for the expenditure of \$700,000 by the trustees in the purchase of land, and construction of a telescope thereon, with all the machinery appertaining thereto, and appropriately connected therewith, and a suitable observatory; and that upon the completion thereof the trustees convey the land, telescope, machinery, and observatory, to the regents of the University of California; and, if any of the moneys set apart for said purpose remain unexpended, that the same be paid over to said regents to be invested in certain bonds mentioned, the income to be devoted to the maintenance of the telescope and observatory, and in promoting science. The fourth, fifth, sixth, seventh, and eighth clauses provide for the payment of certain sums to various charitable and other institutions. The ninth provides for the erection of monuments at the graves of the father, mother, sister, and grandfather of the donor. The tenth and eleventh trusts are declared as follows: "Tenth. And in further trust out of the proceeds of said property to expend one hundred thousand dollars (\$100,000) to found an institute to be called the 'Old Ladies' Home,' to be located in San Francisco, as a retreat for women who are unable to support themselves, and who have no resources of their own; the right of admission thereto to be prescribed by A. B. Forbes, J. B. Roberts, Ira P. Rankin, Robert McElroy, and Henry M. Newhall, and the survivors of them, who shall receive the title to the lands on which the same shall be erected, and who shall hold the same until the same can be conveyed to a corporation authorized to maintain such an institution, said sum of one hundred thousand dollars (\$100,000) to be expended under the direction of said Forbes, Roberts, Rankin, McElroy, and Newhall, and the survivors of them, and the site for the institution to be selected and acquired by them as soon as possible. Eleventh. And in further trust to expend the sum of one hundred and fifty thousand dollars, (\$150,000,) under the direction of H. M. Newhall, Ira P. Rankin, Dr. J. D. B. Stillman, and John O. Earl, and the survivors of them, in the erection and maintaining in the city of San Francisco of free baths, the site or sites therefor to be acquired and held by the persons last named, and the survivors of them, in trust, to forever maintain such baths for the free use of the public, under proper and reasonable regulations; said baths to be erected as soon as practicable to raise the money after the money has been provided to erect said telescope." The twelfth clause provides for the erec-

tion of a monument in Golden Gate park, in the city of San Francisco, to the memory of Francis Scott Key, author of "The Star Spangled Banner." The thirteenth calls for the erection of a group of bronze statuary at the city hall in San Francisco. The fourteenth clause is as follows: "*Fourteenth.* And in further trust to found and endow, at a cost of five hundred and forty thousand dollars, (\$540,000,) an institution to be called 'The California School of Mechanical Arts,' the object and purpose of which shall be to educate males and females in the practical arts of life, such as working in wood, iron, and stone, or any of the metals, and in whatever industry intelligent, mechanical skill now is or can hereafter be applied; such institution to be open to all youths born in California. The institution shall be founded and endowed under the direction of said Dr. J. D. B. Stillman, Horace Davis, A. S. Hallidie, John Oscar Eldridge, John O. Earl, and Hon. Lorenzo Sawyer, and the survivors of them, who are directed to acquire the site therefor, and to form a corporation, the only corporators being themselves; to own, control, and manage the said institution, the members of said corporation never to exceed seven, and vacancies in the membership to be filled from time to time by the survivors." It is this fourteenth clause of the deed that we are called upon to construe, but we have set out other parts of the deed, because we believe they tend to throw some light upon the clause in controversy, and to show the intention of the grantor in making this provision for the California School of Mechanical Arts. Other parts of the deed need not be set out or referred to, as they do not affect the question before us, except the provision that the residue of the property, after making the payments mentioned, be made over, in equal parts, to the California Academy of Sciences, and the Society of California Pioneers, to be used by them in the construction of certain buildings, and for other purposes. The corporation mentioned in the fourteenth trust was organized before the site for the institution was acquired, the reason assigned therefor being that it was feared that on account of necessary delays in carrying out the trusts under said deed a sufficient number of the parties named would not survive to form the corporation at a later day. The California School of Mechanical Arts, the Society of California Pioneers, and the California Academy of Sciences, filed answers, each calling upon the court to give a construction of the fourteenth clause of the deed above set out. The court below found and decreed, in substance, that under the fourteenth clause the plaintiffs, as surviving trustees, and their successors, possessed the power, and it was their duty, to found, endow, and establish, ready to be put in operation, the institution named in said trust; that they are the executors of said trust, and the active promoters of the purposes of the donation; that in executing the trust the plaintiffs are to consult and seek the advice, guidance, co-operation, and concert of action of the persons named in said trust, and their survivors, or such of them as consent to act,

and that it is the duty of such persons in their individual capacity to extend to the plaintiffs their advice, guidance, and co-operation in the establishment of said institution, and select and secure a site for said institution, the title to which is to be taken in the names of the plaintiffs as surviving trustees, or their successors in the trust, and is to be paid for by the trustees out of said fund of \$540,000; that in case the parties named in the trust fail to co-operate with the plaintiffs, or refuse to select the site, the trustees have the power, and it is their duty, to acquire the site and establish the institution; that upon the establishment and completion of said institution, and that the same is ready to be put in operation, it is the duty of the trustees to convey, transfer, and set over the same to the corporation referred to in said trust, together with any balance remaining unexpended of said sum of \$540,000, and when so conveyed the said corporation is to own, control, and manage the said institution and the surplus fund as an endowment; that the corporation the California School of Mechanical Arts is a valid corporation; that the Honorable Lorenzo Sawyer, although he may have resigned as a member and director of said corporation, is still entitled to act as an individual under said trust; that no part of said fund is to be paid to the individuals named in said trust; that in case of disagreement among the persons named in said trust, or the survivors of them, as to the site or the advice to be given to the trustees, the latter may act upon the advice of such of said persons as they may think best. This construction was and is satisfactory to all of the parties concerned except the parties named in said trust, and the corporation organized thereunder, the California School of Mechanical Arts. They appeal from the judgment. The case was submitted in the court below on the pleadings, and the judgment was founded upon the construction of the deed, without other evidence.

The contention of the appellant is that the intention of the donor by this clause in the deed was to vest in the parties named therein the sole power of selecting and acquiring title to the site for the institution to be erected; that they should take the title thereto in themselves, and upon the organization of the corporation mentioned they should convey the same to such corporation, which should thereafter hold the title and control the institution; that the duty of founding and endowing the institution rested upon the persons named in the trust; and that the only duty of the plaintiffs, the general trustees, was to furnish the money required to be furnished for the purpose. On the other hand, the respondents contend that, taking the whole instrument together, the particular clause in controversy must be construed as imposing upon the general trustees the duty of founding and endowing the institution; that the title to the site must be taken in the name of the trustees, and the building constructed, furnished, and fitted up by them; that when completed, and ready for use, the trustees must convey the same to the

corporation, and that the only right and duty of the parties mentioned in the fourteenth trust is to co-operate with the trustees, and advise and counsel with them as to the selection and purchase of a site, and the construction and fitting up and equipment of the building, and to organize the corporation required to be organized. It must be admitted that, taking the fourteenth trust alone, or the whole of the provisions of the deed together, the meaning of this trust is ambiguous and uncertain. But, after a careful study of the whole deed, we feel ourselves constrained to disagree with the court below. The first clause in the deed gives the trustees power to deal with and dispose of the property conveyed, and has no relation to their powers and duties with respect to property to be purchased for charitable and beneficent purposes thereafter provided for. It simply gives them power to convert the property conveyed into money, and to place themselves in a position to furnish the means necessary to carry out the donor's benefactions. This clause, therefore, lends us no aid in this controversy. The same may be said of most of the trusts provided for, which consist merely of the payment of money for certain purposes, or to certain existing charitable or other corporations, to be used by the latter. In these cases nothing is to be done by the trustees but to pay over to the persons named the amounts specified. We must look for assistance, if any can be obtained from other parts of the deed, to those parts which provide for the acquisition and improvement of lands. Of these may be mentioned the third, which provides for the purchase of land, and the construction of a telescope and observatory. Here there is no question as to who shall select the land to be purchased, as it is provided in express terms that it shall be lands designated by the party of the first part; nor can there be any question as to who is to take and hold the title. The trustees are required to purchase the land, and, when the telescope and observatory are constructed, to convey it to the regents of the University of California, and turn over to said regents any surplus of the \$700,000 remaining unexpended. There is nothing uncertain in the declaration of this trust, nor does it aid us in arriving at the meaning and intention of the donor in the fourteenth clause of the deed. The tenth trust is more nearly like the one under consideration, and we think tends to show the general intent of the donor as to donations of this class. The tenth trust requires the trustees to expend \$100,000 to found an "Old Ladies' Home." The right of admission thereto is to be prescribed by certain individuals named, "who shall receive the title to the lands on which the same is to be erected, and hold the same until it can be conveyed to a corporation authorized to maintain such an institution; the money to be expended under the direction of the parties named, and their survivors, and the site for the institution to be selected and acquired by them as soon as possible. The eleventh trust is of a like kind, and is similar in its provisions. It provides that the trustees shall expend

the sum of \$150,000, under the direction of certain persons named, and their survivors, the site or sites therefor to be acquired and held by the persons named. In none of these provisions is the deed clearly or accurately worded, but the general intent of the donor is apparent. Whenever real estate is to be acquired and improved for a charitable or beneficial purpose, third parties are called in to acquire and hold the title, and direct the expenditure of the money; and the only duty imposed upon the trustees is to furnish the money to be expended. In neither of these cases could the parties properly take or hold the property in their own names. Although the fourteenth trust is even more inaccurately worded, we think the meaning and intent of this clause of the deed must be held to be the same as in the others. In this trust, the trustees are required, not to expend a certain sum of money under the direction of other persons, but to "found and endow the institution at a cost of a certain sum." This is to be done under the direction of certain persons named, just as in the other two trusts of a like kind. The words "found and endow," used in this connection, must be held to mean the same thing as the requirement in the two other trusts of a like kind that they shall expend the money for the purpose. This, it seems to us, is made clear by other provisions contained in the fourteenth trust. The parties named, and not the trustees, are required to acquire the site. This, of course, is equivalent to saying that they shall acquire the title to the site. They are not required to acquire the site for the trustees, nor are the trustees given any power or authority to act in the selection of the site, or in acquiring the title thereto. The parties named are to acquire the site, and form a corporation consisting of their own number to own, control, and manage the institution. The object of this provision must be apparent. The power to acquire the site, hold the title thereto, and manage the institution, is directly cast upon these parties; but, in order that their power may be perpetuated, they are required to form themselves into a corporation, and the manner in which vacancies in their number may be filled is provided. As we construe this trust, therefore, the trustees have no other power or duty in this connection than to furnish the money, up to the amount named, to be expended as directed by the other parties named. The latter are required to select the title to the site, and take the same in their own names; or, if the corporation provided for is formed before the title is acquired, it might, with equal propriety, be taken directly to the corporation, as the ultimate object of the trust is to vest the title in the corporation, and not in the individuals. We do not regard it as of any importance whether the corporation is formed before the site is acquired or after, or whether the title to the site is conveyed to the individuals named, and by them conveyed to the corporation, or is conveyed directly to the latter in the first instance. These matters relate to the mere form of procedure under the deed, and cannot affect the

substance of its provisions, which is that the title shall finally vest in the corporation. It is probable that action by the individuals, as such, was provided for with the idea that action might be necessary before a corporation could or would be formed, but what the reason for it was is not material.

The question whether the trustees are bound to pay over at once to the individuals or corporation the sum of money named, or to furnish it when needed, and in the amounts and for the purposes directed by them, is not so easily answered; but, in the light of the provisions of the other parts mentioned, and set out above, we are of the opinion that the parties who are required to acquire the site and direct the founding and endowment of the institution cannot call for the whole of this money, and expend it themselves. In this clause the other trustees are required to expend the money donated, under the direction of the parties mentioned. This, we think, is the meaning of this trust. The parties named are, however, the sole judges as to how, for what purpose, and when, the money is to be expended, subject only to the purposes mentioned in the trust. The trustees have nothing to say in this matter. They furnish the money to found and endow the institution, "under the direction" or as directed by the parties named; and whenever the expenditure of any money is required or directed by them, or by the corporation consisting of themselves and their successors, it is the duty of the trustees to furnish the same, so long as the expenditure is within and for the purpose named in the deed. And upon the institution being founded and endowed, as required by the deed, if there be a surplus of the money donated remaining in the hands of the trustees, it should be paid to the corporation, which is given the control and management of the institution. We have been unable to find anything in this deed tending to show an intention on the part of the donor that the parties mentioned in this trust are to act as the mere advisers of the trustees, or that the trustees may act without, or in opposition to, their direction, or that the title to the property should be taken by or in the name of the trustees, and by them conveyed to the corporation. On the contrary, the parties mentioned in the trust are to be the actors in the matter of acquiring the site, and directing the improvement of the property; and they alone could convey the title to the property, because they, and not the trustees, are expressly required to acquire such title. The court below was right in holding that the corporation provided for in the deed was a valid corporation. Counsel for the respondents, the trustees, ask us, in case we do not agree with the court below, to answer categorically certain questions, 18 in number, set out in the complaint, and affecting, as it is claimed, the proper construction of the trust under consideration. Many of these questions are repetitions of each other, or present the same questions in different forms. We have answered the material questions, and the really controverted ones, as pre-

sented by the record, and need not extend this necessarily long opinion by attempting to answer these numerous questions, the answers to which are not necessary to a proper and full determination of the matters in controversy. The judgment is reversed, with instructions to the court below to enter judgment in accordance with this opinion.

We concur: FOX, J.; PATERSON, J.

86 Cal. 154

WILLARD v. DILLARD. (No. 20,692.)

(Supreme Court of California. Oct. 15, 1890.)

BILL OF EXCEPTIONS—SIGNING—EXTENSION OF TIME.

Pen. Code Cal. § 1171, provides that a party desiring to have a bill of exceptions settled must, upon not less than 2 days' notice to the district attorney, and within 10 days after the rendition of the judgment, or such further time as may be allowed by the court or judge, present the same to the judge for settlement. *Held* that, where defendant was given an extension of time within which to prepare and present a bill of exceptions, and within such time, and on 2 days' notice to the district attorney, presented the same, it was no reason for disallowing the bill that, when the extension of time was given, it was too late for defendant to have presented it on 2 days' notice within 10 days after judgment.

In bank. For former report, see ante, 789.

R. B. Canfield and J. W. Taggart, for petitioner. John J. Boyce, for respondent.

FOX, J. Application for a peremptory writ of mandate requiring the respondent, judge of the superior court of the county of Santa Barbara, to settle and certify a bill of exceptions in a criminal case tried in said court. By way of return to the alternative writ two papers are presented on behalf of respondent; one in the nature of a demurrer to the petition, and the other an answer. By the paper styled a "demurrer," exception is taken to the sufficiency of the petition, for that it does not sufficiently appear therefrom that the respondent is the judge before whom the criminal case referred to was tried, or who heard and determined the motion for new trial therein. It would perhaps have been better if the petition had specifically stated that fact; but it does not state that the respondent is the judge of that superior court. This court will take judicial notice of that fact, and also of the fact that he is the only judge of that court. The petition also shows that the criminal case was prosecuted in that court; that a trial has been had, verdict rendered, and judgment pronounced, and motion for new trial made and denied. When we look into the balance of the return,—for it is all one return, although in two papers, and called by two names,—sufficient appears to show that the respondent was in fact the judge who presided at the trial, and who heard and determined the motion for new trial, and that he is therefore the proper one to settle the bill of exceptions. If there are any omissions in the petition in this regard, they are sufficiently supplied by the answer.

It appears from the pleadings that the defendant in the criminal case was given an extension of time beyond that allowed by law, within which to prepare and present her bill of exceptions, but that such extension was not in excess of the time which the court was authorized by law to give. On the last day of the time so given by the court, and upon not less than two days' notice to the district attorney, counsel for the defendant applied to the court to settle and certify his bill of exceptions in the cause. The district attorney appeared and objected that the court had no jurisdiction then to settle or allow a bill of exceptions, on the ground that the right to have a bill of exceptions settled or allowed had been waived or lost before any order had been made granting an extension of time for that purpose. The order granting such extension was made on the day before the expiration of the statutory time within which the party was required to present his bill for settlement, but the district attorney contends that it was then too late, for the reason that the time had already expired within which he could give notice of an application to be made on the tenth day for the settlement of the bill, and no such notice having been given, and no order of extension made prior to the time when it would have been necessary to give notice of an application to be made on the tenth day, the right to make the application at all had been waived. The judge adopted this theory of the district attorney, and, according to the answer, for this reason, and this alone, refused to allow or settle any bill of exceptions in the case. This position is, in our judgment, altogether untenable. A party desiring to have a bill of exceptions settled must, upon not less than 2 days' notice to the district attorney, and within 10 days after the rendition of the judgment, or such further time as may be allowed by the court or judge, present the same to the judge for settlement, etc. Pen. Code, § 1171. The object of notice in this case is not like that in the case of a motion for new trial, to initiate the proceeding, or preserve a right to the moving party, but simply to enable the district attorney to be present, and be heard, if he desires, upon the settlement of a bill, which is the absolute right of the party to have settled according to the fact, if he prepares and presents it within the time allowed by the law or the court; and, if it is given two days prior to the actual application for such settlement, no waiver of a right to make the application or to have the bill settled can follow from failure to give it at an earlier period. Under the allegations of the answer there is really no issue as to whether or not a prepared bill was in fact presented to the judge for settlement at the time mentioned in the notice, and there appears no reason for a reference of the cause. Let the peremptory writ issue as prayed.

We concur: BEATTY, C. J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

HOOKER v. THOMAS. (No. 12,942.)

(Supreme Court of California. Oct. 18, 1890.)

TRIAL BY COURT—FINDINGS—SEPARATE COUNTS.

A complaint contained three counts, alleging three entirely separate and distinct causes of action, each of which was put in issue by the answer. The court found on the issues under one count alone, and rendered judgment thereon in favor of the plaintiff. *Held*, the omission to find upon the issues presented by the other two counts is no cause for reversal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Daniel Titus, for appellant. *Pillsbury & Blanding*, for respondent.

WORKS, J. The complaint in this case contains three counts, alleging three separate and distinct causes of action. The material facts in each count were put in issue by the answer. The court below found on all of the issues, under one count, in favor of the plaintiff, and rendered judgment in his favor as prayed for in said count. No findings were made on the issues presented by the other two counts of the complaint. The only point made on this appeal is that the court below failed to find on all of the material issues presented by the pleadings, and therefore the cause should be reversed. In other words, the appellant asks us to reverse a judgment which is fully sustained by the findings, because issues which were material in determining another and different cause of action were not found upon. This, we think, we cannot do. All of the issues necessary to sustain the judgment rendered were found upon. Therefore, the fact that entirely separate and distinct issues, which might have been the basis of another and different judgment than the one appealed from, and which, if found upon, could not have affected the judgment actually rendered, were not covered by the findings, cannot justify a reversal of the judgment before us. Every fact material to the judgment appealed from was found, and the judgment must necessarily be affirmed. *Roberts v. Haley*, 65 Cal. 397, 402, 4 Pac. Rep. 385. The failure to find on the other issues was not prejudicial to the appellant, and for that reason is not cause for reversal. *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. Rep. 738; *Mining Co. v. Deferrari*, 62 Cal. 162; *McCourtney v. Fortune*, 57 Cal. 617.

It is contended by the appellant that he was entitled to a finding upon the other causes of action, because such findings were necessary to shield him from another suit for the same causes of action. But we do not understand that a second suit can be maintained upon those causes of action because findings were not made thereon. Each of the causes of action alleged were put in issue, and the presumption is that they were litigated, and, if the judgment rendered did not cover these causes of action, and did cover the other one alleged, it must be presumed against the plaintiff that he was found and adjudged to be entitled to nothing more than was given him by the judgment rendered in his favor. In other words, the judg-

ment in his favor on a part of the issue, if he were to bring a second action, would be taken as a finding and judgment against him on the other issues. Of course the presumption that all of the issues were litigated is not a conclusive presumption where a second action is brought. It may be shown that, as a matter of fact, they were not litigated. But, if this were so, there would be no injustice to the appellant in presenting them the second time for adjudication. So, taking either view of it, he was not harmed by a failure to find upon the issues not affecting the judgment appealed from. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

3 Cal. Unrep. 297

TAYLOR v. FORD. (No. 12,982.)¹

(*Supreme Court of California.* Oct. 18, 1890.)

RIGHT TO JURY TRIAL.

Plaintiff brought an action under Code Civil Proc. Cal. § 1050, alleging that defendant was making a claim against him for money upon a pretended promissory note; that the exact nature of the claim was unknown to plaintiff; and praying that defendant be compelled to set forth the nature and extent thereof, in order that the court might determine it to be invalid. Defendant answered in the form of an ordinary complaint on a promissory note, and to this plaintiff filed a reply, alleging fraud in procuring the note, mistake, and want of consideration. *Held*, the action being purely statutory and equitable in form, the reply to plaintiff's answer was unnecessary to the relief sought, and he was not entitled to a jury trial upon the issue thereby raised.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Code Civil Proc. Cal. § 1050, provides: "An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former, for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other for which plaintiff is bound as a surety."

Chas. F. Hanlon, for appellant. *Page & Eells*, for respondent.

WORKS, J. This action was brought by the appellant under section 1050 of the Code of Civil Procedure, alleging in his complaint, in substance, that the respondent was making an adverse claim for money against him, on a pretended obligation, to-wit, a promissory note; that the exact nature of the claim was unknown to the plaintiff; that no suit had been brought on said claim; that he desired that said claim be brought forward and determined; and praying that the defendant "be compelled to set forth the nature and extent of said claim, and the particulars thereof, in a concise form, and that any cause of action that he pretends to have be fully alleged against this plaintiff, and that thereupon the same be determined by this court to be of no force and validity, and that the plaintiff have judgment against the defendant; that the defendant

take nothing under said claim; and that the plaintiff recover costs." The defendant answered by alleging that the plaintiff was indebted to him in the sum of \$2,660.44, on a promissory note, a copy of which note is set out in the answer. This answer is, in legal effect, the same as an ordinary complaint on a promissory note, and prays for judgment in like manner. The only allegations therein, not properly belonging to a complaint on a promissory note, are that the note set out is the obligation mentioned in plaintiff's complaint, and a denial of the allegation in the complaint that the plaintiff did not know the exact nature of the defendant's claim. The plaintiff treated the defendant's answer as a cross-complaint, so far as it set up and relied upon the note, and filed an answer thereto, alleging fraud in procuring the note, mistake, and want of consideration. On the issues thus formed the case went to trial. The court below found for the defendant, and rendered judgment in his favor on the note. The plaintiff moved for a new trial, which was denied, and he appeals. The plaintiff demanded a jury trial as to what he claims were the legal issues formed by the answer or cross-complaint, and his answer of fraud, mistake, and want of consideration. This was denied, and he complains that this was error. The respondent contends that there were no legal issues in the case; that the action was brought by the plaintiff; that it was statutory and equitable in its nature; that the issue presented was made by the complaint, and the answer of the defendant; and that the pleading on the part of the plaintiff by way of answer was unnecessary and superfluous. The question is not entirely free from doubt, but we think that the court below was right in denying the plaintiff a jury trial. The real issue presented by the pleadings was whether the defendant's claim was a pretended one, as alleged by the plaintiff, or a valid one, as averred by the defendant. If an invalid and pretended one, asserted against the plaintiff, he was entitled to judgment so declaring it. If a valid one, as claimed by the defendant, he was entitled to a judgment to that effect, and that it be enforced as such. The plaintiff, instead of waiting and allowing the defendant to bring his action on the note, saw fit to bring a purely statutory action, equitable in form, to have the claim declared invalid and set aside; and prayed in his complaint for such relief. The sole object of his complaint was to have the claim presented that he might have it so declared and set aside. It was only necessary for the defendant to set up his claim. This presented the whole issue. No pleading was necessary on the part of the plaintiff in reference to the defendant's answer. It was not a cross-complaint, nor was it pleaded as such. Under the allegations of his complaint the plaintiff might have proved every fact necessary to show the invalidity of the defendant's claim without further pleading. This was the gist of his complaint, and the very foundation of his right to maintain the action. The fact that le-

¹ Reversed in banc. See 28 Pac. 441, 92 Cal. 419.

gal issues, incidental to the main issue, which is equitable, must be determined in arriving at a decision of the case, does not entitle either party to a jury trial. *Downing v. Le Du*, 82 Cal. 472, 23 Pac. Rep. 202. In this case the cause of action being to declare an obligation invalid, and to set it aside, the real issue in the case was equitable, and the plaintiff, having chosen this equitable remedy, and thus brought the defendant into court to meet his equitable cause of action, cannot complain that a jury trial, which would have been his right, if he had allowed the defendant to maintain his common-law action on the note, was denied him. It is contended that the findings of the court below were not sustained by the evidence, and that they do not sustain the judgment. There was evidence to support each of the findings, and the weight of the evidence must be left to the determination of the trial court. The findings are sufficient to uphold the judgment. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

86 Cal. 179

In re WELCH'S ESTATE. (No. 13,875.)

(*Supreme Court of California.* Oct. 18, 1890.)

REMOVAL OF ADMINISTRATOR.

The court made an order allowing a fee of \$75, to be paid by the administrator, to an attorney appointed by the court to represent absent heirs in the administration of an estate. Before paying this the administrator was advised by his counsel that it was his duty so to do. Thereafter, on the representations of the attorney that he was in need and that he would eventually be allowed a fee of from \$750 to \$1,000 in the case, the administrator advanced from his own funds to the attorney different sums, amounting to \$212. The attorney then presented an order from the court for \$350, which the administrator paid, withholding the \$212. This order was, in fact, forged, and the administrator did not charge the amount paid to the estate, but paid it out of his own money. Certain notes belonging to the estate were by order of the court deposited in a certain bank. The administrator obtained an order allowing him to withdraw the notes. After collecting them, he deposited the money in the same bank in his own name. He did not, however, mingle it with his own money, and, in fact, had no money in that bank. *Held*, that these transactions did not show the administrator dishonest or incompetent, or justify an order for his removal.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

John T. Greany, for appellant. *Chas. A. Sumner*, for respondent.

WORKS, J. This is an appeal by an administrator from an order removing him from his trust, and revoking his letters. He was first suspended by order of the court, and an attorney appointed to represent some non-resident heirs, who filed a petition for the removal of the administrator, charging him with neglect, incompetency, using the money of the estate to his own profit and advantage and to the injury of the estate, mingling the property of the estate with his own, to the danger and detriment of the estate; that his claims with respect to said estate were ad-

verse to the estate; that he disobeyed, in letter and spirit, the lawful orders of the court; that he failed to account for money and property of the estate which came into his hands, or under his control; that, through his negligence and incompetency, he paid out money of said estate upon a forged order to persons not entitled thereto; and that, in each and all of said acts and omissions, he had exhibited and shown his unfitness and incompetency to be or to remain such administrator. The administrator denied each of the allegations of the petition, and upon a hearing he was removed and his letters revoked.

We have gone through all of the proceedings of the court, and the evidence at the hearing, as they appear in the record, and have searched in vain for any evidence or reason for removing the appellant from his trust. There are only two of the charges made in the petition that have even a semblance of evidence to support them, viz.: That he paid out money of the estate on a forged order; and that he disobeyed the orders of the court. As to the first charge, the facts are these, as shown by the evidence: One Price was appointed by the court below to represent absent heirs. Subsequently the court made an order allowing him a fee of \$75, as such attorney, to be paid by the administrator. The appellant, on the order being presented to him, applied to his attorney, and was advised that it was his duty to pay the amount. After this, Price, who was evidently a drunken and unreliable man, applied to the appellant for small amounts of money, representing that he was in need, and that he would be allowed a fee of from \$750 to \$1,000. On these representations the appellant let him have money until the amount ran up to \$212.90. Price then applied to him, representing that the court had allowed him a fee of \$350, and asking that he pay him the balance of the amount over and above what he had already received. This the appellant refused to do. He then said he would get an order of court, and subsequently came back, accompanied by a man, who, it was claimed, was his uncle, and presented what purported to be an order allowing him a fee of \$350. He was then in a state of intoxication. The appellant refused to pay the money to him in his then condition, but did pay it to his uncle. The order upon which the money was paid was a forgery. It does not seem to us to be at all surprising that the administrator should pay the money under such circumstances. He had a right to presume that a member of the bar, who had the indorsement of the court in the form of an appointment to represent absent heirs in an important estate running away up in the thousands, would not commit a felony to procure the small sum of \$137.10, the balance actually paid. He had already been advised that it was his duty to pay the attorney his fee on a similar order. Besides, the uncontradicted evidence shows that not a dollar of this money was paid out of the money of the estate, or charged against it. The appellant says that he let the attorney have the money paid before the order was presented, as a loan

out of his own money and as a matter of charity, supposing that when an order was made, allowing him a fee, he could withhold the amount advanced, and thus make himself whole; and that, when the order was presented, he did withhold the amount already advanced, and paid him the balance out of his own money, supposing the order to be genuine. As to the second of the charges, there were three promissory notes belonging to the estate, of \$10,000 each. The court ordered that these notes be deposited in the bank of California for safe-keeping. They were so deposited. Subsequently, the court made orders allowing the appellant to withdraw two of these notes. What for does not appear, and no subsequent order was made with reference to them. They were in fact withdrawn by the administrator for the purpose of collection. They were collected, and the money realized from them deposited in the same bank in his own name. He did not mingle the money with his own, as he appears not to have had any money of his own on deposit in that bank. He did deposit there \$2,000 of the money of the widow of the deceased, at her request, and for safe-keeping. In all this there was no disobedience to, or violation of, any order of the court, in its letter or spirit. The only claim made is that he should not have deposited the money in his own name, but it is apparent that he acted in perfect good faith, and without any intention of deviating from the orders of the court, or from his duty. Not a dollar of the money was ever drawn out by him, or used for his own purposes. It was shown to be on deposit in the bank untouched at the time he was removed. Surely there is nothing in either of these transactions that could justify an order of the court branding the appellant as either dishonest or incompetent. The evidence to support the other charges is even less satisfactory, if possible, than that given to sustain those specially mentioned. While it is the duty of the courts to protect, carefully, the interests of estates, the rights of those who are appointed to take charge of and manage them should not be overlooked; and an administrator should not be removed except for good and sufficient cause. We are thoroughly satisfied that no such cause existed in this case. The appellant, as the proceedings of the court show, was proceeding to settle and close up the estate with reasonable dispatch, and in an entirely proper manner. He had a claim against the estate, but it was referred to a referee, who heard evidence and reported in favor of its allowance, except as to a small sum the disallowance of which in no way reflected upon the administrator. He paid \$750 to an attorney for the estate as a retainer, which was reported by him in his first account. This was also referred to a referee, who approved of his action, and there is no claim made that the amount paid was excessive. His account filed with the court was approved by a referee, except as to some small items not material or affecting the fairness or integrity of the administrator. Each and all of these reports of the referee

were approved by the court. We find, on the whole, that there was no just cause or reason for the order removing the administrator, and revoking his letters. Order reversed.

We concur: FOX, J.; PATERSON, J.

80 Cal. 238

PEOPLE v. SMITH. (No. 20,709.)*(Supreme Court of California. Nov. 1, 1890.)***BURGLARY—INDICTMENT.**

1. Under Pen Code Cal. § 459, making the entering of certain premises "with intent to commit grand or petit larceny, or any felony," burglary, as there is no other degree of larceny, it is not necessary that an information charge the degree of larceny with intent to commit which defendant entered the premises.

2. An information charging entrance with intent to commit larceny does not charge two offenses.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Alva E. Snow, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of burglary, and appeals from the judgment rendered against him, and from an order refusing him a new trial. He demurred to the information on the grounds (1) that it did not conform substantially to the requirements of section 950, subd. 2; (2) that the facts stated do not constitute a public offense; (3) that more than one offense is charged. His demurrer was overruled. He then pleaded not guilty, and was convicted as charged. After verdict, he moved in arrest of judgment, on the same grounds as those contained in the demurrer. The motion was denied, as was also that for a new trial. As will be seen, according to the transcript, he did not state in which of the Codes "section 950, subd. 2," was contained, but presumably the court treated it as that in the Penal Code, or it may be that by clerical error it is omitted from the transcript.

The point most insisted upon by the defendant for a reversal of the judgment and order seems to be, as he claims, that the

information did not state the degree of larceny with intent to commit which he feloniously and burglariously entered the premises he is charged to have burglarized. His view of the law seems to be that the information should have stated whether he entered with intent to commit grand or petit larceny. He is charged to have feloniously entered, with intent to commit larceny. Larceny is a specific offense, (Pen. Code, § 484.) just as murder is, (Id. § 187;) but there are degrees of each under our statutes, (Id. §§ 189, 486-488.) Section 459 of the Penal Code makes the entering of certain premises as here involved, "with intent to commit grand or petit larceny, or any felony," burglary; that is to say, the entrance with intent to commit the specific crime of larceny is burglary, whether the degree of larceny be grand or petit. Grand and petit are the only degrees of larceny. Id. § 486. It could make no difference to the defendant whether the proof showed him guilty of the intent to commit grand or petit larceny. He would be just as guilty of burglary if he entered with intent to commit the one as the other. He would still have entered with the intent to commit the specific crime of larceny, the degree of the specific offense being immaterial. Therefore, it is plain that the defendant was fully and clearly informed of the nature of the charge against him, which is all that was necessary as to the matter under discussion; and we can perceive no respect in which the defendant's rights have been prejudiced, as claimed.

The case cited of *People v. Nelson*, 58 Cal. 104, is not in point. There the information did not state that the defendant had entered with intent to commit larceny. It stated that he had entered with intent to commit a felony, but not specifying what felony. Here he was notified that he was accused of entering with intent to commit the specific crime of larceny, it being immaterial to the commission of burglary which of the two his intent was to commit, if he intended to commit one of the degrees of larceny, either grand or petit.

In *People v. Henry*, 77 Cal. 445, 19 Pac. Rep. 830, it was held that an information charging the entrance with intent to commit the crime of larceny was not an allegation of the commission of two offenses, so that the point made here by the defendant upon that head is untenable. The evidence of the recent possession of the stolen property, together with the defendant's statements and the circumstances surrounding the transaction, were sufficient to warrant the jury in their verdict. *People v. Flynn*, 73 Cal. 511, 15 Pac. Rep. 102. There is no reason given in the defendant's points and authorities why the instructions were not correct, and we perceive no error therein, although such is alleged. Perceiving no prejudicial error, we advise that the judgment and orders be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

PARKER v. LARSEN. (No. 12,820.)

(Supreme Court of California. Oct. 30, 1890.)

WATERS AND WATER-COURSES—INJURY FROM IRRIGATION DITCH.

A land-owner who permits the water used in irrigating his fields to percolate through a ditch, and saturate his neighbor's land, is liable for the damages, and may be restrained from continuing the injury.

Department 2. Commissioners' decision. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

C. D. Wright, for appellant. *T. H. Laine*, for respondent.

BELCHER, C. C. This is an action for damages, and an injunction. The court below gave judgment for the plaintiff, and the defendant appeals on the judgment roll. The facts found are in substance as follows: The plaintiff and defendant own adjoining tracts of land in Santa Clara county; the plaintiff's tract lying north of defendant's. Both tracts are adapted to, and are used for, agricultural purposes. They are nearly level, but there is sufficient slope so that water will flow from the land of defendant to and upon the land of plaintiff. The defendant raises alfalfa on his tract, and, in order to do so, it is necessary that the ground be irrigated two or three times during the summer. He has two artesian wells upon the upper end of the tract, which are so capped that the water can be shut off, or permitted to flow, at his pleasure. He has also excavated along the north side of his land, and two or three feet from the plaintiff's south line, a shallow ditch, which is several hundred feet long, and has no outlet or drain from either end. In excavating this ditch the earth was thrown up on the north side thereof, that is, between the ditch and the plaintiff's line. When he wishes to irrigate his land, he removes the caps and lets the water flow over the surface for 10 days or 2 weeks, and when it is sufficiently irrigated the wells are again closed. The excess of water not absorbed and held by the soil flows into the ditch above mentioned, and forms a pool some two or three hundred feet in length, and some 6 or 10 inches in depth, and remains there for about a week, and until taken up by evaporation and percolation. Upon the west side of defendant's tract is a lane, and upon the side of it a ditch, much lower than his land, into which at a very small expense, and with little inconvenience, he could drain the water from his ditch, and probably, prevent any injury to plaintiff. During the last two or three years, and two or three times each summer, defendant has irrigated his land in the manner above described, and on each of these occasions the water has accumulated, as above stated, and has slowly percolated beneath the surface, and through the embankment into the plaintiff's land, and has saturated the soil to a considerable distance, and to the extent of three acres, which has thereby been made wholly useless for any purpose of ordinary husbandry. And during this period, upon one or more occasions, the water from these wells has flowed over the

top of the embankment, and thence upon the surface of the plaintiff's field. The damage and injury to plaintiff's land, from these percolations, is \$100. The defendant, in so running and using said water, and permitting it to accumulate upon the north line of his field, was not actuated by any malice or desire to injure plaintiff, but it was done for the purpose of fully utilizing the whole of his field in growing the crop of alfalfa. And, as conclusions of law, the court found that the plaintiff was entitled to a judgment for \$100 damages, and to an injunction restraining the defendant from permitting the water from his wells to flow to and accumulate in the ditch along the north line of his land. And judgment was so entered. From the foregoing statement of the facts, it is manifest that the plaintiff was entitled to the relief which he obtained. The water which did the injury to plaintiff was not a natural stream flowing across defendant's land, but was brought upon the land by artificial means. And the rule is general that, where one brings a foreign substance on his land, he must take care of it and not permit it to injure his neighbor. The law upon the subject is tersely expressed in the maxim, *sic utere tuo ut alienum non lædas*. We think the judgment should be affirmed, and so advise.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

furnished the material without any notice of such intention.

3. Where the building was erected by the tenants as copartners, the executor of one of them, since deceased, is not a necessary defendant in an action to foreclose a material-man's lien, as the surviving partner is fully authorized to alone defend the partnership interest.

Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Geo. W. Hardacre and D. L. Withington, for appellant. *Trippet & Neale, Hunsaker & Britt*, and *C. F. Holland*, for respondents.

Fox, J. 1. Appellant is the owner in fee of Lot L, block 734, New San Diego. He leased the same for the term of five years to the defendant Apfield, who took one Newkirk into partnership with him, and they proceeded to erect a four-story building upon the lot, upon which divers liens were filed, for labor and materials, upon which suits were brought, four of which suits were consolidated and tried together, resulting in judgments in favor of the claimants, from which judgments the defendant Low appeals, also from an order denying his motion for new trial. The lease contains the following provision: "No buildings or improvements shall be removed until the taxes shall be fully paid, and until all rents and indebtedness has been paid. And, at the expiration of said term, the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, (damage by the elements alone excepted.)" The demised premises are described as being "all that real property," etc., "with the appurtenances," etc. There is no clause in the lease either reserving or granting to the lessee the right to remove any buildings or improvements which have been or may be erected upon the premises. But, from the first sentence of the clause above quoted, the appellant argues that the building erected by the lessee upon said lot is not an improvement to or upon the same, and that laborers and material-men, who furnish labor and material therefor, cannot, by reason thereof, acquire a lien upon his interest (the fee) in said land, the lease being a matter of public record in the office of the county recorder. To this the respondent makes the pertinent suggestion that it is this very improvement to his realty that enables him to realize \$100 per month rent therefor, for the term of the lease,—an amount which it could not command if the lot remained vacant. But assuming that the inference which appellant draws—that the building is subject to removal at the expiration of the lease—be true in fact, he is still protected by the terms of his lease, for it cannot be removed until all taxes, rents, and debts are paid. If, therefore, in order to protect his realty, he has to pay off these liens, the building, even under his theory of the case, cannot be removed until the money is repaid. But there is more than this of this lease. By its terms, he has demised all that there is of the "real property," with its appurtenances. That includes not only the land, but everything

36 Cal. 335

WEST COAST LUMBER CO. v. APFIELD *et al.* (No. 13,788.)

(Supreme Court of California. Nov. 7, 1890.)

MECHANICS' LIENS—LEASED PREMISES—EVIDENCE—PARTIES.

1. Where a lease of land contains nothing to put third persons on notice that buildings to be erected thereon by the tenants will not inure to the landlord's benefit, and become a part of the realty, the landlord, who has stood by and seen the tenants erect a large and costly building on the land, without giving any notice under Code Civil Proc. Cal. § 1192, that he will not be responsible for the same, cannot be heard to say that the tenants have the right to remove the building at the expiration of their term, and thereby deprive material-men of their lien on his land for material furnished for the building.

2. In an action to foreclose a material-man's lien on both the land and the building, evidence of an intention by the tenants to remove the building at the expiration of their term is properly excluded as against the material-men, who

that is affixed, incidental, or appurtenant to the land. Civil Code, § 658. That which is affixed includes that which is "imbedded into it, as in the case of walls; or permanently resting upon it, as in the case of buildings." Id. § 660. And that is deemed incidental or appurtenant to land which is by right used with the land for its benefit. Id. § 662. It is apparent that it was the erection of this building which gave to the otherwise vacant lot a rental value of more than a nominal amount. It was a large and substantial structure, not only apparently "permanently resting upon" the lot, but the proof shows that it was resting upon mud-sills "imbedded in it," and also that when completed it was "used with the land." To all appearance the lot and building was a single entity of "real property." Again, as we have before said, there was neither a reservation of right, nor a grant of right, to remove any buildings; but, on the contrary, there was an express covenant to surrender at the expiration of the term "in as good state and condition as reasonable use and wear thereof will permit, damage by the elements alone excepted." This at least was an express provision negating the right to remove. "A tenant for years, or at will, has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section." Id. § 820. The preceding section, being the one referred to as "the last section," gives him the right to "occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy." Nowhere does the Code give the right to remove buildings, unless that right is expressly granted or reserved in the instrument creating the tenancy, or the buildings are such, or so erected, as not to partake of the realty. "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it." Id. § 1013. "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, or domestic use, if the removal can be affected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises." Id. § 1019. This would hardly authorize the removal of a four-story building erected to be used for stores, and as a lodging and boarding-house. It may be that the parties have not expressed in this lease what they had agreed upon beforehand, and understood and intended at the time, but, having reduced the same to writing, and executed the same, it supercedes all oral negotiations or stipulations concerning the subject-matter, which preceded or accompanied the execution of the instrument. Id. § 1625. If by mistake the parties have failed to express the intention in the making of the instrument, the appellant, upon proper showing of the fact, may have it revised and reformed;

but that he has not sought to do here, and he could not have it so done as to prejudice the rights of third persons, acquired in good faith and for value. Id. § 3399. Here, with the record showing that he was the owner in fee, with nothing to show, or to put third parties upon notice, that buildings erected thereon would not inure to his benefit, and become a part of the realty, with actual knowledge of the construction of the building, and without giving any notice, under section 1192, Code Civil Proc., that he would not be responsible for the same, the appellant has stood by and seen his tenants erect a large and costly building upon his lot. He cannot now be heard to say that the men who performed labor upon and furnished material for such building have no lien upon his lot therefor, because the building has not become a part of the realty, and is not an improvement upon his property. Possibly he would have been entitled to have the decree foreclosing the lien so framed as to have the leasehold interest of the tenant first sold, and his fee held liable only for deficiency, if there was any, but he asked for no such relief in the court below, and it is too late now to assign the failure to grant that relief as error upon which to reverse the judgment.

2. Appellant claims that it was error to exclude the evidence of the defendant Apfield as to his intention in reference to a future removal of the building. While it is true that, as between the appellant and his lessee, the question of whether a building about to be erected would become a part of the realty or not would depend largely upon the intention of the parties, it is equally true that it would not depend upon the intention of one of the parties; nor would a secret intention on the part of both defeat the rights of third parties who acted without notice of such intention, and upon the faith of the rule established by law where no such intention existed. It was not, therefore, error to reject this evidence.

3. There was no error in refusing to continue the case and make Newkirk's executor a party. It was a partnership of Newkirk & Apfield that erected this building. No judgment was sought against the estate of Newkirk, and the surviving partner alone was fully authorized to defend for the partnership interest. Besides, Newkirk's interest had already been assigned before his death, and his assignee was also a party to the action.

4. The objection to the lien of the West Coast Lumber Company, filed May 26th, is not well taken. It shows upon its face that the original charge was made against Newkirk alone, because the claimant did not know at that time that Apfield was interested in the building, or a partner of Newkirk's, but that, before the claim of lien was filed, the company learned the fact, and the claim was filed against the firm. Defendant was not misled or prejudiced by reason of the claimant stating the whole fact in its notice of lien. The remaining objections to the claims of liens all go to the question of the time of filing, — whether the same were filed at the prop-

er time or not. The record is not very clear as to when this building was finally and fully completed. As we read it, the last of the liens was filed within the time required by law after the last work was done on the building.

On the other hand, some of them would seem to have been filed before all work had ceased, but not until the building was so nearly completed as that only "trivial imperfections" remained in the work. Under these circumstances, and in view of section 1187, Code Civil Proc., (as amended March 15, 1887,) we are not disposed to disturb the findings of the court on this point.

5. It is claimed that the court erred in finding that the building was constructed with the knowledge and consent of the appellant. The finding of consent was unnecessary, and may be treated as surplusage. The finding that it was done with his knowledge is in accordance with the admissions of the pleadings. Judgment and order affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.

83 Cal. 600

LOWREY v. HOGUE. (No. 13,779.)

(Supreme Court of California. Sept. 10, 1890.)

CRIMINAL LAW—CHANGE OF VENUE—SENTENCE.

1. Under Pen. Code Cal. § 1431, providing that "if the action or proceeding is in a justice's court a change of the place of trial may be had at any time before the trial commences: * * *

(2) When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of a township where the same prejudice does not exist,"—the mere filing of an affidavit of prejudice does not make it the imperative duty of the justice to transfer the case, but it is for him to determine whether the facts set out in the affidavit show that a fair trial cannot be had by reason of prejudice.

2. Where a judgment provides that defendant be imprisoned for a certain time, and that he also be fined a certain amount, and that in default of payment of the fine he be imprisoned a certain additional period, the fact that the latter provision is void does not render the rest of the judgment void.

In bank. Writ of review to justice's court, city and county of San Francisco; S. L. HOGUE, Judge.

Justin Jacobs, for petitioner. W. D. Tupper, for respondent.

PATERSON, J. A complaint was filed in one of the justice's courts of the county of Fresno, charging the plaintiff with having committed the crime of battery. Prior to the time the case was set for trial, the plaintiff filed an affidavit in which he set forth that he could not have a fair and impartial trial by reason of the prejudice of the citizens of that township. The cause of such prejudice he alleged to be certain publications in the newspapers of the township with reference to the facts or purported facts of the case. A copy of the articles referred to was set forth in the affidavit. The justice denied the motion for a change of venue, the jury was impaneled, the defendant was convicted,

and a judgment was entered against him that he be confined in the county jail for the period of 30 days. The judgment imposed a further penalty of \$200 fine, with the usual alternative of imprisonment in the county jail until the fine be paid at the rate of one day for every dollar thereof. This is a proceeding to annul and set aside the judgment. It is claimed that the judgment is void for two reasons: *First*, because the affidavit filed on motion for a change of venue ousted the justice's court of jurisdiction,—that it was the imperative duty of the court to transfer the case to another township for trial; *second*, because the court had no authority to add to the fixed period of imprisonment the alternative of imprisonment for non-payment of the fine imposed. Section 1431 of the Penal Code provides that "if the action or proceeding is in a justice's court, a change of the place of trial may be had at any time before the trial commences: * * * (2) When it appears from affidavits that the defendant cannot have a fair and impartial trial, by reason of the prejudice of the citizens of the township, the cause must be transferred to a justice of a township where the same prejudice does not exist." Under this provision we do not think it was the imperative duty of the justice to transfer the case. In civil cases in justices' courts the legislature has provided that the place of trial may be changed "when either party makes and files an affidavit that he cannot have a fair and impartial trial on account of the bias or prejudice of the citizens of the township or city against him;" but in criminal cases the opinion of the defendant that he cannot have a fair and impartial trial is not sufficient. He must state the facts upon which he bases that opinion, and the court is then called upon to determine whether the reasons given support the conclusion. The justice is called upon to exercise his discretion. For any abuse of discretion, the defendant has a speedy and adequate remedy by appeal to the superior court. If the justice has erred in this case, we presume that the error will be corrected by the superior court. It is not a case of want of jurisdiction.

That portion of the judgment providing for a collection of the \$200 fine by imprisonment in case the money be not paid is void. *Ex parte* Rosenheim, 83 Cal. 388, 23 Pac. Rep. 372. But the whole of the judgment is not void because of this defect.

It is ordered that there be stricken from the judgment that portion thereof which provides that "in case said fine be not paid within one hour from this time of rendering judgment that you, the said George Lowrey, defendant, be imprisoned in the county jail of the county of Fresno, state of California, until the fine be duly satisfied in the proportion of one day's imprisonment for every dollar of the fine, or until lawful payment shall have been made of such proportion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed."

We concur: SHARPSTEIN, J.; WORKS, J.; FOX, J.; MCFARLAND, J.

88 Cal. 210

FAEKLER v. WRIGHT. (No. 13,644.)

(Supreme Court of California. Oct. 23, 1890.)

JUDICIAL NOTICE—POLITICAL DIVISIONS OF THE STATE.

Under Code Civil Proc. Cal. § 1875, subds. 3, 8, providing that the courts shall take judicial notice of the acts of the legislative, executive, and judicial departments of the state, and of the geographical divisions and political history of the world, the court will take judicial notice of the fact that the land described in a mortgage by section, range, and township, according to government survey, has been detached from the county of which it was a part at the time the mortgage was executed, and added to a new county, in which latter the foreclosure suit was brought.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Victor Montgomery, for appellant. *Ray Billingsly*, for respondent.

PATERSON, J. The only question raised by appellant, which is worthy of consideration, is whether the court below had jurisdiction of the subject-matter. The complaint refers to the copy of the mortgage attached thereto for a description of the property. It is described therein as follows: "The real property situate in the Rancho Santiago de Santa Anna, county of Los Angeles, state of California, and described as follows, to-wit: The north-west quarter of lot number three, of block 'C,' containing ten acres of land in the A. B. Chapman tract, according to the survey thereof made by Frank Lecouvreur in the year 1870, being a portion of the north-west quarter of section 33, township 4 south, range 9 west, of S. B. B. and M." There is no allegation that the property described in the mortgage is a portion of the territory which has, since the execution of the mortgage, been taken from the county of Los Angeles, to create the county of Orange; but, as a matter of fact, township 4 south, range 9 west, of S. B. B. and M., is a part of that territory, and it is a fact of which the court takes judicial notice. Section 1875, Code Civil Proc. subds. 3, 8. Judgment affirmed.

We concur: **WORKS, J.; FOX, J.**

88 Cal. 219

WHITE v. WHITE. (No. 13,331.)

(Supreme Court of California. Oct. 23, 1890.)

DIVORCE—CROSS-COMPLAINT—FINDINGS.

1. Civil Code Cal. § 130, provides that no divorce can be granted upon the uncorroborated statement, admission, or testimony of the parties. A husband sought divorce for adultery and desertion, and the wife, by cross-complaint, sought it for adultery and extreme cruelty. The court found the wife innocent of both charges, and granted her a divorce for the adultery of her husband; but also found that the specific acts of extreme cruelty were mainly sustained by the wife's evidence, which was contradicted by the husband, and the corroborating circumstances were insufficient to establish them. *Held* that, while the court was restrained by the statute from finding cruelty as a ground of divorce, it was at liberty to find it as a justification for the desertion, and there was no conflict in the findings.

2. It was proper for the court to award all the community property to the wife, although it also found that it was impossible for it to deter-

mine what part of the property claimed by the husband was community property, and appointed a referee to determine that question, and report for final action thereon.

3. When there is no bill of exceptions, it will be presumed that there were no objections to evidence below, and the reviewing court will refuse to consider questions arising thereon.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

E. D. Wheeler and *Barclay Henley*, for appellant. *H. E. Highton*, *H. C. McPike*, and *J. A. Cooper*, for respondent.

McFARLAND, J. 1. This is an action for a divorce upon the alleged grounds of adultery and willful desertion, brought by the husband against the wife. The defendant filed an answer and cross-complaint, in which she denied the charges made against her in the complaint, and, alleging adultery, willful neglect, willful desertion, and extreme cruelty against plaintiff, prayed that she be granted a decree of divorce for those causes. The trial court found against plaintiff as to his averments of defendant's adultery and desertion, in favor of defendant as to her averments of plaintiff's adultery, neglect, and desertion, and against her as to her averment of plaintiff's extreme cruelty. Judgment was rendered denying the prayer of the complaint, and decreeing a divorce according to the prayer of the cross-complaint. Plaintiff appeals from the judgment upon the judgment roll alone. (There are also questions about community property, which will be noticed hereafter.)

As there is no evidence before us, that part of the judgment which decrees a divorce must be affirmed, unless its invalidity appears upon the face of the judgment roll. The point which appellant makes against the validity of the decree of divorce, stated briefly, is this: Appellant, in his answer to respondent's cross-complaint, pleaded her desertion by way of recrimination. The court found that respondent did leave the appellant on October 26, 1884, and did not return; and, as the court also found that appellant was not guilty of extreme cruelty, therefore respondent must have been guilty of desertion. But as to respondent's averment of appellant's cruelty, the court finds as follows: "There is testimony tending to prove the allegations of the extreme cruelty contained in the fourth cross-complaint of the defendant, but as to the specific acts therein alleged they are mainly sustained by the evidence (testimony) of the defendant herself, which is contradicted by the plaintiff, and the corroborating circumstances are insufficient to establish the said specific acts, or the said charge of extreme cruelty." The court was here dealing with the respondent's affirmative averment of extreme cruelty as a distinct cause for granting her a divorce, and was acting under the restraint of section 130 of the Civil Code, which provides that "no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties." But the court was not under that restraint when considering appellant's affirmative averment of respondent's

ent's desertion as a distinct cause of divorce on his part, she claiming that his treatment justified her in leaving. And, if upon that issue the only evidence was the testimony of the parties, there is no rule which prevented the court from believing the one, or disbelieving the other. We therefore see no reason for disturbing the judgment, so far as it decrees a divorce.

2. Respondent, in her cross-complaint, averred that appellant was the owner of a large amount of property, and that certain parts of it were community property; and the court decreed that the whole of the community property be awarded to respondent. And appellant contends that in this part of the decree the court "acted improperly and erroneously, and not intelligently, and without knowledge of all the facts of the case, or the condition of the parties." This contention is founded upon the latter part of finding 14, which is as follows: "It is impossible upon the testimony, so far as available and produced, to determine what the property, real and personal, the resources, the income, and the interests of the plaintiff really are, or were at the commencement of this action, or what proportion community property; and to obtain this information, and to enable the court to act intelligently and finally upon these questions, a strict, accurate, and full inquiry, investigation, and account is indispensable, which, from its nature, cannot originally be taken by the court itself, but must in the first instance be had and conducted by a competent referee." But the previous part of said finding recites the fact that evidence had been taken on the subject of property; and it may well be assumed that sufficient evidence had been introduced to inform the court generally on that subject, so that it could know the limits within which the value of the community property would lie, and thus intelligently exercise its discretion in awarding all such property to respondent. The decree contained a clause appointing a referee to take, and report to the court for its final action, a full and accurate account of the property. In all this we see no error; and the point here made by appellant is, in our opinion, not tenable.

3. Appellant, in his answer to the cross-complaint, denied that there was any community property, and also averred that immediately preceding the marriage the parties entered into a written contract, properly executed and acknowledged, by which it was agreed that all property acquired by plaintiff after the marriage should be his separate property, and should in no event become community property. The court found that this contract, owing to circumstances under which appellant procured respondent to make it, was invalid; and decreed it to be set aside and annulled. Appellant contends that this was error, because that result could have been legally reached only in an action brought by respondent for the direct purpose of annulling said contract, and in which pleadings on that issue could have been properly framed. But in

the case at bar the real issue here involved was as to the existence of community property, which was affirmed by respondent, and denied by appellant; and if on that issue the latter chose to introduce the said contract in evidence, it is difficult to see why respondent could not attack its validity for any cause. The fact that appellant pleaded the contract in his answer made no difference, for, under our system, it stood as denied. But, waiving the question whether there would be any merit in the point if properly presented, it is sufficient to say that in the case at bar, there being no bill of exceptions, it must be assumed in support of the judgment that appellant made no objection to the introduction of evidence attacking the validity of the contract. The parties, therefore, must be treated, according to numerous decisions of this court, as having waived all objection, and as having tried the issue upon its merits. It is too late to make the objection here for the first time. *King v. Davis*, 34 Cal. 106; *Hutchings v. Castle*, 48 Cal. 155. It was perhaps going further than was necessary for the court to decree the contract a nullity; but that would be, at worst, only surplusage.

We think that the facts found by the court were sufficient to warrant the conclusion that the contract was invalid because improperly procured. Judgment affirmed.

We concur: BEATTY, C. J.; Fox, J.; THORNTON, J.; WORKS, J.

PATERSON, J., (*concurring*.) I concur in the views expressed by Mr Justice McFARLAND, but would decide the first contention on the broad ground that the cruelty referred to in section 98 of the Civil Code, and which makes the offending party the deserter, is not necessarily of the same character or grade as the "extreme cruelty" defined in section 94 as one of the grounds of divorce. Section 98 reads as follows: "Departure or absence of one party from the family dwelling-place, caused by cruelty or threats of bodily harm, from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party." This section, say the code commissioners, was "intended to settle a question discussed as doubtful in 1 Bish. Mar. & Div. §§ 787, 791, 794. If a wife quits her husband's house under probable cause to apprehend personal violence from him, or if he, by reason of acts of cruelty, drives her from the home, it is the same as if he had thrown her out of doors. If the acts of cruelty show an intention on his part to drive her from him, he is held responsible for the natural and probable consequences of such acts, and it is as much desertion on his part as if he had without cause left her, intending to desert her. Unless section 98 provides for a grade of cruelty other than that defined in section 94, it is entirely superfluous. The two sections would provide for one cause of action only, under two different names.

86 Cal. 225

PEOPLE v. TARM POL. (No. 20,648.)

(Supreme Court of California. Oct. 23, 1890.)

MURDER—INSTRUCTIONS—ALIBI—MISCONDUCT OF JURY.

1. Upon a trial for murder it is not error to give the following charge, which is taken *verbatim* from Pen. Code Cal. § 1105: "Upon trial for murder, the commission of the homicide by the defendant being proven to the satisfaction of the jury, or admitted, the burden of proving circumstances of mitigation, or that justify or excuse him, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounted to manslaughter, or that the defendant was justifiable or excusable."

2. Where the accused totally denies the killing, introduces testimony that it was done by others and that he was at another place at the time, a charge upon the doctrine of self-defense cannot be prejudicial to him.

3. Where there is testimony tending to prove an *alibi*, it is not error to charge that the accused "may establish any fact essential to his defense by merely a preponderance of evidence," when accompanied by a further charge that "if, from the whole case, and a consideration of all the testimony, the evidence [as to *alibi*] be sufficient to create a reasonable doubt as to whether defendant was present at the time and place of the murder, he should be acquitted."

4. Where the accused asks for a view of the *locus*, he cannot complain of the momentary separation of a juror from the others during the view, without showing that he was injured thereby.

In bank. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNEGOM, Judge.

D. M. Delmas, for appellant. Frank M. Stone and Atty. Gen. Geo. A. Johnson, for respondent.

McFARLAND, J. The appellant was convicted of murder, and he appeals from the judgment, and from an order denying a new trial. He makes three points on the appeal, viz.: (1) That the trial court erred in instructing the jury; (2) misconduct on the part of the jury; and (3) insufficiency of the evidence to support the verdict.

1. The objection urged against the instructions is that they require a preponderance of evidence on the part of a defendant in a criminal case, contrary to the rule laid down in *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549, and *People v. Elliott*, 80 Cal. 296, 22 Pac. Rep. 207. The instructions objected to, and which for convenience we will number 1, 2, and 3, are as follows: "(1) Upon trial for murder, the commission of the homicide by the defendant being proven to the satisfaction of the jury, or admitted, the burden of proving circumstances of mitigation, or that justify or excuse him, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounted to manslaughter, or that the defendant was justifiable or excusable. (2) If, from all the evidence, the jury should be satisfied by a preponderance of testimony that the circumstances were such as to excite the fears of a reasonable man, and that the defendant acted under the influence of those fears alone, or if he killed the aggressor to prevent the commission of a felony, he would not be criminally responsible for his death, although the cir-

cumstances might not be sufficient to prove by a preponderance of evidence that the aggressor was actually about to commit a felony. (3) In the determination of this case you are further instructed that, while the law requires the guilt of the defendant to be shown to your satisfaction beyond a reasonable doubt before you can convict, he may establish any fact essential to his defense by merely a preponderance of evidence." The first instruction above quoted is taken *verbatim* from section 1105 of the Penal Code, and, of course, is not erroneous, although it should, in justice, be accompanied, as it was in the case at bar, by what the same Code contains on the subject of reasonable doubt. The second instruction is somewhat confused by the use of the word "if;" but it might, perhaps, be fatally erroneous if in this case, as in *People v. Bushton*, and kindred cases, the defendant had admitted the killing, and the question had been about "circumstances of mitigation, or that justify or excuse him." In the *Bushton* Case the killing was admitted, but defendant claimed that it was done accidentally; and section 1105, Pen. Code, was therefore applicable to the case. But the trial court in that case, in its charge to the jury, in addition to giving said section of the Code, used strong and repeated expressions to the effect that "it devolves upon the defendant" to prove circumstances of mitigation, excuse, or justification "by a preponderance of evidence on his part," by "some stronger proof," etc. This language was held to be beyond the meaning of the Code, and to be inconsistent with the rule that if the jury have a reasonable doubt of a defendant's guilt they should acquit. *People v. Elliott* was a similar case; that is, defendant admitted the killing, but claimed that it was justifiable. Now, in the case at bar, there were no facts which made section 1105, Pen. Code, or the doctrine of the *Bushton* and *Elliott* Cases applicable. In this case the defendant did not set up any circumstances of mitigation, or excuse, or justification. He totally denied that he had anything to do with the killing of the deceased. He introduced witnesses who testified that they were present and saw the killing; that it was done by persons other than defendant; and that he was not present when the killing took place. He also testified himself, and introduced other witnesses who testified that, at the time of the killing, he was at another place in bed. It is clear, therefore, that the second instruction,—about "fears of a reasonable man,"—whether correct or not, could not have injured the defendant. The part of the third instruction which is objected to is this: "He may establish any fact essential to his defense by merely a preponderance of evidence." Of course this proposition in itself is true; it does not upon its face declare anything that is erroneous. It is apparently intended for the benefit of the defendant. But the objection made to it is that the jury might infer from it the other proposition that no evidence on the part of the defendant of a fact would be sufficient to raise a reasonable doubt of his guilt, un-

less he actually proved the fact by a preponderance of evidence. It is possible that the language objected to might have the alleged effect on a jury in some cases when not accompanied by other qualifying instructions; and for this reason it had better be left out of charges to juries in criminal cases. In the case at bar, however, the only effect that the instruction could have had was in relation to the fact of an *alibi* which defendant attempted to prove. But, with respect to that fact, the court instructed the jury as follows: "Where evidence has been offered by the defendant for the purpose of proving an *alibi*,—that is to say, that the defendant was in another place at the time of the alleged act of murder, and was distant from the scene of the killing charged, at the time, and therefore could not have participated in it,—if, from the whole case, and a consideration of all the testimony, the evidence in this behalf produced be sufficient to create a reasonable doubt as to whether the defendant was present at the time and place of the murder, he should be acquitted." This was certainly putting the law as favorably for defendant as he could reasonably demand, and taking the instruction last above quoted, and the one objected to, together, there was no danger of the jury being misled.

2. Alleged misconduct of the jury. The deceased was killed on the street, near the corner of Jackson and Dupont streets, in the city of San Francisco, and in the taking of the testimony in chief of the prosecution a great many different localities, houses, etc., were mentioned. When the evidence for the prosecution in chief was closed the prosecution and defense joined in a request to the court that the jury be allowed to visit and view the various places mentioned in the testimony, whereupon the court made an order for the viewing of about a dozen enumerated places. The deceased was attacked and killed about 10 o'clock on the night of June 23, 1889, by two or three persons who used hatchets, and perhaps other weapons; and a witness had testified that he saw the assault, that defendant was one of the assailants, and that immediately after the assault the defendant went up the stairway of a certain house designated as "No. 924 Dupont street." The defendant was arrested about three hours afterwards, in a house on another street in that vicinity, called "Washington alley," the house being designated as "No. 10 Washington Alley." And a witness (Wittman) had also sworn that he (the witness) had afterwards gone up the stairway of No. 924 Dupont, and, passing through a window, had gone on the roofs of the intervening houses and down into the house No. 10 Washington alley. Now, the order above mentioned for viewing premises, made at the joint request of the parties, included "the premises No. 10 Washington alley," and "also to ascend the stairway at No. 924 Dupont street, and look out of the window at the head of the stairs, look at the alley, and pass over the roof, if desired, to the place alleged to have been reached by Sergeant Wittman." When the order was made, one of the jurors, Mr.

James Means, in open court, and before the jury started, asked permission to pass over the roofs from No. 924 Dupont to No. 10 Washington alley. Counsel for the people said he "would not object;" and counsel for defendant stated that "he would be glad to have affiant [Means] or any other, or all, of the jury, pass over the roofs if they wished to attempt the passage, and expressly stated that on behalf of defendant he had no objection to affiant passing over the roofs, if he could." "The remainder of the jury, in open court, stated that no other members of the jury desired to attempt said passage on said roofs." Means says in his affidavit further as follows: "That upon reaching said 924 Dupont street, in conformity with said permission, affiant passed out of said window and over said roofs onto the roof of the building No. 10 Washington alley; that the other jurors passed to No. 10 Washington alley by way of the street, and met affiant where he had remained on the roof said building No. 10 Washington alley; that affiant was in full view of the balance of the jury, and of the judge of said court, while passing over said roofs; that he neither spoke to any one nor did any one speak to affiant, from the moment he left the balance of said jury, until he was again joined by the balance of the jury. That both defendant and his counsel, Mr. Lyman I. Mowry, were present during all the foregoing proceedings, and offered no objection to the said act of affiant." And the passage of said juror, Means, over said roofs, under the circumstances as above stated, is relied on by appellant as misconduct for which the judgment should be reversed. The only substantial difference between the affidavit of Means and that of appellant, upon which alone he rests this part of his case, is that appellant says that during a part of the time when Means was on the roof he could not be seen by the other jurors. There is always necessarily some difficulty in keeping jurors closely together when viewing premises; and when a party requests that there be such a viewing he should not be heard afterwards to object, unless he can show that without his consent or knowledge there has been some misconduct in the proceeding which has caused him substantial injury. He should not be allowed to use it voluntarily as a means of entrapping the opposite party into mere abstract errors. It is not necessary to determine whether the act of Means, had it been done against appellant's consent, would have constituted in law a "separation" of the jury. Neither does it appear that appellant was injured by the act. Appellant took the chances of injury or benefit. The juror might, as appellant may have expected, have become lost in the labyrinth of Chinese roofs. If appellant had not desired to have the juror make the attempt, he should have objected when the proposition was made before the court left the court-room, or afterwards, before the juror commenced the passage. Instead of doing so, he not only consented, but requested that the juror make the attempt. After the result was known, it was too late to make the objection. We do not

see that the question of a defendant's power to waive a constitutional right is involved. The thing complained of here is, at worst, only an irregularity which should have been objected to when the opportunity was offered. The point as to jurors examining the box in which appellant's hat was said to have been kept over night, we do not understand to be urged. The statement about it was made merely "on information and belief," and was insufficient. *People v. Williams*, 24 Cal. 38.

3. As to the point of the insufficiency of the evidence to support the verdict, it is enough to say that the mass of evidence, both direct and circumstantial, against appellant, is too great to afford any warrant for the court to disturb the finding of the jury. Judgment and order affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; WORKS, J.; FOX, J.

THORNTON, J., (*concurring*.) In my opinion the instructions are without error. I find no error in the record. I wish to add that I do not intend by what is said herein to approve the ruling in *People v. Bushon*. I concur in affirming the judgment and order.

86 Cal. 158

FISHER v. POLICE COURT OF THE CITY OF SAN DIEGO *et al.* (No. 13,781.)

(*Supreme Court of California*. Oct. 15, 1890.)

MUNICIPAL CORPORATIONS—BOUNDARIES—CONSTRUCTION OF STATUTES.

The city of San Diego is built around three sides of a bay, shaped like a horseshoe, and was originally a pueblo, whose water-line was the bay. A peninsula, beginning near the mouth, and at one side of the bay, runs nearly in the center, and more than half way up the bay, around which the water for an indefinite distance is called the "Ship's Channel." Acts Cal. 1875-76, p. 806, reincorporated the city, with the same limits on the land side as before, but provided that the "water front line should be the ship's channel," and gave the city jurisdiction of the bay and of the sea for one league from shore. Another section divided the peninsula into wards for voting purposes, and drew the boundary line of one ward from one point to another across the mouth of the bay; thus including, practically, the whole peninsula. Other sections restricted the elective franchise to residents of the city, and authorized the city to acquire land outside of its boundaries for municipal purposes only. *Held*, that the act included the peninsula within the city limits.

In bank. Application for writ of prohibition.

Hunsaker & Britt, for appellant. *Capps & Montgomery*, for respondents.

PER CURIAM. Appellant applied to the superior court for a writ of prohibition to prohibit the police court of the city of San Diego from further proceeding in a certain criminal action in which petitioner was charged with violating a certain ordinance of said city. The superior court denied the writ, and petitioner appeals to this court. The only question involved is whether a certain territory, known generally as "Coronado Beach," is within the limits of the municipal jurisdiction of the city of San Diego. This question was directly presented, and elaborately consid-

ered by this court, in *City of San Diego v. Granniss*, 77 Cal. 511, 19 Pac. Rep. 875, and it was there held, all the justices who were present and participating in the decision concurring, that said territory was within said limits. Upon a petition for rehearing, that case was again thoroughly considered, and the rehearing was denied. The record on the present appeal presents the point in substantially the same way in which it was presented in said case of *City of San Diego v. Granniss*, and, upon the authority of the latter case, the position of appellant that, at the time said case was decided, Coronado beach was not a part of the city of San Diego is held to be untenable. Appellant also relies upon an act of the legislature approved March 16, 1889, which he says changed the boundaries of the city of San Diego by taking away from it the said Coronado beach. But in the recent case of *People v. Common Council*, ante, 727, (No. 13,874, filed Aug. 18, 1890,) this court held said act to be unconstitutional and void "so far as it undertakes to exclude or take away any part of the territory under the municipal jurisdiction of San Diego." There are no other points necessary to be noticed. The order appealed from is affirmed.

88 Cal. 197

CAMPBELL v. WEST *et al.* (No. 13,750.) (*Supreme Court of California*. Oct. 23, 1890.)

MORTGAGES—FORECLOSURE—EVIDENCE—JUDICIAL NOTICE.

1. The court will take judicial notice that the county clerk is *ex officio* clerk of the superior court, so that, though he indorses a complaint filed in the superior court as "county clerk," it will be deemed to have been filed with the proper officer.

2. Judicial notice will not be taken of the fact that land described in a mortgage by reference to private and not government surveys, and as situated in a certain county, has, since the execution of the mortgage, been taken from that county, and attached to the county in which the foreclosure suit is brought.

3. Where a petition in foreclosure fails to allege that the land described in the mortgage is situated in the county in which the suit is brought, and the description shows that it is situated in another county, the court acquires no jurisdiction of the case, under Code Civil Proc. Cal. § 392, and Const. art. 6, § 5, requiring the action to be brought in the county where the land is situated.

4. Where a mortgage note provides that the interest shall be paid semi-annually, and if not so paid that it shall be compounded semi-annually, or the whole sum, principal and interest, shall become immediately due at the option of the holder of the note, the holder of the note may exercise his option promptly upon a default in the payment of any installment of interest, and the fact that he has compounded the interest on prior installments does not affect his right.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Victor Montgomery, for appellants. *Ray Billingsley*, for respondent.

Fox, J. This is an action to foreclose a mortgage. Judgment and decree in favor of plaintiff, from which defendants appeal, the case coming up on the judgment roll.

1. The first point made is that the court never acquired jurisdiction of the case, for the reason that the complaint was never

filed in the court,—the indorsement thereon showing that the same was filed with the county clerk. This point is not well taken. The court will take judicial notice of the fact that the county clerk is *ex officio* clerk of the superior court. The complaint is entitled and indorsed in the superior court of the county of Orange, and is also indorsed, "Filed October 19, 1889. R. Q. WICKHAM, County Clerk." If the indorsement had been signed simply "R. Q. Wickham, Clerk," it would have been sufficient. The placing of the word "county" before the word "clerk" was mere surplusage, and will not defeat the effect of the indorsement, inasmuch as it is a designation consistent with that of the *ex officio* office of clerk of the court.

2. It is claimed that the complaint contained no description or allegation showing that the property against which foreclosure is sought was situate within the jurisdiction of the court. The action must be brought in the county in which the land is situate. Const. art. 6, § 5; Code Civil Proc. § 392. The complaint in this case contains no description of the property, except as it is found in the copy of the mortgage attached as an exhibit, and that describes it as being situate in the county of Los Angeles. The court finds and recites in its decree that the land is situate in the county of Orange, and that the same was formerly a part of the county of Los Angeles. This finding and recital would be sufficient, if there was anything in the complaint to support it, but there is not. The court will take judicial notice of the boundaries of the county, and of the location of lands described by government subdivisions, as by township, range, and section, and the legal subdivisions thereof; but it cannot take judicial notice of the location of lands designated simply by name, or reference to a private survey, as in this case. The only description given in the complaint or mortgage attached is that it is "situate in the county of Los Angeles, state of California, and described as follows, to-wit: In Rancho Santiago de Santa Ana, the whole of block 'N,' (except thirteen acres on the east side thereof heretofore sold to Mrs. Gearhart,) the same being and lying in the Gray tract, as surveyed and subdivided by Geo. Knox in February, 1881, a plat of which tract is duly recorded in the office of the recorder of deeds in and for said county of Los Angeles," etc. There is not a word here indicating a fact of which the court can take judicial notice, and every fact which is indicated by this description tends to show that the land was so situate that the court did not have jurisdiction to foreclose this lien. It was necessary, to give the court jurisdiction to enter this decree of foreclosure, that the plaintiff should prove that the land was situate in the county of Orange; and in the absence of an allegation of the fact in his complaint he was not entitled to prove it.

3. It is claimed that the default of defendants was unauthorized by law. In this counsel is mistaken. The demurrer of defendants was filed November 4, 1889. It was overruled November 16, 1889, and

defendants given 10 days to answer. They failed to do so. An extension of time was given them, and they still failed to answer; and on the 14th of December, 1889, after the expiration of the extended time, their default was regularly entered.

4. It is claimed that the demurrer should have been sustained, for that it appeared upon the face of the complaint that the demand was not due. This point is not well taken. The note was dated March 28, 1888, due two years after date, with interest at 12 per cent. per annum, payable semi-annually, "and if not so paid to be compounded semi-annually, and bear the same rate of interest as the principal; and, should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable, at the option of the holder of this note." The first installment of interest fell due September 28, 1888, and on the 2d of November, following, a little more than half of that installment was paid. No more was ever paid on account of either interest or principal. A second installment fell due March 28, 1889, and a third installment, September 28, 1889. Conceding that it was the duty of the holder of the note to exercise his option promptly upon the maturity and non-payment of an installment of interest, or in default thereof he would be deemed to have elected to waive immediate payment, and accept the compounding of interest as provided for, it does not follow that, having failed to exercise the option upon the first default, he was bound to waive its exercise at all subsequent defaults, and let the interest accumulate and compound until the note itself matured according to its face. Such a rule would forbid his allowing his debtor any grace whatever, except at the peril of ultimately finding his security insufficient to meet the accumulated obligation. The true and just rule is that while he exercises his option promptly he may do it at the maturity, and upon default, of any installment of the interest. The third installment of interest in this case fell due on the 28th of September, 1889. Defendants had all that day in which to pay it. The court will take judicial notice of the days of the week, and of the month, and so of the fact that the maturity of this installment fell on a Saturday. The 29th was Sunday. Promptly on Monday, the 30th, the first business day after default, plaintiff notified defendants of his option, declaring the whole amount of principal and interest due, and demanding prompt payment thereof. This he clearly had the right to do. Default being made in the payment, this action was commenced October 19th, following.

5. There was no error in the allowance made for counsel fee, under the provisions of the mortgage and of the law and the allegations and prayer of the complaint.

For the error discussed in the second point herein stated, the judgment must be reversed, and the case remanded for such further proceedings as the parties may be advised. So ordered.

We concur: WORKS, J.; PATERSON, J.

88 Cal. 255

MENDOCINO COUNTY v. BANK OF MENDOCINO. (No. 12,975.)

(Supreme Court of California. Nov. 3, 1890.)

COLLECTION OF LICENSE—BANKS.

1. The county government act, (St. Cal. 1883, p. 299,) giving the county boards of supervisors power to license all kinds of business carried on in the counties, and to provide for the collection of the licenses, repeals Act March 13, 1883, (St. 1883, p. 297; Pol. Code Cal. § 4045,) added to the Code the day before the former act was passed, and providing that the licenses should be collected as directed by Pol. Code, § 3360, which declared that the collection should be by suit in the name of the people, and an ordinance passed by the supervisors under the county government act, providing that the licenses shall be collected by suit in the name of the county, is valid.

2. Though one carrying on a business which requires a license refuses to take it out at all, yet, under the ordinance and the statute (St. 1883, p. 299) authorizing it, *assumpsit* will lie to recover the amount of the tax.

3. The fact that a bank of which the payment of a license tax is required by the ordinance of the board of supervisors has paid a state license to the board of bank commissioners, created by a prior statute, (St. 1877-78, p. 740,) does not exempt it from the payment of the license required by the supervisors acting under the county government act.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

T. L. Carothers, for appellant. J. M. Mannon and Dist. Atty. J. Q. White, for respondent.

BELCHER, C. C. In October, 1887, the board of supervisors of Mendocino county passed an ordinance providing for the payment of licenses by persons, firms, and corporations carrying on various kinds of business in that county, and, among others, the business of banking and loaning money at interest, and also providing that the district attorney should commence suit, in the name of the county, to recover the license tax, against any one required, but refusing, to pay the same, and that in case of recovery by the plaintiff \$25 damages should be added to the judgment, to be collected from the defendant. At the time the ordinance was passed, and thereafter, the defendant was engaged in the business of banking and loaning money at interest in the county, but refused to pay the license tax required in such case, and thereupon this action was commenced in a justice's court to recover the same with the penalty. The defendant interposed a general demurrer to the complaint, which was overruled, and then answered. By its answer, which was verified, it alleged that the board of supervisors had no right or power to levy, assess, or collect a license from defendant for transacting its business, and that the license tax claimed was illegal, and not warranted in law. An order was thereupon made transferring the case to the superior court of the county for trial; and in that court it was subsequently tried, and judgment given for plaintiff for the amount sued for. From the judgment so rendered the defendant appeals.

The principal ground urged for a reversal of the judgment is that the power to pass an ordinance, fixing licenses for

the transaction of business, was given to boards of supervisors by section 4045, which was added to the Political Code by an act of the legislature passed March 13, 1883, (St. 1883, p. 297;) that by this section it is provided that "the licenses herein provided for shall be collected as now provided for by the provisions of chapter fifteen, title seven, part three, of the Political Code of the state of California;" and that by section 3360, found in the chapter (15) referred to, it is provided that, "against any person required to take out a license who fails, neglects, or refuses to take out such license, or who carries on or attempts to carry on business without such license, the collector may direct suit in the name of the people of the state of California, as plaintiff, to be brought for the recovery of the license tax," etc. The argument is that under these sections the board of supervisors had no power to provide, as it did, that suit to collect the license tax should be brought in the "name of the county of Mendocino," and that the ordinance was to that extent void, and consequently the action in the name of the county was not authorized, and could not be maintained. Citing *County of Monterey v. Abbott*, 77 Cal. 541, 18 Pac. Rep. 113, and 20 Pac. Rep. 73. The argument is faulty in two important respects: *First*. It is not supported by the case cited. In that case, the ordinance involved provided that actions to collect license taxes should be commenced in the name of the people, and the action was commenced in the name of the county. It was held that where a right is given, and a remedy provided by statute or valid ordinance, the remedy so provided must be pursued, and hence that the action could not be maintained. *Second*. It wholly ignores the fact that, on the next day after section 4045 was added to the Code, another act was passed by the legislature, commonly called the "County Government Act," (St. 1883, p. 299,) which operated to supersede and repeal the said section, as has been held by this court in two well-considered cases.—*Ex parte Benjamin*, 65 Cal. 310, 4 Pac. Rep. 23, and *County of Santa Clara v. Railroad Co.*, 66 Cal. 642, 6 Pac. Rep. 744. By this last act, boards of supervisors in their respective counties are given jurisdiction and power, under such limitations and restrictions as are prescribed by law, "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted or carried on in such county, and all shows, exhibitions, and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise." Section 25, subd. 27. It was, then, under the authority conferred by the county government act, and not under section 4045 of the Political Code, that the ordinance in question was passed, and the contention of appellant upon this point is therefore wholly without support. Of course provision might have been made in the ordinance that actions should be commenced in the name of the people, as was done in the ordinance under review in *Ex parte Mirande*, 73 Cal. 365, 14 Pac. Rep. 888. But this was not necessary, as there was

equal authority to provide that the actions should be commenced in the name of the county. See *County of Santa Clara v. Railroad Co.*, supra; *County of Amador v. Kennedy*, 70 Cal. 458, 11 Pac. Rep. 757; *County of San Luis Obispo v. Hendricks*, 71 Cal. 242, 11 Pac. Rep. 682. In the last-named case, it is true, the judgment for the plaintiff was reversed, but it was for reasons which do not affect this case. It is also claimed that the demurrer to the complaint should have been sustained, because it appeared therefrom that the defendant had not taken out the license required by the ordinance, and, in such case, it is said *assumpsit* will not lie to collect the license tax. This point is rested on the authority of *City of Santa Cruz v. Railroad Co.*, 56 Cal. 143, and *County of Monterey v. Abbott*, 77 Cal. 541, 18 Pac. Rep. 113, and 20 Pac. Rep. 73. But in the *Santa Cruz Case*, as was said in *City of Los Angeles v. Railroad Co.*, 61 Cal. 64, "it did not appear that the city of Santa Cruz had provided by ordinance for the collection of licenses by an ordinary action, or that the city charter in terms authorized an ordinance providing for the collection of licenses by such action." And in the *Monterey Case* it was held that, where a county ordinance imposing license taxes provides that actions to collect the same shall be in the name of the people, "the failure to take out a license did not, of itself, make the defendant a debtor of the county in such sense that an ordinary action, in the nature of an action for debt, could be maintained by the county, as 'the real party in interest.'" Evidently these cases do not support the claim of appellant; for, as we have seen, the ordinance here involved did expressly provide that the actions should be commenced in the name of the county, and this provision was fully authorized by the statute.

As a last ground for reversal, it is urged that the defendant, on payment of a valuable consideration therefor, obtained a license to transact its business under an act of the legislature, passed in 1878, entitled "An act creating a board of bank commissioners, and prescribing their duties and powers," (St. 1877-78, p. 740,) and therefore that the county of Mendocino, which derived its authority and power from the state, could not interfere with this privilege, or restrict it by exacting another license tax for transacting the same business. Upon this point the learned counsel admits that he has been unable to find any authority either *pro* or *con*. In our opinion, no authority other than the statute is necessary to justify the action of the court below. The county government act authorized the board of supervisors to require license taxes to be paid for the privilege of carrying on in the county "all and every kind of business not prohibited by law." This statute fully covers the case, and there is, and can be, no pretense that it is unconstitutional. We advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion, the judgment is affirmed.

McCORMICK *et al.* v. ORIENT INS. CO. (No. 12,836.)

(Supreme Court of California. Nov. 3, 1890.)

REFORMATION OF INSURANCE POLICY—WAIVER OF CONDITIONS.

1. In an action to reform a fire policy which stipulates that, if the title of the assured is less than absolute, it shall be specifically represented to the company, plaintiffs are not entitled to relief when it appears that they were not misled by any acts or representations of the company or its agents, though they may not have actually known of the existence of the clause in question when they accepted the policy on property described in the application as their own, when in fact their only interest in it was that of commission merchants.

2. The company does not waive its right to insist on the forfeiture of the policy because of such misrepresentation by requesting the assured to produce their books, together with the uninjured property, after the fire, as provided by the policy, and after it is aware that the assured are not the absolute owners.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John H. Dickinson, for appellants. *William M. Pierson*, for respondent.

HAYNE, C. The original complaint in this case was to recover \$2,000 on a policy of insurance. After several years of litigation, the plaintiffs amended their complaint so as to seek a reformation of the policy, on the ground of fraud and mistake, and for a decree upon it as reformed. The trial court gave judgment for the defendant, and the plaintiffs appeal upon the judgment roll, without any bill of exceptions or statement. The policy contained the following provision: "Any interest in property insured not absolute, or that is less than a perfect title, must be specifically represented to the company, and expressed in this policy in writing." There was no indication in the policy that the plaintiff's interest was not an absolute interest. On the contrary, it stated that the plaintiffs were insured "on their stock of manufactured manilla paper," etc., and the application (which, in our opinion, was made by the agent of the plaintiffs) stated the same thing. As a matter of fact the plaintiffs were not the owners. They merely had the property for sale on commission, and the defendant did not "have any knowledge of the same, except in so far as the same was disclosed and stated in the said application for insurance and policy." Upon these facts it is plain that the plaintiffs could not recover in an action at law upon the policy; and it was so held on appeal in a companion case, the decision in which was, by stipulation, to control this case. *McCormick v. Insurance Co.*, 66 Cal. 362, 5 Pac. Rep. 617. After that decision, the plaintiffs here amended their complaint so as to make the suit for a reformation of the policy by the elimination of the clause as to ownership. The grounds upon which such reformation was sought were, in substance, that the plaintiffs did not know that the policy contained the provision as to ownership; that the defendant represented to them that the insurance was upon their interest as com-

mission merchants, and prepared the policy in such a way as to mislead, and with the intention of misleading; and that plaintiffs did not read the policy, because of their reliance upon the good faith of the defendant and its agents. With the exception, however, of the plaintiffs' actual knowledge, which is immaterial when taken by itself, the truth of these allegations is completely negatived by the findings, which, as already stated, have not been attacked. It is plain, therefore, that the plaintiffs made no case for a reformation of the policy. They contend, however, that the defendant, by its conduct after the fire, waived the defense in question, and is estopped from refusing to pay their claim; in other words, that no reformation of the policy was necessary. We hardly think that a party should be allowed to shift his ground so much. See *Washburn v. Insurance Co.*, 114 Mass. 175; *Tredegear v. Windus*, L. R. 19 Eq. 607. But disregarding this we proceed to inquire whether there was any waiver or estoppel. In strictness, the term "waiver" is used to designate the act, or the consequences of the act, of one side only, while the term "estoppel" (*in pais*) is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts; but in the law of insurance the terms are ordinarily used indiscriminately. See *May, Ins.* § 505. In this case we see nothing which would amount to a waiver as distinguished from an estoppel. The conduct claimed to constitute an estoppel was as follows: After the fire, the agents of the defendant, who then knew of the facts concerning the ownership of the property, requested the plaintiffs to produce their books, together with that portion of the property which had escaped damage, whereupon the plaintiffs, "at considerable inconvenience and labor," produced their books, and, at "considerable expense and labor," produced that portion of the property which had escaped damage, and had the same sorted and weighed. The defendant then offered to pay \$1,154.54, which it contended was all the damage covered by the policy, which offer was refused. It is admitted that "both parties acted in good faith up to the commencement of the suit." It is to be observed that there is no question of any conduct of the defendant which induced the plaintiffs to omit anything essential, or to do anything prejudicial, to the validity of the policy, either before or after the loss. There was simply a request to be shown the books, and a request to produce the property not damaged, a compliance with these requests, and an offer to pay a part of the claim. So far as the request for the books, and the production of them, are concerned, we do not think that the act is of such a nature that it ought to estop the defendant from relying upon a valid defense. It is not more arduous in character than the making of an affidavit as to the circumstances of the loss; and, upon the former appeal, in the companion case, it was held that the making of such an affidavit, followed by the offer to pay a part of the claim, did not

operate as an estoppel. 66 Cal. 364, 365, 5 Pac. Rep. 619. That case is not overruled by *Wheaton v. Insurance Co.*, 76 Cal. 432, 433, 18 Pac. Rep. 758, as supposed by the counsel for the plaintiffs. What is said in the latter case concerning the former in this connection relates simply to the power of a general agent to make a waiver under certain conditions, and was put in merely by way of guarding against an unwarranted implication. Now the only thing in which the case before us can be argued to be materially different from the case on the other appeal is that it now appears that the plaintiffs, at "considerable expense and labor," produced that portion of the property which had escaped damage, and had the same sorted and weighed. But we do not think that this worked an estoppel. An essential element of estoppel of this character is that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action. *Boggs v. Mining Co.*, 14 Cal. 367, 368. This essential element does not appear from the findings. It is found that the request was made, and that the plaintiffs subsequently did the things requested. But it is not found that the acts were induced by the request. As a matter of evidence, one might possibly be inferred from the other; but mere inference of that character does not supply the place of a finding. And in this case it appears from other parts of the record that no such inference could be drawn, and that the element in question did not exist, for the things which were done by the plaintiffs were required by the contract to be done. The plaintiffs were simply complying with their contract; and, as their position was that the defendant was liable in an action at law for the full amount of the claim, it is manifest that they would have done the things anyway. In view of this, it seems idle to say that they were induced by the conduct of the defendant to incur expense in producing the goods, and having them sorted and weighed. This precise point was decided by the case of *Wheaton v. Insurance Co.*, supra. That case went further than is required here, because there the time to make preliminary proofs had expired, and it was afterwards that the request to make them was made; and the jury found that the insured was put to trouble and expense in complying with the request, and that except for it he would have abandoned the claim. But it was held that this finding was not justified by the evidence, from which nothing appeared except the request, and the subsequent performance of the acts requested; and the court, per *McKINSTRY, J.*, said: "His action is to be referred to the contract; his motive to the necessity of making the proofs as a preliminary to securing the insurance. After he was requested to make the proofs he had agreed to make, he made them; but the statement that he was induced to make them by the request is only a *post hoc ergo propter hoc*." Upon the record before us, we do not see anything to estop the defendant from relying upon the defense

referred to, which, as we have seen, was clearly made out. We, therefore, advise that the judgment be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

McCORMICK *et al.* v. UNION INS. CO. (No. 12,837.)

(*Supreme Court of California.* Nov. 3, 1890.)

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John H. Dickinson, for appellants. William M. Pierson, for respondent.

HAYNE, C. The judgment in this case should be affirmed on the authority of McCormick v. Insurance Co., ante, 1003, (just decided.) It is contended that that case is unlike this in two particulars, viz., the provision as to ownership, and a provision as to the indorsement of a waiver on the policy; but, so far as the case before us is concerned, we do not think that the provision as to ownership is different in effect, and we did not rest our opinion in the other case upon the provision as to waiver, above referred to. We, therefore, advise that the judgment be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

McCORMICK *et al.* v. SPRINGFIELD INS. CO. (No. 12,838.)

(*Supreme Court of California.* Nov. 3, 1890.)

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

John H. Dickinson, for appellants. William M. Pierson, for respondent.

HAYNE, C. This case is not materially different from McCormick v. Insurance Co., ante, 1003, (just decided); and upon the authority of that case we advise that the judgment should be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

86 Cal. 184

JAMES v. YAEGER. (No. 13,940.)

(*Supreme Court of California.* Oct. 21, 1890.)

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.

1. One who buys a note after maturity, from one of the makers thereof, is presumed to take it with knowledge of all the facts, and, where it has been paid, he cannot sue thereon.

2. Civil Code Cal. § 1774, which provides that "one who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless," applies only to the transfer of paper, in due course, and to an innocent holder.

Department 1. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Charles S. McKelvey, for appellant. Richard Melrose and E. A. Meserve, for respondent.

WORKS, J. This action was brought by the respondent, as indorsee, against the

appellant and two others, on a non-negotiable, joint and several promissory note. The other makers of the note denied the assignment to the respondent, and set up affirmatively that the note had been fully paid by the appellant. The appellant answered, admitting the execution of the note by himself and the other defendants, but denied that the payee of the note had ever assigned or delivered the same to the respondent, and alleged that he had fully paid the note to the payee, and taken it up; that he thereby became entitled to contribution from his co-makers; that he was only a surety on the note for the other makers, which was known to the plaintiff; and that he sold his right to contribution to the plaintiff, and nothing more, and assigned and delivered the note to him for the purpose of securing the same. At the trial, it appearing that the appellant had in fact fully paid the note to the payee upon its maturity, and taken it up, the court granted a nonsuit as to the other defendants, who were the principals on the note, and the plaintiff amended his complaint by adding thereto the following allegations: "(2) That on or about the 29th day of November, 1889, the said defendant, C. Gomber, paid the principal sum of said promissory note, and the interest due thereon, to the said H. Werder, and that thereupon the said Werder delivered the said promissory note to the defendant, C. Gomber; and afterwards, to wit, on or about the 4th day of December, 1889, the said defendant, Gomber, sold and delivered said note for a valuable consideration to the said plaintiff. (3) That since the said 4th day of December, 1889, no part of the said principal sum of said promissory note, nor of the interest due thereon, has been paid by said defendant, Gomber, or at all." Upon the issues thus formed the court below tried the cause, and found the execution of the note, as alleged, the payment of it to the payee by the appellant, and its delivery to him; that he afterwards sold the note to the plaintiff, and has not since paid it the second time; and upon these findings rendered judgment against the appellant for the amount of the note and interest.

It is contended by the appellant that the findings of the court do not sustain the judgment. In this contention we fully agree with counsel for appellant. By the payment to the payee the note became extinct, and ceased to be a binding obligation. Code Civil Proc. § 1473; Wright v. Mix, 76 Cal. 465, 18 Pac. Rep. 645. And a purchaser of the note after maturity—or in this instance, the note being non-negotiable, whether the purchase was before or after maturity—took it subject to the defense of payment. Elgin v. Hill, 27 Cal. 373. Having been paid it became *functus officio*, and no action could be maintained upon it. Gordon v. Wansey, 21 Cal. 79. If the respondent had been an innocent purchaser, it would have been different. But here, not only was the note non-negotiable and the purchase by the respondent after maturity, but his purchase was from one of the makers of the note. This was sufficient to put him upon inquiry. But it must be presumed, in this case, that the

respondent took the note with full knowledge of all the facts. In his amended complaint he alleges the facts, but does not allege that he had no knowledge thereof at the time the note came into his hands. And, as we have said, the mere fact that the note was in the hands of one of the makers, after maturity, was sufficient notice to him that it had been paid and taken up. We do not overlook the fact contended for by the respondent, that a negotiable note may, under certain circumstances, be enforced against certain parties to it after payment. But this is not one of the cases. The purchaser of a note from the maker, after maturity, cannot claim to be an innocent holder, nor can he claim, as against the maker or any one else, that the note has not been extinguished, if it has in fact been paid.

But it is contended that the maker who again puts out the note is estopped to deny its genuineness, or to set up the defense of its extinguishment by payment. We do not think so under the circumstances of this case. There is no allegation or finding that the respondent was ignorant of any of the facts, or that he was misled by any representations of the appellant, or otherwise. This being so, there is no element of estoppel in the case. Counsel for respondent rely upon section 1774, Civil Code, which provides: "One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." But this section only applies to the transfer of paper, in due course, and to an innocent taker. This must be so necessarily, else all the legislation for the protection of an innocent holder of commercial paper, as between him and his assignor, would be unnecessary, and an indorsee with knowledge would be protected equally with a purchaser for value, and without notice. Judgment reversed, and cause remanded for a new trial.

We concur: FOX, J.; PATERSON, J.

85 Cal. 421

PEOPLE v. NELSON. (No. 20,628.)
(Supreme Court of California. Sept. 1, 1890.)

CRIMINAL LAW—ROBBERY—EVIDENCE.

1. On trial for robbery, where it appears that the crime was committed on the prosecuting witness and another, who met in town, and then drove out to the ranch of the witness, and that during the drive the robbery occurred, the witness, after stating where and when he met his companion, can testify that they took a journey on that day, such statement being preliminary to the ensuing examination.

2. Such witness can testify that after robbing him defendant proceeded to rob his companion, as such evidence is part of the *res gestæ*, and does not tend to establish another and distinct offense.

3. An exception to testimony cannot be taken for the first time by a motion to strike out.

4. Where a non-resident witness for the prosecution, who gave his testimony at the preliminary examination, told the prosecuting attorney that he did not expect to remain in the state more than 10 days longer, but that, if he did, he

would notify him, and he has not been heard of since, his deposition, correctly taken at the preliminary examination, is admissible under Pen. Code Cal. § 686, providing that the testimony of a witness taken at the preliminary examination may be read at the trial, when it is shown that he cannot, with due diligence, be found within the state.

5. The grounds of an objection to the admission of evidence must be specified, otherwise an exception to its admission will not be regarded on appeal.

6. The erroneous admission of evidence is not ground for reversal when it is not prejudicial to defendant.

7. Evidence of defendant's absence from the place where the crime was committed is not a defense, but it is admissible to establish a defense; and, if a reasonable doubt is created by the evidence, defendant should be acquitted.

8. In order to convict on circumstantial evidence alone, the circumstances proved "must concur" to show that he committed the crime, and "must be inconsistent" with any other rational conclusion.

9. A new trial on the ground of newly-discovered evidence is properly refused when it is not shown why the evidence was not produced at the first trial.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

W. A. Anderson and J. C. Tubbs, for appellant. George A. Johnson, Atty. Gen., for the People.

BELCHER, C. C. The defendant was convicted of the crime of robbery, and he appeals from the judgment and an order denying him a new trial. Numerous errors in the admission of evidence, and in the refusal to give certain instructions, as asked by defendant, are assigned, and, in order to make clear the points presented, a brief statement of the facts should be made. The offense charged was committed by stopping one Thomas Davis on the highway, and taking from him his watch and chain, and a small amount of money. Davis was the foreman of a ranch, situated on the north side of the American river, in Sacramento county, and on the 3d day of July, 1889, was in the city of Sacramento to obtain supplies for the ranch. He met there one John Cownie, who had recently come to this state from Iowa, and took him into his buggy, and then drove across the river towards the ranch. Shortly after passing the river, and at about 2 o'clock in the afternoon, or a little later, he was stopped on the road by a man who came out of the brush, and, presenting a revolver, told him to halt, and to strip his pockets, and throw out his watch, quick. Davis threw his watch and money on the ground, and the robber then turned his pistol on Cownie, and told him to deliver up his money. Cownie threw out his purse, and was then told to give up his watch, and be quick about it, or he would shoot, and Cownie threw down his watch and chain. The robber then told Davis to go on, and he drove rapidly to the ranch, about three miles away. On arriving there, he had one Phil Johnson telephone to the sheriff in Sacramento that he had been robbed across the American river, and to come out. The sheriff telephoned back to Davis to meet him, and Davis, Johnson, and Cownie at once went

back and met the sheriff and two deputies near the place of the robbery. Davis then told the sheriff who he thought had robbed him, and the officer went to a milk ranch, nor far away, and there found and arrested the defendant. At the trial, Davis was called as a witness for the prosecution, and, after telling where and when he met Cownie, he was asked: "State whether you and he took any journey on that day." Counsel for defendant objected to the question as irrelevant, immaterial, and incompetent, and the objection was overruled. This ruling is assigned as error, but we think it proper. The question was merely preliminary to the further examination. The same witness, after stating how he was made to give up his watch and money, was asked: "What occurred after you had given all the property that you had?" The answer was: "Well, he turned his attention then to Mr. Cownie, and he pointed his gun at him. Question. What kind of a gun was it? Answer. It was a pistol." This testimony was objected to on the ground that it was irrelevant and incompetent, because it tended to show the commission of another distinct offense. The objection was overruled, and an exception reserved. We see no error in this ruling. The robbery of both parties was practically one act, and the testimony was admissible as part of the *res gestæ*. Further along, after the witness had stated that he had Phil Johnson telephone to the sheriff, he was asked the following questions: "Did you tell him what occurred before you telephoned?" "What did you tell him to telephone?" "Did you tell him who to look for?" Each of these questions was objected to as irrelevant and immaterial, and the objections were overruled. It is claimed that these rulings were erroneous, but, as shown by the record, no answers were given to the first and third questions, and the answer to the second was only: "I told him to telephone to the sheriff that I was robbed. Q. What else, anything? A. And across the American river, and for him to come out." We are unable to see that the defendant was in any way prejudiced by the rulings. The witness was also asked: "Q. Didn't you know the man then that had robbed you? A. Yes, I had recognized him. Yes, sir. Q. Did you tell anything to that effect to the sheriff? A. No; and he telephoned back to me to meet him, and me and Phil Johnson and Mr. Cownie turned around after they said they were going out." The defendant moved to strike out this testimony as irrelevant and incompetent and hearsay. The motion was denied, and an exception taken. The answer to this point is that an objection to testimony cannot be taken for the first time by a motion to strike it out. *People v. Long*, 43 Cal. 444; *People v. Rolfe*, 61 Cal. 540.

At the preliminary examination of the defendant, John Cownie was a witness for the prosecution, and his testimony was correctly taken down by a reporter. At the trial, the district attorney proposed to read this testimony, and counsel for defendant objected to his doing so on the ground that it was incompetent, no rea-

son having been given why the witness himself was not present. The district attorney was then sworn, and testified: "Mr. Cownie informed me that it was his intention to leave the state in about two weeks. If he didn't leave he would notify me as to his whereabouts. I received no notification from him, and it is my best belief that he has returned to Iowa. The Court. When this testimony was taken, where did the witness go, or did he state where he was going? Answer. He said he did not know where he would go. He said it was probable he might go up the Sacramento road, and from there go on to Oregon. He said he might go to San Francisco, and he hadn't yet made up his mind. He might take the steamer back, or he might go back by the Southern road, but he hadn't made up his mind, but it was his intention not to stay in the state more than ten days or two weeks. I said, 'The case might be set for trial at any time, and your presence desired, if you are in the state.' He said: 'If I remain here more than two weeks, I will let you have notice of my whereabouts.' I have no knowledge of where the man is to-day, unless he is at home, at Des Moines, Iowa. I could not issue a subpoena, because I had no idea where to send it, and could have no idea. I will further state that Mr. Cownie told me it was his intention not to return to the state of California." The objection was then overruled, and an exception reserved. The Penal Code, § 686, provides that in a criminal action the defendant is entitled "to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, * * * the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot, with due diligence, be found within the state." It is claimed that this ruling was erroneous, because it did not appear that any effort had been made to ascertain whether the witness was still in this state, or had returned to his home in Iowa; but we think the sworn statements of the district attorney, in the absence of anything to the contrary, were sufficient to justify the court in concluding that the witness had left the state, and could not by any diligence have been produced at the trial.

In the testimony of the witness Cownie, the following occurs: "Question. I will ask you this: Did he mention to you, did he state as a fact to you, any time after that, that he recognized the man? Answer. We had not driven forty rods until Mr. Davis said: 'I know that man. I know that voice. I know who robbed us. Just let me think,—let me think.' I was letting him do as much thinking as he pleased, for I was doing considerable myself, and was not speaking. He said, 'Let me think.' I had not spoken yet. I was thinking, too. Q. When did he, if any

time, state that he knew who it was? A. He spoke before we were at the end of the trestle. He said, 'I know that man.' Q. Where did he fix the man? A. He said he was a painter. He said: 'I know that voice. That is the voice of the man that done some painting for us.' He said: 'He painted this buggy we are riding in.' At the conclusion of the testimony of the witness, the following objections, motions, and exceptions are shown by the record: "Counsel for the defendant objected to the question asked in the deposition as to whether Davis recognized the man. The objection was overruled, and counsel for defendant excepted. Counsel for the defendant moved to strike out the answer to that question after the answer was made. Motion denied. Counsel for the defendant excepted. Counsel for the defendant moved at the time of reading to strike out the answer, 'I know that man.' Motion denied. Defendant excepted. Counsel for defendant moved to strike out the expression of the witness, 'That is the voice of the man that done some painting for us. He painted this buggy we are riding in.' Motion denied. Defendant excepted." It is claimed that the conversation between Davis and Cownie was inadmissible, and that the court erred in its rulings to the prejudice of defendant. The answer to this point is that no ground of objection to the first question was stated, and the well-settled rule is that a general objection to the admission of evidence is insufficient. "A party objecting to evidence must specify the ground of his objection. *People v. Manning*, 48 Cal. 335. If he does not, there is no error in overruling his objection, and an exception taken to the ruling is not revisable on appeal. *Winans v. Hassey*, 48 Cal. 635." *People v. Chee Kee*, 61 Cal. 404. And as to the motions to strike out, it does not appear from the record that any objection to the testimony was taken at the preliminary examination, or at the trial, and, in such case, as we have seen, a motion to strike out will not be entertained. Besides, no grounds for the motions were stated.

John Morrison was called as a witness for the prosecution, and testified that he kept a saloon on the north side of the American river, and that the defendant came to his saloon at about 12 o'clock on the 3d of July, that he did not notice how defendant was dressed; and that he testified in the justice's court. He was then asked: "Recall to your memory whether you didn't testify there as to the clothes that he had on." Counsel for defendant "objected to the attorney calling the attention of the witness to that testimony, or to any testimony." The objection was overruled, and an exception taken. The answer was: "I remember testifying. I testified that I didn't know what clothes he had on when he went on, but I noticed the clothes after he was arrested." The witness went on to state that he saw Mr. Davis drive past at a pretty good gait, going north, and that he remembered when he came back. He was then asked: "Did Mr. Davis communicate to you the fact that a robbery had been committed?" This question was objected to as irrele-

vant and immaterial, and the objection was overruled. The answer was, "Yes, sir." It is claimed that these two rulings were erroneous; but conceding them to be so, we are unable to see that the defendant was, or could have been, in any way, prejudiced by them. They are therefore not cause for a reversal of the judgment.

It is further contended that the verdict of the jury was contrary to the evidence, and that the jurors must have been controlled by prejudice or passion. But there was direct and positive testimony that the offense charged was committed, and that the defendant was the party who committed it. There was also circumstantial evidence tending strongly to the same end. Whether the defendant was guilty or not was therefore a question for the jury, and the verdict cannot be disturbed on the ground that it was not justified by the evidence. It should be added that we see nothing in the record tending to show that the jury was at all influenced by passion or prejudice.

Counsel for defendant requested the court to give to the jury the following instructions: "When a criminal charge is sought to be proved by circumstantial evidence, the proof must be consistent with defendant's guilt, and inconsistent with every other rational conclusion. Each rational fact going to make up the chain of circumstances must be proved to a moral certainty, and beyond all reasonable doubt. The evidence must be such as to exclude the probability of any other hypothesis being true, and, if the evidence does not establish this absolutely to moral certainty, then the jury must acquit." "The identity of the accused must be established to an absolute moral certainty, and every fact and circumstance must be established to the same degree of certainty as the main fact, which these independent circumstances, taken together, tend to establish. If this certainty is not proven, then the jury must acquit the defendant." The court struck out the word "absolute" in the first of these instructions, and, as thus amended, gave it to the jury; and it refused to give the second. There was no error in this. In *People v. Davis*, 64 Cal. 440, 1 Pac. Rep. 889, an instruction was asked by the defendant in regard to circumstantial evidence, which stated that "the hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty." The instruction was refused, and in this court it was said: "A philologist may be able to say that the word 'absolute,' in the instruction requested and rejected, adds no force to the words 'moral certainty.' But the word suggests a degree of certainty greater than that moral certainty which can be reached upon such evidence as is securable in courts of justice. If the learned judge of the court below had stricken out the word 'absolute,' we certainly could not have held that it was error on his part. It follows that it was not error to decline to give the instruction as it was presented."

The defendant also asked the court to give to the jury instructions reading as follows: "The commission of a crime implies the presence of the defendant at the necessary time and place, and evidence of the absence of defendant is always a defense, and, if a reasonable doubt is created by this evidence, it is the duty of the jury to acquit the defendant." "In order to convict the defendant of a crime upon circumstantial evidence alone, the circumstances proved must all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion, and must exclude, to a moral certainty, every other hypothesis but the single one of guilt." The court amended the first of these instructions by inserting after the word "always" the words "admitted to establish," and the second by striking out the word "all." As thus amended both instructions were given. We think the instructions as given stated the law correctly, and that the amendments complained of were therefore properly made.

The last point made is that a new trial should have been granted on the ground of newly-discovered evidence. A sufficient answer to this is—*First*, that no reason is shown why the evidence was not produced at the trial; and *second*, that it simply tells how another robbery was attempted by some unknown person, near the same place, and under similar circumstances, about 20 days after the offense here charged was committed. We advise that the judgment and orders be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders are affirmed.

86 Cal. 203

TATUM *et al.* v. THOMPSON. (No. 12,701.)
(*Supreme Court of California.* Oct. 23, 1890.)

LANDLORD AND TENANT—REPAIRS—EVIDENCE.

1. Under a lease stipulating that if the premises become untenable by reason of fire, no rent shall be charged until they are made tenable by the lessor, the lessees who remain in possession after a fire, and continue to pay rent, without protest, elect to treat the premises as tenable, and cannot recover for damages to their property occasioned by rain coming through the roof, which was injured by the fire, and which had not been wholly repaired when the rain occurred.

2. Where the lessees continue in possession after the fire, without notifying the lessor that the premises are untenable, there is no duty on his part to repair under Civil Code Cal. §§ 1941, 1942, providing that the lessor shall repair within a reasonable time after notice from the lessee.

3. In such case, evidence by plaintiffs as to why they remained in the premises after the fire is inadmissible.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Langhorne & Miller, for appellants.
Mesick, Maxwell & Phelan, for respondent.

Fox, J. Appellants were tenants of respondent, occupying the first floor and basement of the building Nos. 25 to 31 Main

street, San Francisco, under a written lease, paying a monthly rent of \$450 per month, monthly in advance. The rent fell due on the 5th of each month. On the 5th of August, 1884, the rent for the next succeeding month was demanded and paid in advance, in due and regular course of business. The lease contained the following clause: "It is mutually agreed that if, by reason of fire, the premises herein leased shall become untenable, no rent shall be charged or paid until they are made tenable by the party of the first part, [the lessor.]" On the 5th of August, and after the rent falling due on that day had been paid, a fire consumed the roof of the building, and the two stories above the premises leased to the plaintiffs. It did not reach plaintiffs' premises, except to burn out in several places the flooring of the premises immediately over them, thus rendering them subject to the falling in upon them of *débris* and cinders from the floor above. They were, however, liable to become further untenable by reason of rains likely to occur, and the first of which did occur on the 12th October following. On the 18th of September, defendant commenced the repair of the building, and put a ceiling in plaintiffs' premises to protect them from the falling *débris*, and the floor immediately above was tongued and grooved, and the joints laid in white lead, with the idea that it would, "in some measure," protect plaintiffs' premises from any rain that might intervene before the roof was completed. Plaintiffs did not elect to treat the place as untenable for their use, or either move out, or refuse to pay rent, but remained there, without any indication of intention to move; and regularly, on the 5th of each month, the collector called as usual for the rent, and they as regularly paid it. They allege in their complaint: "That immediately after said fire, the defendant informed and promised plaintiffs that he would at once commence and set about repairing said building, and would thoroughly repair the same, and put it in a good, safe, and tenable condition; that these plaintiffs, relying upon the defendant's duty as well as also upon his promise, to repair said building, and put it in good, safe, and tenable condition, remained in and continued to occupy said demised premises with their goods, wares, and merchandise, as aforesaid, and paid thereat as provided in said indenture of lease, up to the commencement of this action." The evidence does not support this averment. On it the court found against the plaintiffs; and the testimony, even that given by the plaintiffs and their manager, justifies the finding. There was no duty devolving upon the defendant, by reason of the clause in the lease above quoted, to repair promptly, or at all. Whatever duty there was resting upon the defendant to repair, (assuming that the premises had become unfit for the occupation for which they were demised,) was that growing out of the provisions of the statute. Civil Code, §§ 1941, 1942. Under these provisions, if the premises had become unfit for the occupation for which they were demised, from a cause not occasioned by the ordinary negligence of the

lessee, it was the duty of the lessor to repair, within a reasonable time after notice from the lessee; and, if he failed to do so, the lessee had the right to vacate the premises, and would thereupon be discharged from further payment of rent; or he might at his option, after such notice and failure to repair within a reasonable time, himself make the repairs, if they did not require an expenditure greater than one month's rent, and deduct the amount of such expenditure from the rent. *Van Every v. Ogg*, 59 Cal. 563. The evident purpose of the clause of the lease which we have quoted was to change in some measure the rights of the parties under this statute; but it did not change the duty of the lessor in the premises, so far as relates to the making of repairs. It certainly suspended his right to collect, or the duty of the lessees to pay, rent, pending repairs. In our judgment, it gave the lessees the right either to remain in the possession of the premises, making such use of them as they could, pending repairs, without the payment of rent for such period as the premises remained out of repair, or at their option they could move out and remain until the repairs were completed, and then return and continue to occupy the premises at the stipulated rental for the balance of the term of the demise. They did not do either, but continued to occupy the premises, and regularly to pay the rent, as if no repairs were required. They did not even notify the defendant to repair, and therefore never put him in default under the statute. They had some talk with the defendant about the repairs, in which he told them that he was in no hurry about the matter, that he did not wish to commence until the loss was adjusted with the insurers, and in which they requested that in making repairs some things should be done which he was not required to do,—putting the premises in better condition than they were before,—of which the ceiling was one. These were made as requested. But the repairs did not commence until about the 18th of September, and on the 12th of October, the roof not yet being on, a rain came, and plaintiffs were damaged by water. This action is to recover for the damages thus sustained. Judgment went for defendant, and from this, and an order denying plaintiffs' motion for new trial, this appeal is taken.

1. Three errors are assigned on the rulings of the court in rejecting certain testimony offered by plaintiffs: (1) That the court erred in not permitting the plaintiffs to testify as to why they remained in the demised premises after the fire; (2) that the court erred in not permitting plaintiffs to testify as to whether or not defendant had said or had done anything that induced them to believe that he would make the premises tenantable; (3) that the court erred in not permitting plaintiffs to testify as to whether or not they remained in the premises after the fire until the time of the rain by reason of any promise made by defendant in regard to repairing the building. The court admitted and received all the testimony that was offered by either party as to all that was said and all that

was done by any and every of the parties, or their agents or representatives, touching the subject-matter of repairs. This being done, the evidence as to what the effect of these things so said and done was upon the minds of plaintiffs was wholly incompetent and inadmissible, and it was not error to reject it. Cases are triable by the proof of facts, not of the thoughts of men.

2. Appellants claim that "the finding of the court that at all times after August 5, 1884, the plaintiffs, by their acts and conduct, and by the payment of rent, elected to consider the premises not untenable, * * * and that the premises by the fire of August 5, 1884, were not untenable as to plaintiffs, is not supported by the evidence." We think the evidence fully supports this finding. The plaintiffs continued to occupy and conduct their business as if there had been no fire. There is nothing to show that they ever claimed that the premises were untenable, or notified the defendant to repair, or took any steps to put him in default for not repairing. If the premises had been rendered untenable, then, by the express covenant of the lease, they were under no obligation to pay rent until repaired; but they paid promptly and regularly, without diminution or protest.

3. Appellants claim that "the evidence does not support the findings that from August 5 to October 12, 1884, was not ample or reasonable time for putting the premises in a safe or tenantable condition, and that there was no failure or neglect on the part of defendant in putting the demised premises in a safe or tenantable condition." The argument in support of this proposition is based upon the idea that the demand for rent after the fire operated as an implied warranty that the premises were not untenable, and cites the case of *Roussinet v. Rebout*, 18 Pac. Rep. 423, in support thereof. That case is hardly in point. There certain premises were leased for the purposes of a nursery for plants. On the premises were 15 orange trees, the care and product of which were reserved by the lessor, who covenanted that "the care given to the orange trees must not cause any harm to the plants raised by the tenant." It was shown that, by means of the care given to the orange trees, the plants of the lessee were destroyed, and the lessor was held liable therefor. This liability was for damages resulting from the direct act of the lessor, done in violation of his covenant, not for injuries resulting from causes over which he had no control, and against which he was not bound to protect the lessee. As already stated, this special provision of the lease did not bind the lessor to repair at all. Under the statute, he was bound to repair only upon notice from the tenant, and, if he then failed to do it, the limit of his liability was the right of the lessee to terminate the lease, or, at his option, to make the repairs to the extent of one month's rent, and deduct the cost thereof from the rent. *Van Every v. Ogg*, supra. Neither did the covenant in the lease amount to a warranty of anything except that, if the premises were untenable, the lessee should not be required to pay

rent. In regular course of business, the collector called for the rent. If the plaintiffs deemed the premises untenable, it was their duty to say so, and refuse to pay the rent. But instead of that they promptly paid, without objection or protest, thus, in the most emphatic terms, assenting to the proposition that they had not become unfit for the purpose for which they were rented. Neither did they take any measures to assert their rights under the statute, but they remained in possession, and gave no notice to repair, or of intention themselves to make repairs. The other cases cited by appellant are even less in point. They are generally cases where the landlord had undertaken permanent repairs on his own account, where no rights were reserved to the tenant by reason thereof, and where the repairs were conducted in such a manner as that injury to the tenant resulted therefrom. The court found in the same connection with this point that the time from the date of the fire to the 12th of October was not ample or reasonable for the repair, refitting, and reconstruction of the building. On this point, and almost on this point alone, there was some conflict of testimony, but there was evidence to support the finding, and it cannot therefore be disturbed. There is evidence to support all the findings, and they support the judgment. No errors of law are assigned in the argument except such as we have here considered. We think, with the court below, that the plaintiffs elected to treat the premises as not untenable, and governed themselves accordingly, and that they cannot recover in this action.

Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

88 Cal. 274

CORTEZ v. SUPERIOR COURT. (No. 13,885.)

(Supreme Court of California. Nov. 3, 1890.)

JUDGMENT—PARTITION PROCEEDINGS—ALLOWANCE OF COMMISSIONERS' FEES.

1. A decree allowing a certain sum to a commissioner in partition, for services and expenses, is a money judgment, within the meaning of Code Civil Proc. Cal. § 685, providing that "in all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion or by judgment for that purpose," and cannot be enforced by execution after five years.

2. The commissioner was a "party in whose favor judgment is given," within the meaning of section 681, providing that such party may have execution to enforce a judgment, within five years from its entry.

In bank. Writ of review to superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Code Civil Proc. Cal. § 681, provides: "The party in whose favor judgment is given, may, at any time within five years from the entry thereof, have a writ of execution issued for its enforcement." Section 685 reads: "In all cases other than for the recovery of money the judgment may be enforced or carried into execution after five years from the date of its entry, by leave of the court, upon motion, or by

judgment for that purpose founded upon supplemental pleadings."

Garber, Boalt & Bishop, (J. P. Phelan, of counsel,) for petitioner. T. Z. Blake-man, for respondent.

PATERSON, J. Review. On August 3, 1883, a decree of partition of certain real estate was entered in the superior court, probate department, of the city and county of San Francisco. One Wackenreuder, who performed the duty of commissioner in making the partition, was by the decree allowed a fee of \$480 for his services and expenses incurred. It was provided in the decree that the sums so allowed to Wackenreuder, and "amounting to \$480, be, and the same are hereby, charged and made a lien upon the land and premises partitioned." In July, 1888, the executors of Wackenreuder procured from the court an order of sale to satisfy the claim with interest thereon from the date of the decree. On August 20, 1889, the court made an order requiring the executors of Wackenreuder to show cause why the order of sale should not be set aside, and an order was entered staying all proceedings. On May 15, 1890, the order under review herein granting an execution was made. It vacates the order to show cause, and the stay order, procured by the distributees of Ramirez's estate, August 20, 1889, finds the amount which had been paid on account of fees and expenses, the amount still unpaid, and directs execution therefor against the respective shares partitioned to the several parties, and made liable by the provisions of the decree. That portion of the decree which provides for the payment to Wackenreuder of \$480 is, in effect, a judgment in his favor for that sum. It is a money judgment, and, if valid, one upon which he would have been entitled to an execution, if the probate court had the power to issue one at all, which is doubtful.

The judgment, being one "for the recovery of money," so far as Wackenreuder was interested in it, could not be enforced by execution after the lapse of five years from the entry thereof. Sections 681, 685, Code Civil Proc.; *Dorland v. Hanson*, 81 Cal. 202, 22 Pac. Rep. 552. We think that Wackenreuder was "the party in whose favor judgment was given," within the meaning of the word "party," as used in section 681, *supra*. The order staying proceedings did not operate to suspend the running of the statute. *Solomon v. Maguire*, 29 Cal. 237; *Dorland v. Hanson*, *supra*. We think that the order under review was in excess of the jurisdiction of the court. The court had no power to enforce the same after the lapse of five years. It had ceased to be operative, (*White v. Clark*, 8 Cal. 513,) assuming that the probate court had the power to declare a lien, and to award an execution in satisfaction thereof,—a question we deem it unnecessary to determine, in view of what has been said on the other point raised.

The order is annulled.

We concur: SHARPSTEIN, J.; Fox, J.; McFARLAND, J.

86 Cal. 286

FLOURNOY v. FLOURNOY. (No. 13,732.)

(Supreme Court of California. Nov. 5, 1890.)

HUSBAND AND WIFE—SEPARATE ESTATE—COMMUNITY PROPERTY.

1. Where real estate is conveyed to a wife, with the understanding between her and her husband that it is to be her separate estate, and is to be paid for out of the separate property which she already owns, the fact that the husband loans her money to make a partial payment thereon gives him no interest in the land, as between himself and her.

2. Where a wife who had made large payments on lands conveyed to her for her separate estate, joined with her husband in executing a mortgage thereon, to raise money partly for her own benefit, and partly to discharge a prior mortgage on the land, the amount used in discharging the prior mortgage was, as between herself and husband, an investment for her separate estate.

3. Where a wife purchases lands for her separate estate, and the deed is deposited in escrow, to be delivered upon payment of the balance of the purchase money, the husband cannot gain an interest in the lands, as between himself and her, by paying the money and receiving the deed, without the wife's knowledge.

Department 1. Appeal from superior court, San Diego county; **GEORGE PUTERBAUGH**, Judge.

L. L. Boone and Hunsaker & Britt, for appellant. **Capps & Montgomery**, for respondent.

WORKS, J. This is an action brought by a wife against her husband, to recover upon a promissory note, and for money had and received. The defendant set up a counter-claim for money loaned. The court below found in favor of the plaintiff on the note, and for a part of the amount claimed by her for money had and received, and allowed the defendant a part of his counter-claim. The plaintiff appeals on the judgment roll. There is no controversy as to the correctness of the finding, and judgment upon the note and the counter-claim. The contest is as to the amount allowed the plaintiff for money had and received. The real matter of controversy is as to the character of certain moneys claimed by the wife, whether the same was her separate estate or community property. The facts, as disclosed by the findings, are these, in substance: That certain real estate was sold to the plaintiff for \$4,750, and a deed therefor executed to her; that it was the intention and expectation of the parties that the consideration therefor should be paid by the plaintiff, out of her separate estate, and that thereupon the property should be her separate property; that, on the day said real estate was purchased, the defendant loaned the plaintiff \$600, which sum was by the defendant, at the instance of the plaintiff, paid to the party who conveyed said property to the plaintiff, and, as a part of the consideration therefor, that the plaintiff promised to repay said sum to defendant, and defendant expected the same to be paid out of her separate property; that the plaintiff at that time had separate property of the value of between \$7,200 and \$9,200; that, upon the payment of said \$600, a deed for the property was delivered in escrow till the balance of the purchase price should be paid; that after-

wards the plaintiff paid upon the property, of her separate funds, \$2,000; that said deed contained a covenant on the part of the plaintiff to pay off a mortgage standing against said property for \$1,000; that plaintiff and defendant borrowed \$3,000, and gave their joint note therefor, and joined in a mortgage on said property to secure the payment thereof; that \$2,000 of said sum was paid to the plaintiff, and \$1,000 thereof applied to the payment of the mortgage for that amount, which she had covenanted to pay; that the balance of the consideration for the property purchased by the plaintiff, \$1,150, was paid by the defendant out of his own separate estate, without the request or knowledge of the plaintiff, and thereupon the deed was taken out of escrow and recorded; that afterwards said property was sold for \$6,500. The purchaser assumed the \$3,000, and paid the balance in cash at divers times to the defendant, no part of which has been paid to the plaintiff.

The question presented under these findings, is, how much of the money thus received, and not paid over to the plaintiff, was her separate estate, and how much of it, if any, was community property? The court below held, as a conclusion of law, that the plaintiff was entitled to recover of the defendant, on account of the moneys thus received, and not paid over, \$983.33, and as against this sum allowed the defendant an offset of \$160 on an account stated, and the sum of \$594.40 for money loaned. By what rule of law or what process of reasoning the court found that for \$3,500, collected and appropriated by the defendant, he was only bound to pay less than one-third of that sum, we are not informed by the findings and conclusions of law. We suppose, however, that the court came to the conclusion that all of the money realized by the defendant from the land purchased by the plaintiff was community property, except what was actually paid by her therefor out of her separate property, and the proportionate increase in the value of the land at the time it was sold by her. The position taken by the respondent in this court is that, as to the \$600 loaned to the plaintiff by the defendant, to make the first payment, they were dealing with each other in a fiduciary capacity, and, as she gave no mortgage on the property to secure its repayment, it was in effect a payment made by the defendant on the land, and gave him an interest therein to that extent. But it must be remembered that this is a question wholly between the husband and wife; that the court finds that he loaned her the money to be repaid out of her separate estate; and that such was the intention of the parties. The effect of the respondent's position is to convert this loan of money by the defendant into an investment, on his individual account, in real estate, against the express understanding and intention of the parties. It is, in effect, to say that by loaning to the wife he could hold her liable to him on her contract to repay him the money loaned, and yet hold an interest in the land to the extent of such loan, with the right to sell the same without her con-

sent; or, putting it differently, the loan of the defendant to his wife was a loan to himself, in spite of their agreement to the contrary, and he could recover from her the amount loaned, for that was their contract, and yet hold an interest in the land to the same extent, because, according to the respondent's contention, that was the legal effect of his making the payment, without taking a mortgage on the land to secure its repayment. Such a construction of the law would certainly not offer great inducements for a married woman to call upon her husband for aid where her separate property was in danger. The case of *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. Rep. 719, gives some countenance to the respondent's claim, to the extent that it is there held that money borrowed by a married woman to invest in real estate, during her marriage, is community property, unless it be borrowed by her upon the faith of her existing separate property, *which she mortgages or pledges as security for its payment, or against which her contract may be enforced*. That part of the doctrine announced in the case cited which appears in italics may well be doubted, but, in any event, we are not inclined to apply it to a case of this kind, where the question arises between the husband, who made the loan, and the wife, who received it, and where such a construction of the contract between them would defeat the intention of the only persons who were parties to the transaction, and who alone can be affected by a decision of the question. The parties dealt with each other as if they were unmarried. There was no intention that the husband should, by virtue of the payment made by him, become a part owner in the land. The intention was that it should be her separate property, and so it must be held to be. *Schuler v. Society*, 64 Cal. 397, 1 Pac. Rep. 479; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. Rep. 869.

As to the \$2,000 paid by the wife out of her separate estate, there can be no question as to her having a separate estate in the land to that extent. Up to the time, therefore, that the \$3,000 was borrowed the money invested in the property was her separate estate, and the defendant had no interest in it. This being so, the money borrowed was borrowed "on the faith of her existing separate property, and secured by mortgage," and, even under the strict rule laid down in *Schuyler v. Broughton*, supra, the money thus realized became her separate property, and the \$1,000 used to pay off and satisfy the mortgage standing against the property gave her a further separate estate therein to that extent. The fact that the defendant joined in the note and mortgage given to secure the repayment of the money borrowed, does not affect the question. The real security was her separate property; the \$1,000 was invested in the property, and the balance of the money went to her, and was legally hers. *Martin v. Martin*, 52 Cal. 235; *Beaudry v. Felch*, 47 Cal. 183. It is equally clear to us that the amount of \$1,150 paid by the defendant, as the balance due on the property out of his own separate funds, accrued to the in-

terest of the plaintiff in the land. Up to that time the land was wholly her separate estate. It was the intention and understanding of the parties that she should pay for the property out of her separate estate. The husband could not, by voluntarily paying the balance due on the property, convert it into community property to that extent. His payment, being voluntary, and without her knowledge or consent, could give him no right or interest in the property, or change it from separate to community property. *Morgan v. Lones*, 80 Cal. 317, 22 Pac. Rep. 253. To give it such an effect would be to violate the express understanding and intention of the parties, and hold the plaintiff liable for an obligation which she never incurred. This we cannot do. *Moulton v. Loux*, 52 Cal. 83; *Curtis v. Parks*, 55 Cal. 106. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's separate estate, and that it was intended to accrue to her benefit. *Peck v. Brummagim*, 31 Cal. 441; *Swain v. Duane*, 48 Cal. 358. In dealings of this kind the intention of the parties is of paramount importance, where the question as to the effect of a conveyance of real estate arises as between themselves; and where it appears that a conveyance to the wife was intended, as between the husband and wife, to vest the title to the property in her as her separate estate, the courts will respect the intention of the parties, and, as between themselves; uphold her title to the property, although the legal effect of the purchase and conveyance would, independent of such intention, vest the title in the community. *Woods v. Whitney*, 42 Cal. 358; *Peck v. Brummagim*, 31 Cal. 441; *Higgins v. Higgins*, 46 Cal. 263; 2 Devl. Deeds, §§ 1168, 1169. For these reasons we are constrained to hold that the whole of this property was the separate estate of the plaintiff, that the whole of the purchase money realized from its sale belonged to her, and that she was entitled to recover the full amount thereof collected by the defendant, and converted to his own use. Judgment reversed, with instructions to the court below to modify its conclusions of law in conformity to this opinion, and render judgment in favor of the plaintiff accordingly.

We concur: FOX J.; PATERSON, J.

86 Cal. 241

SILVA v. SERPA et al. (No. 12,636.)

(*Supreme Court of California*. Nov. 1, 1890.)

NOTICE OF APPEAL—FORECLOSURE OF MORTGAGE.

1. Where defendant appeared in person in the court below, and had no attorney, and it appeared that when the appeal was taken he was absent from the state, it was sufficient to serve the notice of appeal upon the clerk, for him, as provided in Code Civil Proc. Cal. § 1015.

2. On suit in foreclosure, it is error to admit evidence of the mortgagor's declarations, made after the execution of the mortgage, that it was given without consideration, and only for the purpose of putting the property beyond the reach of his wife, with whom he was having difficulty.

Commissioners' decision. In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

John L. Hudner and M. T. Dooling, (J. H. Campbell, of counsel,) for appellant. N. C. Briggs, for respondent.

VANCLIEF, C. The action was to foreclose two mortgages executed to the plaintiff by the defendant Joaquin S. Serpa, to secure payment of his promissory notes, the first mortgage dated June 2, 1885, to secure \$1,500 with interest, and the second, dated September 14, 1885, to secure \$600. The respondent Maria L. Serpa was made defendant on the alleged ground that she had, or claimed to have, some interest in, or lien upon, the mortgaged property subject to the mortgage. The mortgagor, Joaquin S. Serpa, in person, without an attorney, demurred generally to the complaint, and his demurrer being overruled, failed to answer, and his default was duly entered. The defendant Maria answered to the effect that, after the execution of the mortgages in July, 1886, she married the defendant Joaquin; that in January, 1887, by a decree of the superior court in which this action was brought, she obtained a divorce from said Joaquin on the ground of extreme cruelty, and also a judgment against him for \$290 and for \$40 per month as permanent alimony; which judgment was duly docketed immediately after it was entered; and that said judgment remains in full force, and is a lien upon the mortgaged property. She further alleged, in substance, that there never was any consideration for said notes or mortgages to plaintiff, and that nothing was ever due or owing thereon from defendant Joaquin to the plaintiff; but that they were executed for the sole purpose of defrauding Joaquin's creditors, and that the purpose of the attempt to enforce and foreclose them in this action is to cheat and defraud her out of the money due, and to become due, her on said judgment. As between the plaintiff and the defendant Maria, the court found in her favor on all the issues. As between the plaintiff and the mortgagor, (Joaquin,) the court, upon the default of the latter, ordered the mortgaged property to be sold to satisfy the mortgages, but subject to the lien of the judgment in favor of the defendant Maria. The plaintiff appeals from that part of the judgment in favor of the defendant Maria, upon the judgment roll containing a bill of exceptions.

1. Respondent has moved to dismiss the appeal on the alleged ground that the notice of appeal was not served on the defendant Joaquin. It appears, however, by affidavit filed in the court below and properly certified to this court, (*Moore v. Besse*, 35 Cal. 184,) that, at the time the appeal was taken and the notice thereof served, the defendant Joaquin resided out of this state; and the record shows that the notice of appeal was served on the clerk for him. As he had appeared in person, and had no attorney, this was proper service. Code Civil Proc. § 1015.

2. The bill of exceptions shows that on the trial, the defendant Maria, and other witnesses on her behalf, were permitted by the court, against proper objections by plaintiff's counsel, to testify to state-

ments and admissions of the defendant Joaquin, in regard to the notes and mortgages in suit, the purpose for which they were executed, and as to the consideration therefor, made ten months and a year after their execution. Frank Pendro was thus permitted to testify that, in August, 1886, the defendant Joaquin told witness that "the only reason he had mortgaged was on account of a difficulty with his former wife; that he put mortgage not to borrow money, but to avoid paying; that he did not owe John Silva anything; that he had trusted Silva and had given mortgage, but could get it back at any time; and that, if I would buy, we would go and see Silva, and I could get a good title." The defendant Maria was thus permitted to testify that, in November or December, 1886, Joaquin told her about the mortgages, and said: "They were put on, on account of trouble he had with the Portuguese society, but that he never received any money for them; that they went before a justice of the peace when mortgage was made, and Silva gave him \$300, but that he gave it back to him in half an hour after." That the admission of this testimony, against the objection of plaintiff's counsel, was error presumably prejudicial to plaintiff, is too plain to require argument or the citation of authority. The rights of the mortgagee could not have been prejudicially affected by the *ex parte* statements or admissions of the mortgagor made after the execution of the mortgages. I think the motion to dismiss the appeal should be denied, and that part of the judgment appealed from should be reversed, and the cause remanded for a new trial between the plaintiff and the defendant Maria L. Serpa only.

WE CONCUR: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied, and that part of the judgment appealed from is reversed, and the cause remanded for a new trial between the plaintiff and the defendant Maria L. Serpa only.

86 Cal. 295

PEOPLE v. EUBANKS. (No. 20,679.)
(*Supreme Court of California.* Nov. 5, 1890.)

MURDER—INSANITY AS A DEFENSE.

In a murder case, where the only claim of the defense was that defendant had inherited such an impaired mind, and this had been so further weakened by liquor, that he was incapable of the malice requisite for murder in the first degree, or that at least the jury should in their discretion make his punishment a life sentence instead of death, there being no claim of insanity, there was no prejudicial error in charging that the burden of proving insanity was on defendant, the jury being clearly charged that as to all other matters, including defendant's said claim, they must give him the benefit of every reasonable doubt, and that as to such matters the burden of proof was not on him.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

H. D. Morehouse and H. D. Tuttle, for appellant. Atty. Gen. Geo. A. Johnson, for the People.

FOOTE, C. The defendant was convicted of murder in the first degree, and is under sentence of death. He appeals from the judgment therein rendered, and from the order denying a new trial. The main ground upon which he bases his contention for a reversal of the judgment and order is that the court gave in its charge to the jury, of its own motion, among other things, this instruction: "Upon the issue of insanity, the evidence must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to you in a civil case you should find that he was insane. In all other matters, except that of insanity, the defendant is entitled to the benefit of every reasonable doubt." The claim of the defendant is, to quote the language of his closing brief: "The appellant does not claim that he is innocent. He does not claim that he ought not to be punished. But he does claim that the facts in this case do not warrant a punishment of death; that he is only guilty of murder in the second degree, and, if guilty of murder in the first degree, the death penalty should not be affixed. He bases this contention upon the proposition that, from the long and excessive use of intoxicating liquors, and from inheritance from his mother, he was, at the time of the homicide, and for a long time prior thereto, of a weak and enfeebled mind, and incapable, by reason of this mental infirmity, of conceiving that malice requisite to constitute murder in the first degree." His defense on the trial, as stated by his counsel, in the presence of the court and to the jury, was: "That the defense in this case stands in the remarkable attitude from beginning to end that the defendant was guilty of the crime of murder, but they would endeavor to establish that the defendant inherited from an insane mother an impaired mentality; that at the time of the homicide the defendant's mind had been further weakened by a long and continuous use of alcoholic liquors, and that his mental condition was such at the time of the homicide that he should not be adjudged guilty of murder in the first degree, or, at least, he should not be subjected to the death penalty; that, as the law divided murder into first and the second degrees, the defense would offer testimony showing the impaired mental condition of the defendant's mind for the purpose of rebutting malice, and for the purpose of reducing the degree of crime from the first to the second degree, or, if they failed in that, still the law permitted the jury to affix imprisonment for life as the penalty for the crime, and the defense would therefore attempt to show that the mind of the defendant was so weakened that the death penalty should not be affixed." The evidence offered on this head was admitted. The uncontradicted evidence showed that the defendant had shot his own child, a girl just verging upon womanhood, through the heart with a shot-gun, without any provocation or excuse. Self-defense was not set up; to prove an *alibi* was not attempted; insanity, as we have seen, was not pretended, because, if it was present at the time of the killing, the defendant could not be guilty

of murder, or any other crime, and must have been acquitted, and he admits he was guilty of murder. But it was hoped to raise in the minds of the jury a reasonable doubt whether, from the somewhat weakened mental condition of the defendant, it being contended that such weakness existed, he could have entertained malice in the shooting, or, from the fact that such a defense as was set up had some shadow of evidence to support it, that the jury might be induced not to inflict the death penalty upon him. It is plain, then, that the defendant did not pretend, either in his defense or in the evidence to support it, that he was insane at the time of the killing. So that the instruction (assuming it to be wrong under the decision of the *Bushton Case*, 80 Cal. 160, 22 Pac. Rep. 127, 549) that the burden was upon him to prove that defense by a preponderance of evidence could not have misled the jury. They could not but plainly see that he was not relying upon the defense of insanity; that he made no pretense of being entitled to an acquittal on that account. Hence, they were clearly told in the charge that as to all other matters, including his peculiar defenses, as above indicated, they must give him the benefit of every reasonable doubt, and that, as to such matters, he was not required to prove them by a preponderance of evidence. And it further appears that, as to all those things upon which he based his defense, the court gave full and complete instructions, giving him the benefit of all that he claimed or asked for at the hands of the jury, and as to all other questions upon which the jury needed instruction they were fully and clearly charged by the court. Perceiving no prejudicial error in the record, we advise that the judgment and order be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 298

Dwyer v. Carroll. (No. 12,770.)

(*Supreme Court of California*. Nov. 6, 1890.)

LANDLORD AND TENANT—EVICTION OF TENANT—REPAIRS—DAMAGES.

1. In an action by a tenant for the unauthorized interruption of his quiet and peaceable possession by his landlord, it appeared that the tenant had informed the landlord that the floor on the first story of the building, which was an hotel, had settled and needed repair; that it was agreed that the work of repairing should commence in a few days; that thereafter, and a few days before the commencement of the work, plaintiff paid his rent for a month in advance. Plaintiff's testimony was that defendant said he was only going to put in a new floor on the first story; that it would not take more than 10 or 12 days; that it would not require the building to be vacated; that with this understanding he made no objection; but that, instead of merely putting in a new floor, the house was raised 14 feet, a cellar dug, and a new story placed between the old building and the cellar, the changes occupying over two months; that on account of the raising of the building, plaintiff and his family and boarders had to leave, and he was unable to get his furniture from the building for over three months. Defendant testified that plaintiff was fully advised of the unsafe condition of the build-

ing, and that a new floor and foundation would have to be put in, requiring from 30 to 60 days; that plaintiff consented to this, and, on finding that the building could not be safely occupied during the repairs, voluntarily vacated it and gave up possession. *Held*, that the jury, by finding a sum certain for plaintiff, in effect found that plaintiff did not consent to the re-entry.

2. The authority given by Civil Code Cal. § 1941, to the lessor of a building to enter and make repairs necessary to make it tenantable, does not give the lessor the right to re-enter for the purpose of making extensive alterations.

3. Plaintiff having pleaded specially the loss of his business, it was properly considered in estimating his damages.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Smith & Murasky, for appellant. *T. J. Crowley*, (*E. P. Cole*, of counsel,) for respondent.

GIBSON, C. This appeal is brought by the defendant from a judgment entered upon a verdict for \$500, rendered against him in an action of trespass prosecuted by plaintiff; also from an order, made therein, denying him a new trial. The plaintiff, in his complaint, alleged that by virtue of a lease from the defendant he was the tenant, and, as such, was in the possession, of certain premises on Mission street in San Francisco, known as the "Union Hotel," which he used in carrying on the business of keeping an hotel, from the 1st day of February, 1886, until the 10th day of November, 1886, when the defendant forcibly and unlawfully invaded the said premises, and ejected the plaintiff therefrom, and tore down and destroyed the building thereon, and removed and destroyed a large portion of the furniture in said building, and withheld the possession of the premises from the plaintiff; that at the time of such ejection the plaintiff was earning a net profit of over \$200 per month in his said business of hotel keeping; and that, by the trespass of the plaintiff, the defendant's peaceable possession of the premises was destroyed, and his said business ruined, to his damage in the sum of \$5,000. Defendant, in his answer, admitted the relation of landlord and tenant as alleged by plaintiff, but denied that he committed the trespass, or withheld the possession of the premises, or that the plaintiff was earning \$200, or any other sum, per month as a net profit on his business of hotel keeping, or that he sustained or suffered any damage whatever. It thus appears that the gist of the action is the unauthorized interruption by the landlord of the quiet and peaceable possession of his tenant. The main question then is, did the tenant suffer such an interruption? It appears from the evidence that early in October, 1886, the tenant, who was holding from month to month at the monthly rental of \$60 payable in advance, brought to the notice of one McGrath, the agent of the landlord, the fact that the Union Hotel building was in a dilapidated state, particularly the floor of the first story, which had settled several inches in places, and also a back stairway. This in turn was communicated to the landlord, who a few days afterwards caused

the building to be examined, and, upon learning that it was in a dangerous state for habitation, the foundation having decayed and given way, he with the carpenter who made the examination and subsequently undertook the work upon it, went together to the building about the 7th of October, and informed the tenant of the condition of the building, and that it could not be repaired unless it was vacated. The tenant said he did not want to have his occupancy disturbed until after the election which was to be held on the 2d day of the following month of November, as he had rented a portion of the first story to the election commissioners for a polling place. The landlord then said to the tenant that he would defer the repairs until after the election, but that he (the tenant) would have to occupy the building at his own risk. These conditions, it seems, the tenant assented to, and he continued to occupy the building until after the election and the canvassing of the votes cast at the polls in the building, which canvassing was not completed until about the 9th of November. In the meantime, that is to say, on the 7th of the same month, the tenant's rent to the 7th of December fell due, and on the 9th of November he paid it. On the 10th of November, the carpenter above mentioned, Mr. Worden, with his men, went to the place and commenced the work upon the building. To this the tenant made no objection, but began to move his effects on the first floor out of the way of the workmen. Regarding this entry, the evidence on behalf of the tenant tended to show that the latter was informed by his landlord that he, the landlord, only intended to have a new floor put in the first story, and that it would not take more than 10 or 12 days to do it, and that the inconvenience resulting therefrom would only be temporary, and would not require the building to be vacated; that with this understanding he (the tenant) made no objection, but, instead of merely putting in a new floor, the house was raised about 14 feet, a cellar dug underneath it about 9 feet deep, and a new story placed between the cellar and the old building, which changes occupied over two months; that, on account of the house being thus raised, the tenant with his family and a number of boarders were compelled to vacate the building, and he (the tenant) was prevented from obtaining his furniture in the upper story of the building for nearly three months. In contradiction of this, the evidence of the defendant tended to show that the tenant was fully advised of the unsafe condition of the building, and that a new foundation and floor would have to be put in, which would probably require from 30 to 60 days. As to the necessity of the tenants moving out at the time the alterations of the building were commenced, the landlord testified: "I might have talked to Mrs. Dwyer [wife of his tenant] that it was a dangerous place for her to keep her children. The best thing she could do was to move out. It was before the commencement of the repairs. I did not, after the repairs began, tell her to get out. I would not do such

a thing. He kept the furniture up-stairs and intended to have the place when it would be fixed, but he left and rented a place before it was done. That was in February, 1887, I guess. I was not notified that he intended to move. I saw him moving his furniture. I asked him, was he going to move, and he said: 'Yes, I have rented that place at the opposite side.' That is the only time, after the repairs were begun, I had a conversation with him. One time he asked me what the rent would be. I told him I could not tell him what the rent would be, for I didn't know what the building was going to cost. This conversation took place some time during the improvement on the building." This makes it apparent that the plaintiff on his part endeavored to show that he consented to the entry of his landlord during the month of November for which he had paid rent for the purpose of repairing the floor in the first story, with the understanding, however, that he (the tenant) would not have to vacate the building, and, at most, would not be inconvenienced in his possession more than 12 days, and not otherwise; and that the defendant in like manner tried to prove that his tenant understood that the foundation of the house would have to be repaired as well as the floor, and so understanding it, he assented to the entry for such purposes, and, on finding that the building could not be safely occupied while the repairs were being made, he (the tenant) voluntarily vacated it, and yielded up the possession of the premises. It is well established that, if one consents to an act, he is not injured by it, but, in order to constitute a consent, the minds of the parties must meet upon the same thing in the same sense. Now if, in this case, the plaintiff's position be the true one, it is evident that the minds of the parties did not meet in the above sense. The evidence shows that instead of the landlord's entering to repair the building, that is, to restore such portions of it as were decayed or worn out, he entered for the purpose of making extensive alterations in the building, that is, to make a different building of it; and that, during the progress of the alterations, the building became uninhabitable, in consequence of which the tenant was compelled to vacate it. It does not seem probable that the tenant paid rent for a month in advance, a few days before the work was commenced, knowing that in a few days thereafter the house would be raised about 14 feet and an excavation of 9 feet made under it, so as to cut off all communication with the upper story, and thereby render his use and enjoyment of the building impracticable, if not impossible. There is, in fact, nothing in the evidence tending to show that anything was said, or intimation given, to the tenant regarding the putting in of a new story or the digging of a cellar. Nor is there anything tending to show that the tenant contemplated such changes being made. And as the jury, who were the exclusive judges of the value and effect of the evidence which, as is above shown, was conflicting regarding the consent of the tenant to the entry,

found a verdict for a sum certain in favor of the plaintiff, they in effect found for him upon all the issues. *Mendelsohn v. Lighter Co.*, 40 Cal. 657. We must, therefore, hold in accordance with their verdict that the tenant did not consent to the re-entry made by the landlord. This being so, the first contention of the appellant that the tenant assented to the landlord's re-entry cannot be sustained.

The appellant, however, further contends that, even if the tenant did not consent to the re-entry, the landlord had the right to re-enter upon the premises for the purpose of making all necessary repairs, by virtue of section 1941 of the Civil Code, which reads as follows: "The lessor of a building intended for the occupation of human beings, must in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidation thereof which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine." And the section referred to as the exception declares: "The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence." Under those sections it is clear that, in the absence of an agreement to the contrary, the landlord, after the delivery of possession to his tenant, has the right, and it is made his duty, to re-enter for the purpose of repairing any dilapidations not occasioned by the ordinary negligence of the tenant which renders the leased building untenable and which occurs after the beginning of the term. But while this is so, the facts of this case do not come within the rule so established, because, as we have already seen, the re-entry was made not for the purpose of making necessary repairs, but, on the contrary, to make extensive alterations. A re-entry cannot be made for such a purpose unless the right is expressly reserved in the lease. Civil Code, § 1927. And a right of entry for one purpose will not justify the performance of acts for another purpose. *Shiffer v. Broadhead*, 126 Pa. St. 260, 17 Atl. Rep. 592. In that case the defendants had the right to enter upon certain woodland to cut trees of a certain size, but they were held liable in trespass for cutting trees of a different size. So, in the present case, the landlord had a right, as already shown, to re-enter to make necessary repairs, but having made unauthorized alterations instead of repairs he thereby committed a trespass. Therefore this second contention of appellant must also be resolved against him.

The remaining point urged by the appellant is that the damages found are excessive. The evidence shows that the tenant was deprived of a large portion of his furniture for several months, and that some of it was broken, but there is no estimate as to what loss such deprivation and breakage caused. But it is undisputed that the landlord accepted rent from the tenant, and the jury impliedly found that, on account of the unauthorized alterations begun by the landlord, the tenant was compelled to vacate the building within three days after the beginning of the month for which the rent had been

paid; and at the time of his ejection the tenant was carrying on a business in the building that yielded him \$200 net profit per month. This is not contradicted. It is true, however, that it appears the tenant moved across the same street and there continued in the same business, but whether at a profit or a loss is not shown. In view of this state of the evidence, we cannot say that the damages are excessive. Appellant suggests that the loss of plaintiff's business, which he pleaded specially, is not a proper element of damages. But we think the destruction of his business was a proximate result of his ejection from the leased premises, and as such was, under his special allegation respecting the same, properly considered in estimating the damages sustained. The case of *Dexter v. Manley*, 4 Cush. 14, sustains this view. There, as here, the lessee was deprived of the use of the property leased, and it was held that the rule of damages was the value of the lease, and that the amount of business and profits, which were also specially pleaded, in connection with the rent reserved, were competent to show such value. The same principle is recognized in *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. Rep. 327. We therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 248

JOSHUA HENDY MACHINE-WORKS v. AMERICAN STEAM-BOILER INS. CO. OF NEW YORK. (No. 12,769.)

(Supreme Court of California. Nov. 1, 1890.)

FIRE INSURANCE—CANCELLATION OF POLICY—RETURN OF PREMIUM.

Under Civil Code Cal. § 2617, providing that the assured shall have a return of his entire premium when his property has not been exposed to any of the perils insured against, and that, when the insurance is for a definite time and he surrenders his policy, a proportionate part of the premium shall be returned, a person who has taken insurance for a certain period cannot surrender his policy and reclaim a ratable proportion of the premium, unless the policy is canceled for some of the reasons mentioned in sections 2610, 2619, or under a right to do so reserved in the policy.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

F. V. Bell and T. C. Van Ness, for appellant. J. N. E. Wilson and James M. Trout, for respondent.

WORKS, J. This action was brought to cancel a policy of insurance and to recover \$194.46 as the ratable proportion of a premium paid thereon. Defendant's demurrer, on the ground of insufficiency of the facts stated in the complaint, was overruled, with leave to answer, which it failed to do. Judgment for plaintiff was thereupon entered, from which the defendant appeals. The defendant on June 2, 1887, in consideration of a \$300 premium paid by plaintiff, issued to the latter its policy of insurance, duly countersigned

by its agents at San Francisco, whereby it insured plaintiff to the amount of \$20,000, for a period of three years from June, 1, 1887, against loss or damage to property, whether owned by plaintiff or not, or for which plaintiff might be liable in case of loss or damage resulting from the explosion of either or both of two steam-boilers situate on certain premises in San Francisco; and, also, against loss of human life, or injury to person, resulting from the explosion of either or both of said boilers, for which plaintiff might be liable. Subsequently, on August 22, 1887, and prior to any loss or damage of any kind covered by the policy, plaintiff presented it to the defendant for surrender and cancellation, and requested defendant to accept the surrender of and cancel it. At the same time, plaintiff demanded the return of such proportion of the premium as corresponded with the unexpired term of the policy after deducting 30 per cent. The defendant refused to accept the surrender of the policy upon any terms, or to return any proportion of the premium. Among other provisions in the policy is the following: "This policy shall be canceled at any time at the request of this company, on giving notice to that effect, first deducting thirty per cent. for the charges of inspection, and refunding to the assured a ratable proportion of the balance of the premium for the unexpired term of the policy."

The defendant contends that, as this provision reserves the right to cancel the policy to the insurance company only, the plaintiff is not entitled to a cancellation of it, unless such right exists, independently of the contract of insurance, in some one or more of the cases provided for in sections 1689, 2580, 2610, 2619, of the Civil Code; and that, as the complaint does not present a case within any of those sections, the demurrer thereto should have been sustained. The policy reserves to the insurer the right to cancel the policy under certain conditions and on certain terms, but no such right is given to the insured. Therefore, the only question for us to determine is whether the insured had the right to a cancellation of its policy as a matter of law, independent of any stipulation to that effect in the instrument itself. The Code gives the right to rescind or cancel contracts, generally, for certain specified reasons. Civil Code, §§ 1689, 2580, 3406, 3414. And the right is given to rescind contracts of insurance for certain reasons. Civil Code, §§ 2610, 2619. It is not alleged in the complaint that any of the reasons above mentioned existed, but it is contended that section 2617 of the Civil Code gave the respondent the right to have the policy canceled without cause and upon his mere request. We do not so construe the section referred to. If this is its effect, the other sections of the Code above referred to are wholly unnecessary. If an insured has the right to rescind his contract at his pleasure, and without giving any reason therefor, it was hardly necessary for the legislature to provide, specifically, the grounds upon which such a right might be exercised. The Code provides that "an insurer is entitled to pay-

ment of the premium as soon as the thing insured is exposed to the peril insured against." Civil Code, § 2616. And when the peril insured against has existed, and the insurer has become liable for any period, however short, the insured is not entitled to cancel the policy, or to a return of any part of the premium, unless the right is given by the sections of the Code above referred to. May, Ins. § 67; *Rothschild v. Insurance Co.*, 11 Ins. Law J. 282. Section 2617 does not provide when a policy of insurance may be canceled by the insured, or profess to do so. It relates exclusively to the matter of a return of premium, and provides how much of the premium shall be returned to him. Two cases are mentioned, viz., where his interest in the property has not been exposed to any of the perils insured against, and where the insurance is made for a definite time and the insured surrenders his policy. In the first case, he is entitled to the return of the whole of his premium, and in the latter, to a certain proportion of it. The section is intended to provide how much of the premium shall be returned to the insured in the two cases mentioned, and nothing more. In any of the cases in which either party may cancel the policy as provided in the other sections of the Code, mentioned above, or as stipulated by the policy, this section steps in and protects the rights of the insured by preserving to him either the whole or a part of the premium paid by him, as the case may be. This view of the effect of these Code provisions, or others like them, was taken in the case of *Insurance Co. v. Coleman*, (Dak.) 43 N. W. Rep. 693, in which it is said: "But the defendant further claims that he is entitled to a reduction of the amount recoverable by the terms of the note, by the principles which apply to the return of premiums, claiming that 'risk and premium go hand in hand, and, once ceasing, the other also ceases.' This is not by any means true. If the premium had been paid, and the risk incurred, for any period, no matter how short, no breach of a subsequent condition for which the insured was responsible would entitle him to a return of any of the premium, although the company thereby ceased to be liable. The law relating to the return of premiums is clearly laid down in our Civil Code, §§ 1542-1544, and we are not aware that it differs materially from the general law of insurance elsewhere. Section 1542: 'A person insured is entitled to a return of premium as follows: (1) To the whole premium if no part of his interest in the thing insured be exposed to any of the perils insured against; (2) where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds to the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.' Section 1543: 'A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insured, or on account of facts of the existence of which the insured was ignorant without his fault, or when, by any fault

of the insured other than actual fraud, the insurer never incurred any liability under the policy.' Section 1544: 'If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.' We cannot see how section 1544, which is particularly referred to by defendant's counsel, in any way sustains his position. The words, 'so far as that particular risk is concerned,' do not refer to the time in which the subject is exposed to the peril; but where a premium is applicable to risks on two or more distinct subjects of insurance, and no risk has ever been incurred upon one subject, the proportionate premium may be recovered. This is evident not only from the reading of the previous sections, but from the history of the legislation which led to the adoption in the Code states of section 1542. This section, as originally adopted in California, read: 'A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against, or, where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole period of that time.' In proposing as an amendment the language of section 1542, the Code examiners said: 'The present section does not conform to the general rule and the law elsewhere, and is manifestly unjust. Under it the insured, meeting with a loss in the first month of a policy for a year, could recover not only the loss, but eleven-twelfths of the premium, thus depriving the insurer of that proportion of the consideration for which he assumed the risk.' If the defendant had sustained a loss during the first year the premium for which had been paid in cash, he would have been liable on his note, because the peril had existed, the insurer had been liable, and the event insured against, in consideration of the entire premium, had happened. This being an insurance for five years, and the risk having attached, the insured is not entitled to any reduction on his note." The judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

WE CONCUR: BEATTY, C. J.; FOX, J.; PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

86 Cal. 322

BANK OF SONOMA COUNTY v. CHARLES.
(No. 13,573.)

(*Supreme Court of California.* Nov. 6, 1890.)
EXECUTORS AND ADMINISTRATORS—PRESENTATION
OF CLAIM—MORTGAGES.

1. Code Civil Proc. Cal. § 1500, provides that the holder of a mortgage may, without presentation thereof to the administrator, maintain an action to enforce the mortgage against the particular property subject thereto, "when all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action, unless such claim be so presented." Plaintiff, without any presentation of the mortgage, and without recourse against the other property being "expressly waived in complaint," proceeded to fore-

close as if the mortgage had been presented, and although there was no deficiency judgment the decree provided for an attorney's fee. *Held*, that the decree could not be modified by striking out the provision for attorney's fee and then allowed to stand as if the proceeding had been under said section.

2. Where one presents to an administrator, and has allowed a note against an estate secured by a mortgage, but, by mistake, does not present the mortgage, supposing that the presentation of the note constituted a presentation of the mortgage also, he does not thereby waive his rights under his mortgage.

3. The approval of a note by an administrator does not constitute a waiver of the presentation of the mortgage by which the note is secured.

4. Error cannot be predicated of a decree in a foreclosure suit for following the provision of the mortgage, that the lands therein embraced be sold in one large parcel, and several other smaller parcels.

Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

Horace L. Smith and Thomas Ruthledge, for appellant. *J. N. Gillett and J. F. Coogan*, for respondent.

McFARLAND, J. This is an appeal by the defendant, Vernetta Charles, administratrix of G. W. Charles, deceased, from a judgment in favor of plaintiff foreclosing a certain mortgage. In his life-time the said G. W. Charles, and J. M. Charles, made their promissory note to plaintiff for \$42,250, and interest, and, to secure the same, executed a mortgage to plaintiff which covered a large quantity of land, and was duly recorded. After the death of said G. W. Charles, the plaintiff presented the following creditor's claim to the administrator and administratrix, viz.: "The undersigned, a creditor of George W. Charles, deceased, presents its claim against the estate of said deceased, with the necessary vouchers for approval, as follows, viz.: Estate of George W. Charles, deceased, to Bank of Sonoma County, Dr. 1889, February 16. To principal of promissory note, dated December 11, 1886, (copy here attached,) \$38,069.58. Interest thereon from December 11, 1886, \$5,979.07. This note is secured by mortgage of even date herewith." Then follows a copy of the note, and a proper verification of the claim. No other presentation of the claim or of the mortgage was ever made, or attempted to be made. The claim as presented was allowed by the administrator and administratrix and by the probate judge. The complaint is in the form commonly used in an action to foreclose a mortgage. It does not waive recourse against the property of the estate other than the mortgaged premises, but prays for a deficiency judgment against the estate, and counsel fees. The complaint shows upon its face that the only presentation of the claim was as above stated, and makes the presentation a part of the complaint as an exhibit. The defendant demurred to the complaint upon the general ground, and also upon the ground that it was ambiguous, uncertain, etc., because it cannot be ascertained therefrom whether the mortgage was ever presented. The demurrer was overruled, and defend-

ant answered, averring, among other things, that the mortgage was never presented, and that the only presentation of the claim was the one set forth in the complaint, and the court so found. The court rendered judgment foreclosing the mortgage, and allowing an attorney's fee of \$500, but not awarding any deficiency judgment against said estate. It is quite clear that there was no presentation of the mortgage. The general provision of the Code, as to the presentation of a claim founded upon a written instrument, is that "a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed;" in which event there must be an affidavit containing a copy, "or particular description of such instrument." Code Civil Proc. § 1497. Of course, in the case at bar, there was no attempted compliance with this general provision. There is, however, in the same section, a provision which relieves the holder of a mortgage from presenting either the original or a copy of the mortgage. It is as follows: "If the claim, or any part thereof, be secured by a mortgage, or other lien, which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record." But this, plaintiff did not do. It neither complied with the general provision, nor with the special one which was intended for the convenience of persons in its situation. The mortgage was, therefore, not presented at all.

But the complaint is drawn upon the theory that the mortgage had been presented; and the judgment rendered upon that complaint cannot be maintained, and the demurrer should have been sustained. Respondent contends that, as the court did not in fact order any deficiency judgment, the decree might be modified by striking out the attorney's fee, and then be allowed to stand as though plaintiff had proceeded under section 1500, Id. That section provides that the holder of a mortgage may, without presentation thereof to the administrator, maintain an action to enforce the mortgage against the particular property subject thereto, "when all recourse against any other property of the estate it expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented." But to take advantage of that section there must be an express waiver in the complaint, and the complaint here contains no such waiver, and such a plain, statutory provision cannot be disregarded or explained away.

Appellant contends that plaintiff, by presenting the note and having it allowed, waived his mortgage, and all rights under it; but we do not think that the consequences of plaintiff's carelessness are so ruinous as to utterly preclude it from the benefit of the mortgage lien. Its property therein should not be held to be lost, unless such holding be an inevitable legal conclusion. Plaintiff certainly did not intend to waive or abandon its mortgage.

It evidently supposed that the presentation of the note was a presentation of the mortgage also, and it has proceeded on that theory ever since, and it would be unjust and inequitable not to allow plaintiff to correct the error into which it fell while it is not too late to do so, and when no injury will be done to other parties, and we see no legal obstruction in the way. The fact that the note was presented and allowed, as above stated, presents no great difficulty. Plaintiff should amend its complaint, so as to clearly waive all claim upon the mortgage and note against any of the property of the estate other than the mortgaged premises; and we see nothing in the point made by respondent that the appellant, by approving the note, waived presentation of the mortgage, even supposing that an administratrix could bind the estate by such a waiver. We think, therefore, that the judgment should be reversed, with leave to plaintiff to amend its complaint so as to expressly waive all recovery against any of the property of the deceased other than the mortgaged premises; and that, under the complaint so amended, a judgment foreclosing the mortgage, all the necessary facts being proven, can be maintained. But of course no counsel fees could be allowed.

The decree provided that the lands embraced in the mortgage should be sold in one large parcel, and in several other smaller parcels; and appellant contends that the provision for the sale of the one large parcel was erroneous. But there is an express provision in the mortgage that, in case a foreclosure should be necessary, the land should be sold in a certain manner, and the court in its decree followed that provision. In this we think there was no error. The parties had as full power to contract about the subdivisions or parcels by which the property should be sold as about any other matter, and it was proper for the court to enforce that part of the contract. It was not against the right of redemption. Section 694, Code Civil Proc., relates to sales under executions in cases where there have been no contracts between parties as to the manner of the sale. In *Hopkins v. Wiard*, 72 Cal. 259, 13 Pac. Rep. 687, it was held, generally, that in a foreclosure suit the court has jurisdiction to provide in the decree in what parcel or parcels the mortgaged premises shall be sold; and we have been referred to no case in which it has been held erroneous for the court to order the premises sold in parcels, as provided by the parties in the mortgage itself. The only case cited which approaches the point under discussion is *Mickle v. Maxfield*, 42 Mich. 304, 3 N. W. Rep. 961, and in that case, while compliance with the contract was demanded by the mortgagor, a contract in a mortgage similar to the one in the case at bar was held valid; and it was further held that subsequent incumbrancers or purchasers took "subject to this provision as part of the contract," and that the right sought to be enforced "did not depend on implied equities, but upon express agreement, and it could not, under such circumstances, be important

to know what considerations brought it about." The judgment is reversed, and the superior court is directed to sustain the demurrer to the complaint, with leave to plaintiff to amend its complaint, as intimated in this opinion.

We concur: THORNTON, J.; SHARPSTEIN, J.

86 Cal. 329

PEOPLE v. CHUN HEONG. (No. 20,658.)

(Supreme Court of California. Nov. 6, 1890.)

MURDER—ALIBI—REASONABLE DOUBT—INSTRUCTIONS—EVIDENCE.

1. Upon a conviction of murder in the first degree a refusal to grant a new trial will not be overruled, although it appears that a preponderance of the evidence was in favor of an *alibi*, as it will be presumed that the jury had good reason to discredit the testimony of the witnesses upon that point.

2. Newspaper accounts of a murder, and of the arrest of the accused, are not competent evidence.

3. Where the commission of a murder was conceded, and the only real question was as to the identity of the murderer, it was not prejudicial error to charge upon the law of manslaughter and excusable and justifiable homicide.

4. A charge that defendant is entitled to acquittal if there is a reasonable doubt, but that "mere possible doubts, however reasonable, which beset some minds on all occasions," should not prevent conviction, is meaningless and confusing; but where the whole charge contained a sufficiently clear definition of reasonable doubt, the judgment will not be reversed.

5. Where the defense is an *alibi*, a charge that while defendant's guilt must be proved beyond a reasonable doubt, he can establish any fact essential to his defense by a preponderance of evidence, if erroneous, is cured by a charge that he must be acquitted if there is a reasonable doubt of his presence at the commission of the crime.

6. It is not error to charge that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness against the testimony of any greater number."

7. In charging upon *alibi* the court spoke of the "place of the alleged murder," and immediately afterwards of the "time and place of the murder." *Held*, the jury could not have considered the last phrase as an assumption that the crime had been proved.

8. The court charged that, "if you sustain a reasonable doubt as to whether the defendant is guilty of murder in the first degree, then you should not find him guilty of murder in the first degree, but you should proceed to inquire whether he is guilty of murder in the second degree," and immediately added: "If you believe from the evidence in the case beyond a reasonable doubt that the defendant is not guilty of murder in the first degree, but that the defendant with malice, [stating elements of murder in second degree,] then you should find him guilty of murder in the second degree." *Held*, this did not tell the jury not to consider murder in the second degree, unless satisfied beyond a reasonable doubt that he was not guilty of the higher offense, and was not erroneous.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. VAN REYNES, Judge.

Lyman I. Mowry, for appellant. Atty. Gen. Geo. A. Johnson, for respondent.

BEATTY, C. J. This is an appeal by the defendant from a judgment of life imprisonment upon a conviction of murder in the first degree. Numerous errors are assigned.

1. We cannot say that the superior court erred in overruling defendant's motion for a new trial for the reason that the verdict is contrary to the evidence. Although there is a serious conflict in the evidence, and, as it appears from the bill of exceptions, even a preponderance in favor of the defendant upon his defense of *alibi*, still, as there is sufficient evidence to support the verdict, it must be assumed that the jury, who saw and heard the witnesses for the defense, had good reason for discrediting their statements.

2. The superior court did not err in excluding from evidence the newspaper accounts of the killing and of the arrest of the defendant. They were not competent evidence of any material fact in the case, and were not rendered admissible by reason of the fact that they might have tended to corroborate the statements of one of defendant's witnesses upon purely collateral matters called out upon cross-examination. There had been no attempt to impeach the witness upon these points, nor any question made as to the truth of his statements.

3. As all the evidence in the case went to prove a deliberate murder, leaving no question for the jury except that of the identity of the murderer, it may have been unnecessary, but it was not error, certainly not prejudicial error, to charge the jury as to the law of manslaughter, and excusable and justifiable homicide. Such instructions could not by any possibility have harmed the defendant.

4. In attempting to define "reasonable doubt" the judge of the superior court gave an instruction containing an expression which has been repeatedly condemned by this court as meaningless, if not confusing. To tell the jury that the defendant is entitled to be acquitted if there remains a reasonable doubt of his guilt, and then in the next breath to tell them that "mere possible doubts, however reasonable, which beset some minds on all occasions," should not prevent a verdict of guilty, would seem to tend only to confusion. But in two cases, (*People v. Kernaugh*, 72 Cal. 609, 14 Pac. Rep. 566, and *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. Rep. 310,) this court, while severely and justly condemning similar if not identical language to that above quoted, held, nevertheless, that taking the whole charge together there was a sufficiently accurate definition of what the law terms "a reasonable doubt," and that the instruction was not invalidated by this meaningless expression. Upon the same reasoning it may be held that its use in this instance was not prejudicial error. We cannot, however, abstain from again expressing the hope that the trial judges who have made use of this form of instruction will eventually see the propriety of returning to the approved definition which, since the time of Chief Justice SHAW, has never been improved upon.

5. The jury were instructed that, while it was necessary to prove the guilt of the defendant beyond a reasonable doubt, he could establish any fact essential to his defense by a mere preponderance of evidence. It is claimed that this was ineffect, and by implication, an instruction that

it was necessary for the defendant to prove the *alibi*, upon which alone he relied as a defense, by a preponderance of evidence. But it is not a necessary implication from the language of the instruction that the defendant must prove any fact relied on by him by a preponderance of evidence, and, as to the *alibi* upon which he relied, the jury were correctly and explicitly charged that the defendant must be acquitted in case of a reasonable doubt that he was present at the time and place of the murder. This was sufficient to cure any apparent error in the instruction objected to.

6. There was no error in charging the jury that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness against the testimony of any greater number of witnesses." This is certainly true as a legal proposition, and it is not perceived how its statement in this case can possibly have prejudiced the defendant.

7. In instructing the jury upon the question of *alibi*, the trial judge made use of the expression, "place of the alleged murder," and immediately following in the same connection used the words, "time and place of the murder." It is claimed that this was an assumption that the crime of murder had been proved, and was equivalent to an instruction to that effect. We do not so regard it. The instruction has regard to the crime of murder "alleged" in the information, and so the jury must have understood it.

8. The court correctly instructed the jury as follows: "If you entertain a reasonable doubt as to whether the defendant is guilty of murder in the first degree, then you should not find him guilty of murder in the first degree, but you should proceed to inquire whether he is guilty of murder in the second degree." But immediately following this language the court added: "And if you believe from the evidence in the case beyond a reasonable doubt that the defendant is not guilty of murder in the first degree, but that the defendant with malice, [stating elements of murder in the second degree,] then you should find him guilty of murder in the second degree." It is contended that the court here charged the jury not to consider murder in the second degree, unless they were satisfied beyond a reasonable doubt that defendant was not guilty of the higher offense, thus reversing the merciful rule prescribed by the legislature. But it is plain to us that the expression, "beyond a reasonable doubt," as here used, applies to and qualifies that part of the instruction following, which defines murder in the second degree, and so we are bound to presume the jury must have understood it. By itself it bears this meaning, and immediately following this language is added: "If you entertain a reasonable doubt as to whether the defendant is guilty of murder in either the first or second degree, you should not find him guilty of murder, but you should proceed to inquire whether or not he is guilty of manslaughter," etc. This makes the meaning of the whole instruction plain, or at least it leaves noth-

ing in the literal terms of the instruction of which the defendant can complain, for, if the jury can be supposed to have taken it literally as construed by the defendant, they must have understood (1) that they could not convict of murder in the first degree if there was a reasonable doubt of guilt in that degree, and (2) that they could not convict of murder in the second degree, unless it was proved beyond a reasonable doubt that defendant was not guilty of murder in the first degree. In other words, following the instruction as construed by defendant, the jury could not have convicted him improperly of murder in the first degree, but might have been compelled to acquit him improperly of murder in the second degree. This was not an error of which he could complain.

We have thus reviewed all of the assignments of error. We find that the court used language in its charge tending to confusion upon some points, but that the entire charge construed together is sufficiently accurate and free from substantial error, at least of error prejudicial to the defendant, and conclude that the judgment must be affirmed. It is so ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.

3 Cal. Unrep. 302 ———

BARRY v. GOAD *et al.* (No. 12,984.)¹

(Supreme Court of California. Nov. 6, 1890.)

SCHOOLS—BOARD OF EDUCATION—EMPLOYMENT OF TEACHERS.

The employment, by the board of education of the city and county of San Francisco, of inspecting teachers, whose duty it is to visit the schools and ascertain, by frequent oral examinations, the condition of the classes, and to give advice to teachers and principals when necessary, is within the power to "employ teachers" conferred on the board by Worley, Consol. Act, p. 171, § 1, subd. 3, (St. Cal. 1871-72.)

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; N. HAMILTON, Judge.

Otto Tum Suden and *Horace W. Philbrook*, for appellant. *Jos. Rothschild*, for respondents.

FOOTE, C. This action was brought by the plaintiff, a resident citizen of California, of the city and county of San Francisco, and a tax-payer, for the purpose of restraining the defendants, the board of education of the city and county of San Francisco, from drawing any drafts upon the school fund of the said city and county in favor of Laura T. Fowler and J. G. Kennedy, as compensation for their services as teachers in the public schools of said city and county. The cause was tried before the court, without a jury, and there is no bill of exceptions or statement on motion for a new trial. Upon the complaint and answer, apparently, the court found—*First*, that the allegations of the complaint were not sufficient in law to entitle the plaintiff to any relief or judgment; *second*, that all the affirmative allegations in defendants' answer were true. Judgment passed for the defendants, from which this appeal is taken. The whole matter turns upon the question as to whether the board of education had the power to appoint,

and order paid out of the school fund, Fowler and Kennedy, as inspecting teachers, and this depends upon the language of the statute, which is the measure of their power to appoint teachers; and whether the duties assigned to the teachers above mentioned, under their employment by the board, are those which appertain to teachers such as that board could appoint. The answer sets up, in an affirmative defense, the resolution of the board defining the duties of the teachers, who, it is claimed by appellant, are inspectors merely, and not teachers. He insists that such persons were not employed to perform the functions of teachers in the public schools at all, but were to be mere inspectors of schools, and to perform the duties that pertained to members of the board of education, which could not be delegated to any one. That being so, such appointments or employments were without authority of law, and the appointees could not be paid from the school fund. The power of employing teachers given to this board is to be found in the Statutes of 1871-72, (see Worley, Consol. Act, p. 171,) as follows: Section 1, subd. 3. "To employ and dismiss teachers, janitors, and school census marshals, and to fix, alter, allow, and order paid their salaries or compensation," etc. The resolution of the board of education, under which Laura T. Fowler was employed as inspecting teacher, paid, and her duties defined, provides, specially, that her duty shall be to visit schools and ascertain by frequent oral examinations the condition of the classes; to observe carefully the methods of teaching and discipline by the teachers; to give advice and assistance to teachers and principals, when necessary; and, in the presence and before their classes, exemplify the best methods of teaching. It is alleged in the answer, and not denied, that J. G. Kennedy was appointed by the board as head inspecting teacher of the public schools of San Francisco. It is plain, we think, that unless the duties to be performed by them are such as are compatible with those of teachers in the public schools, the statutes do not authorize their employment or payment out of the school fund. Whether such appointments of teachers are, or not, in consonance with good policy in connection with the public schools is not a matter which comes within the purview of the appellate court to consider. The only thing left for determination is whether these persons, thus appointed, are teachers in the sense as expressed in the statute above quoted. That statute does not declare what kind of teachers the board is to employ. It says they may "employ and dismiss teachers." This means of course teachers for the public schools, such as the course of study in such schools, as prescribed by law and the regulations of the board, may demand. We cannot see what duty is assigned to these so-called "inspecting teachers," which may be said to make them anything but teachers, instructors, or tutors. They seem to be a higher order of teachers than those immediately over the pupils; but they are nevertheless teachers. They examine the

¹ Reversed in banc. See 26 Pac. 785, 89 Cal. 215.

school children orally, and thereby ascertain the condition of their classes. They observe the methods of teaching and discipline pursued by the other teachers. They give advice and assistance to other teachers, and, in their presence and before their classes, exemplify the best methods of teaching; and all these matters come within the province of a teacher or instructor, and tend to educate the public school children. We cannot say, therefore, that the board of education exceeded its powers in employing this kind of teachers; and we advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

86 Cal. 348

PERKINS *et al.* v. ONYETT *et al.* (No. 13,-348.)

(Supreme Court of California. Nov. 7, 1890.)

EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIMS—MORTGAGES—HOMESTEAD.

1. Under Code Civil Proc. Cal. § 1475, providing that a mortgage on a homestead must be presented like other claims against an estate, a judgment of foreclosure cannot be sustained where the only presentation was of the note, secured by the mortgage.

2. Section 1494, providing that every claim presented to the executor or administrator "must be supported by the affidavit of the claimant, or some one in his behalf," further provides that, "when the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant," also that the affidavit must state that there are no credits, offsets, etc., "to the knowledge of affiant." *Held*, that where an affidavit was made by an agent, and he gave no reason therefor, and further stated that there were no credits, etc., "to the knowledge of claimant," the claim having been rejected, an action could not be maintained thereon. Estate of Swain, 67 Cal. 637, 8 Pac. Rep. 47, distinguished.

in bank. Appeal from superior court, Butte county; PHILIP W. KEYSER, Judge.

John Gale, for appellants. Gray & Sexton, for respondents.

PER CURIAM. This action was brought upon a promissory note made in his lifetime by John Onyett, deceased, and upon a mortgage to secure it, executed by said John and his wife, Amy Onyett, on premises which constituted their homestead, the homestead being on community property. The defendants are S. B. Onyett, executor of the estate of said John, deceased; the said Amy, his widow; and Jenkin Morgan, who claims an interest in the mortgaged premises. The answer of the executor and said Amy sets up several defenses, such as payment, the statute of limitations, etc., and denies that there was ever any legal presentation of either the note or the mortgage to the executor, within the time prescribed by law. The trial court gave judgment for plaintiffs upon both the note and mortgage; and the executor and said Amy appeal from the judgment, upon the judgment roll, with several bills of exceptions. The court

finds, among other things, that the only presentation of plaintiffs' claim that was made to the executor within the time prescribed by law was a presentation of the note alone, without any reference whatever to the mortgage; and that the only affidavit by which said claim was supported was as follows: "Milton J. Green, agent for Perkins & Co., whose foregoing claim is herewith presented to the executor of the estate of said deceased, being duly sworn, says that the amount thereof, to-wit, the sum of six thousand five hundred and fifty dollars and interest, is justly due to claimant; that no payments have been made thereon which are not credited; and that there are no offsets to the same, to the knowledge of said claimant." This was signed by Green, and sworn to before a notary public, and was properly certified. As there was no presentation of the mortgage, that part of the judgment which forecloses it is clearly erroneous. Even if all recourse against other property had been waived in the complaint, (which was not done,) still the judgment could not be maintained, because a mortgage of a homestead on community property must be presented. Section 1475, Code Civil Proc.; Camp v. Grider, 62 Cal. 20; Bollinger v. Manning, 79 Cal. 7, 21 Pac. Rep. 375.

It is contended, however, that the mortgage, having been defeated through failure to present it, might be considered as valueless; and that, therefore, an action, under a properly amended complaint, might be maintained against the estate upon the note alone. But it is useless to consider that question, because the presentation of the note itself was fatally defective. Section 1494 of the Code of Civil Procedure, after providing that every claim presented to the executor or administrator "must be supported by the affidavit of the claimant, or some one in his behalf," further provides that, "when the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant." No attempt to comply with this last requirement in presenting the note in the case at bar was made. See affidavit of Green, above quoted. The section also provides that the affidavit must state that there are no credits, offsets, etc., "to the knowledge of affiant," which the affidavit in this case does not state. It is contended that Estate of Swain, 67 Cal. 637, 8 Pac. Rep. 47, is authority to the point that such defect in the affidavit is not material. But that case does not support this contention. The Estate of Swain was not a case where a claim had been rejected by the administrator. The claims there had been approved and allowed by the administrator and the probate judge, and had been filed among the approved claims against the estate. Such allowance established, *prima facie*, their validity. Afterwards, upon the settlement of the final account of the administrator, the heirs contested the claims; and upon that issue, the court said: "In law, the allowance of the claims, although made upon defective verifications, was not void. It was a judicial act, which entitled the

claims to rank as acknowledged debts of the estate, to be paid in due course of administration; but, as a judicial act in their favor, it was not binding and conclusive against the heirs, because they were not parties to it. They had, therefore, the right to question the allowance at the settlement of the estate." That was a very different case from one where, as in the case at bar, a person seeks judgment against an estate upon a rejected claim, when the "judicial act" has been against him. In such a case the plaintiff must show at least a substantial compliance with each requirement of the statute on the subject of the presentation of claims; and as, in the case at bar, the respondents made no attempt at complying with the provision above quoted relating to the affidavit by which a claim must be supported, they cannot maintain an action against the estate upon the promissory note set forth in the complaint. And this view makes it unnecessary to discuss other points which are made in the case.

The judgment is reversed.

86 Cal. 192

GRIFFITHS v. GALINDO. (No. 12,980.)

(*Supreme Court of California.* Oct. 23, 1890.)

DEDICATION—HIGHWAYS.

Where the owner of an entire tract has it surveyed and laid off into lots and streets, and a map made of the survey, and then sells the lots at auction before the map is filed for record, but does not deliver the deeds until after it is recorded, there is a complete dedication to the public of the streets designated on the map, and a purchaser at the auction sale at which the map was used to inform purchasers of the location of the lots and streets cannot close the street, though his deed includes the land to its center, for that is simply a conveyance of the legal title subject to the public easement.

Department 1. Appeal from superior court, Contra Costa county; Jos. P. JONES, Judge.

G. W. Bowie, for appellant. W. S. Tinning, for respondent.

WORKS, J. This is an action for damages for an alleged trespass upon lands in entering upon the lands of the plaintiff, and tearing down a fence situate thereon. The defendant, in his answer, justified on the ground that the land where the fence was situate was a public street, and the fence an obstruction thereof; that he was road overseer of the district, and under an order of the board of supervisors of the county removed said fence as an obstruction to the street. The whole question in the case is whether the land in controversy had been dedicated to and accepted by the proper authorities, or by user, as a public highway. The owner of an entire tract of land, including the property owned by the plaintiff at the time this action was commenced, caused the same to be surveyed and laid off into lots and streets, and a map to be made thereof. He subsequently sold some of the property at public auction, and the plaintiff became the purchaser of three of these lots. At the time the sale was made, the map had not been filed in the recorder's office, but it was so filed before deeds were made to the purchasers, and the lots purchased

by the plaintiff were described as "those certain lots, pieces, and subdivisions of land, being portions of the government or Gwin ranch, in said Contra Costa county, as subdivided, laid out, and surveyed for J. Rosenthal and G. Bates, in September, 1884, by T. A. McMahon, county surveyor, and as per map and survey thereof filed in the office of the county recorder of said county on the 8th day of November, 1884, and which said lots and subdivisions of land are known and therein designated as lot No. forty-six, (46,) as lot No. forty-seven, (47,) and lot No. forty-nine, (49.)" The deed also described each of these lots separately, by metes and bounds, running to the centers of the streets designated on the map, and designating them as such streets. While, as we have said, this map was not filed in the recorder's office at the time of the sale, it was on the ground at the time, and the attention of all purchasers was called to it, and they were notified that when they purchased the lots designated on the map they purchased and paid for the lands to the centers of the streets designated on the map as bordering on such lots. A number of other persons, besides the plaintiff, became purchasers at the same sale and under like circumstances. The street bordering on the plaintiff's land was used by the public as a street, but not exclusively, or by a great number of people. The plaintiff, claiming that he had bought the land to the center of the street, constructed a fence in the center thereof, and cultivated one-half of the street. The board of supervisors ordered the street to be opened, and all obstructions removed. The defendant, as road overseer of the district, and acting under this order, took down plaintiff's fence and removed it from the street; and this is the alleged trespass complained of. The court below found that the land had been dedicated for and accepted as a public street, and found for the defendant. A new trial was denied, and the plaintiff appeals.

The contention of the appellant is that the map was not filed at the time of the sale, that the streets themselves were sold, the land sold on each side extending to the center of the street on each side, showing that at that time there was no intention to dedicate the property, or any part of it, for street purposes, and that, by conveying the property including the streets, the owner withdrew his offer of dedication, if one was made. But, as has been said many times, the question of dedication is one of intention, to be determined from the acts of the owner. *Harding v. Jasper*, 14 Cal. 647; *People v. Reed*, 81 Cal. 70, 22 Pac. Rep. 474. In this case the acts of the owner show a clear intention to dedicate this and other streets designated on the map. He had the land surveyed, and a map made designating the streets. He made the sales at public auction with reference to the map, and before the deeds were made, and while he was still the owner of the land, caused the map to be filed in the recorder's office, and the descriptions in the deeds referred to such map. The case differs materially from *People v. Reed*, supra, and other cases cit-

ed by the appellant. There was in this case a complete offer of dedication by the owner of the land. No act on his part withdrawing the offer is shown. The public authorities accepted the offer of dedication by entering an order designating the street as a public highway, and ordering it to be opened and obstructions removed. The fact that the specific description of the lots purchased by the plaintiff carried the plaintiff's exterior lines to the centers of the streets does not affect the question. Conceding that the streets existed, he was entitled to a deed to the center of the street, and thereby became the owner of the legal title to one-half of the street, subject, however, to the right of the public to use it as a public highway. This was the legal effect of the description of the property by reference to the numbers of the lots. The lots extended to the centers of the streets. Therefore the description by metes and bounds was precisely the same in legal effect as the general description. This is not like the cases referred to and relied upon by the appellant, to the effect that a conveyance of the whole tract included in the map, without reference to such map, may amount to a withdrawal of the offer to dedicate. Here the land was not sold in a body, but in separate lots, according to and with reference to the map, and that such sales were not intended to withdraw the offer to dedicate is conclusively shown by the fact that the owner, before conveying the property, made his offer complete and effective by placing the map on file, and making the conveyances with reference to it as such recorded map. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

(86 Cal. 191)

DE FLORES v. SANTA CRUZ. (No 13,658.)
(*Supreme Court of California.* Oct. 23, 1890.)

APPEAL—OBJECTIONS NOT MADE BELOW.

Where, in an action to set aside a deed on the ground that it was procured by duress, a demurrer to the complaint is overruled by consent, and defendant answers admitting the execution of the deed, but denying that it was obtained by duress, it cannot be objected on appeal for the first time that the complaint is insufficient because it fails to aver directly that plaintiff executed the deed.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

W. T. Williams, for appellant. **M. J. Waldheimer** and **Frederic Hall**, for respondent.

WORKS, J. This is an action to set aside a deed on the ground that it had been procured by duress. There was a judgment for the plaintiff. A motion for a new trial was overruled, and the defendant appeals. It is contended that the complaint is insufficient because it does not directly allege the execution of the deed by the plaintiff. We think the complaint is sufficient in this respect, but if it were not the record shows that the demurrer to the complaint was overruled by consent, and the defect in the complaint is cured by the an-

swer, which alleges the execution of the deed, but denies that it was procured by duress. As there was an allegation of such a conveyance in the complaint, which is made certain by the answer, the appellant cannot be allowed to attack the complaint in this court, for the first time, on this ground. The findings support the judgment, and they are sustained by the evidence. The judgment and order are affirmed.

We concur: FOX, J.; PATERSON, J.

(86 Cal. xxi)

PEOPLE v. WING. (No. 20,730.)
(*Supreme Court of California.* Oct. 17, 1890.)
DEGREES OF CRIME—FINDING BY JURY.

Under Pen. Code Cal. § 1157, providing that, "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, shall find the degree of the crime of which he is guilty," the judgment will be set aside when, upon conviction, the jury fails to find such degree.

Department 1. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

John Flournoy, for appellant. **Atty. Gen. George A. Johnson**, for the People.

PER CURIAM. The only question in this case is the same as that decided in the case of *People v. Travers*, 73 Cal. 580, 15 Pac. Rep. 293; and, on the authority of that case, the judgment appealed from must be reversed. So ordered.

(3 Cal. Unrep. 300)

WILLAMETTE STEAM MILL & LUMBER CO.
v. KREMER et al. (No. 13,690.)

(*Supreme Court of California.* Oct. 22, 1890.)
MECHANIC'S LIEN—NOTICE—SUFFICIENCY OF DESCRIPTION.

Where a mechanic's lien notice describes the property as a dwelling-house, situate upon a certain lot, and it turns out to be situated partly on that lot and partly on another, the lien cannot be enforced, as there is no lien on that part of the house not situated on the lot named, and it would work great injury to the owner to allow the lien to be enforced against a part only of the house.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Wells, Guthrie & Lee, for appellants. **Johnston & Borden** and **Barclay, Wilson & Carpenter**, for respondents.

WORKS, J. This is an action to foreclose mechanics' liens. There were three claimants, and their actions were consolidated together. The notice of two of the liens described the property as situate on lot 6 of a certain addition to the city of Los Angeles. The other described the property as "that certain dwelling-house now upon that certain lot or parcel of land situate in the city and county of Los Angeles, state of California, at the north-east corner of Eighth and Hope streets." This notice did not give the description of the lot by number or reference to the addition or map of it, but it described the corner lot, and, as the property was subdivided into lots and blocks, this description must, if sufficient

at all,—which we very much doubt,—be held to mean the corner lot as thus subdivided, and no more; so that all of these descriptions, conceding this one to be sufficient, are in legal effect the same. At the trial the court found that the house was situated partly upon lot 6, which was the corner lot, and partly upon the adjoining lot, 7. Upon this finding the court rendered a decree foreclosing the lien on lot 6 only, which took all of the house but about 10 feet.

It seems to be too clear for argument that a lien cannot be enforced against a part of a house. Counsel for respondents say that the appellants are not injured by their taking only a part of the property that might have been included in their lien. Ordinarily, no doubt, this would be so, but it is not so in this case. To attempt to sell a part of the appellants' house would necessarily be to sacrifice the property. No one would pay a reasonable price for a part of a house, and the 10 feet, or less, remaining to the appellants would be almost, if not entirely, worthless. Such a sale would therefore work great injury, and cannot be allowed. For these reasons the liens in this case cannot be upheld. There are other errors assigned by the appellants and urged in their briefs, but as the one mentioned is fatal to the liens the others need not be considered. The judgment and order are reversed.

We concur: PATERSON, J.; Fox, J.

88 Cal. 235

MIX v. SAN DIEGO & C. RY. CO. (No. 13, 857.)

(Supreme Court of California. Oct. 27, 1890.)

APPEAL—PRACTICE—RECORD.

1. When the statement of the case copied in the transcript on appeal was not filed in the court below after it was settled, it is no part of the record, and error predicated on the evidence cannot be reviewed.

2. Where the statement was not used on motion for a new trial, it cannot be the basis of an appeal.

Department 1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Cassius Carter, S. C. McCormick, and Leovy & Humes, for appellant. Hunsaker, Britt & Goodrich, for respondent.

WORKS, J. This is an appeal from a judgment of nonsuit. A statement of the case is copied into the transcript, but it does not appear to have been filed in the court below after it was settled. This being so, it is no part of the record, and cannot be looked to in aid of this appeal; and, as the only ruling complained of depends upon the evidence given at the trial, the position taken by the appellant has nothing to support it. *Mills v. Dearborn*, 82 Cal. 51, 55, 22 Pac. Rep. 1114. Besides, it does not appear that the statement was used on motion for a new trial, and for that reason it cannot be the basis of an appeal from the judgment. *Jue Fook Sam v. Lord*, 83 Cal. 160, 23 Pac. Rep. 225. Judgment affirmed.

We concur: Fox, J.; PATERSON, J.

88 Cal. 246

SAN FRANCISCO & N. P. R. CO. v. TAYLOR.
(No. 12,067.)

(Supreme Court of California. Nov. 1, 1890.)

CONDEMNATION PROCEEDINGS—VALUE OF LAND—IMPROVEMENTS.

In condemnation proceedings by a railway company, commenced after the construction of the road, the land-owner is not entitled to recover the value of the improvements placed upon the land, but simply the value of the land.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

D. H. Whittemore and W. H. Sears, for appellant. Charles F. Hanlon, for respondent.

BELCHER, C. C. This is an action to condemn a right of way for a railroad across a piece of swamp and overflowed land owned by the defendant. Judgment of condemnation was entered in the court below, from which, and from an order denying a new trial, the defendant appeals. The only question involved in the case relates to the measure of compensation which the defendant was entitled to claim and receive for the strip of land taken. The facts affecting this question are as follows: In the year 1860 one Blatchley made application to purchase from the state a tract of swamp and overflowed land situate in Marin county, and known as "Survey No. 55." He paid 20 per cent. of the purchase price, and one year's interest on the remaining 80 per cent thereof, and, in April, 1861, received a certificate of purchase. He never made any further payments of interest or principal. In July, 1882, he assigned his certificate of purchase to the defendant, and in January, 1883, the latter obtained from the state a patent for the land. In 1876, the Sonoma & Marin Railroad Company, the grantor of the plaintiff, constructed a road-bed across the said land, and in 1878 laid its track thereon. Since 1876 the said company and the plaintiff, its successor in interest, have been continuously in possession of the strip so taken, and using it for the purposes of a railroad. Whether Blatchley knew of the construction of the railroad across this land, or whether he consented or objected to its construction thereon, does not appear. It would seem, however, that he must have known of it between the years 1876 and 1882, unless he had abandoned his intention to complete the purchase, or was more than ordinarily careless in regard to his own affairs. Shortly after obtaining his patent, the defendant commenced an action to eject the plaintiff from the possession of the said strip, and before that case was brought to trial, this proceeding was instituted. At the trial of this case the defendant claimed that he was entitled to have the value of all improvements placed on the land by the plaintiff and its predecessor in interest included in the compensation which should be awarded to him. The court allowed him the value of the land, but not of the improvements, and hence this appeal. The case is not materially different from that of *Railroad Co. v. Hesser*, 84 Cal. 435, ante, 288. In that case it was held, on the authority of *Railroad Co. v. Armstrong*, 46 Cal. 85, and other cases cited, that the defendant was not

entitled to be paid the value of improvements placed upon the land by the company before the commencement of the condemnation proceedings; and the rule there declared seems to be in accord with the weight of authority. We think that case decisive of this, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 265

In re WHITCOMB'S ESTATE. (No. 13,882.

(Supreme Court of California. Nov. 3, 1890.)

WILLS—CONSTRUCTION—PRECATORY WORDS.

A will provided, "I give to my nephew * * and to his son all my interest, either real, personal, or mixed, in the 'Jimeno Ranch.' * * * And I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife," to his son and his children or descendants, and in default of such, to Harvard College. Testator was a lawyer, had created trusts in the will by appropriate words, and had also devised property with a "recommendation" as to the disposal of it, when there was no question that he intended to give it absolutely. *Held*, the word "recommend" was intended only as advice, and not as a limitation of the estate, and no trust was created in favor of Harvard College.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Smith & Pomeroy, for appellant. *Edward J. Pringle and Jerome B. Lincoln*, for respondent.

FOOTE, C. This action was instituted for the purpose of construing a will. The appellant's contention is that the word "recommend" used in the sixth provision thereof "is obligatory, and that its effect is to limit A. D. Tuttle's interest to a life-estate, and to dispose of the remainder by his will, in accordance with the wishes of the testator." The court below disagreed with this desired construction, and from its decree in the premises, so far as the same affected the property mentioned in the sixth clause of the will, this appeal is taken.

That decree, among other matters, distributed the property in dispute "to the said Adolphus Darwin Tuttle and his son Charles Whitcomb Tuttle of Hancock, New Hampshire, in fee-simple absolute," and further ordered that George Hagar, who held the legal title of the property in trust, should make conveyance of the same to them. The testator, A. C. Whitcomb, was a lawyer who had acquired a large property in California. He left the state in 1867, and spent the last 20 years of his life in Paris, adding while there a good deal to his fortune. He died in 1888, leaving an estate which was inventoried at over \$4,000,000. A part of it consists of an equitable 31-48 parts, undivided, in the Jimeno rancho, originally a Spanish grant extending for some miles along the Sacramento river, in Colusa and Yolo counties. It contains about 18,500 acres

of land, of which 10,000 acres are in a swamp-land district, a large portion of it at times covered with water. The whole interest in this land, including appurtenances and personal property, was appraised at \$850,000. About \$25,000 of this value consists in town lots in the town of Colusa. The taxes upon the rancho were large, and the income proportionately small. It was improved only so far as was necessary to raise crops of hay and grain. Being not profitable, it was thought best to subdivide and sell it, and to that end George Hagar was invested with Whitcomb's title, he (Hagar) holding and owning the other 17-48 parts. This mere legal estate, held in trust for Whitcomb and his devisees, Hagar admitted in open court, and was willing to abide by the decree thereof ordering a conveyance to the Tuttles. The real party contesting here against the decree is Harvard College. Whitcomb had been brought up by A. D. Tuttle's mother, was much attached to Tuttle, and frequently aided him by gifts of money, and in the education of C. W. Tuttle, the son of A. D. Tuttle, whom Whitcomb wished to be prepared for the sphere in life intended for him, which would come by virtue of a large amount of property which Whitcomb had declared he should leave to him. Whitcomb removed to Paris, as before stated, was there married, and left surviving him two small children, who with his wife were his heirs at law. C. W. Tuttle was about 25 years of age at the date of this will. So much of the will as is necessary to this controversy is as follows: "I, Adolphus Carter Whitcomb, of the city and county of San Francisco, state of California, United States of America, but temporarily stopping in Paris, France, do make this my last olographic will and testament: (1) I give the San Francisco Protestant Orphan Asylum and to the Ladies' Protection and Relief Society, both of said San Francisco, each the sum of five thousand dollars, making in all the sum of ten thousand dollars. (2) I give to Mrs. Sarah Brazer Berry, now or formerly of Washington city, D. C., the sum of five thousand dollars; and, in addition, I release her from all indebtedness to me or my estate, for his kindness to my brother and myself after the May fire of 1861, at said San Francisco. (3) I give to Adolphus Darwin Tuttle, of Hancock, New Hampshire, and to Henry Foster Whitcomb, of Boston, Massachusetts, or to the survivor of them, one hundred thousand dollars of my Chesapeake & Ohio Railroad bonds, to be held by them in trust, nevertheless, to pay over semi-annually to my cousin Love Maria Whitcomb Willis, now or lately of Glenora, Yates county, New York, and to her daughter Edith, now or lately married, or to the survivor of them, during their natural lives, the income therefrom for their own separate use and behoof, free from the debts, charge, or control of their husbands, with the remainder or remainders thereof to their children or grandchildren '*per stirpes*,' if any be alive at the time of their death; and if none be alive then the said remainder shall go to my heirs at law. (4) I

give to my wife, Louise Palmyre Vion Whitcomb, two hundred thousand dollars (\$200,000) of my Chesapeake & Ohio Railroad bonds, and I recommend her not to dispose of them or to convert them without the distinct advice of my friend Mr. Bruce. (5) I give to the town of Hancock, New Hampshire, for the maintaining of a free public and unsectarian library, ten thousand dollars of my Chesapeake & Ohio Railroad bonds; and also to the said town the further sum of ten thousand dollars of said bonds,—one-half thereof, or such part of the said one-half as may be considered necessary, for the reclamation and embellishment of the 'common,' so called, in the village of said Hancock; and the rest of said ten thousand dollars as a fund, of which the income shall be used for the increase and maintenance of said reclamation and embellishment. (6) I give to my nephew, the said Adolphus Darwin Tuttle, and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, either real, personal, or mixed, in the 'Jimeno Rancho,' so called, wholly or partially in the counties of Colusa and Sutter, in said California, and all mortgages, contracts, debts, or dues arising therefrom; and I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife, in trust for the said Charles Whitcomb Tuttle, and to his children or descendants, if any be alive at the time of the death of his said son, and, if there be none so alive, to Harvard College, Cambridge, Massachusetts,—one-half of the income thereof to be used by said college for the assistance of students of said college to complete their regular course therein; and the other half of the income thereof for the general uses of the college, apart, however, from any participation therein by the divinity school. (7) I give to my herein-after named executor, Jerome Lincoln, of said San Francisco, all the rest of my property, real, personal, or mixed, except what I may have in France, of every kind and nature, and not hereinbefore disposed of, after the payment of my debts, in trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof, or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her,—one, Adolphe, born on or about the 23d day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882,—with the reversion or remainder of the whole three-third parts to the descendants '*per stirpes*' of the said two children, if any be alive at the time of the death of the said two children; and, if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in section six (6) of this will having reference to said Harvard College. The said Lincoln is hereby authorized to pay out of said two-third parts only such portion as he may deem meet, fit, and proper for the education and maintenance of said two children until they shall have arrived respectively at the age of twenty-one years, after which they will be entitled to receive their

Cal. Rep. 23-25 P.—52

portion of the yearly income or interest. And the said Lincoln is hereby authorized to appoint his successor or successors in this trust."

It is said in *Colton v. Colton*, 127 U. S. 309, 8 Sup. Ct. Rep. 1164, a case on appeal from the United States circuit court for California, as the rule on the subject laid down by Chief Justice MARSHALL: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." Mr. Whitcomb was a lawyer, and understood fully what was necessary in order to vest a trust estate. If he had intended that the property thus willed to Adolphus Tuttle and his son should finally go to Harvard College, as is contended for by the appellant, it was very easy for the former to have said so in unequivocal language. As to the other property mentioned in the seventh clause of his will, he expressly left it in trust to Jerome Lincoln to pay over to his testator's wife one-third of the income thereof during her natural life, and the other two-thirds to his two children born of her, with the reversion or remainder of the whole to their descendants "*per stirpes*" if any were alive at the death of the children; and if no descendants of them were alive at their death, the property to go to Harvard College, in conformity with the provisions named or indicated in section 6 of the will having reference to that college. If he had intended to create a trust in the sixth section, he would have said so in as plain language as he used in the seventh section. Again, when in the fourth section he leaves his wife \$200,000 of his Chesapeake & Ohio Railroad bonds, he further recommends that she do not dispose of them or convert them without the distinct advice of his friend Mr. Bruce. There it is plain that the solicitude of the husband for the wife's welfare induces him to say to her in effect: "It is my advice that you consult Mr. Bruce, and be governed by his judgment in your action as to the sale or conversion of these bonds." Even to the wife, to whom, from her close alliance to him, such a word as "recommend" might be intended to have more binding force than to a man like Mr. Tuttle, he does not use that word in a sense to convey any particular injunction or command, disobedience to which would affect her title to the property in any way, or by means of which Mr. Bruce acquired any interest in the property. And in the third section, where he recognizes the business capacity of, and his confidence in, A. D. Tuttle and Henry Foster Whitcomb by making them trustees for two persons, he uses apt and unambiguous language. In fact, the whole will taken together shows that the testator fully understood what he desired done with his property, and that when he intended trusts to exist he said so in plain language. And when he gave persons property, and recommended them to do so and so with it, he meant to leave them free to act upon his advice or not as they saw fit, but did not intend in any way to limit the estates he had bequeathed them

in the first part of the sections of the will giving the property. Such being the plain intent of the testator, it is clear that the trial court gave proper construction to the section of the will in controversy, and we advise that the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

86 Cal. 212

WHITE v. WHITE. (No. 12,890.)

(Supreme Court of California. Oct. 23, 1890.)

APPEALABLE ORDERS—DIVORCE—ALLOWANCE FOR ATTORNEY'S FEES—CONTINGENT FEES.

1. An order denying alimony for counsel fees *pendente lite* is an appealable order.

2. In an action for divorce, it was proper to refuse alimony *pendente lite* for counsel fees to an attorney who had agreed to give his services for a percentage of the property recovered as a result of the suit.

3. The existence of such contract does not preclude the granting of alimony for fees to other counsel not interested in the contract, whose services were necessary.

4. It appearing that \$2,400 had already been allowed for attorney's fees, and that this sum was more than had been paid by the husband to his attorneys, and more than half the amount that they were to receive in the suit, it was not an abuse of discretion to refuse a further allowance for that purpose to the wife.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

H. C. McPike and J. A. Cooper, for appellant. E. D. Wheeler and Barclay Henley, for respondent.

BEATTY, C. J. This is a suit for divorce commenced by the husband. The wife filed a cross-complaint, and the decision of the court was announced in her favor. Pending the preparation of findings, she moved for an allowance of alimony to enable her to pay counsel fees. Her motion was denied, "without prejudice," and she appeals from that order.

Respondent contends that the order is not appealable, but we think it must be held otherwise, on the authority of Sharon v. Sharon, 67 Cal. 185, 7 Pac. Rep. 456, 635, and 8 Pac. Rep. 709. With respect to the right of appeal, there would seem to be no distinction on principle between an order denying and an order granting alimony *pendente lite*. As to the merits of the case, it appears that the defendant has been represented by three attorneys, Mr. Highton, Mr. Cooper, and Mr. McPike, all of whom participated in the trial of the case and in the preliminary preparations. There was evidence that the services of Mr. Highton were worth from ten to fifteen thousand dollars, and those of the other two gentlemen from eight to ten thousand dollars; but it was shown that, about the time the litigation commenced, Mr. Highton and the defendant entered into a contract by which she agreed, in consideration of his services as her attorney, to pay him a certain percentage on the value of the property secured by her as a

result of the litigation. In other words, his compensation was made entirely contingent on success. The existence of this agreement was a sufficient reason for refusing any allowance to pay Mr. Highton for his services as attorney. Sharon v. Sharon, 75 Cal. 39-43, 16 Pac. Rep. 345. The contract with Mr. Highton, it is true, differs in important particulars from the Tyler contract in the Sharon Case, but there is no ground of distinction so far as concerns the right of defendant to receive an allowance from respondent for the purpose of paying Mr. Highton's fees. By the terms of his agreement, he was bound to perform all the services he did perform as appellant's attorney, and therefore she had no need of other means to secure their performance.

But as to Messrs. Cooper and McPike, who were employed before the making of the Highton contract, and who had no knowledge of its existence until after the trial, if their services in addition to those of Mr. Highton were necessary to the appellant to enable her properly to defend the action commenced by her husband, or to present the merits of her cross-action, the fact that Mr. Highton had contracted for a contingent fee was not in itself a sufficient ground for denying a reasonable allowance to pay them. We do not understand it to have been decided in the Sharon Case that the existence of the Tyler contract precluded an allowance to the plaintiff of a reasonable amount for the compensation of other attorneys whose employment was necessary. The order in that case was reversed, because it was a judgment, or several judgments, in favor of persons not parties to the action, *i. e.*, the several attorneys for plaintiff, including the Tylers. 75 Cal. 38, 39, 16 Pac. Rep. 362. This, we say, was the ground of reversal. It is also true that the order was criticised, and would undoubtedly have been modified on other grounds. As to the Tylers, who were allowed \$20,000, it would have been wholly set aside because their services were secured by the contract for a contingent reward. But as to the other attorneys, who had been allowed \$35,000, it was merely said that there appeared to have been no necessity for such an array of counsel, and that the amount allowed was excessive and beyond the discretion of the court. 75 Cal. 39-40, 16 Pac. Rep. 362, 363. The principle decided, and the principle which runs through all the cases, seems to be that the wife in a divorce case is entitled to such allowance out of the community estate as may be necessary to enable her to maintain her rights. Her husband, who has control of the community estate, is presumed to be using it in the litigation so far as his necessities require, and she is entitled to an equal privilege. Therefore, if she needs money to enable her to secure legal advice and assistance, she should have a suitable allowance; but, if she does not need it,—that is, if she has secured attorneys by an agreement for a contingent fee,—then no allowance should be made. If she has bargained with one attorney for a contingent fee, but has need of the services of another attorney, no allowance will be made on account of the

services of the former, but for the latter she will be allowed a reasonable sum. The question, therefore, for the superior court to decide in this case, was whether the services of Messrs. Cooper and McPike, in addition to those of Mr. Highton, were necessary; and, if so, what was a proper sum to be allowed for their payment. Upon this question there was but slight, if any, conflict in the evidence. The preponderance of the proof certainly was that the services of these gentlemen were not only important, but essential, and that Mr. Highton could not have conducted the case without the assistance of one or both of them. The respondent was represented throughout the proceedings by two able attorneys, and a part of the time by three, and it does not seem unreasonable to suppose that the appellant had need of more than one. If, therefore, the appellant had been applying for the first time for an allowance to pay counsel fees, we should feel constrained to hold that the order of the superior court was erroneous.

But there is evidence in the record that the respondent had, prior to this application, already paid to the appellant the sum of \$2,450 to enable her to pay counsel, and that this was more than he had paid his own counsel, and more than half of all they were to be paid. Upon this evidence the superior court would have been justified in concluding that the defendant had received all that was necessary for the compensation of her attorneys other than Mr. Highton, or at least all that was necessary to secure such additional counsel as she needed. At all events, in view of this testimony, we cannot say that the superior court abused its discretion in denying the motion. It may be true, as contended by counsel, that the decision of the superior court was in fact based upon the erroneous idea that the existence of the Highton contract was in itself an insuperable bar to any allowance for the services of other attorneys, however necessary; but this does not appear, and cannot be assumed. We find in the record matter which sustains the order, and we presume that it was made upon that ground. Moreover, as the motion was denied without prejudice, there is perhaps nothing to prevent its renewal hereafter, at which time it can be considered unembarrassed by this question. Order affirmed.

We concur: MCFARLAND, J. PATERSON, J.; FOX, J.; THORNTON, J.; WORKS, J.

88 Cal. 216

WHITE v. WHITE. (No. 13,948.)

(Supreme Court of California. Oct. 21, 1890.)

DIVORCE—ALLOWANCE FOR COUNSEL FEES—CONTINGENT FEES.

The fact that one of the wife's attorneys in a divorce suit has made a contract for a contingent fee, does not prevent an allowance *pendente lite* out of the community property for fees to other counsel who have no such agreements, and whose services are necessary to the wife's case.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

H. C. McPike and J. A. Cooper, for appellant. E. D. Wheeler and Barclay Henley, for respondent.

MCFARLAND, J. This is an appeal by defendant from that part of the judgment of the superior court which refuses to require plaintiff to pay defendant a reasonable sum of money for her attorneys' fees. The court finds that defendant made a certain contract with one of her attorneys, (Henry E. Highton,) and further finds upon the subject as follows: "By reason of the contract aforesaid between said Henry E. Highton and the defendant, the defendant is estopped and disentitled to any further allowance for counsel fees in this cause, and such allowance, for this reason, and for this reason alone, is refused. Irrespective of the said contract, the defendant would be entitled to a further allowance for counsel fees down to the date of this finding as follows, to-wit, \$12,500; and the defendant, for any further and additional services they may render, would be entitled to a further and additional allowance for counsel fees as might be determined by the court." And in the judgment the court decrees "that, by reason of the contract between Henry E. Highton, one of her attorneys, and the defendant, * * * the defendant cannot recover against the plaintiff for counsel fees in this cause; and for this reason alone no allowance is made to her for counsel fees, the reasonable value of which, beyond the payments already made, and apart from any services, if any, to be hereafter rendered, is \$12,500." In another appeal in this same action, (White v. White, ante, 1030, No. 12,890, this day decided,) we held that the said contract between defendant and Highton did not preclude the court from making an allowance to defendant for the payment of the services of attorneys employed by her other than said Highton, provided the services of such other attorneys were necessary, and sufficient allowances to pay them had not already been made; but in that appeal there was nothing in the record to show the ground upon which the court refused to make the allowance asked by defendant, and therefore the order appealed from was affirmed. On the present appeal, however, it appears that the part of the judgment appealed from was based on the supposition that the contract with Highton precluded any allowance to other attorneys. On that subject we adopt the views expressed in the appeal No. 12,890. But, while the court finds that \$12,500 would be a proper further allowance for counsel fees to the date of the judgment, it does not find what part of that amount, if any, defendant should have to pay for the services of her attorneys other than Highton, —viz., Cooper and McPike. No further allowance should be made to defendant on account of said Highton; but whatever further amount, if any, she should have been allowed for Cooper and McPike, under the said views expressed in the appeal No. 12,890, should have been included in the judgment. That part of the judgment here appealed from relating to allowance for counsel fees is reversed; and the

superior court is directed to award to defendant such further allowance as is necessary—if any such further allowance be necessary—to enable defendant to remunerate her attorneys Cooper and McPike for their services, in accordance with the views here and in said appeal No. 12,890 expressed.

We concur: BEATTY, C. J.; PATERSON, J.; FOX, J.; THORNTON, J.; WORKS, J.

86 Cal. 279

SOUTHERN PAC. CO. v. BURR. (No. 13,339.)
(Supreme Court of California. Nov. 4, 1890.)

PUBLIC LANDS—GRANT OF RAILROAD RIGHT OF WAY—EJECTMENT.

1. Congress has the power to grant a right of way over the public lands of the United States, and it is immaterial that such lands have long been occupied by one who is a qualified pre-emptor, but who has taken no steps to procure a title.

2. Act Cong. July 1, 1862, granting to the Central Pacific Railroad Company a right of way 200 feet wide on each side of its road, was a conclusive legislative determination that so much land was necessary to the use of the road, and gave an exclusive right of possession to the full width, and the company can maintain ejectment therefor against one who occupied without title before the grant.

3. The fact that the company offered to lease to such person for a nominal rent the land occupied by him does not affect its right of recovery.

Appeal from superior court, Placer county; B. F. MYRES, Judge.

Hale & Craig, for appellants. Wallace & Prewett, for respondent.

WORKS, J. The following opinion was prepared by BELCHER, C. C., when this case was pending in department 1:

"This is an action to recover possession of about five acres of land, situate in Placer county. The case was tried before the court, without a jury, and judgment was given for defendant. The plaintiff moved for a new trial, and, the motion being denied, appealed from the judgment and order. The land in controversy is situated within and forms a part of the right of way granted to the Central Pacific Railroad Company of California by act of congress passed July 1, 1862, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes.' Section 2 of the act provides 'that the right of way through the public lands be and the same is hereby granted to said company for the construction of said railroad and telegraph line; * * * said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands.' The plaintiff is the successor in interest of the original grantee, and as such claims a right to the possession of the disputed premises. The defendant is the successor in interest of one Skillinger, to whom a patent for a quarter section of land, embracing the disputed premises, was issued by the United States in December, 1880, and as such he claims title in fee. The defendant had the

land inclosed, and the plaintiff offered to allow him to maintain his inclosure and use the land, on condition that he would accept a lease thereof, and pay a nominal rent therefor. He accepted a lease for a year, but, at the expiration of the term, refused to renew it, saying that he owned the land, and 'he wouldn't pay a cent.' At the trial, the defendant was permitted, against the objections of the plaintiff, to prove that the quarter section patented to Skillinger was agricultural land, and that it was occupied as early as 1853, and continuously thereafter; that one Mitchell lived on it from 1860 till after the railroad was constructed across it, and was a qualified pre-emptor; that Mitchell was succeeded by one Summers, who was a citizen of the United States, and, with his family, resided on the land for a time, and then sold it to one Fuller; that Fuller sold it to a Mrs. Warren, who filed on it, and then sold it to Skillinger, who afterwards filed on it himself. We are unable to see that this testimony was relevant or material for any purpose. When the act of 1862 was passed, and until after the railroad was constructed, the quarter section was public land of the United States, and congress had full power to withdraw it from sale, or to sell or grant it as it pleased. *Railroad Co. v. Tevis*, 41 Cal. 489; *Farley v. Irrigating Co.*, 58 Cal. 142.

"The principal question discussed by counsel is, did the plaintiff have any such interest in the land as would enable it to maintain an action of ejectment? The theory of respondent is that it had not; that the act of 1862 granted only an easement for the construction and operation of a railroad and telegraph line across the land, and that, subject to this easement, the legal title passed to Skillinger under the patent of 1880; that having only an easement the plaintiff had, and can have, no right to use the land for any other purpose, and no cause of complaint until it is disturbed or obstructed in the enjoyment of the easement; and that, if disturbed or obstructed, its only remedy is by an action known under the old system as an 'action on the case,' or by 'bill in equity.' This theory is rested mainly upon the authority of *Wood v. Turnpike Co.*, 24 Cal. 474. In that case the plaintiffs purchased at sheriff's sale, under execution, 'all the right, title, interest, claim, and property of the Truckee Turnpike Company in and to the Truckee Turnpike Road, a highway,' and, having obtained the sheriff's deed, commenced an action of ejectment to recover possession of the property so purchased. It was held that the plaintiffs could not maintain the action because—(1) The franchises of the defendant did not pass by the sheriff's deed. (2) A road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments. (3) The lands traversed by the road were public lands of the United States, and the plaintiffs by their purchase acquired no title and no possessory interest therein. (4) 'The way levied upon and sold as the property of the company did not belong to it by any proprietary right. The way was *publici juris*. Its uses were not only

public, but it belonged to the public by title.' The road involved in that case was an ordinary toll-road, constructed on public lands without any special grant of a right of way. Since the decision was rendered, the law has in some respects been changed. The Code now provides that, 'for the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof may be levied upon and sold under execution in the same manner, and with like effect, as any other property.' Civil Code, § 388. And it has lately been held that the right of way for such a road is private property, though held for a public use, and is incident and necessary to the privilege of collecting tolls thereon, and constitutes an interest in the land on which the road rests. *Welch v. County of Plumas*, 80 Cal. 338, 22 Pac. Rep. 254. We think that case plainly distinguishable from this. Here there was a special grant of a right of way 200 feet in width on each side of the road. This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the road-bed and telegraph line may be only a small part of the 400 feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so.

"It is said that the plaintiff had no right to use the land for any purposes other than its railroad and telegraph line, and this may be conceded. But, under the law of this state, railroad companies are required to fence in their roads, (Civil Code, § 453,) and the plaintiff could undoubtedly have included within its fences the whole 400 feet. It is also said that, when the plaintiff offered to lease to the defendant the parcel in dispute, on payment of a small rent, it was attempting to use the land for an unauthorized and unlawful purpose. But the defendant had no right to inclose and occupy the land at all without the plaintiff's permission. The demand, therefore, that he accept a lease cannot affect the right of recovery. Besides, the demand may have been intended only as a recognition of the plaintiff's right to take and use the land for its legitimate purposes whenever it might wish to do so. The exact point involved here was before the United States circuit court for the district of Nevada in *Railroad Co. v. Benity*, 5 Sawy. 118, and it was held that the plaintiff could recover possession of the land in an action of ejectment. The court said: 'It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy; but, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under

the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot, or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track. The grant is a right of way to the extent of two hundred feet on each side of the track, and the plaintiff is entitled to possess and use the whole quantity. * * * The right of the plaintiff to possess the land in dispute springs not from an actual necessity for its use at any given point of time, but from the grant of the right of way to the extent of two hundred feet on each side of the track, a grant which, as we view it, carries with it necessarily a right to the possession of all the land within the limits named. Moreover, it might materially interfere with the plaintiff's enjoyment of the right granted if obliged to permit third persons to occupy all such portions of its right of way as it was not at the moment using. Whenever needed, the delay necessary for ejecting an occupant might cause inconvenience.' In *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. Rep. 433, the action was ejectment to recover a portion of a public street, and it was held that the action would lie. The court said: 'It is true an action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee, or the adjoining proprietor retains it.' So in *City of Winona v. Huff*, 11 Minn. 119, (Gil. 75,) the action was ejectment to recover possession of a public square. The land had been owned by the defendant, and dedicated to the public for a public square. Subsequently, he entered upon, inclosed, and held possession of the square, claiming title to it. It was held that the action could be maintained, and the court said, (page 136:): 'For a mere easement, perhaps the action would not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie.' We think the law correctly stated in the above-cited cases, and that under it the plaintiff in this case could maintain its action of ejectment. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial."

We are satisfied with this opinion, and for the reasons therein stated the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; PATERSON, J.; SHARPESTEIN, J.; THORNTON, J.

SOUTHERN PAC. CO. v. MEYER. (No. 13,340.)
(*Supreme Court of California*. Nov. 4, 1890.)

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Hale & Craig, for appellant. *Wallace & Prewett*, for respondent.

WORKS, J. This case is in all material respects the same as *Southern Pac. Co. v. Burr*, ante, 1032, (No. 13,339, just decided,) and, upon the authority of that case, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur; BEATTY, C. J.; MCFARLAND, J.; FOX, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

86 Cal. 306

In re ORTIZ'S ESTATE. (No. 13,625.)

(*Supreme Court of California*. Nov. 6, 1890.)

EXECUTORS AND ADMINISTRATORS—FOREIGN ASSETS.

It is the duty of a domiciliary executor to collect foreign assets so far as he is able; and he should be charged in his accounting with such assets when they were under his control, and might easily have been transferred to the domestic jurisdiction, before the filing of the account.

Commissioners' decision. Department 1.

Thomas I. Bergin and Sullivan & Sullivan, for appellant. *Smith, Wright & Pomeroy*, for respondents.

VANCLIEF, C. This is an appeal by the executor of said estate, Vicente Cagigal Pezuela, from an order of the superior court of the city and county of San Francisco, settling his final accounts. The deceased, a native of Spain, died in Spain on the 5th day of April, 1887, leaving a will executed in Spain according to the laws of that kingdom, and also in compliance with the laws of this state. At the time of his death, he was a resident of the city and county of San Francisco, in this state, where he left property of the value of about \$97,800. He also left personal property in Spain of the value of about \$15,000, and one-half of a house and lot; and also left property in Mexico. The will disposed of all his property to his seven children, and four grandchildren, and appointed the appellant (who was his son-in-law, and a native and resident of Spain) executor without bond or other security for the performance of the trust. There was no evidence of the laws of Spain except the testimony of the appellant, who said he was not a Spanish lawyer, but testified that no other letters testamentary than a duly authenticated copy of the will were required by the laws of Spain to authorize him to administer the Spanish assets of the estate, although he would be required to render a final account to a Spanish tribunal in order to be discharged from his trust. The will authorizes the executor to take possession of all kinds of property, credits, claims, and shares; to liquidate all accounts, and to approve them or not, as he sees fit; to claim, receive, collect, or pay whatsoever shall be owing the estate, or due by the same, of any nature whatsoever, wheresoever situated, giving and signing therefor the proper vouchers; to compound or settle differences which may arise, or submit them to friendly arbitration; to sell or exchange what may be deemed absolutely necessary, receiving the consideration therefor; and, when exchanging, to make up any difference. In all matters in which the executor cannot personally act, he may give power of at-

torney, general or special, "with power of revocation and appointment of new attorneys in fact, and to the formation of an inventory, appraisement, accounts, and partition, carrying out said changes by themselves, without submitting or reporting the same to any tribunal of justice, this being expressly prohibited;" basing said prohibition on his confidence that his executor will do nothing but what is just. The appellant accepted the trust; and, having received from the proper officers of Spain duly authenticated copies of the will, and a proper certificate of the death of the testator, he proceeded immediately to collect and take possession of all that part of the assets of the estate which were then in Spain, and converted all the personal property into money. He then, with his family, removed to this state, for the purpose of residing here while administering the California assets. He arrived in California in June, 1887; and, on the 22d day of that month, filed in the office of the clerk of the superior court of the city and county of San Francisco an authenticated copy of the will, which was afterwards admitted to probate by that court, and the appellant was appointed executor, and he qualified to act as such on the 26th day of September, 1887. Thus he became the domiciliary executor of the will, and at the same time was invested with the character of ancillary executor of the assets in Spain. On October 17, 1887, in obedience to section 1443 of the Code of Civil Procedure, he filed an inventory of all the property of the estate, including that situated in Spain. On February 13, 1889, the appellant filed his final account, in which he failed to charge himself with the assets in Spain, and prayed that the account be settled and allowed, and that the residue of the estate be distributed. In due time, two of the devisees and legatees named in the will filed objections to the account, on several grounds, but principally on the ground that the executor had failed to charge himself with the assets of which he, in his character of ancillary administrator, took possession in Spain. It appears that all the devisees resided in California and Mexico, and that all were represented in the proceedings in the superior court. After hearing the contest, the court charged the executor with \$9,847.29, which it found to be the residuum of the Spanish assets after deducting all proper demands and charges against the estate in Spain. The court also disallowed three small charges of the executor for traveling expenses from San Francisco to the city of Hermosillo, in Mexico, amounting to \$315.

1. Counsel for appellant contended that the court erred in charging the executor with the residuum of the Spanish assets, for the alleged reason that the administration of those assets had not been closed in Spain. This presents the principal question, and the only question of any difficulty to be decided. The evidence of the facts upon which the court acted, consists of the will, petitions, and inventories filed by the executor, and his testimony at the trial, and on a former occasion. The executor was examined and cross-ex-

amined at great length, and it is impracticable to epitomize his testimony by stating the mere substance of it so as to show its full effect and bearing upon his motives and intention. I think, however, that his testimony, in connection with the documentary evidence, substantially tends to prove, and is sufficient to justify findings of, the following facts: *First*, That the residuum of the assets in Spain had been under his active control, and at his disposal, as the domiciliary executor, during the term of at least six months before he filed his final account, though not actually separated from that part of such assets which may have been necessary to discharge the demands against the estate in Spain, and the expenses of administration there, which, however, could not have exceeded the value of the assets left in his hands, in his character of ancillary executor, for the purpose of paying such demands and expenses; *second*, that he could have had the residuum with which he was charged transferred to him in this state at any time within six months before the filing of his final account by simply drawing for it upon his brother, whom he had authorized to act for him in all matters pertaining to the estate in Spain, and who had on deposit, in a bank there, subject to appellant's order, proceeds of the estate in Spain, amounting to \$15,000; *third*, that with ordinary diligence in the discharge of the duties of his trust, the appellant might have had the administration of the estate in Spain closed, and the residuum thereof transferred to him in this state, before he filed his final account, but that he willfully refused to have this done, intending not to account for or to distribute that residuum in this state, but to account for and distribute it, if at all, in Spain. It is strenuously contended that the lower court assumed jurisdiction over the appellant and dealt with him in his character of ancillary executor on the estate in Spain, and not merely as domiciliary executor; but I think this is a mistake. The court dealt with him only as the principal domiciliary executor, and only held him responsible for what he should have charged himself with in his final account here. Upon the facts which the court was justified in finding, the case against him appears to be quite as strong as it would have been if his brother had been the ancillary executor of the estate in Spain, and he had willfully refused or neglected to procure a transfer of the residuum from his brother, as such foreign executor, to himself, knowing that with ordinary diligence, or by mere demand, he could do so. There is no complaint that he was charged with more than what would necessarily be the residuum after satisfying all lawful demands in Spain; nor is any reason suggested why, upon the settlement of his final account in Spain, the Spanish tribunal will not credit him with all that he has been required to account for and distribute in this state. There is no question here as to the estate in Mexico. For aught that appears, that portion of the estate has been administered and distributed to the satisfaction of all concerned. I think the law applicable to the

facts is correctly stated by Prof. Schouler, in his late treatise on Executors and Administrators, (2d Ed. 1889, § 175,) as follows: "The earlier rule frequently asserted in England, in one loose form or another, is that assets in any part of the world shall be assets for which the domestic executor or administrator is chargeable; the practical effect being to enjoin upon the principal personal representative the duty of procuring, so far as foreign law and the peculiar circumstances will permit, personal assets wherever situated, realizing the bulk of the estate of his decedent as best he may, gathering in the property as one who represents the whole fortune, and, having gathered it, account to those interested accordingly. Some of the judicial expressions on this point, to be sure, import too onerous a responsibility on the representative's part; and Mr. Justice STORY has pointed out the fallacy of holding a domestic executor or administrator answerable for foreign property which it is admitted that he can neither collect nor sue upon, nor compel its payment or delivery to himself by virtue of his domestic appointment,—foreign property, we may add, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware. And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary representative, whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign *situs*, or the limitations of his own appointment, may restrain him. If, therefore, assets cannot be collected and realized for the benefit of the estate without a foreign ancillary appointment, the executor or administrator of the decedent's last domicile ought, so far as may be consistent with his information, the means of the estate at his disposal, and the exercise of a sound discretion, to see that foreign letters are taken out, and that those assets are collected and realized, and the surplus transmitted to him. If, as frequently happens, the domestic representative may collect and realize such property in the domestic jurisdiction, as by selling negotiable bonds, bills, notes, or other securities, payable abroad, or by delivering bills of lading or other documents of title, (indorsing or assigning by acts of his own which would be recognized in conferring the substantial title in such foreign jurisdiction,) or, otherwise, by effectually transferring property of a chattel nature situated or payable elsewhere, which is capable, nevertheless, of being transferred by acts done in the domestic jurisdiction, he should be held accountable for due diligence as to such net assets; and so, too, he may enforce the demand against the debtor without resort to the foreign jurisdiction. If, however, foreign letters and an ancillary appointment at the *situs* be needful or prudent in order to make title, and to collect and realize such assets, the principal representative should perform the ancillary trust,

or have another perform it, observing due diligence and fidelity, according as the laws of the foreign jurisdiction may permit of such a course; and if, in accordance with those foreign laws, a surplus be transmitted to the principal and domiciliary representative, or otherwise transferred, so as to be held by him in such capacity for payment and distribution, he will become liable for it accordingly. Whether, then, the principal or domiciliary representative be required *pro forma*, or not, to include in his inventory assets which come to his knowledge, either situate in the state or county of principal and domiciliary jurisdiction, or out of it, his liability as to assets of the latter sort depends somewhat upon his means of procuring them, and the fact of an ancillary administration in the *situs* of such assets. In any case he is bound to take reasonable means, under the circumstances, for collecting and realizing the assets out of his jurisdiction; nor is his liability a fixed, absolute one, but dependent upon his conduct, and it is getting the foreign assets into his active control that makes a domestic representative chargeable as for the property or its proceeds, rather than upon the duty of pursuing and recovering such assets. If assets situated in another jurisdiction come into the possession of the executor or administrator in the domiciliary jurisdiction, by a voluntary payment or delivery to him, without administration there, it follows that he should account for them in the domiciliary jurisdiction whose letters were the recognized credentials in the case. And it is held in several American cases, consistently with this rule, that, no conflicting grant of authority appearing, the domiciliary appointee of another state may take charge of and control personal property of the deceased in the state of its *situs*." See, also, *Wilkins v. Ellett*, 9 Wall. 741, and *Van Bokkelen v. Cook*, 5 Sawy. 589. The authorities cited by appellant's counsel seem not inconsistent with the above extract from Prof. Schouler's work. None of them denies the duty of the domiciliary executor to gather in, and account for, the foreign assets to the extent of his conscious ability to do so, nor the consequent and corresponding authority of the court of the domicile to compel him to account for willful neglect to perform such duty. All the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor.

2. As to the disallowance of the three items of traveling expenses, it is to be observed that, as they pertained solely to the administration of the estate in Mexico, they should be paid from that part of the estate, and not from the estate in California. If those charged may be allowed here, why may not all the expenses of administration, both in Mexico and Spain, be charged to the California estate? I think the order appealed from should be affirmed.

We concur: GIBSON, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

86 Cal. 284

JACKS v. JOHNSTON. (No. 12,247.)

(Supreme Court of California. Nov. 12, 1890.)

EXECUTION—TIME OF ISSUANCE.

The general rule under Code Civil Proc. Cal. § 681, is that execution cannot issue after five years. Section 685, however, provides that "in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion." *Held*, that a judgment foreclosing a mortgage given to secure a note, though not a personal judgment, was a judgment for the recovery of money within the five years' limitation. THORNTON, J., dissenting.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Geil & Morehouse, (T. I. Bergin, of counsel,) for appellant. *R. M. F. Soto*, (*Hermann & Soto*, of counsel,) for respondent.

McFARLAND, J. In this case an action was brought upon a promissory note for \$1,300, and interest, and a mortgage given to secure it. Judgment in the usual form

was rendered for plaintiff on March 29, 1879, except that, by stipulation, the decree provided that no judgment should be docketed for any deficiency if the proceeds of the sale should fail to satisfy the amount found due. On April 11, 1887, more than eight years after the entry of the judgment, plaintiff moved the court in due form to direct the clerk to issue a writ of execution for the sale of the mortgaged premises. The court denied the motion, and from the order denying the motion, plaintiff appeals. The only question presented is, can an execution issue on a judgment foreclosing a mortgage given to secure the payment of money after five years from the date of the rendition of the judgment? The general rule, under section 681 of the Code, is admitted to be that an execution cannot issue after five years; but it is contended by appellant that under section 685, Code Civil Proc., which provides that "in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion," the court should have ordered an execution in the case at bar. This contention, however, was substantially determined against appellant by this court in *Dorland v. Hanson*, 22 Pac. Rep. 552. That was the case of a decree foreclosing a street assessment, and the court decided that "section 681 must be held to apply to a judgment, the object, purpose, and effect of which is to enforce the payment of money, whether the same be a personal judgment against the party indebted, or a decree foreclosing a lien for the amount due." This rule applies even more strongly to the case of a note and mortgage, where the latter is given to secure an express personal promise to pay money. With respect to the sections of the Code in question, the mortgage is a mere incident to the debt. The cause of action could have been removed at any time before suit by the payment of the amount of money due; and the judgment could have been satisfied in the same manner. We are asked to overrule *Dorland v. Hanson*, which we decline to do. The court properly refused to order the execution. Order appealed from affirmed.

We concur: BEATTY, C. J.; FOX, J.; PATERSON, J.; WORKS, J.; SHARPSTEIN, J.

I dissent: THORNTON, J.

3 Cal. Unrep. 304

HERBERGER v. HUSMANN. (No. 14,012.)
(*Supreme Court of California*. Nov. 7, 1890.)

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—DISAFFIRMANCE BY VENDEE.

1. Where a contract for the sale of land provides that the vendee may disaffirm the sale at the end of a year, in which event he is to be repaid his purchase money, with 10 per cent. interest, on giving 30 days' notice of his intention to disaffirm, the vendor cannot complain that the vendee gave more than 30 days' notice of his intention, as this is to the vendor's advantage.

2. A further provision in the contract of sale that on its disaffirmance the vendee should surrender the title acquired by him thereunder is sufficiently complied with by an offer, in the notice of disaffirmance, to surrender his claim to

the land on the repayment to him of the purchase money; and, on the vendor's refusal to make such repayment, the vendee may maintain an action therefor without tendering a release of his rights under the contract, Code Civil Proc. Cal. § 2074, providing that an offer in writing to deliver a written instrument is, if not accepted, equivalent to a tender of the instrument.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

R. L. Horton, for appellant. Allen & Miller, for respondent.

WORKS, J. The parties to this action entered into a contract for the sale by the appellant to the respondent of certain real estate, \$1,500 of the purchase money to be paid at the time the contract was executed, and \$1,000, the balance of the purchase money, at the end of one year, at which time a deed for the property was to be executed. The contract was in the usual form of such agreements, except that it contained this clause: "And it is further agreed by and between the parties hereto that, should the party of the second part become dissatisfied with the purchase of said lots at the end of one year from date hereof, then, and in that event, should the said party of the second part so desire, the said party of the first part hereby agrees to return to said party of the second part the amount of money this day paid on said lots by the party of the second part, with interest thereon at the rate of 10 per cent. per annum, provided said party of the second part gives said party of the first part 30 days' notice, and a surrender to said party of the first part of the title to said lots; but, should the party of the second part not notify the party of the first part, as agreed, then this agreement to hold good." The contract stipulated that times should be the essence thereof. The contract was executed, and the \$1,500 paid on the 30th day of November, 1887. On the 12th day of September, 1888, the respondent served upon the appellant the following written notice: "You are hereby notified that, as per agreement in a certain article of agreement heretofore entered into by and between H. Husmann, the party of the first part, and Theobald Herberger, the party of the second part, wherein in said agreement said H. Husmann agreed to convey to said Theobald Herberger lots 4, 5, 6, 7, and 8, in block F, of the Park tract, East Los Angeles, one year from date thereof, which said agreement was dated November 30, 1887, and recorded in Book 338, at page 292, of Deeds, Los Angeles County Records; and whereas, in said agreement it was agreed by and between the parties hereto that, should the said Theobald Herberger become dissatisfied with the purchase of said lots therein mentioned, the said party of the first part, H. Husmann, therein agreed to refund to said Herberger the amount of money which said Herberger had advanced, with interest thereon at the rate of 10 per cent. per annum, provided said Herberger gave to said Husmann 30 days' notice: Now, therefore, this is hereby to notify you, the said H. Husmann, that I, Theobald Herberger, am dissatisfied with

said purchase, and, as agreed upon in said article of agreement, request and demand that you return to me the amount of money so advanced to you, to-wit: Fifteen hundred dollars, with interest thereon at the rate of 10 per cent. per annum, then, and thereupon, I will surrender to you the title to said lots you by your article of agreement conveyed to me." The appellant failed to repay the \$1,500, and the respondent brought this action against him for its recovery. In addition to the facts above stated, it was alleged in the complaint: "That after the expiration of thirty days from the giving of said notice, to-wit, at the end of one year from the date of said agreement, plaintiff was dissatisfied with said purchase, and notified defendant of his dissatisfaction with said purchase, and offered to return and release all rights thereunder, and then, and at subsequent times, each more than thirty days thereafter, plaintiff demanded of defendant a return of said \$1,500, with interest, as provided in said agreement, and offered, upon receipt thereof, to surrender to defendant all title to said lots, and rights conveyed to plaintiff therein by said agreement, and to release defendant therefrom; but defendant, in violation of said agreement with plaintiff, neglected, and still neglects, to return said \$1,500, with interest as aforesaid, to plaintiff, and accept from him the said release." The defendant answered, admitting the execution of the contract, and the giving of the notice, but denied the allegations of the complaint, above set out, and denied that "the plaintiff ever offered or tendered any instrument to the defendant purporting to convey title to said property, or any part thereof, or to release the defendant from the obligation resting upon him by virtue of said contract of sale, except on the 12th day of September, 1888." The defendant also filed a counter-claim, the specific performance of the contract, to which the plaintiff answered by alleging the facts set up in his complaint. The court found the facts substantially as alleged in the complaint, and, in addition, that the defendant had consented to a rescission of the contract and promised and agreed to repay the \$1,500, and interest. Judgment was rendered for the plaintiff for the amount claimed by him. A new trial was denied, and the defendant appeals.

The appellant contends that the notice of the election of the respondent to rescind the contract, and his demand for the repayment of the amount paid by him, was not effective because it was, as he claims, prematurely given. The point made is that the notice must, by the terms of the contract, have been given at the end of the year, and could not properly be given before that time. We do not so understand the agreement. The appellant was entitled to 30 days' notice of the respondent's election not to complete the purchase, and this notice must necessarily have been given at least 30 days before the expiration of the year, at which time the respondent was entitled to a return of his money. The notice was given more than 30 days before the end of the year, but the appellant certainly has no reason to com-

plain of this fact. It was to his advantage that more time than the agreement required was given him within which to raise the money, if necessary, to meet his obligation to repay the \$1,500.

Again, it is contended that the respondent failed to make out his case because it was not shown that he, at any time, tendered a reconveyance of the title to the appellant, or offered to do any act that would relieve the latter from the effect of the contract, upon his title, or to place him *in statu quo*. No conveyance of the property by the respondent to the appellant was necessary, because the title had never passed to the respondent. There was an agreement to convey to him, and nothing more. It would probably have been sufficient for him to deliver up his contract, or, if recorded, to give, in addition, a release of his claims under it, but it is unnecessary to determine what act was necessary on his part to put the appellant *in statu quo*. This case is fairly within section 2074 of the Code of Civil Procedure. Under that section, the offer to surrender up the title to the property was equivalent to an actual tender of an instrument which would have had that effect. If the appellant had any objection to the tender, it was his duty to make it known. Code Civil Proc. § 2076; Ward v. Flood, 48 Cal. 46; Bank v. Applegarth, 67 Cal. 86, 7 Pac. Rep. 139, 476. No such objection was made. On the contrary, the evidence tends strongly to show, and the court below found, that the appellant consented to the rescission. A demand was made upon him for the money at the end of the year, and afterwards, when he stated according to the testimony of some of the witnesses, that a certain party, referred to by him, had promised to and would raise the money for him. Of course, if the appellant had been in a condition to pay the money, and was willing to do so, he could, as a condition of such payment, have required the respondent to place him *in statu quo* by such a conveyance or surrender of his rights as were necessary for that purpose. Not having done so, the written offer was sufficient as a basis for this action. It is perfectly evident, from the reading of the evidence, that the only reason that the appellant had for not complying with his contract was that he was unable to raise the funds necessary to meet his obligation. The evidence sustains the findings, and the findings support the judgment. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

86 Cal. 352

HYDE v. BOYLE. (No. 13,876.)

(Supreme Court of California. Nov. 7, 1890.)

BILL OF EXCEPTIONS—SETTLEMENT—POWER OF SUPREME COURT.

The only authority the supreme court has to interfere with a bill of exceptions is granted by Code Civil Proc. Cal. § 652, which provides that, where the judge has "refused to allow an exception," a petition will lie to the supreme court to prove such exception, and, under this provision, the supreme court has no power to remodel a bill of exceptions by striking out matters therein contained.

In bank. Petition to settle bill of exceptions.

George H. Buck and Edward F. Fitzpatrick, for petitioner. *T. M. Osment*, for respondent.

PER CURIAM. The petition in this case purports to be one for leave to prove an exception, under section 652 of the Code of Civil Procedure; but it is really a petition to remodel a bill of exceptions, settled and signed by the judge of the trial court, by striking out certain things therein contained. The power of this court in the premises is discussed in *Landers v. Landers*, 82 Cal. 480, 23 Pac. Rep. 126, and other cases. The duty and power of settling statements and bills of exceptions rest generally and properly in the judge of the trial court. This court can interfere with such statement or bill only in the cases provided by statute; and the only case thus provided is found in said section 652. But that section refers only to a case where the judge has "refused to allow an exception." It does not give this court jurisdiction to remodel a bill of exceptions generally by striking matter out of it, etc., as is prayed for in this petition. The power of this court must be confined within the limits prescribed by the Code. The petition is denied.

PATERSON, J. I concur in the order denying the petition.

THORNTON and WORKS, JJ., did not participate in the decision.

3 Cal. Unrep. 309

HYDE v. BOYLE *et al.* (No. 13,849.)

(Supreme Court of California. Nov. 9, 1890.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

A motion to dismiss appeal on the ground that the transcript was not filed in time will be denied, where it appears that the question of the settlement of the bill of exceptions in the cause was not determined until the day of the motion.

In bank. Motion to dismiss appeal.

George H. Buck and Edward F. Fitzpatrick, for petitioner. *T. M. Osment*, for respondent.

PER CURIAM. This is a motion to dismiss appeal on the ground that the transcript was not filed in time. It appearing that the question of the settlement of the bill of exceptions in the cause was not determined until this day, the motion is denied.

86 Cal. 232

EX PARTE BOSWELL. (No. 20,751.)

(Supreme Court of California. Oct. 23, 1890.)

VISITING GAMBLING-HOUSES.

Order No. 1587, § 33, as amended by Order No. 1955, of the board of supervisors of San Francisco, making it a misdemeanor to visit any gambling-house, is valid, and not in conflict with the general law in the Penal Code declaring it to be a misdemeanor to carry on or bet at a gambling game, as the latter law does not include the offense of visiting the game.

In bank. *Habeas corpus*.

Alfred Clarke, for petitioner. *J. D. Page*, Dist. Atty., for respondent. *Crittenden Thornton*, *amicus curiæ*.

Fox, J. The petitioner is arrested and held under a warrant issued out of the police court of the city and county of San Francisco, upon a complaint charging him with misdemeanor, in that he willfully and unlawfully became and was a visitor to a certain house and place for the practice of gambling, thereby violating the provisions of sections 1 and 33 of Order No. 1587 of the board of supervisors, as the same was amended by Order No. 1955 of said board.

1. It is claimed that said order is in conflict with the general law, and therefore void. The Penal Code makes it a misdemeanor, punishable by fine not exceeding \$500, or imprisonment not exceeding six months, or both, to keep or carry on a gambling game, or to bet at such game; but there is no provision of the general law making it a crime for being a visitor at a house or place for the practice of gambling. It may be said that one cannot well bet at a gambling game unless he is a visitor thereat, but he may be a visitor, and not bet at the game; and the intention of the order is to make visiting such a place a crime, whether the visitor bets at the game or not. But it is urged, as against the validity of the order, that the act of visiting is necessarily included in the act of betting at the game; and that, if made a separate offense, it should be of a lesser grade, and one for which a lesser punishment should be prescribed; and that, while the Code imposes a fine of \$500, or imprisonment of six months, as the maximum punishment for betting, the order prescribes a fine not exceeding \$1,000, or imprisonment not exceeding six months, as the maximum of punishment for the lesser offense of visiting. Order No. 1587 consists of a large number of sections; is itself a sort of municipal Penal Code, covering a multitude of offenses. The first section of the order provides that any person violating any of the provisions of the order shall be deemed guilty of misdemeanor, and be punished by fine not exceeding \$1,000, or imprisonment not exceeding six months, or by both such fine and imprisonment. No minimum is prescribed in this section, and, unless otherwise restricted, the court could make the punishment as low as it pleased. Section 33 of the order, as amended by Order No. 1955, is the one relating to this particular offense; and in that it is prescribed that the punishment shall not be less than \$20 fine, or imprisonment for not less than 10 days, no authority being given to impose both fine and imprisonment. This may be regarded as a legislative expression of opinion as to what ought ordinarily to be the measure of punishment for this particular offense. It does not in terms, and perhaps not by implication, deprive the court of the power to impose the higher penalty named in section 1, but until a penalty has been imposed by the court, in excess of that prescribed by the Code for the higher offense, within which this lesser one is included, it is unnecessary for us to pass upon the question of the validity of this section 1, as bearing upon this offense. It is sufficient now to say that the order making the act of becoming a visitor at a gambling-house a misdemeanor is not in conflict with the Code, and does not trench

upon ground covered by the general law; and that in this order there is nothing which requires the court upon conviction to impose any penalty in excess of that authorized by general law for like offenses.

2. It is claimed that Orders Nos. 1587 and 1955 have been repealed by the provisions of Order 2191, subsequently passed. The former orders are general, applicable to all parts of the municipality; the latter one special, applicable to only a small part of the municipality. We are not at this time called upon to pass upon the validity of the latter order. The petitioner is not arrested or held under it. It does not, either expressly or by implication, repeal either of the former orders. These not being in conflict with general law, the authorities cited on behalf of petitioner are not in point. Writ discharged, and prisoner remanded.

We concur: SHARPSTEIN, J.; PATERSON, J.; McFARLAND, J.

86 Cal. 171

BLANCKENBURG *et al.* v. JORDAN *et al.*
(No. 12,971.)

(Supreme Court of California. Oct. 17, 1890.)

TRUSTEES—COMPENSATION.

The management of a wife's one-third interest in property, conferred on her husband by a decree of divorce, is a personal trust, which he can neither transfer nor perpetuate; and the trustees under his will, which did not even assume to make any disposition of such trust, are not entitled to any fees and commissions under the will for their management of the wife's one-third interest after the husband's death.

Department 1. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Charles F. Hanlon, (Otto Tum Suden, of counsel,) for appellants. Selden S. and Geo. T. Wright, for respondents.

Fox, J. This is a bill in equity to secure a decree construing a will. The will is simple and easy of comprehension, and had been correctly construed by the probate court in its decree of final distribution more than eight years before the commencement of this action. The appeal, and even the case itself, is so destitute of merit, that we do not feel justified in devoting much space to its discussion, though we have devoted some time to its examination. John Berghauser and Margarethe Berghauser were husband and wife. The wife brought an action against her husband for a divorce, alimony, and a division of community property. Pending the trial, an agreement was made as to the division of property, in case the court should decree a divorce, under which, upon decree being entered, it was adjudged and decreed that the defendant (husband) should convey to the wife (plaintiff) certain real property in her own right, and a life-estate, with remainder to their six children, or their heirs, in an undivided one-third of three other parcels of real estate, situate in the city and county of San Francisco, the principal one of which was that known as the "Prescott House." These three properties were all improved, and at the time bringing in an aggregate

rental of something over \$1,900 per month. It was agreed and decreed that the husband, who remained an owner, as tenant in common, of the undivided two-thirds thereof, should "manage the aforesaid property, in which defendant and plaintiff are jointly interested; and all proper expenses on the property, including insurance, taxes, street assessments, repairs and further litigation, if any, are to be borne by plaintiff and defendant in proportion to their respective interests, monthly accounts to be rendered by defendant to plaintiff, as to all the property in which plaintiff and defendant are jointly interested, and monthly payments to be made by defendant to plaintiff, or her agent, of her share of the rents, income, and profits thereof." Presumably deeds were made to conform to the decree, although they are not given in the record. This decree was made in 1873, and thereafter, during the life-time of John Berghauser, the property was managed as therein provided. In February, 1878, Berghauser died, leaving a will by which he devised his estate to the plaintiffs in this action, in trust, to manage and control the same until the youngest of his children should reach a certain age; then the same to be conveyed to them, share and share alike. The will being admitted to probate, the trustees, as executors, continued to manage the property as before, and in 1879, administration being closed, the property was distributed to the trustees, as such, the court in and by its decree of distribution specifically describing each piece of real and personal property so distributed, and correctly describing the interest of the estate which was so distributed in the three parcels of property here under consideration as the undivided two-thirds thereof. The trustees thereafter continued to manage the property and account to Mrs. Berghauser, as before, until 1888, when this action was brought, the plaintiffs claiming that their trust covered the whole, not simply the two-thirds, of this property, and that they were entitled to fees and commissions for administering the whole, one-third thereof to be taken out of the one-third interest of Mrs. Berghauser in the rents and profits; or, if that could not be done, then the fees and commissions for administering the whole to be taken out of the two-thirds interest of the children. Such a claim seems to us to be entirely without foundation. From the date of the entry and recording of that decree of divorce John Berghauser never had any power of testamentary or other disposition of this one-third interest in that property. It had passed out of him forever, with no chance of its ever coming back, except it might have been by purchase or descent, and of that there is no pretense in the case. Even the management and control which was accorded to him was a personal trust, which he could neither transfer nor perpetuate. There is nothing in the will to indicate that he attempted or intended to make testamentary disposition thereof, or to create any testamentary trust over the property. The probate court so understood it, and distributed the estate accordingly. If the

trustees ever had any control over this one-third interest, it was by the permission or agreement of Mrs. Berghauser, and not by virtue of any power under the will. The court below so held, and expressly refused to find whether or not they were entitled to any compensation for their services in caring for her interest in the property, because that was not a proper matter to be determined in this action, and was not a matter involved under the pleadings herein. All that could be determined here was whether they were entitled to commissions and fees, under the will, for their management and care of this one-third interest, and, if so, against what interest were the commissions and fees to be charged. The court correctly found that they were entitled to no such fees or commissions under the will; and that was the end of this case. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

86 Cal. 316

BERGHAUSER v. BLANCKENBURG *et al.*
(No. 12,972.)

(Supreme Court of California. Nov. 6, 1890.)

COMPENSATION OF TRUSTEES.

Defendants, as trustees under a will, claimed commissions of plaintiff for caring for and collecting the rents of certain property. They also claimed on the ground of a special agreement, and a *quantum meruit* for services rendered. One of them testified that, as trustees, they collected the rents, paid the running expenses, "and paid B. [the plaintiff] her one-third of the net rental therefrom, and made no charge against her therefor, either by way of compensation, or as trustees or executors, for commissions. * * * We never told her we intended charging anything for our services, because we never had any conversation on the subject." The other testified: "We considered that we were trustees for B. on the same terms and conditions from the time that Mr. B. died up to the present time." *Held* sufficient to sustain a finding that there was no agreement for compensation, and no valid claim upon a *quantum meruit*.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Charles F. Hanlon, (Otto Tum Suden, of counsel,) for appellants. Selden S. & Geo. T. Wright, for respondent.

FOOTE, C. This action was brought by the plaintiff to recover a certain sum of money from the defendants, which they had received for her, and which they refused to pay over, claiming—*First*, that it was due them for commissions as trustees of her husband's will; *second*, that, if their demand in this respect was not just, they were entitled to it under a contract with her; and, *third*, if not so entitled, that it was due and payable to them on a *quantum meruit* for services performed for her, at her instance. In a cause lately adjudicated in department 1 of this court, entitled *Blanckenburg v. Jordan*, ante, 1061, (No. 12,971,) which was to construe the trust in the will of the plaintiff's husband, by virtue of which the first contention of the defendants in this action is here sought to be maintained,

it was said: "John Berghauser and Margarethe Berghauser were husband and wife. The wife brought an action against her husband for a divorce, alimony, and a division of community property. Pending the trial, an agreement was made as to the division of property, in case the court should decree a divorce, under which, upon decree being entered, it was adjudged and decreed that the defendant [husband] should convey to the wife [plaintiff] certain real property in her own right, and a life-estate, with remainder to their six children, or their heirs, in an undivided one-third of three other parcels of real estate situate in the city and county of San Francisco, the principal one of which was that known as the 'Prescott House.' These three properties were all improved, and at the time bringing in an aggregate rental of something over \$1,900 per month. It was agreed and decreed that the husband, who remained an owner, as tenant in common of the undivided two-thirds thereof, should 'manage the aforesaid property, in which defendant and plaintiff are jointly interested; and all proper expenses on the property, including insurance, taxes, street assessments, repairs, and further litigation, if any, are to be borne by plaintiff and defendant in proportion to their respective interests, monthly accounts to be rendered by defendant to plaintiff, as to all the property in which plaintiff and defendant are jointly interested, and monthly payments to be made by defendant to plaintiff, or her agent, of her share of the rents, income, and profits thereof.' Presumably deeds were made to conform to the decree, although they are not given in the record. This decree was made in 1873, and thereafter, during the life-time of John Berghauser, the property was managed as therein provided. In February, 1878, Berghauser died, leaving a will, by which he devised his estate to the plaintiffs in this action, in trust, to manage and control the same until the youngest of his children should reach a certain age; then the same to be conveyed to them, share and share alike. The will being admitted to probate, the trustees, as executors, continued to manage the property as before, and in 1879, administration being closed, the property was distributed to the trustees, as such, the court in and by its decree of distribution specifically describing each piece of real and personal property so distributed, and correctly describing the interest of the estate which was so distributed in the three parcels of property here under consideration as the undivided two-thirds thereof. The trustees thereafter continued to manage the property and account to Mrs. Berghauser, as before, until 1888, when this action was brought, the plaintiffs claiming that their trust covered the whole, not simply the two-thirds, of this property, and that they were entitled to fees and commissions for administering the whole, one-third thereof to be taken out of the one-third interest of Mrs. Berghauser in the rents and profits; or, if that could not be done, then the fees and commissions for administering the whole to be taken out of the

two-thirds interest of the children. Such a claim seems to us to be certainly without foundation. From the date of the entry and recording of that decree of divorce John Berghauser never had any power of testamentary or other disposition of this one-third interest in that property. It had passed out of him forever, with no chance of its ever coming back, except it might have been by purchase or descent, and of that there is no pretense in the case. Even the management and control which was accorded to him was a personal trust, which he could neither transfer nor perpetuate. There is nothing in the will to indicate that he attempted or intended to make testamentary disposition thereof, or to create any testamentary trust over the property. The probate court so understood it, and distributed the estate accordingly. If the trustees ever had any control over this one-third interest, it was by the permission or agreement of Mrs. Berghauser, and not by virtue of any power under the will. The court below so held, and expressly refused to find whether or not they were entitled to any compensation for their services in caring for her interest in the property, because that was not a proper matter to be determined in this action, and was not a matter involved under the pleadings herein. All that could be determined here was whether they were entitled to commissions and fees, under the will, for their management and care of this one-third interest, and, if so, against what interest, were the commissions and fees to be charged. The court correctly found that they were entitled to no such fees or commissions under the will; and that was the end of this case." Thus it will be seen the contention of the appellants here is very plainly disposed of against them, upon all questions except as to whether Mrs. Berghauser employed them to care for her interest, and collect the rents, etc.; or, if she did not do that by agreement, whether they are entitled to retain her money upon the principle that, as she permitted them to do the work and got the benefit of it, she is under a legal obligation to pay them for it. The court below found against them upon all their contentions, gave judgment for the plaintiff, and refused a new trial, from which, as we have seen, they have appealed.

The two points now to be considered, therefore, are, whether or not the evidence fails to sustain findings 4 and 5 of the trial court. They are as follows: "(4) That it was never mutually understood or agreed between plaintiff and defendants that said defendants should hold or care for plaintiff's interest in all or any of said properties, in trust for her, or for her use or benefit, or should manage or control the same to the extent or on the same terms as they were managing or controlling the property in trust for the devisees and heirs of John Berghauser, deceased, or on the same terms or conditions or in the same way, or for the same period. (5) That, at the time of the commencement of this action, plaintiff was not indebted to the defendants in the sum of three thou-

sand dollars, or in any other sum, for services rendered for her, at her special instance and request, or otherwise, in the state of California; and that, at the time of the commencement of this action, defendants had rendered no services for plaintiff, at her request, or otherwise." In his testimony upon these matters, one of the defendants says: "Mr. Blanckenburg [as the witness was Theodore Blanckenburg, it is evident that when he said Blanckenburg he meant to say Medeau] and myself were the executors of the will of John Berghauser, deceased, and, as such, collected the entire rents of the Prescott House, Broadway and Green street properties, and paid the running expenses, and paid Mrs. Berghauser her one-third of the net rental therefrom, and made no charge against Mrs. Berghauser therefor, either by way of compensation or as trustees' or executors' commissions. * * * We never told Mrs. Berghauser we intended charging anything for our services, because we never had any conversation on the subject." It is manifest from all the evidence of this witness and John P. Medeau, his co-defendant, that they thought that they had a claim on Mrs. Berghauser's interest, perhaps as trustees under the will; but that they never pretended or acted under any belief that they had any agreement with her to be her agents, and to receive any compensation therefor, or that they had any claim against her for services rendered upon a *quantum meruit*, outside of their claim as trustees under John Berghauser's will. Medeau says: "We considered that we were trustees for Mrs. Berghauser, on the same terms and conditions, from the time that Mr. Berghauser died up to the present time, and are yet." It is clear, then, that this pretended agreement of Mrs. Berghauser to pay them and the *quantum meruit* obligation set up were after-thoughts, and were never contemplated at the time the services were rendered. We think the evidence sustains the findings, and that the judgment and order should be affirmed; and so advise.

WE CONCUR: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

86 Cal. 211

FLASHNER v. WALDRON. (No. 13,733.)
(Supreme Court of California. Oct. 23, 1890.)

APPEAL—EXCEPTIONS—NONSUIT.

An order granting a nonsuit is not an order "finally determining the rights of the parties," and "deemed to have been excepted to" within Code Civil Proc. Cal. § 647; but error in granting a nonsuit is an error in law, and must be excepted to.

Department 1. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Graff & Creighton, for appellant. Smith, Winder & Smith, for respondent.

PATERSON, J. The court below granted a motion for nonsuit, and judgment fol-

lowed for the defendant. The plaintiff took no exception to the ruling. It is claimed that no exception was necessary, but it has been several times decided that an error in granting a nonsuit is an error in law, and must be excepted to. It is unnecessary, therefore, for us to consider the argument for counsel of appellant in support of his contention that the order granting a nonsuit is an order "finally determining the rights of the parties," and "deemed to have been excepted to" under section 647, Code Civil Proc. Judgment affirmed.

We concur: WORKS, J.; Fox, J.

86 Cal. 342

BURELSON v. NORTHWESTERN MUT. LIFE INS. CO. (No. 12,924.)

(Supreme Court of California. Nov. 7, 1890.)

CONTRACTS—CONSTRUCTION.

1. The contract of an insurance agent, with the company, specified the duration of the agency, and the commissions to be received on premiums, and that the agent should receive a certain commission on renewal premiums "while he retained the agency, and no longer," and that the agency might be terminated by the company at any time for his failure to account for moneys collected. Before the expiration of the agency, the parties entered into another contract, in which it was agreed that the agent should give up part of his original territory, but should receive a certain per cent. on all renewal premiums collected during the continuance of the original contract. This right to the percentage on the renewal premiums the agent assigned to plaintiff, and shortly afterwards his agency was terminated by the company, because of a shortage in his accounts. *Held*, in an action by plaintiff to recover the renewal premiums stipulated for in the second contract, that it was simply a modification of the original, and that no renewal premiums were payable under it after the termination of the agency under the original.

2. But the commissions on the premiums earned and actually due before the termination of the agency are recoverable, subject to set-off of the agent's indebtedness to the company.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

C. E. K. Royce, for appellant. T. I. Ber-
gin, for respondent.

WORKS, J. On the 3rd day of March, 1885, the respondent, an insurance company, entered into a contract with one Abbott, by which it appointed said Abbott its agent in the state of California, and agreed to pay him certain commissions on premiums collected on insurance business done by him, and $7\frac{1}{2}$ per cent. commissions on renewal premiums, obtained under a certain contract of the respondent, and certain other agents, and under the contract with Abbott. This commission on renewal premiums was to be paid "while he retained the agency, and no longer." In consideration of the payment of these commissions, the agent stipulated to "devote his entire time, energy, and ability to soliciting applications, collecting premiums, and otherwise promoting the interests of the company," and bound himself to make reports, each month, of the business, and pay to the respondent all moneys by him collected up

to the time of making such report, less his commissions. The contract provided that it should terminate on the 1st day of June, 1892, unless sooner terminated by the company, through its proper officers, for a failure or neglect of the agent to keep and perform any of the stipulations therein, and also contained this clause: "A failure or neglect to make reports or pay over moneys belonging to the said company, according to the conditions of this contract, shall be considered good and sufficient reason for closing this agency at any time, without notice, anything in this contract to the contrary notwithstanding." It was also stipulated: "And it is further understood and agreed that, upon the discontinuance of this contract in any way, all interest of said agent in this contract in commission on premiums shall revert back to the company, except as above mentioned, and upon the deferred semi-annual and quarterly premiums on new business, unless it is otherwise specially agreed." On the 15th day of April, 1886, the same parties entered into another contract as follows: "For value received, and in consideration of retaining the remainder of any contract with the Northwestern Mutual Life Insurance Company, under date of March 3, 1885, I hereby release and relinquish to the said company all of my right, title, and interest in and to so much of the territory mentioned in the said contract as is described as follows, to-wit: All that portion of the state of California that is north of and includes the counties of Monterey, Tulare, and Inyo, so that the field hereafter covered by my said contract shall comprise and consist only of such portion of the state of California as is south of said counties; and I hereby consent and agree that such of the seven and one-half per cent. ($7\frac{1}{2}$ per cent.) renewals as are mentioned in said contract, and are situated in the territory hereby released and relinquished, may hereafter, during the continuance of my said contract, be collected by the said company, in such manner as it may elect, making to me quarterly statements of said collections so made, and paying me or to my order five and one-half per cent. ($5\frac{1}{2}$ per cent.) on the same, during the continuance of the said contract." On the 23d day of April, 1886, Abbott assigned to the plaintiff in this action his right to receive the $5\frac{1}{2}$ per cent. commissions provided for in this last contract, and this action is to recover said commissions, and for an accounting. The defendant answered by setting up the two contracts above mentioned, and alleging that, previous to the month of September, 1886, Abbott became a defaulter in his accounts with the defendant, and failed, on request, to pay over large sums of money collected by him as such agent, under said contracts, and that on the 16th day of September, 1886, the defendant, by reason of such failure, default, and neglect, terminated said agency, and that Abbott had never since that time acted as such agent. It is further averred in the answer that on the 1st day of September, 1886, Abbott was indebted to the defendant, on account of collections made by him, as such agent, and not paid over, in

the sum of \$2,253.79; that the whole amount of renewal premiums collected by the defendant under said contracts since the 15th of April, 1886, was \$10,770, and a percentage of 5½ per cent. thereon amounted to \$592. The court below found the facts substantially as alleged in the answer, and rendered judgment for the defendant. The plaintiff appeals on the judgment roll.

The whole question as to the right of the plaintiff to recover depends upon the construction and legal effect to be given to the two contracts above mentioned. The appellant contends that the contract of April 15, 1886, by which Abbott was to receive 5½ per cent. commissions on renewal premiums, collected by the defendant, in territory thereby surrendered by Abbott, was a separate and distinct contract; that it gave Abbott the commissions provided for, absolutely; that such right was not in any way affected by the terms of the original contract, or the default or neglect of Abbott to comply with its requirements, or the termination of his agency thereunder; and that the plaintiff took the same absolute right to such commissions by the assignment of Abbott to him. On the other hand, the respondent takes the ground that the second contract was only a modification of the original contract, by which the territory over which Abbott was to act as agent was limited, and his commissions on renewal business were reduced, in consideration of the fact that the defendants were to collect the same; that the two contracts must be taken and construed as one; that so construed, all right of Abbott to commissions was cut off and forbidden by his violation of the original contract, and the consequent termination of his agency. We do not entirely agree with the contention of either of the parties; but it is quite clear to our minds that these two contracts must be taken and construed together. The last contract did not supersede the first, but only modified it in certain particulars. Under the first contract, Abbott became the agent of the defendant for the whole of the state of California, and, as to the commissions here in controversy, he was to receive 7½ per cent. By the new contract, the territory of his agency was limited to a part of the state. He could take no new insurance in the territory excluded from his agency. But his right to commissions on renewal premiums was preserved, but reduced to 5½ per cent., in consideration of the fact that collections thereof were to be made by the company. In all other respects the original contract, so far as it affects this case, remained in full force. Therefore, as the original contract limited the right of Abbott to receive commissions to the time he should continue to be the agent of the defendant thereunder, the right to receive the reduced commission, under the modification of the contract, was limited in like manner. When the original contract of agency terminated, the right to receive these commissions terminated also; and it appearing that the agent had become a defaulter, and by reason of his defalcation was indebted to the defendant in a sum

greater than the amount due him for commissions, he could not have recovered. If he could not have recovered the commissions, certainly the plaintiff could not recover as his assignee. His rights were no better than the rights of his assignor, where they were expressly defined, and limited by the terms of the contract under which the commissions were earned. So far we agree with the contention of the respondent, but we find no warrant in the contract for the position taken by the respondent that, by the termination of the original contract, all right of Abbott or the plaintiff, as his assignee, to commissions was forfeited. Undoubtedly, this was the case as to any and all business done after the termination of the contract, but we think it was not so as to business already done, and where commissions had been earned before the contract ceased to exist. Therefore, as to any renewal premiums upon which Abbott would have been entitled to his 5½ per cent. commissions before and at the time the contract was terminated, or rather, at the time of any violation of the terms of the contract which authorized, and for and on account of which it was terminated, Abbott would have been entitled to recover, subject, however, to any indebtedness on his part to the defendant, growing out of his agency under the contract, and its subsequent modification. Therefore, if the amount of Abbott's indebtedness had not equalled, or exceeded, the amount of the commissions actually due before the defalcation for which the contract was terminated occurred, plaintiff would have been entitled to judgment. As it was, however, he was not entitled to recover, and the judgment of the court below was right. After the cause was at issue, but before trial, the plaintiff filed a supplemental complaint setting up that the defendant, since the commencement of the action, collected renewal premiums to the amount of \$25,000, upon which the plaintiff was entitled to 5½ per cent. commissions. A demurrer to this complaint was sustained, and this, it is contended, was error. But, as we construe the contracts above set out, the commissions claimed in this complaint were collected by the defendant after the termination of the original contract, and neither Abbott nor the plaintiff were entitled to any commissions thereon. Therefore the demurrer was properly sustained. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

86 Cal. 353

STRATTON v. CALIFORNIA LAND & TIMBER CO. *et al.* (No. 13,568.)

(*Supreme Court of California.* Nov. 7, 1890.)

IMPLIED TRUSTS—RIGHTS OF VENDOR UNDER LAND CONTRACT.

1. A vendee under a land contract, who had in fact obtained the contract as agent for a land company, assigned it to the company's manager, and also executed a subcontract in which he agreed to convey the land to the company. The vendee paid one installment of the purchase price, and the company's manager paid the second,—both with the company's funds. *Held*, that these facts did not raise an implied trust in the

land in favor of the company, as against the vendor, who had dealt with the vendee and the manager in their individual capacities only, without knowledge either of their relation to the company or of the fact that the money paid on the contract belonged to the company, and who had, in good faith and for value, obtained from them a release of all their rights to the land after a default in the payment of the third installment.

2. The mere fact that the vendor had knowledge of the existence of the subcontract in which the vendee agreed to reconvey to the company was not sufficient to put the vendor on inquiry, so as to charge him with knowledge of the company's rights when he procured the release from the vendee and the company's manager.

3. After the default in the third installment the vendor tendered to both the vendee and the manager of the company a sufficient deed of the land, and demanded of each of them the balance due him, which they neglected and refused to pay. Subsequently, the company was adjudicated insolvent, and an assignee appointed. Afterwards, on proceedings to foreclose a trust-deed, a receiver of its property was also appointed. Neither the company nor any of its representatives in these proceedings ever tendered the unpaid purchase money, or offered to perform the contract of sale. *Held*, that the vendor was justified in treating the contract as abandoned, and that he was entitled to a decree quieting his title to the land as against the company and its representatives, without the repayment of any of the purchase money received by him under the contract.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

Craig & Meredith and Pillsbury & Blanding, for appellants. *Frederick S. Stratton*, for respondent.

GIBSON, C. The plaintiff brought this action to quiet his title to 4,000 acres of land situate in Plumas county. All the defendants defaulted except Jacob Goldberg, Charles M. Fry, A. F. Higgins, Hugh Craig, and Charles Kohler. Of the latter, Goldberg filed a disclaimer, and the others filed answers and cross-complaints, to which the plaintiff answered, putting in issue the new matter set up in each. Fry and Higgins, in their cross-complaint, claimed under a deed of trust executed to themselves, and one Charles Kohler, by the California Land & Timber Company, to secure certain amounts and obligations due from the company to various persons and corporations, and also to secure a loan not exceeding \$100,000, that the company was at the time negotiating for. Craig, in his cross-complaint, claimed as receiver in an action brought by Fry and Higgins, as such trustees, in the United States circuit court of the ninth judicial district, and Kohler, in his cross-complaint, claimed as assignee in insolvency of the California Land & Timber Company. Judgment passed for the plaintiff against all of the defendants, and those of the defendants who filed answers and cross-complaints bring this appeal from the judgment against them, and an order denying them a new trial.

On March 15, 1886, an agreement, which is referred to in the record as Exhibit A, was made between the plaintiff and one W. C. Roberts, whereby the plaintiff agreed to sell and Roberts to buy the land in controversy for \$3 per acre, payable in the following installments: 25 cents per acre

upon signing the agreement; \$1.25 per acre on or before April 1, 1886; and the remaining \$1.50 per acre one year from the date of the agreement, with interest on the last installment, at the rate of 6 per cent. per annum: provided, however, that the last installment should not be payable until plaintiff should be able to convey to Roberts, or his assignees, a clear title to the land based upon patents from the United States, or this state, which he was to acquire within two years from the date of the contract; and provided also that, in case of non-payment by said Roberts of any of the purchase money, according to the terms of the agreement, the party in default should not be liable to the other party in damages for such default, and the remedy of the party injured should consist only of the right to cancel the agreement, and refund, with interest, or retain all the moneys paid under the agreement, as the case might be. This contract was entered into by Roberts at the request of A. T. Nation, who at the time was the manager and also a director of the California Land & Timber Company, and immediately after it was executed Roberts made a separate and independent contract with the California Land & Timber Company to sell to it the same land for \$5 per acre, \$3 per acre payable in three several installments, upon the payment of which Roberts was to convey the land to the company, and the latter in return was to give to Roberts its note secured by mortgage on the same land for the remaining sum of \$2 per acre, payable three years from the date of the contract, with interest thereon from the said date at 8 per cent. per annum, payable semi-annually, all subject, however, to Roberts' ability to acquire clear title to the land, based upon patents from the United States or this state. This contract is referred to in the record as Exhibit B. Upon the execution of Exhibit B, Roberts, at the request of A. T. Nation, assigned to him Exhibit A, subject to Exhibit B, and assigned the latter to him also, and, thereafter, on the 29th September, 1887, A. T. Nation, in consideration of \$1, assigned to his brother, G. M. Nation, all the rights and benefits he acquired by his assignments from Roberts. Roberts, in making Exhibit A, and in assigning the same to A. T. Nation, it appears, acted solely for and at the request of the latter. Of this the plaintiff had no notice, but dealt with Roberts in his individual capacity alone, and had no reason to believe that Roberts was acting otherwise. The first installment under Exhibit A, was paid by Roberts, and the second by A. T. Nation. Both installments were in fact paid with the moneys of the California Land & Timber Company, but plaintiff did not have either notice or knowledge of the fact. Nor did he have either notice or knowledge or any reason to believe that A. T. Nation acted for any one but himself. On January 31, 1887, the California Land & Timber Company executed the deed of trust above mentioned, by which it conveyed all its property to the defendants Fry and Higgins and another, who accepted the trust; and the sum of \$25,000 was advanced to the company by Fry and Higgins pursuant to the

trust. In July, 1887, the plaintiff procured state patents to the land in question; and, not having either notice or knowledge of the interest of any one else in the land, he in the same month notified Roberts and A. T. Nation that he had procured patents to the land, and at the same time tendered them a sufficient deed thereto and demanded of each the balance due under Exhibit A, which demand they each neglected and refused to comply with. Said Nation, though, notified the company and its principal stockholders of the demand, and endeavored to procure the amount due plaintiff under said exhibit, and was assured, from time to time, by persons connected with the company that the money would be paid. These assurances Nation repeated to the plaintiff, without, however, notifying or suggesting to him that the company claimed or had any interest under Exhibit A. Fry and Higgins were also notified by A. T. Nation of the demand of plaintiff, but they never notified plaintiff that they or the company claimed or had any interest under the said exhibit. In November of the same year the company was, by the superior court of the city and county of San Francisco, adjudged to be insolvent, and the defendant Kohler was appointed, and he duly qualified as assignee of all the estate of the insolvent company. Thereafter, on or about January 4, 1888, in an action brought in the United States circuit court, in and for the ninth judicial district, by Fry and Higgins, as trustees, against the company, the defendant Craig was appointed, and he duly qualified as receiver of all the property of the company. February 28, 1888, plaintiff procured from Roberts, in consideration of \$50 paid to him, a release and quitclaim of all his interest in the premises in question, and a cancellation of Exhibit A; and, on March the 20th of the same year, he procured from A. T. Nation, in consideration of \$750 paid to him, a similar release and quitclaim of all his interest in the said premises. The several positions of the appellants are that Fry and Higgins are the owners under the trust-deed of whatever interest the company acquired in the land; that Craig, as receiver, is entitled to the possession of the land; and that Kohler, as assignee, is entitled to all that may remain of the property or the proceeds thereof, after the objects of the trust-deed are satisfied. And they contend that, as Exhibit A was entered into by Roberts at the request of A. T. Nation, who was at the time the general manager of the California Land & Timber Company, and as the money paid under such contract was the money of the company, a resulting trust arose in favor of the company, and Roberts thereby became the trustee of the company; but as plaintiff, in making Exhibit A with Roberts, and in receiving the first installment of money thereunder from him, and in receiving the second installment of money under the same contract from A. T. Nation, dealt with them in their individual capacities only, and had no knowledge of their relations to each other or to the company, or that the money paid by them to him belonged to the company, it is clear that,

whatever implied trust may have been created in favor of the company as against Roberts and Nation, it could not affect the plaintiff. When Exhibit A was executed, and the first two payments made under it, the plaintiff, it seems, had no knowledge of the existence of the company, and there appears to have been some grave reason, according to the testimony of A. T. Nation, for concealing the fact that the company was to receive the land ultimately. Whatever the reason was, it seems that plaintiff never knew or was notified of the interest of the company in the land until the cross-complaint of defendant Craig as receiver was filed, which, of course, was subsequent to the time he had procured the releases from Roberts and A. T. Nation. The plaintiff, as we have seen, upon obtaining title from the state, notified Roberts and A. T. Nation of the fact, and tendered them a deed, and demanded from each of them the balance due him under Exhibit A, but they did not act upon it. The same demand upon the same parties was several times repeated, but without effect; and, although A. T. Nation reported these demands to the company and its principal stockholders, neither the company nor any one for it ever notified the plaintiff that it claimed any interest in the land under Exhibit A. In view of all the foregoing facts, we think the plaintiff acted in good faith in obtaining, for valuable considerations, the releases from Roberts and A. T. Nation. He certainly did not have notice or knowledge of the circumstances that may have created an implied trust in favor of the company against Roberts and A. T. Nation. The releases so obtained, extinguished the equitable interest in the land which Roberts acquired by virtue of Exhibit A, and the plaintiff, having retained the legal title, thereby became the legal and equitable owner of the lands as completely as though Exhibit A had never been executed and partly performed. *Winton v. Spring*, 18 Cal. 452; *Jennisons v. Leonard*, 21 Wall. 309.

It is further contended that, assuming plaintiff had neither notice nor knowledge of the capacities in which Roberts and A. T. Nation acted in relation to Exhibit A, still, as plaintiff did have knowledge of the execution of Exhibit B by Roberts to the company before he acquired the release of all rights and interests under Exhibit A from Roberts and his assignee, G. M. Nation, such fact was sufficient to put him upon inquiry, which, if pursued, would have disclosed the company's interest under Exhibit A; and, as he did not pursue it, he is chargeable with notice of the company's interest, and cannot, in consequence, be regarded as an innocent purchaser of the interest acquired by the release from Roberts and A. T. Nation. The plaintiff only had knowledge of the execution of the subcontract, Exhibit B. He knew nothing beyond its terms. It was a separate and independent contract between Roberts and a third person, without any reference therein to Exhibit A, and he was not required to take any notice of it. Roberts, as his vendee, could make any contract for the sale of the land to any third person that he might desire,

but Roberts, as such vendee, could not, by contracting to sell the same land to another, create a privity of contract or estate between such subvendee and the original vendor, without assigning his interest in whole or in part under the original contract. His vendor would, without such an assignment and notice of it to him, be entitled to stand upon his contract with his vendee, regardless of any subcontract the latter might make. *Willard v. Taylor*, 8 Wall. 571. This being so, how could the bare knowledge of the contract, Exhibit B, made by Roberts, put the plaintiff upon inquiry, as to the true relation of Roberts to the company? Of course it would be different if Roberts had, as already remarked, assigned Exhibit A to the company, and such assignment had been brought to the knowledge of the plaintiff; but that is not the case here. There was, as found by the court, no assignment of Exhibit A to the company.

Appellants, however, claim that Roberts' subcontract, Exhibit B, operated as an assignment to the company of all the interest he acquired by Exhibit A. This may have been so, as far as Roberts and A. T. Nation were concerned, in view of the circumstances under which they acted, and the ownership of the money used by them, but certainly not as to the plaintiff, who appears to have acted all through the matter in entire ignorance of those facts. Since this was the case, Exhibit B could no more operate as an assignment of Exhibit A than any mere subcontract by a vendee to sell the same premises; for an agreement for the subsale of the same premises will not make the subvendee assignee of the original contract. *Willard v. Taylor*, supra; 2 Dart, Vend. (4th Ed.) 925.

It is also argued for the appellants that when a vendee is in default, so that the vendor may elect to rescind the contract, he must, in order to effect a rescission of it in an action like the present one, restore to the vendee all that he has paid upon the contract. This is undoubtedly the rule regarding the rescission of contracts. Civil Code, § 1691; *Miller v. Steen*, 30 Cal. 403; *Bohall v. Diller*, 41 Cal. 532; *Henderson v. Hicks*, 58 Cal. 364; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. Rep. 772. But this action was not brought for the rescission of a contract, which means the annulling or abrogation of it, and the placing of the parties to it *in statu quo*. The object of the action was to quiet plaintiff's title to the land, under section 738 of the Code of Civil Procedure. He alleged in his complaint all that was required under that section,—his right, and the invasion of it, viz., his ownership of the land, and the defendant's unfounded adverse claims respecting it. It was not incumbent upon him to go further and disclose the nature of the defendants' several claims. That was for them to do, or be precluded from asserting them in any other form of action. *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. The appellants, however, elected to set up their respective claims in their cross-complaints. Neither of the cross-complaints, though, alleged facts which, if proved, would have

warranted a decree compelling the plaintiff to specifically perform Exhibit A. There is no allegation in either of them of a tender of the balance of the purchase price, under Exhibit A, by the California Land & Timber Company, or any of the appellants. Kohler, the assignee of the insolvent corporation last named, alleged, as a reason for not tendering the remainder of the purchase money, that plaintiff had not obtained patents from either the United States or this state, although often requested so to do, and was therefore unable to perform Exhibit A upon his part; and that he had never offered to return the money paid him under said exhibit to A. T. Nation, Roberts, or G. M. Nation, and prayed that plaintiff's interest in the lands be foreclosed, and the latter sold, and the proceeds applied, first, to the payment of the last installment due under Exhibit A, and the remainder delivered to the said assignee. Craig's (the receiver's) cross-complaint was based upon the same theory as that of the assignee's, except that he asked for no affirmative relief. Fry and Higgins, the trustees, who base their claim of title to or interest in the land solely upon the assignment of Exhibit A to the company, which was in fact not made, alleged in their cross-complaint that plaintiff had not furnished to Roberts, the California Land & Timber Company, or themselves, a clear title to the lands based on patents from the United States or the state of California; that they (the last-named defendants) were ready and willing, as soon as such patents should be obtained, to pay to plaintiff the third installment due under Exhibit A, together with interest thereon; and that the United States and this state were ready and willing to patent the land to plaintiff; and prayed that they be decreed the owners of the premises against the other defendants, and also the plaintiff, subject, however, to the latter's right to the payment of the third installment under the contract, before making a conveyance of the land to them. Thus it should appear that the claims of the assignee of the insolvent company and the receiver were, by their respective pleadings, made to depend upon the truth of their allegations, to the effect that the plaintiff never notified any of the defendants of his ability to perform, nor made any offer to perform, the contract upon his part; and that the claim of the trustees Fry and Higgins was made, in like manner, to depend upon their allegation of the plaintiff's inability to perform the contract, on account of his failure and refusal to obtain the title stipulated for in the contract, upon the obtaining of which they (the trustees) were ready and willing to pay the remainder of the purchase price. Now, according to the agreement, (Exhibit A,) plaintiff had two years from March 15, 1886, the date thereof, within which to perfect his title to the land by procuring patents from either the United States or the state of California. This the court found he did do, in July, 1887, which was within the time limited; and, during the same month, notified Roberts and A. T. Nation of the fact, and at the same time tendered

them a sufficient deed to the land and demanded of each of them the balance due him under Exhibit A, which they refused and neglected to pay. Appellants do not attack this finding. Indeed, in view of the evidence, it could not be successfully assailed. This finding, then, negatives and disposes of the positions assumed by Kohler, as assignee, and Craig, as receiver, and upon which they seem to have been willing that the case should turn as to them. It also, in addition to the further finding,—which is likewise unassailed and unassailable,—that Fry and Higgins never, for themselves or any one else, demanded a deed to the land, or offered, or were ready or willing, to pay the remainder due under Exhibit A, as effectually negatives and disposes of the main position assumed by Fry and Higgins as trustees. They, in their attempt to show their derivative right or title to the land, by virtue of the assignment of Exhibit A to the company, completely failed, and also in their attempt to show that the plaintiff was in default. They, therefore, failed to prove any title or interest in the land under Exhibit A. All that Craig, the receiver, could, in any event, recover in the action was the possession of the land. This appears to be conceded. There was no stipulation in the contract, Exhibit A, surrendering the possession of the property to the vendee; and, unless there is such a stipulation in a contract like the one mentioned, it may be considered as settled in this state that the vendor retains the possession until the legal title passes to his vendee. *Gaven v. Hagen*, 15 Cal. 208; *Gates v. McLean*, 70 Cal. 49, 11 Pac. Rep. 489. Hence, it was necessary for Craig to show, as such receiver, a performance of, or offer to perform, the contract by the vendee, or his assigns, or himself, for the benefit of the parties whom he represented, as receiver, so that the court might have compelled the plaintiff to convey the legal title to the proper party, which would have carried the right of possession. As no such state of facts was shown to exist, we think he failed to establish any interest in the premises. Kohler, as assignee, in addition to showing his alleged interest in the land, was required to prove that the plaintiff was in default before he could demand that the latter's interest in it should be foreclosed, and the land sold, and the surplus of the proceeds, over the amount of the last installment due plaintiff, under Exhibit A, paid over to him. Having, like his co-defendants, failed to show any interest in the land, and that the plaintiff was in default, the relief he sought was properly denied. If the several cross-complaints had alleged the facts, as they were disclosed by the evidence, they would have been insufficient to have entitled the appellants to any relief. *Hicks v. Lovell*, 64 Cal. 20, and cases there cited; *Gates v. McLean*, supra; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. Rep. 398. It is true that, in an action by a vendor against a vendee to foreclose the latter's interest under the contract, when the vendee is merely in default,—as was said in *Hansbrough v. Peck*, 5 Wall. 506,—“the court will usually give

him a day, if he desires it, to raise money; longer or shorter depending upon the peculiar circumstances of the case.” But, as we have seen, the appellants here, though they might have had such an advantage, did not frame their pleading so as to avail themselves of it; but, on the contrary, the trustees framed theirs so as simply to defeat the plaintiff's action, and not to obtain affirmative relief for themselves, while the receiver and assignee pleaded their own inability to complete the purchase. This state of the pleadings, considered in connection with the evidence, which shows that, even if the plaintiff had been cognizant of all the facts which appellants' claim made the company the real vendee under, or assignee of Exhibit A, the company, as well as all the appellants, were in default under that contract, and refused to fulfill it upon their part, while the plaintiff, on his part, was not in default, but ready, able, and willing to comply with it. Therefore, we think it plain that there was no rescission of the contract pleaded or shown by the appellants under which they could claim a return of the portion of the purchase price paid, but that there was a voluntary abandonment upon the part of appellants of whatever interest they may have been entitled to under Exhibit A. The contract having been thus abandoned by them, they cannot complain that it results in the retention by the plaintiff of the amount paid under Exhibit A; for, as was said respecting a contract for the sale of land in *Ketchum v. Evertson*, 13 Johns. 359, “it may be asserted with confidence that a party who has advanced money, or done an act in part performance of an agreement, and then stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party, being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done.” See, also, *Hansbrough v. Peck*, 5 Wall. 506, which is to the same effect. Under the circumstances of the present case, the following remarks of the supreme court of Texas, in *Estes v. Browning*, 11 Tex. 287, are applicable: “It is to be regretted that the defendants did not, in the original suit, proffer payment of the balance due, and demand title of the plaintiff. This is the only relief to which they are entitled, and the only condition upon which they can be extricated from the embarrassment occasioned by their own default; and it is further to be regretted that they did not, in this suit, by their plea in reconvention, avail themselves of the opportunity to tender performance and demand title. Their refusal and neglect are diminishing the chance of any relief, and, if persisted in, must terminate in entire defeat.” But it is evident to us in this case that the appellants do not desire any further opportunity to comply with the contract, Exhibit A, upon their part, for they urge in their closing brief that, in the event of a reversal, the plaintiff's complaint cannot be so amended as to change the action to quiet title into one of foreclosure, and therefore the said complaint should be dismissed. None of

the appellants were parties to or assignees of Exhibit A. They assumed no obligations under it towards the plaintiff so as to bring themselves in privity with him. This being so, they acquired no rights under said contract, and, having no rights, consequently there was nothing to forfeit. Their claims, however, operated as a cloud upon the title of plaintiff, which he was entitled to have removed in this form of action. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

85 Cal. 538

PAULSEN v. SCHULTZ *et al.* (No. 12,804.)
(Supreme Court of California. Sept. 10, 1890.)
ASSUMPSIT—SERVICES RENDERED—REDUCTION OF
COMPENSATION.

1. Plaintiff sued for a certain amount for services rendered defendants as partners, and for a certain amount as assignee of a claim against them. It was admitted that the amount claimed as assignee was due, but it was denied that defendants were indebted to plaintiff for services in the amount claimed, but only for a certain part of it; and it was alleged that between certain dates, while plaintiff was working for defendants at \$100 a month, he overdraw a certain amount, which defendants claimed should be allowed as an offset to plaintiff's claim. The only issue was whether plaintiff's salary had been reduced from \$150 per month to \$100 per month. Plaintiff had for a number of years worked for defendants for \$150 per month. Although defendants may have contemplated reducing his salary, nothing was said to plaintiff about it, and when he left their employment he presented his account to one of the partners showing a claim at the rate of \$150 a month, amounting to the sum claimed in the complaint. The partner to whom it was presented said it was correct, and referred him to the other partner for the money. When presented to the latter, all he said was that he had no money to pay it. There was no evidence that plaintiff had overdrawn. *Held*, that a verdict for the amount only admitted by defendants to be due plaintiff for his personal services was not sustained by the evidence.

2. In the absence of evidence that it had been intimated to plaintiff that his salary would be reduced, evidence of the amount of sales, and the embarrassed condition of defendants' business, during the time it was claimed his salary was \$100 per month, was incompetent to show such reduction.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Ben T. Rawlins and T. M. Osment, for appellant. T. C. Van Ness, for respondents.

THORNTON, J. Plaintiff brought this action to recover for services rendered to the defendants as copartners, under the style of Schultz & Von Bargen, upon three separate causes of action. The first was for \$393.45, for services rendered by himself to the defendants; and the other two were for \$160, respectively, for services rendered to the defendants by one Erudenberg and one Knell, which demands they respectively assigned to the plaintiff. The defendants in their answer denied that

they were indebted to plaintiff for services rendered by him personally to any greater extent than \$76.45, and averred that between January 1, 1884, and April 18, 1885, the plaintiff had, while employed by them, at the rate of \$100 a month, as a book-keeper, overdrawn the sum of \$780, which should be allowed them as an offset to his claim. A verdict for \$76.45 in favor of plaintiff was rendered, and a judgment thereon rendered. Plaintiff, being dissatisfied with the judgment, appeals therefrom, and also from an order denying him a new trial, for the reasons that the evidence is insufficient to sustain the verdict, and that certain prejudicial errors of law were committed. At the trial it was conceded that the amounts plaintiff sued for as assignee were due, and that the only issue in the case was as to whether the salary of the plaintiff, as book-keeper for the defendants, had been reduced from \$150 per month to \$100 per month, and, if so reduced, when the reduction was made. The evidence shows, without conflict, that the plaintiff worked for the defendants for a number of years as book-keeper, for an agreed salary of \$150 per month; and that, while the defendants may have contemplated reducing it to the sum of \$100 per month on and from January 1, 1884, to April 18, 1885, which would make a difference to the extent of the amount they claim he overdraw his salary, no such reduction was in fact made, or intimation of it given to the plaintiff. When he left their service, and submitted a statement of his account to one of the partners, which showed a claim of wages at the rate of \$150 per month from January 1, 1885, to April 18th of the same year, with a credit of \$146.50, and a balance of \$397.45 due him, it was pronounced correct, and, when subsequently brought to the attention of the other defendant for payment, was not disputed. There is no evidence that he overdraw his account; but, on the contrary, there is abundant evidence, which must, because not contradicted, be regarded as conclusive, showing that the defendants were indebted to him to the extent of his claim for personal services, from which it resulted that he is also entitled to recover as assignee the full amount of the other two demands which were not disputed. Since this is so, it is apparent that the verdict is not sustained by the evidence.

The court, against the objection of plaintiff that it was irrelevant and incompetent, admitted evidence of the amount of sales, and the embarrassed condition of the business of defendants during the last three or four months that plaintiff was employed by them. The evidence that plaintiff had been employed by defendants for a number of years at a salary of \$150 per month, and that during such period the above salary had been paid him, was clear, distinct, and uncontradicted. There is no evidence that there had ever been any intimation that this salary would be reduced, made to plaintiff by defendants. Under such circumstances, we cannot perceive that the evidence above referred to was relevant to any issues in the cause. Such evidence may have shown

that there was a necessity for reducing, or that it was highly expedient to reduce, the expenses of conducting the business of defendants and the plaintiff's salary as one item of expense; but, in the absence of some evidence tending to show an agreement between the parties for a reduction of the salary, we cannot see in what way the necessity or expediency of reducing the salary would tend to show that there was a reduction. The court erred in admitting the evidence just above mentioned. Taking the whole charge of the court as to the presumption that the defendants knew what was contained in the entries in their books, we cannot say that the court erred.

The only error we discover in the charge to the jury is where the jury were told that the evidence was conflicting as to whether defendants objected to the statement of the plaintiff's account with them, which he submitted to them at the time he left their employment. The evidence was not conflicting on this point, as already stated. The defendant Von Bargaen, to whom the statement was first given, said it was correct, and referred it to his partner, the defendant Schultz, for the money due upon it. When it was presented to the latter for this purpose, all he said was that he had no money to pay it. Upon this state of facts, the accuracy of the items of the account was established *prima facie*, and it had the effect of an account stated. Judgment and order reversed, and cause remanded for a new trial.

We concur: SHARPSTEIN, J.; McFARLAND, J.

(85 Cal. 619)

HUTCHINSON v. McNALLY *et al.* (No. 12,579.)

(Supreme Court of California. Sept. 12, 1890.)

EJECTMENT—HOMESTEAD—RIGHTS OF DEVISEE.

1. A complaint in ejectment alleged that the land was devised to plaintiff; that it was the homestead of decedent and his wife, and was selected from the separate property of decedent without his consent; that, after decedent's death, an order was made setting off said homestead to decedent's widow, and that she continued in possession until after her death. By Civil Code Cal. § 1265, a homestead in the separate property of the husband can be set apart to the widow for a limited period, not longer than during her life. *Held*, that the complaint was not demurrable on the ground that it did not show that the homestead to which plaintiff's estate was subject had ceased to exist at the time the action was brought, as it would not be presumed against plaintiff that the court set apart the homestead for a longer time than that allowed by law.

2. The complaint having alleged that the homestead was set apart to the widow, and it being further alleged that plaintiff, as devisee under decedent's will, and as owner of the land, became and was entitled to possession on her death, the possibility that the homestead was set off to the family for a time extending beyond the widow's death will be *held* on demurrer to be precluded.

Reversing 23 Pac. Rep. 132.

In bank. On rehearing. For former report, see 23 Pac. Rep. 132.

T. M. Osment, for appellant. Chas. F. Hanlon, for respondents.

WORKS, J. Ejectment. Judgment for defendants upon demurrer to the complaint. Plaintiff appeals. The complaint alleges: "(1) That one Charles C. Hutchinson, late of the city of Oakland, county of Alameda, state of California, was, at and before his death, the owner, and seised in fee and possessed, of that certain piece and parcel of land, situate, lying, and being in the said city of Oakland, county of Alameda, state of California, described as follows, viz. * * * (2) That on or about the 2d day of June, 1878, the said Charles C. Hutchinson died, having by his last will and testament devised to the plaintiff the said land and premises; that said will was, by an order duly given and made on the 29th day of June, 1878, by the late probate court of the county of Alameda, admitted to probate. (3) That said property was, prior to and at the time of his death, the homestead of the said Charles C. Hutchinson, deceased, and Esther C. C. Hutchinson, his wife, and was selected from the separate property of the decedent without his consent; that the declaration of homestead was duly recorded in the office of the county recorder of said county of Alameda, on or about the 10th day of May, 1878. (4) That, thereafter, certain proceedings were had in the superior court of said county of Alameda, whereby on the 20th day of April, 1880, an order was duly made and entered, setting off said homestead to said Esther C. C. Hutchinson, surviving widow of the said decedent; that said Esther C. C. Hutchinson was, at the date last aforesaid, in possession of the said homestead property, and continued in possession thereof until the time of her death, viz., on or about the 31st day of January, 1881. (5) That upon the day and year last aforesaid, the plaintiff herein, as devisee under the said will of Charles C. Hutchinson, deceased, and as the owner of the land and premises hereinbefore described, became and was entitled to the possession of said land and premises, and every part thereof." The objection made to the complaint is that it does not allege for what length of time the homestead was set off to the widow, and therefore does not show that the homestead, to which the plaintiff's claim of ownership was subject, had ceased to exist at the time she brought her suit, and for that reason does not show either title or right to possession in her. The objection is not well taken. The complaint shows that the homestead was of the separate property of the deceased, selected without his consent, and that the widow, to whom it was set apart, was dead at the time the suit was brought. The homestead being of separate property, could only be set apart to the widow for a limited time, certainly not longer than during her life. Civil Code, § 1265; Code Civil Proc. § 1474. It will not be presumed against the pleader that the court set apart the homestead for a longer time than that allowed by law. It is contended, however, that there might have been children of the deceased, and the homestead might have been set off to the family for a time extending beyond the life of the widow. But the allegation of the com-

plaint is that it was set apart to the widow, which disposes of that objection. Besides, the complaint alleges in general terms, after stating the facts, that plaintiff, "as devisee under the said will of Charles C. Hutchinson, deceased, and as the owner of the land and premises hereinbefore described, became and was entitled to the possession of said land and premises, and every part thereof." Of course this general allegation would not have been sufficient standing alone, but the objection made to the complaint being that it was uncertain, as above stated, the general allegation assisted to make the complaint certain in the particular mentioned. The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; FOX, J.; PATERSON, J.; THORNTON, J.

86 Cal. 367

GARDNER V. DONNELLY *et al.* (No. 12,993.)
(*Supreme Court of California.* Nov. 12, 1890.)

ATTACHMENT—BOND FOR RELEASE—NOTICE OF
DEFAULT—PLEADING.

1. It is no defense in an action on an undertaking executed in consideration of the release of an attachment, and stipulating for the payment by defendant on demand of whatever judgment should be recovered by plaintiff in the attachment suit, that, after the court ordered the attachment discharged and the property released, the sheriff refused to deliver up the goods, and retained possession thereof.

2. The undertaking having been executed and the attachment released it became binding as a common-law obligation and cannot be repudiated, though it be more onerous than the statutory undertakings.

3. The undertaking being for defendant's payment of the judgment on demand, and the sureties being, by Civil Code, § 2807, liable immediately on default of their principal, and without demand or notice, plaintiff could institute and maintain his action against the sureties without waiting for the expiration of the day on which payment was demanded of and refused by defendant.

4. An averment in an action on an undertaking that defendants, and each of them, "wholly neglected and refused, and still neglect and refuse, to pay," is a sufficient allegation of non-payment.

Commissioners' decision. Department 2. Appeal from city and county of San Francisco; JOHN HUNT, Judge.

Edward S. Salomon, O'Brien, Morrison & Daingerfield, for appellants. Geo. D. Collins and R. B. Mitchell, for respondent.

BELCHER, C. C. This is an action upon an undertaking given to procure the release of an attachment levied on the property of the defendant Donnelly. The court below gave judgment for the plaintiff on the pleadings, and the defendants appeal. It is alleged in the complaint that the plaintiff commenced an action against Donnelly to recover the sum of \$630, with interest; that a writ of attachment was duly issued in the action and levied by the sheriff upon certain personal property of the said defendant; that four days thereafter Donnelly, as principal, and the other defendants, as sureties, executed a writ-

ten undertaking, which after reciting the commencement of the action and the issuance and levy of the attachment, proceeds as follows: "And whereas, the said defendant J. W. Donnelly is desirous of having said property released from said attachment, now, therefore, we, the undersigned residents and freeholders in the city and county of San Francisco, in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, do hereby jointly and severally undertake, in the sum of thirteen hundred dollars, and promise that, in case the plaintiff recovers judgment in the action, the defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest, and costs, the same to be paid in United States gold coin, if so required by the terms of the judgment." It is then further alleged that the undertaking was duly approved by the judge of the court, and filed in the action for the use and security of the plaintiff; that thereupon, "in consequence and in consideration of said undertaking on the part of these said defendants, said property so, as aforesaid, attached, and so, as aforesaid, held, by the said sheriff of said city and county, under and by virtue of said writ of attachment issued in said action, was, upon motion of the said defendant J. W. Donnelly, ordered to be released from said attachment, and said attachment was ordered discharged by an order of said superior court, therein duly given and made in the words and figures following," (setting out a copy of the order,) and that "immediately upon filing of said undertaking, and in consideration thereof, the property so attached, as aforesaid, was released from said attachment;" that subsequently, the plaintiff recovered a judgment against Donnelly for \$630, with interest and costs, and that an execution thereon was taken out and placed in the hands of the sheriff, who returned it unsatisfied, except as to the sum of \$60.06, which sum was duly credited on the judgment; that thereafter, and prior to the commencement of this action, demand in writing for the payment of the judgment, together with interest thereon, and costs, was made upon the defendants, but they, and each of them, wholly neglected and refused, and still neglect and refuse, to pay the balance due on the judgment, or any portion thereof. For answer, the defendants admit all the averments of the complaint, except as follows: They allege that the sheriff, upon due demand made upon him by the attorneys of defendant Donnelly, for the release of the attached property, in compliance with the order of the court, refused to release the same from attachment, and never did release the same, and the said property never was restored to said defendant, and that the conditions of the undertaking were therefore never complied with. They further deny that they are indebted to the plaintiff in the sum demanded, or in any other sum, or at all, by reason of the undertaking mentioned in the complaint.

1. In support of the appeal, counsel for

appellants contend that a material issue was raised by the answer, as to the release of the attached property, and that, hence, a judgment on the pleadings could not properly be granted. They say: "The answer admits that an order for release had been made, as set forth in the complaint, but the fact that the sheriff disobeyed said order, and held onto the property, is a defense. The sheriff seized the property at the instigation of plaintiff. The defendants here entered into the bond in suit, on condition that the possession of the property should be restored to the attachment debtor. * * * The sheriff was plaintiff's agent in seizing the property. He was presumptively his agent in refusing to release the property. It was plaintiff's duty to make the sheriff let go, before a right of action on this bond could accrue." Citing *McMillan v. Dana*, 18 Cal. 339. In the case cited, the facts on which the action was based are almost identical with those involved here, and the court, after setting out a copy of the undertaking sued on, proceeds to say: "The complaint avers that, after the execution and approval by the court of this paper, and in consequence and consideration of such undertaking, the said property and moneys so attached were released from said attachment, 'as by the order of said court made by the judge thereof, and filed in said court.' The order of the court is set out, which releases and discharges the property attached from the attachment. The court on the trial granted a nonsuit, upon the ground, it seems, that there was no averment in the complaint that the property attached was actually released and delivered to the defendant. * * * In the present instance, the defendants promise, in consideration of the release of the property from the attachment, that, in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. The complaint avers that this property was released by order of the judge, and the order of release is set out. The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking, therefore, is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not, was wholly immaterial. The plaintiff in attachment, after the giving of the undertaking and the order of the judge, had no further claim on it. Nor does it matter whether the property was subject to attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on, as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit." In this case the condition of the undertaking was not that the property should be released from the possession of the sheriff, but from the attachment; and when the court ordered the attachment discharged and the prop-

erty released, this was fully accomplished, whether the sheriff still retained possession of it or not. If he did retain the possession, he did so wrongfully, and not for the plaintiff, unless he had some other process in his hands which justified his action. We are unable to see, therefore, why the case above referred to was cited, or how it could be supposed to support the contention of appellants. It seems, on the contrary, to be directly opposed to their theory, and to decide fully, fairly, and correctly the point presented against them.

It is further urged that the undertaking contains conditions not at all like those required by sections 554 and 555 of the Code of Civil Procedure, and that it is more onerous than the statutory undertaking, and therefore void on its face. But, conceding all that is said of the undertaking to be true, still the conclusion does not follow. Section 540 of the same Code also provides that an undertaking may be given when property "has been or is about to be attached," and we think the undertaking in question good under that section. Whether it be so or not, however, is immaterial. It was given for a purpose which was accomplished when the order of the court was obtained, and it then became binding on its makers as a common-law obligation, and cannot now be repudiated by those who asked for and received its benefits.

2. The point is made that the complaint was prematurely filed, as against the sureties, and therefore that it does not state facts sufficient to constitute a cause of action against them. This point is rested upon the fact that the complaint appears, from the indorsement thereon, to have been filed on the same day that demand for the payment of the judgment is alleged to have been made and refused. The argument is, in substance, that the liability of the sureties depended on a demand on Donnelly, and that they could have extinguished the obligation by an offer to perform made within "reasonable hours" thereafter, and, hence, that they were not in default until midnight, or at least until the last "reasonable instant" of the day on which demand was made had expired. Citing section 1490 of the Civil Code. The section cited is in the title relating to the extinction of obligations, and in the chapter headed "Offer of Performance." It reads as follows: "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards." Evidently this section has no application to the point in hand. The undertaking was that Donnelly would pay the amount of the judgment on demand; and, when demand for its payment was made and refused, he was in default, and his sureties became immediately liable without demand or notice. Civil Code, § 2807. A cause of action, then, at once accrued against all of the defendants, and the plaintiff could institute and maintain his action, without waiting for the day to expire. *Green v. Robertson*, 64 Cal. 75.

It is also claimed that the alleged demand

was insufficient, because it was "for the payment of said judgment, with interest thereon and costs," and a portion of the judgment had already been paid. There might be something in this point if the defendants had offered or shown a willingness to pay the amount still due, but, as alleged, they, and each of them, neglected and refused "to pay the balance due on said judgment or any portion thereof." We think the allegation of demand and refusal sufficient, certainly in the absence of a special demurrer.

3. Finally, it is urged that the judgment should be reversed, because there was no sufficient averment in the complaint of non-payment; and, in support of this position, counsel cite *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. Rep. 882. In answer to this, it is enough to say that the same point was considered and overruled in *O'Hanlon v. Denver*, 81 Cal. 60, 22 Pac. Rep. 407; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. Rep. 1134; and *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. Rep. 1094. In our opinion judgment on the pleadings was properly entered, and we, therefore, advise that it be affirmed.

We concur: HAYNE, C.; FOOTE, J.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

36 Cal. 374

TOOMEY v. SOUTHERN PAC. R. CO. (No. 12,202.)

(*Supreme Court of California*. Nov. 12, 1890.)

RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK.

Decedent, while walking along a railroad track without license, was run into and killed at a distance of 150 yards from a crossing behind him, from which direction the train was coming. The engine was in a reversed position, and there was no head-light or cow-catcher on the tender. The bell was not rung, nor was the whistle blown at the crossing, though provided for by statute. Had such signals been given, decedent would probably have heard them and escaped injury. He was not seen by the trainmen until after the accident. *Held*, that decedent was a mere trespasser, to whom the company owed no duty, and therefore it was not liable.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. C. Belcher, for appellant. J. E. McElrath, for respondent.

HAYNE, C. This was an action for damages for the death of the plaintiff's son, alleged to have been caused by the negligence of the defendant. The trial court, sitting without a jury, gave judgment for the plaintiff, and the defendant appeals upon the findings. The facts found are as follows: The plaintiff's son, a lad of 18, was run over and killed while walking at night upon the defendant's track. About 150 yards to the south of the place of the accident was a public crossing, but it does not appear that the deceased had been at this crossing. He was going in an opposite direction towards a neighboring town, which was more than a mile

away. There was no path, road-way, or crossing at the place of the accident, or nearer thereto than the crossing mentioned, and it is expressly found that the deceased had no license to be where he was, and that it was not usual or customary for any one, except employees of the defendant, to be there. The train was an extra, or "special," train. It was going in the same direction as the deceased, and had passed the crossing above referred to. The engine, though running in front of the cars, was in a reversed position, so that the tender was in front. There was no head-light or cow-catcher upon the tender; and the bell was not rung or the whistle blown on approaching the crossing, as required by section 486 of the Civil Code. None of the employees on the train saw the deceased until after he was hurt. What is claimed to constitute negligence is the omission to have a headlight and cow-catcher, and the omission to cause the bell to be rung or the whistle to be blown at the crossing. The central position of the defense is that the deceased was a trespasser upon the track, and it is very clear that he was such. The track was not a highway for pedestrians. The law holds a railroad company to a very high degree of responsibility for the safety of its passengers, and public convenience requires rapid transit. Such being the case, regard for the safety of the passengers, and common justice to the company, require that (except at crossings and similar places) the track should be kept clear. In some countries, this is regarded as of such importance that it is made a penal offense to trespass upon a railroad track; and even at crossings there are gates and gate-keepers to prevent people from crossing when trains are approaching. In this country, there are no such regulations. The matter is left to individual good sense and responsibility, but it is none the less of grave importance that the track should be kept clear. The law does not sanction its use as a path or sidewalk, and if people persist in using it as such, they must be held to be doing an act which is not lawful. This, which seems clear enough on principle, is fully sustained by authority. In *Railroad Co. v. Hummel*, 44 Pa. St. 378, the court, per STRONG, J., said: "It is time it should be understood in this state that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries, it is a penal offense to go upon a railroad. With us, if it is not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge GIBSON, with the concurrence of all the court, that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to

use the highest attainable rate of speed, with which neither the person nor property of another may interfere." Similar language was used in *Mulherrin v. Railroad Co.*, 81 Pa. St. 375. In *Railroad Co. v. State*, 62 Md. 487, the court, per IRVING, J., said: "A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and any one who travels upon such right of way as a footway, and not for any business with the railroad, is a wrong-doer and a trespasser." In *Palmer v. Railroad Co.*, 112 Ind. 253, 14 N. E. Rep. 70, the court, per ELLIOTT, J., said: "Under the firmly-settled rule, the deceased must be regarded as having been a trespasser on the track of the railroad company at the time of his death." And see, also, *Morrissey v. Railroad Co.*, 126 Mass. 380; *Railroad Co. v. Monday*, 49 Ark. 262, 4 S. W. Rep. 782; *Mason v. Railway Co.*, 27 Kan. 83. In all of these cases the person injured was trespassing upon the property of the company, and the proposition stated was directly involved.

The deceased having been a mere trespasser, the defendant did not owe him the duty of doing acts to facilitate his trespass, or to render it safe. It is to be observed here that we are not saying that the fact that he was a trespasser would justify the infliction of a willful or wanton injury upon him. It is well settled that the commission of a trespass does not justify the infliction of an injury by way of punishment or revenge, or out of mere recklessness. Nor are we saying that a railroad company is not bound to use ordinary care after seeing the dangerous position of a trespasser. No such principle is involved in this case. For it appears, not only that the employees on the train did not see the deceased until after the accident, but, by reason of the darkness, could not in all probability have done so. What we say is that the company does not owe to a mere trespasser upon its track the duty of doing acts to facilitate his trespass, or render it safe. In other words, it is not bound to provide any particular kind of machinery or appliances for his benefit, or (when not aware of his presence) to give cautionary signals to notify him of the approach of its trains. And we do not put this upon the ground of contributory negligence, which would imply that the defendant as well as the deceased was guilty of negligence in a legal sense. We put it upon the ground that the defendant owed no duty to the deceased to do the acts whose omission is complained of. What we conceive to be the true rule was clearly stated by McKEE, J., in *Tennenbrock v. Railroad Co.*, 59 Cal. 269, in which the plaintiff was walking upon the defendant's trestle, and was injured while trying to escape from a train which had failed to whistle on approaching the trestle. The other justices of the department, however, "concurred in the judgment," on the ground of contributory negligence. In the subsequent case of *Williams v. Railroad Co.*, 72 Cal. 120, 13 Pac. Rep. 219, the plaintiff was injured while lying drunk near the rails. It was conceded by his counsel that he was a tres-

passer, and that the company did not owe him the duty of looking out for him; and the court adopted this concession, and went on to inquire whether there was a want of ordinary care after seeing him. If these cases could be regarded as decisive of the proposition, it would not be necessary to pursue the subject further. But, as already stated, the opinion of McKEE, J., was not concurred in by the other justices. And with reference to the *Williams* Case it is insisted for the plaintiff that the concession of counsel does not make the law, and that the proposition is unsound in principle and contrary to previous decisions. In view of these criticisms, we have examined the question without regard to the cases referred to. The proposition that mere omissions do not amount to negligence, in a legal sense, unless there was a legal duty to do the act, is fundamental, and it must necessarily be true; for if there was no duty to do the act,—in other words, if the party was not bound to do it,—he had a right to omit it, and he cannot be held liable for omitting something which he had a right to omit. In this regard the language of Pollock is expressive and apt. "For mere omissions," he says, "a man is not, generally speaking, held answerable. Not that the consequences or the moral gravity of an omission are necessarily less. * * * But, unless he is under some specific duty of action, his omission will not in any case be either an offense or a civil wrong." Pol. Torts, p. 352. See, also, Cooley, Torts, pp. 659, 660; Add. Torts, p. 953; Whart. Neg. § 3; *Railroad Co. v. Bingham*, 29 Ohio St. 369; *Railroad Co. v. Monday*, 49 Ark. 261, 4 S. W. Rep. 782; *Nicholson v. Railroad Co.*, 41 N. Y. 529. If this proposition be true, the question reduces itself to this: Did the defendant owe to the deceased the duty of doing the acts whose omission is complained of? We think not. So far as machinery and appliances are concerned, it seems entirely clear that a mere trespasser cannot claim that a railroad company is bound to furnish them for his benefit. He can no more complain of the want of proper machinery than the tramp who steals a ride upon the trucks can complain that due care was not used in the selection of the wheels. The case is not like that class of cases in which trespassers are injured by spring-guns or the like. The use of such contrivances ordinarily implies an intention to injure, or a recklessness which is its practical equivalent; and, as has been stated, the commission of a trespass does not justify the intentional or reckless infliction of an injury. So far as the omission to give cautionary signals is concerned, it seems equally clear that the defendant had a right to assume that no trespassers were upon its track, and to act upon that assumption in the absence of knowledge to the contrary. A trespasser, of whose presence the defendant was not aware, can no more complain of the omission to give such signals than an idler who strolls unnoticed into a foundry to gratify his curiosity can complain that there was nothing to warn him of the danger he was in. To hold otherwise would be to compel the defendant to

keep giving such signals over the whole length of its route. These general propositions are fully sustained by the cases above cited. The counsel for the plaintiff relies upon the maxim, *sic utere tuo ut alienum non laedas*. But the meaning of this is that a man must so use his own as not to injure the rights of others. The maxim is so interpreted in the Civil Code, § 3514. It does not aid us in ascertaining what the rights of others are, and it certainly does not mean that a person is liable for the damage caused by every accident to which his agency may have conduced, regardless of other considerations.

If, therefore, there had been no crossing in the vicinity, we should say that it was very clear that there was no duty on the part of the defendant to do the acts whose omission is complained of. But it has been suggested that, so far as the ringing of the bell and the blowing of the whistle are concerned, the duty is imposed by statute; that in all probability the deceased could have heard such signals from the place where he was, and that he may have relied upon them. This suggestion assumes that the duty imposed by statute was a duty to all the world, or to some class, of which the deceased was a member. We think, however, that the intention could not have been to facilitate unlawful acts. An illustration will make this clear. Suppose that a train wrecker should wish to destroy a particular train, and should rely upon the whistle or bell at a neighboring crossing for warning in time to make his escape, but should be taken unawares and run over, because no whistle was blown nor bell rung, would he be heard to say that the duty imposed by statute was a duty to him, and that its omission was negligence for which he could recover? We think not. And so here, the trespass upon the track was, as we have shown, an unlawful act, and the provision of the statute was not intended to facilitate it. The duty imposed was for the benefit of those who use the crossing, and who, in consequence, have a right to be on the track. The deceased was not of this class. He was not at the crossing at the time of the accident. He does not appear to have been there at all, but was going in an opposite direction for purposes of his own. The case of *Needham v. Railroad Co.*, 37 Cal. 410, is not in conflict with the foregoing. What is said in that case relates to the facts before the court, which were as follows: The plaintiff's mare escaped from his premises and became fastened in the defendant's trestle. The train stopped, and the trainmen removed her in what was claimed to be a negligent manner. It is plain, therefore, that they saw the animal in time to permit the use of ordinary care; and the proposition laid down was that in such case such care must be used. But, as has been stated, this proposition is not involved in this case, because the trainmen did not see the deceased until after the accident, and by reason of the darkness could not in all probability have done so.

The plaintiff's counsel seems to place some reliance upon the fact that the train was an extra, or special, train. But we

do not think this at all material. It can hardly be contended that a railroad company has no right to run an extra train for a particular occasion. The duty of advertising the time of starting applies only to regular trains. To guard against misapprehension it may be added that in what we have said we have had no reference to cases where the track is in a highway, or to any case where the person injured has a right to be upon the track. Upon the facts found, we think that there was no liability on the part of the defendant, and, as the correctness of the findings of fact is not disputed, we advise that the judgment be reversed, and the cause remanded, with directions to enter judgment for the defendant.

We concur: VANCLIFF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant.

4. Where, in a suit for the partition of several distinct parcels of land, plaintiff has judgment, but it is reversed on appeal as to one tract, in which a defendant against whom a default judgment was entered was interested, the whole judgment as to that tract is thereby set aside, and defendant in default can move to vacate the default within a year from the rendition of judgment on the second trial.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Wicks & Ward, for appellant. *Howard & Roberts, John D. Bicknell*, and *Finlayson & Finlayson*, for respondents.

Fox, J. This is an appeal from an order setting aside the default and judgment thereon, entered against the defendant Antonio Maria Lugo, and permitting him to answer in the cause. This court will not interfere with the action of the court below in making such an order as that appealed from in this case, where, as here, it appears to have been made upon affidavit of merits, unless it affirmatively appears that the court was without jurisdiction to make, or abused its discretion in making, the order. The action was for partition of several parcels of land, designated, respectively, as "A," "B," "C," "D," and "E." There were several defendants in the first instance, and, by amendment subsequently made, several others were brought in as defendants. Respondent Antonio Maria Lugo was one of the original defendants, and plaintiff in his complaint, which has never been amended in that particular, avers that the respondent claims some segregated interest in that portion of the lands sought to be partitioned, and designated as "Tract A," the exact nature and extent of which is not accurately known to plaintiff; and in another and prior portion of the complaint he alleges that he and the defendants named, of whom the respondent is one, "hold and are in possession, and are the owners and tenants in common, as hereafter set out," of the several tracts of land designated as above stated. A certificate, headed "Office of the Sheriff, Los Angeles County, Cal.," and dated May 14, 1885, is indorsed upon the *alias* summons, reciting that the respondent was served, by delivering to him a true copy of said summons, at the county of Los Angeles, on the 14th of April, 1885, and is signed "M. G. Aguirre." This is not made as, and does not purport to be, an affidavit of service. Aguirre was not the sheriff of the county, and if he was deputy-sheriff, or acting as such, as is now claimed, the fact is entirely immaterial. As proof of service, the certificate was and is void. "The act and return of a deputy is a nullity, unless done in the name, and by the authority, of the sheriff." *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 403. The certificate being a nullity, it was as if no return or proof of service had been made. There was therefore no authority to enter the default of the defendant. The clerk in entering defaults exercises no judicial functions, but acts merely in a ministerial capacity, and unless he confines himself strictly within the statute his acts can have no binding force. *Willson v.*

86 Cal. 395

REINHART v. LUGO *et al.* (No. 13,638.)

(*Supreme Court of California.* Nov. 20, 1890.)

SERVICE OF WRIT—RETURN—VACATING JUDGMENT.

1. A service of summons by a deputy-sheriff, or one acting as such, is void when the return is made in the deputy's name instead of in that of the sheriff.

2. A default judgment, entered on a void service and return, is void, and is not validated by a finding of the court that there was due service, for such finding is not conclusive of the fact under Code Civil Proc. Cal. § 670, subd. 1, requiring the summons, together with proof of service, to be made a part of the judgment roll in case defendant fails to answer.

3. A motion to vacate a default judgment, on the ground that it is void because of lack of proof of service of summons on defendant, is not a collateral but a direct attack.

Cleaveland, 30 Cal. 198, citing *Stearns v. Aguirre*, 7 Cal. 443; *Kelly v. Van Austin*, 17 Cal. 564; *Glidden v. Packard*, 28 Cal. 651. Before default can be regularly taken against a party, there must be positive and sufficient evidence in court of due service, and no substantial defect in that respect can be cured by subsequent knowledge of the fact. *Johnson v. Delbridge*, 35 Mich. 436. If proof of service of summons is not made as required by law, the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them. Any judgment rendered is, therefore, invalid and void. *Lyons v. Cunningham*, 66 Cal. 42, 4 Pac. Rep. 938, and cases there cited.

The default of this respondent was entered by the clerk June 17, 1885, upon no other proof of service than that furnished by this certificate. Subsequently the complaint was amended, but it does not appear that the amended complaint was ever served upon this respondent. Such service is required by section 472, Code Civil Proc., and without it no judgment by default could be entered against him. "The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of default against him on the original pleading; for where a plaintiff amends in matter of substance, (and in an action of partition, the bringing in of new parties, alleging that they have or claim an interest in the subject of partition, is matter of substance,) he in effect opens the default on the original pleading, and must serve his amended pleading upon all the parties, including the defaulting defendant." *Thompson v. Johnson*, 60 Cal. 292. Findings were filed, and decree entered, January 29, 1886. In the findings, the court recites the fact that certain defendants, among them this respondent, had been duly served with summons, and had not appeared, and their defaults had been duly and regularly taken and entered. Appellant claims that by reason of this finding the judgment was not void, but, at most, simply voidable, and that it cannot be attacked collaterally. There would be some force in this argument if a finding of due service was conclusive proof of the fact as against a defendant who had not answered; but, under section 670 of the Code of Civil Procedure, such a finding is not conclusive as against the evidence required to be in, and when found in, the judgment roll. By reference to subdivision 1 of that section, it will be seen that if the complaint be not answered by any defendant, the summons, with the proof of service thereof, must be made a part of the judgment roll. If it be answered, then that fact is sufficient proof of service, or of waiver. In this case, that which was claimed to be proof of service was made a part of the judgment roll, and comes up as such to this court. As we have seen, the proof is a nullity, and furnished no authority for entering the default of the defendant. It follows that the judgment entered thereon was invalid and void. *Lyons v. Cunningham*, supra. Motion to vacate a judgment on the ground that it is void is not a collateral but a direct attack. *Peo-*

ple v. Mullan, 65 Cal. 396¹; *People v. Greene*, 74 Cal. 400, 16 Pac. Rep. 197. But it is claimed that the court has no power to vacate a judgment so entered upon motion, after the lapse of one year. Even if this were true, (but we do not concede that it is, where, as here, the judgment is void on the face of the record, and the authorities cited in support of the proposition do not sustain it,) it would not help the appellant in this case; for an appeal was taken by the plaintiff from the judgment, which we have so far been considering, and the same was reversed, so far as affected the right of plaintiff to have partition of tracts A, D, and E, and affirmed in other respects. *Reinhart v. Lugo*, 75 Cal. 639, 18 Pac. Rep. 112. Tract A is the one in which the complaint admits that this respondent is, or claims to be to some extent, an owner, tenant in common, and in possession. When the judgment as to the plaintiff's rights to partition in this tract was reversed, it vacated and set aside the whole judgment as to the tract, for a judgment in partition cannot be piecemeal; and as to that tract, it was as if no judgment had been entered. The court below correctly so understood it, and when the case was tried again, again passed upon and determined the rights of all parties, including those of this respondent, in the tract. Again it acted, as before, upon the default of this respondent, evidenced and entered as before; and, as a consequence, its judgment, like the first, was, as against this respondent, "invalid and void." This judgment was entered February 12, 1889, and it was the only judgment standing against the respondent in the case, so far as related to tracts A, D, and E. Notice of motion to vacate it was given July 8, 1889, to be heard on the 15th of the same month, and was determined on the 16th of September, 1889; so that even according to appellant's own theory, it was not too late.

But it is claimed that the court ought not to have vacated the judgment, because at the hearing appellant made proof of the fact of service of summons at the time mentioned in the certificate above referred to. That would not justify the court in refusing to vacate the judgment. The default and judgment were void, not because there was no service, but because there was at the time of entering the same no proof of service. This new proof might have been sufficient to have authorized the court, at any time after it was made, if the defendant had not answered, or had leave to answer, to enter a valid default, and thereupon to proceed to a valid judgment, but it would not operate by relation, to make that valid which when entered was void.

In any view we take of the case it does not appear that the court was without jurisdiction to make the order appealed from, and, there being a sufficient affidavit of merits, it does not appear that there was any abuse of discretion. Order affirmed.

We concur: PATERSON, J.; WORKS, J.

¹ 4 Pac. Rep. 343.

86 Cal. 293

PEOPLE v. NEVCE. (No. 20,671.)

(Supreme Court of California. Nov. 18, 1890.)

EMBEZZLEMENT—INFORMATION—EVIDENCE.

1. An information for embezzlement which fully states the facts constituting the crime is good though it does not designate the accused as "bailee," "trustee," or "agent," or formally put him in any of the classes named in the statute defining embezzlement.

2. On prosecution for embezzlement, previous acts of embezzlement similar to the one charged, and against the same person, may be shown.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

George Pearce and J. C. Sims, for appellant. Geo. A. Johnson, Atty. Gen., for the State.

McFARLAND, J. The defendant was convicted of embezzlement, and appeals from the judgment and an order denying a new trial.

1. The objections raised by the demurrer and motion in arrest of judgment, to the sufficiency of the information, are not well taken. The main point here made is that appellant is not called in the information "bailee," "trustee" or "agent," or formally put into any of the classes named in the sections of the Code which define embezzlement. But facts constituting the crime were fully stated, and, that being so, it was not necessary to designate the appellant by any particular name, (People v. Johnson, 71 Cal. 389, 12 Pac. Rep. 261;) and the information in all other respects was unassailable.

2. The transcript is defective on the points sought to be made about alleged errors in ruling on the admissibility of evidence. The bill of exceptions merely shows that respondent asked certain questions of certain witnesses; that appellant made certain objections to said questions; that the court overruled the objections; and that appellant excepted. But it is not shown whether the answers to the questions were favorable or unfavorable to appellant, or that they were answered at all. It is true that in another part of the transcript the appellant "tenders all the evidence, objections, rulings, exceptions, instructions given and refused, shown in the report of the trial of said action taken down by George Hall, reporter of said court;" but in said report which follows there are no objections, rulings, or exceptions. But if the exceptions stated in one part of the transcript could possibly be applied to evidence stated in another part of the transcript, which was apparently admitted without objection, it would be found that they are pointed to certain testimony which might be construed as tending to prove previous acts of embezzlement similar to the one charged in the information, and against the same person. But it has frequently been held that in a case of embezzlement the admission of such evidence is not erroneous. People v. Gray, 66 Cal. 271, 5 Pac. Rep. 240.

3. In the brief of appellant no point is made on the instructions. We have examined them, however, and find in them no material error. Really the only apparent defense which appellant could have

had on the evidence as presented by the record was the technical one that the money which he is charged with embezzling was not the property of McLean, as averred in the information, but of Wightman, to whom it was to have been paid; but there was evidence that appellant was the agent of McLean who gave him the money. That question was submitted to the jury, and we see no error committed with respect to that question. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

86 Cal. 403

PEOPLE v. LATTIMORE. (No. 20,700.)

(Supreme Court of California. Nov. 20, 1890.)

ARSON—EVIDENCE—ALIBI.

1. On a trial for arson, witnesses for the state testified to several conversations with defendant before the fire, in which the subject of previous fires on the property of the same person was discussed, and defendant said they were nothing to what would happen, and used expressions indicating an intention to burn out said owner. Held, that these conversations were properly admitted to show defendant's threats as to the future.

2. Evidence tending to show that defendant started the former fire was admissible to prove intent.

3. The defense of *alibi* is not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM A. CHEENEY, Judge.

Bower & Grant, for appellant. Frank P. Kelly, for the People.

FOX, J. Conviction of arson, motion for new trial denied, and defendant appeals. Only two points are made in the brief of appellant.

1. That it was error to admit certain evidence of other burnings of property on the rancho of Chapman, the place where the fire in this instance occurred. The evidence against the defendant in this case was almost entirely circumstantial. Among other circumstances tending to connect the defendant with the burning, two or three conversations between the defendant and different persons, at different times, were shown, in which the fact of former fires upon the rancho was discussed, and the defendant used expressions to the effect that these were nothing to what would happen in the future, and other like expressions of a threatening character, indicating an intention to burn the Chapmans out. These conversations were not introduced for the purpose of connecting the defendant with the former burnings, but simply to show his threats as to the future. They all occurred before the present fire, and there was no error in their admission. Subsequently two witnesses were called and interrogated as to the circumstances of one of the former fires to which allusion had been made in these conversations, and they gave testimony strongly tending to show that the defendant started the fire to which reference was made. The fire referred to in

this evidence was the burning of another building on the same premises, and belonging to the same person as the one for which the defendant was being prosecuted in this case, and to the same person against whom the threats already proved had been made. Under the rule laid down in *People v. Shainwold*, 51 Cal. 468, the evidence was admissible as further evidence tending to prove intent, although it may have been but cumulative and unnecessary. As said in the case cited: "While perhaps unnecessary, it wrought no such injury to the prisoner at the trial as to entitle him to a reversal of the judgment here."

2. One of the instructions given by the court to the jury was an exact copy of the instruction considered by this court in bank, in the case of *People v. Levine*, ante, 631, (No. 20,572, filed July 21, 1890.) We again repeat that the defense of *alibi* is "not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause;" and we may add that, if trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed. But in this case, as in the *Levine* Case, the charge of the court, taken as a whole, was so full and fair to the defendant that we cannot conceive that any injury resulted to the defendant from this unnecessary instruction in regard to the scrutinizing of the evidence given in support of the defense of *alibi*.

3. At the oral argument, an additional point was made,—that the evidence was insufficient to justify the verdict. We have carefully read all the evidence in the record, and find no cause for disturbing the verdict upon this ground.

Judgment and order affirmed.

I concur: PATERSON, J

WORKS, J. I think the instruction complained of, relating to the defense of *alibi*, was erroneous, but, as the court in bank held in *People v. Levine* that such an instruction was not cause for reversal, I feel myself bound by that decision.

3 Cal. Unrep. 309

MANNING V. DEN. (No. 13,821.)¹

(*Supreme Court of California*. Nov. 19, 1890.)

SPECIAL ASSESSMENTS—HARMLESS ERROR—EVIDENCE.

1. Where plaintiff, in an action to collect a street assessment, has made *prima facie* proof of the regularity of the proceedings, under Act Cal. March 18, 1885, (St. 1885, p. 147,) and thereafter introduces, without objection, certain parol proof, a refusal to strike this out, if error, is without injury, as such proof was unnecessary.

2. An objection to an offer to prove certain negative conclusions is properly sustained where there is no offer of the evidence from which the conclusions are to be drawn.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

M. Whaling, for appellant. Herndon, Cain & Garrison, for respondent.

Fox, J. This is an action to recover an amount claimed to be due upon a street assessment levied under proceedings had in pursuance of the provisions of the act of March 18, 1885, (St. 1885, p. 147.) Judgment for plaintiff, motion for new trial made and denied, and defendant appeals.

The principal contention is that the evidence is insufficient to show that the proceedings resulting in the assessment and warrant were such as required by law, and sufficient to entitle the plaintiff to recover; in other words, that there was a failure to show a valid contract upon which to base the assessment and warrant. Section 12 of the act which authorizes the suit provides: "The said warrant, assessment, and diagram, with the affidavit of demand and non-payment, shall be held *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action." With the policy of this provision, the court has nothing to do, so it is written and adopted by the legislature. The assessment and diagram attached were offered and admitted in evidence without objection. Plaintiff then offered the warrant and affidavit, with the indorsement of record thereon. To this, defendant "made the same objections as those offered to the assessment." As he had offered no objections to the assessment, this objection was correctly overruled. This made out a *prima facie* case for the plaintiff. But, in addition to this, the plaintiff did introduce, without objection, the records of all the preliminary proceedings on the part of the city council prescribed and required by the statute, with the proof of publication, posting, etc., and in addition thereto made, without objection, parol proof of the fact of contract. This last proof the defendant subsequently moved to strike out, but as it was admitted without objection, and was unnecessary, since the warrant and assessment were *prima facie* proof of the same fact, the court denied the motion. We do not think that this ruling was erroneous, but, if it was, it was error without injury.

Plaintiff, having also proved his assignment of the claim to himself, rested, when the defendant moved for a nonsuit, on 10 different grounds, every one of which is based upon a misconception of the effect of the evidence already in, and hereinabove stated. There was no error in denying the motion. Defendant then "offered to prove" several negative conclusions, not facts, but, as he did not offer the evidence from which the conclusions were to be drawn, the court correctly sustained an objection to the offer. He then called the street superintendent, (successor in office to the one under whom the contract, assessment, and warrant were made,) who, at defendant's request, produced two papers, which defendant offered in evidence. These appeared to be a blank form, partially filled out, of contract, and a bond for the same street-work for which this assessment was made. The bond was complete, fully ex-

ecuted, approved, and certified; but the paper offered as a contract was a mere blank, and there was no attempt to prove that it was the contract, or claimed to be the contract, under which the work was done, or on which the assessment was based. Objection to its introduction was properly sustained. The authorities cited by appellant, in view of the statute, the *prima facie* case made by plaintiff, and of the fact that defendant made no showing to overcome that *prima facie* case, though good law, are not in point. Judgment and order affirmed.

We concur. PATERSON, J.; WORKS, J.

86 Cal. 415

BERONIO v. SOUTHERN PAC. R. CO. (No. 13,673.)

(Supreme Court of California. Nov. 21, 1890.)

RES ADJUDICATA—AMENDMENT OF PLEADING.

1. A railway having been constructed along a street on which plaintiff owned two lots, a few hundred feet apart, he obtained judgment for damages to one of them arising from the construction and operation of the road. *Held*, that this was a bar to a suit for damages to the other lot, accruing prior to the filing of the complaint in the first suit, from the same cause.

2. It is not an abuse of discretion to allow an answer to be amended after a jury is impaneled, where it does not appear that plaintiff was taken by surprise, or suffered any injury therefrom.

Department 1. Appeal from superior court, Ventura county; R. M. DILLARD, Judge.

H. L. Poplin and Barnes & Selby, for appellant. *R. B. Canfield and Blackstock & Shepherd*, for respondent.

Fox, J. The town of San Buenaventura is a municipal corporation. The legal title to the lands comprising Front street in said town was granted to the then town authorities, October 13, 1869, "as a public street, to be forever kept open and maintained as such, and not to be used for any other purpose, nor be diminished in width." On the 4th of October, 1886, the president and board of trustees of the town, by ordinance, granted to the defendant a right to lay, maintain, and operate a single or double track railroad along and upon said Front street for the whole length thereof, from a point near Kalorama street, etc. The plaintiff owned two lots fronting on the north side of said street, one situate in block 19, and one in block 20, the two being separated by a distance of 260 feet. The railroad was constructed along said Front street prior to September 13, 1888, and on that day plaintiff commenced an action against defendant for damages to his lot situate in block 19 by reason of a cut and fill made in the construction thereof, and on the 26th day of January, 1889, the amount of plaintiff's damages were agreed upon and settled between the parties, and paid by defendant to plaintiff, and thereafter, in pursuance of the agreement between the parties, judgment was entered in the cause in favor of defendant. Afterwards the defendant put in a switch on the south side of the street, opposite said block 19, and

thereupon the plaintiff brought this action, alleging, in the first count of his complaint, damages by reason of the construction and maintenance of said railroad in front of his lot in block 20, and, in the second count, damages to his said lot in block 19, accrued since the former settlement and judgment, by reason of the continuance of said railroad, and the operation thereof, and of the construction of said switch, in front of his said lot in block 19. The defendant denied all the allegations of the complaint other than those of incorporation, pleaded its license from the municipal authorities, and, as a separate defense to the second cause of action, pleaded the former settlement, payment, and judgment in bar. At the trial, after the jury was impaneled, but before the introduction of any evidence, defendant moved the court for leave to amend its answer by pleading the former settlement and judgment as a bar to all the causes of action set out in the complaint. To this the plaintiff objected, on the ground that the amendment did not constitute a defense. After argument, the court overruled the objection, and the amendment was made, the court not imposing terms, to which plaintiff excepted, but plaintiff asked no continuance on account of such amendment. Plaintiff then introduced some evidence tending to show damage to his lot in block 20 by reason of the construction of said railroad, a cut of 18 inches in depth having been made in the street by reason thereof. Defendant then introduced the judgment roll in the former case, which was admitted without objection, and it was admitted by the parties that the parties to that action were the same as to this; that the railroad mentioned in the former complaint was one and the same railroad as that mentioned in this case; that plaintiff at the time owned the same lots as now, and was then the owner of the same cause of action upon which he now claimed under his first count of the present complaint; and that the said two lots were separated by a distance of 260 feet. Plaintiff then proposed to introduce further evidence as to his damage to the lot situate in block 20,—the cause of action mentioned in the first count of his complaint,—but the court ruled the same out, on the ground that his claim for such damage was barred by the said former judgment. Plaintiff admitted that he had no claim for damage to his lot in block 19 caused by the construction of the railroad's main track. The record fails to show the introduction or offer of any evidence of damage by reason of the construction and maintenance of the switch. The plaintiff asked the court to instruct the jury that the former settlement and judgment were not a bar to any claim for damages done to the lot in block 20; that such damages, if any, constituted a separate cause of action from that sued for in the former case, and, if any such were found, the same should be included in a verdict for plaintiff. The court refused to so instruct the jury, and, on the contrary, instructed the jury that, as the case was presented, the only question for their consideration

was the damages, if any, done to the lot in block 19 by reason of the construction and operation of the switch and side track in front of his premises in that block. To all these rulings the plaintiff excepted.

We think there was no error in the rulings or instructions of the court in this behalf so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint, or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it was a unit,—the construction and operation of a single railroad, which was complete at the time. The fact that it damaged two lots belonging to the same man at the same time, and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive; and this has been held to constitute but a single cause of action. *Brannenburg v. Railroad Co.*, 13 Ind. 103. In cases of tort, the question as to the number of causes of action which the same person may have, turns upon the number of the torts, not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one. 1 *Suth. Dam.* 183, and cases cited. Whenever by one act a permanent injury is done, the damages are assessed once for all. 3 *Suth. Dam.* 372. This principle is established in *Marble v. Keyes*, 9 *Gray*, 221, and in very many other cases. There is nothing in the authorities cited by appellant in conflict with this view.

Appellant claims that he was entitled to recover for the damages sustained by the continued operation of the railroad after the settlement and judgment in the former case. This claim conflicts with the authorities already cited, but under *Hopkins v. Railroad Co.*, 50 *Cal.* 190, and *Ford v. Railroad Co.*, 59 *Cal.* 290, there might be some force in the argument, if there was anything in the case upon which to base it. But the record shows that plaintiff admitted that he had no claim for damages to the lot in block 19 accruing after the date of the former complaint, and it fails to show any proof of damages to either lot after that date.

Appellant also claims that he was entitled to recover for the damages to his lot in block 19 by reason of the construction and operation of the switch and side track. The court ruled in his favor in that regard, and he proved the fact of the construction and operation of the switch and side track, but his record fails to show that he offered to prove any damages by reason thereof. We cannot therefore disturb the verdict of the jury in that regard.

Appellant also complains of the action of the court in permitting the answer to be amended, after the jury was impeached, and in denying his subsequent motion to strike out the amendment. This was a matter entirely in the discretion of the court. The plaintiff does not seem to have been taken by surprise, or to have suffered any injury therefrom, and we do not per-

ceive that there was any abuse of discretion. Judgment and order affirmed.

1 CONCUR: PATERSON, J.

WORKS, J. I concur in the judgment. Under the circumstances of this case, the lots claimed to have been affected lying near to, if not adjoining, each other, and the road being completed at the time the first action was brought, the settlement of that case was rightly held to be a bar to the second action. But a case might arise where a road being constructed would pass over and affect two tracts of land owned by the same person, the tracts being a long distance apart, and that part of the road affecting one piece of land be constructed long before the part affecting the other piece. In such a case the construction of the whole road could not, with any propriety, be treated as but one act, and the land-owner be compelled to delay his action until the whole road is completed, and join his action for damages to both pieces of land, or bring his action for both, when it may be uncertain whether the last part of the road will ever be completed or not. Under such circumstances, separate actions should be allowed, and, in my judgment, the opinion of Mr. Justice Fox is too broad in its language in this respect.

86 Cal. 405

WOLFSKILL v. LOS ANGELES COUNTY *et al.*
(No. 13,728.)

(Supreme Court of California Nov. 21, 1890.)

DEDICATION OF HIGHWAYS—ESTOPPEL TO DENY.

1. Land was sold, with the understanding that, after the first deferred payment, the vendee should subdivide the same, lay out streets, and make and record maps thereof, and make sales according to such maps, and the vendor was to and did join in conveyances in pursuance to that understanding, the lands conveyed being described by lots, blocks, and numbers, and as bounded by streets, as laid down on the maps. The legal title and possession remained in the vendor, as security for the price, but such land as was appropriated to roads or other improvements was expressly excepted from his reservation of possession. The clause of the contract relating to the making of surveys, construction of roads, etc., provided that "the inclosures of the party of the first part shall be left practically unimpaired." About two years after the recording of the maps the county commissioners assumed jurisdiction of a street laid down on said maps, along the entire length of the western boundary of the land. They accepted a deed of a strip of land on the west of it, and, as thus widened, extended it north and south, and changed its name. Said vendor was living on said land, and made no objections until after the street had been graded part way through said land, and the commissioners were proceeding to have the fence removed from the western boundary of said land and replaced on the eastern side of the road. *Held*, that it was then too late to withdraw the offer of dedication of the street as a public highway.

2. Such change in the fence was not a practical impairment of the vendor's inclosures.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Smith, Winder & Smith, for appellant. Houghton, Silent & Campbell, for respondents.

Fox, J. This is an action for the recovery of the sum of \$5,000 damages for trespass *quare clausum fregit*, and praying for an injunction perpetually restraining the defendants from further trespass, and from laying out and opening a public highway on lands claimed by plaintiff. Defendants had judgment, from which, and an order denying plaintiff's motion for new trial, plaintiff appeals.

It seems from the pleadings, findings, and evidence in the cause that the plaintiff was the owner of a tract of land situate in the county of Los Angeles, consisting of 4,387 acres, known as the "Rancho San Jose de Buenos Ayres." On the 27th of May, 1887, he entered into a contract with J. W. Hoyt, for the sale of said tract, for the sum of \$438,700. This was to be paid in installments,—\$1,000 down; \$37,700 on or before July 1, 1887; \$100,000 on or before January 25, 1888; \$150,000 on or before July 25, 1888; and the balance, \$150,000, on or before July 25, 1889, with interest at the rate of 6 per cent. per annum, on deferred payments, from June 25, 1887. It was further provided in the agreement, "for the purpose of enabling the said second party to subdivide and resell said land, the said second party shall have the right, after the payment due July 1, 1887, is made, to enter upon said land for the purpose of making surveys, constructing roads, developing and piping water, and making other improvements, provided that the inclosures of the party of the first part shall be left practically unimpaired." It was further agreed that the plaintiff should execute deeds of conveyance of lots, and subdivisions of the tract, as sales were made, (a minimum price being fixed at which different portions thereof should be sold,) the sales to be made for not less than one-third cash, the balance to be secured by mortgage upon the portion sold, plaintiff to receive the cash and credit the same on his contract, and also to receive the notes and mortgages given by purchasers, and, when they were paid, to also credit the amount on his said contract. As to the payment due July 1, 1887, time was made of the essence of the agreement. It was also "further understood and agreed that the party of the first part shall remain in possession of the said ranch until the full payment of installments of the purchase money to be paid, on or before July 25, 1888, as above stipulated, excepting such portions as may be conveyed to purchasers, as above agreed, or such portions as may be appropriated to roads or other improvements, as above stipulated, and shall receive the rents and profits thereof for his own use and benefit." It is conceded that the payment due July 1, 1887, was made according to contract. On the 28th of that month, Hoyt conveyed all his interest in the land, and in the contract, to the Los Angeles & Santa Monica Land & Water Company, a corporation. This was done with the knowledge and in the presence of the plaintiff, and he thereafter dealt with the company as his contract vendee. Upon receiving this transfer, the company proceeded to carry out the purpose for which the contract was evidently made, and to

exercise the powers conferred by the contract, of subdividing and laying off the land, making improvements, and sales, etc. In the exercise of this power, it made two maps, and placed the same of record,—one of a town-site, situate in about the center of the tract, called "Sunset," and the other of the lands embraced in the tract, and lying outside the town-site, these outside lands being divided into subdivisions, varying in size from 1 acre to 75 acres, and the tract being so intersected into streets and roads that every subdivision had at least one frontage upon some street, road, or avenue. The company also published and distributed a lithograph map, combining the two maps, and showing the entire tract, as subdivided and laid off by and upon the two maps so made matter of record. To what extent, if any, it made other improvements upon the land, does not appear, and is unimportant, for the purposes of this case. It did make a large number of sales of different subdivisions, and the plaintiff, at its request, and in pursuance of the terms of the contract, made conveyances, to the number of 100 or more, receiving the cash payments made thereon, and crediting the same on the contract, and also receiving the notes and mortgages of purchasers, and holding them as collateral to his contract, as therein provided. He also himself became a purchaser from the company of lots to the amount of \$47,000, and accepted the company's deed for the land, crediting the amount upon his contract. All the conveyances so made and united in by him, and that accepted by himself, described the property conveyed by lots, blocks, and numbers, and as bounded by streets, as laid down on the recorded maps above mentioned. He also accepted from the company a conveyance of several parcels of the outside lands of the tract, described according to the said outside map, and gave a declaration and certificate acknowledging and declaring that the same had been conveyed to him in trust; and that he held the same in trust, as security for the payment of \$1,000 agreed to be contributed by the company to the National Soldiers' Home, an institution located on a tract adjoining said rancho, and the payment of which contribution had been guarantied by him. The payment of \$100,000, due January 25, 1888, with the interest, was duly made; but the company was unable to meet its subsequent payments, as they fell due, and the plaintiff entered into supplemental agreements with it, extending the time of such payments, and subdividing the same, and acknowledged the receipt of divers sums, on account of such subsequent payments. Several roads, streets, and avenues were laid down on the recorded map of said outside lands, or what is called the "Acre Subdivision" of said tract, and, among others, one 60 feet wide along the entire length of the western boundary thereof, from the northern to the southern boundaries, called "Pacific Avenue," and the land fronting on the same was laid off into subdivisions varying from 10 to upwards of 70 acres each, in extent. All the lands fronting

on this avenue were sold and conveyed according to the map, and in the manner above indicated. At the date of the contract, and up until the date of the alleged trespasses of defendants, the entire tract was substantially inclosed, and the defendant living on it, in full view of everything that was being done on the tract. When the plats were made, the land was surveyed and laid off on the ground, as the same was shown on the maps, and stakes set at the corners of the several lots, and along the lines of the several streets and roads. In this condition of affairs, the board of supervisors of the county, in January, or early in February, 1889, assumed jurisdiction over Pacific avenue, as a public highway. On the 8th of February a petition was received by the board concerning the same, and, in due course, was acted upon by the board. They received and accepted a deed of a strip of land 40 feet wide, adjoining it on the west, for the entire length thereof, and with that widened the same to 100 feet, and changed the name thereof to "Military Avenue." They procured the necessary right of way, and extended the same southward some two miles to connect with another road called "National Boulevard," and northward to another road called "Nevada Avenue," running through the Soldiers' Home tract, and they ordered that the whole road, thus widened and extended, be opened and graded, and appointed one of their number, the defendant Davis, a committee to carry the order into effect. Under this order that portion of the road lying south of this rancho was opened and graded, and the graders entered upon the portion thereof on the rancho, and within the then inclosures thereof, and graded about one mile thereof. At this stage, they took down the 60 feet of fence which was within the platted road-way on the south boundary of the rancho, and proceeded to take up the fence along the western boundary of the rancho, and moved the same, and replaced it, in as good order and condition as it was before, 60 feet eastward, and along the eastern line of the avenue as it was surveyed, staked, and platted. During all this time, the plaintiff was living on the rancho, and in full view of the work going on, but made no protest or objection thereto. The supervisor having charge of the work says he heard of no objection on the part of plaintiff until about a mile of the fence had been moved back. This evidence is not contradicted, and oral evidence of all the facts as to the action of the board of supervisors, as herein stated, was received without objection, and no effort was made to contradict it in any particular. It was proved and admitted that up to the time of the removal of the fence no part of the land within the inclosure, and included in Pacific avenue, had in fact been used as a public highway. The matter of opening and grading the highway having progressed thus far, this action was commenced, April 13, 1889. No restraining order was sought or made, *pendente lite*, and whether the work has been prosecuted further does not appear.

To our minds the controlling question in the case is whether or not there had been an offer and acceptance of dedication of Pacific avenue to public use as a public highway. The appellant strenuously insists upon the negative of this proposition, and relies chiefly upon the case of *People v. Reed*, 81 Cal. 79, 22 Pac. Rep. 474, in support of his position. But the case now under consideration is very different from that of *People v. Reed*. In that case the plat or map had never been recorded, and for that reason it was expressly held, (page 78,) "where the right to claim the street by the public rests upon the map alone, there is no offer to be accepted until the same is filed for record." It was further held, and we adhere to that ruling in this case, that the mere sale of lots according to an unrecorded map is not such a dedication as makes the public an interested party. It was further held, in substance, and we again repeat, that even the filing of a map, and the recording of the same, is but an offer of dedication of the streets and highways delineated thereon, and that, "in order to constitute a dedication which can be taken advantage of by the public authorities, * * * the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance." Page 79, and cases there cited. And we may make a further addition, which the history of the country now seems to demand, that the acceptance, by user or otherwise, of one or more particular streets or highways shown upon a recorded map, will not operate as an acceptance of all or any other of the streets or highways delineated thereon. "Such acceptance must be within a reasonable time after such offer of dedication, and, if not accepted, the owner may resume the possession of the property, and thereby revoke his offer." Page 80, and cases there cited. That case was decided in bank, and the principles there laid down, and here affirmed, furnish ample protection to this plaintiff, and to all others whose lands have been platted into streets, lots, and blocks, against any claims of the public to streets and highways of which the offer of dedication has not in some form been accepted by the public authorities. But in the *Reed* Case, as before stated, there was never an offer of dedication, for the reason that the map was never recorded. Some time after the map was made, the land in controversy in that case was actually inclosed, and substantial buildings erected thereon, and the same were occupied for more than 20 years before there was any attempt made to accept what was claimed to have been, by reason of the making of the map, an offer of dedication. The court held, not only that there had been no offer of dedication to be accepted, but also that, even if the making of the map, without recording the same, and the sale of lots according to the same, had been an offer of dedication, there had been a withdrawal of the offer more than 20 years before the attempted acceptance. The facts of that case are so unlike those here developed that the case is not in point. Here the land was sold, with the

express understanding, in the beginning, that, upon the making of the first deferred payment, the vendee should have the right to, and intended to, subdivide the same into smaller tracts, with streets and roads upon and through the same, and make and record maps thereof, and make sales according to such maps; and the vendor was to and did join in conveyances made in pursuance with that intention and understanding. The legal title and possession remained in the vendor, as security for the unpaid portion of the purchase money; but, as to possession, he expressly excepted from his reservation thereof such portions of the land as should be appropriated to roads or other improvements. It is true that in the clause of the contract which provided for the making of surveys, construction of roads, etc., there was a provision that "the inclosures of the party of the first part shall be left practically unimpaired;" but it was expressly proved on the trial, and no attempt made to contradict the evidence, that the work of opening and constructing Pacific avenue was so conducted as that it did leave the inclosures of plaintiff "practically unimpaired." His fences were kept intact, and the inclosure of the vast tract complete, with the exception of placing without instead of within the inclosure the strip of land 60 feet wide along the westerly line of the rancho, which had been "appropriated to" the road called "Pacific Avenue." This appropriation was contemplated by the contract, and this change in the fence can hardly be claimed as a "practical impairment" of his inclosure. Here, then, was a clear offer of dedication, made by the equitable owner, under authority from, and with the full knowledge and consent of, the holder of the legal title, and after payment to and receipt by him of the full consideration demanded as a condition precedent to such authority. In the most solemn manner, and by the most solemn acts, he frequently thereafter ratified the offer, and both he and the owner of the equitable title kept the offer open, with no attempt at withdrawal, or intimation of desire to withdraw it, until, a little more than two years after the offer was first made, the public authorities, by their public acts, of which all the world had constructive notice, and of which it is not pretended that plaintiff did not have actual notice, accepted the offer so far as this one avenue or highway is concerned,—accepted the offer, and assumed jurisdiction and control over it, changed its name, acquired the necessary property to widen and extend it, and, by public act, did widen and extend it, and actually entered upon and graded a goodly portion of it, under the very eyes of the plaintiff, all without protest or objection from him. It was and is therefore too late for him to withdraw that offer of dedication so far as this one street or highway is concerned. The public accepted it within a reasonable time, and before any attempt to withdraw it, or to make any use of the property offered other or different from that which was being made when the offer was made matter of public record. Ex-

tracts from the records of the board of supervisors are presented in the record, from which it is argued that no formal resolution of acceptance of the offer was ever passed. We do not regard this fact as material, if it be true. Such a resolution would be but evidence of acceptance, but it is not the only evidence of such an act. Publicly dealing with the property as a public highway, in such manner as this was dealt with, widening, extending, and grading it, changing its name, and the like, are acts tending to prove acceptance, and proof of these acts, and of the fact of acceptance, was made orally, without objection, or attempt at contradiction. We think they were binding upon plaintiff and his vendees, and that they completed the act of dedication to public use. It does not follow that this would affect, and nothing in the record appears affecting, the question of dedication of any other road or street laid down upon said tract. In view of the conclusion here reached, it is unnecessary to consider any of the other questions discussed by counsel. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

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86 Cal. 483

BARKLY v. COPELAND. (No. 13,520.)

[*Supreme Court of California.* Nov. 27, 1890.]

OBJECTIONS WAIVED—WITNESS—IMPEACHMENT—
DECLARATIONS—CONSPIRACY.

1. Where an answer of defendant's witness on cross-examination is stricken out because it was given too quickly to permit defendant's counsel to object to the question, but the objection is not then urged, and plaintiff's counsel passes on at once to another question, he thereby waives the first question, and his exception to the striking out of the answer is without merit.

2. It is proper on cross-examination of defendant's witness to allow a question whether she had not on a former occasion tried to induce another person to grant a request, involving a collateral matter, by promising that she would not testify for defendant, where the only object of the question is to show that she had been willing on a former occasion to suppress the testimony just given, and so to impeach her.

3. In an action for slander, defendant justified by attempting to show that plaintiff was connected with the cattle stealing charged by defendant. On cross-examination of the thief, he testified that while he was under arrest one T. told him that the whole matter of the stealing had been settled, but nothing was said to connect plaintiff with such settlement. *Held*, that this statement was merely a collateral matter, and the witness could not be impeached by contradicting it.

4. In an action for slander in charging plaintiff with complicity in the theft of cattle, where defendant justifies on the ground of the truth of the charge, entries in plaintiff's books showing that he purchased the cattle from the thief are not admissible to show his good faith, being his own declarations, and no part of the *res gestæ*.

5. Nor is evidence admissible to show that he paid a certain amount of money to the owner of the cattle after they were stolen, and then sued the thief to recover such amount.

6. Where the thief had testified that he had agreed with plaintiff to steal cattle for him, his statements to third persons of declarations made to him by plaintiff before the cattle were stolen, are admissible, as being evidence of the declarations of a conspirator.¹

7. Under Code Civil Proc. Cal. § 2051, a witness' credit cannot be impeached by evidence of specific wrongful acts.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Clay W. Taylor and Jackson Hatch, for appellant. *Chipman & Garter, John F. Ellison, and L. V. Hitchcock*, for respondent.

FOOTE, C. This action was brought to recover damages for slanderous words spoken by defendant, in (as it is alleged) falsely charging the plaintiff, Barkly, with being interested with Russell Speegle in the larceny of certain cattle, the property of one Thomas Polk, and with receiving the same knowing them to have been stolen by Speegle. The defense set up was justification on the ground that the language spoken was true, and certain facts in mitigation were also pleaded. The jury found for the defendant, and from the judgment thereupon rendered, and an order refusing a new trial, this appeal is taken.

The first ground of error relied upon by the appellant is that the court erred in striking out, upon the defendant's motion, the answer of the witness Laura Mandeville in response to the question put by the plaintiff's counsel, with reference to whether or not she had made a certain statement to one Sam Nelson, at a time when Nelson mentioned to her that the defendant was watching her front door, etc., and in refusing to allow to be answered the plaintiff's question to the same witness relating to a conversation with Nelson. The question asked was: "Now, at the time before Nelson and Mandeville had a row, didn't Sam Nelson come into your house one night during the time of the former trial of this case,—your house that you rented at and in the town of Red Bluff,—and then and there say to you that he had seen Copeland standing out watching the front door of your house, or words in substance, and to that effect, and ask you what Copeland was doing there? Didn't you then respond to him, and tell him that Copeland was hanging around you shadowing you, and trying to get you to swear to something for him in this case, and that you were not going to do it?" The answer stricken out was: "He said nothing of the kind to me, and I said nothing to him." The objection was made on the ground that "it is not the proper way to impeach a witness. There is nothing in that question contradictory to what the witness stated upon the stand." The question was answered before the objection was made; and, upon the statement that the defendant's counsel had endeav-

ored to state the objection before answer, and was unable to anticipate it, the court, upon motion, struck it out, and the plaintiff excepted. There is nothing in the exception. The court had a right, and it was its duty, to give the opposite side a chance to object to the question, which had been answered too quickly, and to strike out the answer for such purpose. After the answer was stricken out, no objection to the question was made. The question therefore stood unchallenged, and while it was in this condition plaintiff's counsel passed to another question, and thereby waived the former.

This question was then asked: "After the row took place between Mandeville and Nelson, which you have just referred to, didn't you go to Nelson, in the town of Red Bluff, during the former trial of this case, and say to him, if he would not prosecute Mandeville for shooting him, that you would not testify for Copeland in this case, or words in substance, and to that effect?" Objection was made, and sustained, that the question was as to matter irrelevant and immaterial, and that it was not proper cross-examination. To this, exception was duly made. All this was upon the cross-examination of the witness, who took the stand for the defendant. If the matter attempted to be brought out was intended to show the defendant in the light of one attempting to corrupt the witness, and cause her to swear falsely, and that it would bind him, counsel for the plaintiff freely concede that the ruling of the court is correct; but the contention is that plaintiff's purpose was to impeach the witness as showing her unworthy of belief from her statements, as being willing to suppress testimony for a consideration, which went to her general integrity. Upon the other hand, the defendant contends that, while it is competent to impeach a witness by showing that at other times he or she had made statements inconsistent with his or her testimony as given upon the trial, yet that there is a limitation of the rule, and that the matter involved in the supposed contradiction must not of itself be merely collateral in its character, as is claimed that the matter here in dispute was, but must be relevant to the issue being tried. The evident design of the plaintiff's counsel was to show by Nelson if the witness denied that she had made the statement mentioned in the question, notwithstanding the denial that she had agreed with him to suppress testimony in this case, the latter having no connection with Copeland, nor any reason to hold out any inducement to this witness to suppress her testimony. The effect of this would be to prove by Nelson, contrary to the denials of the witness, that she had been guilty of bargaining with Nelson to suppress evidence in this case, which she afterwards gave upon the stand. This cross-question should have been allowed. It is true under the rule laid down in *Sharon v. Sharon*, 79 Cal. 673, 22 Pac. Rep. 26, 131, and hereinafter applied in the present case, that a witness cannot be impeached by evidence of particular wrongful acts not bearing upon the matter in issue. But

the cross-question here called, not for testimony tending to show the commission of or willingness to commit an isolated wrongful act, but one which was connected with her own testimony in the case given on behalf of the defendant. Therefore the answers should have been allowed, as it seems to us that it is important that the jury should know whether a witness, after she has given her testimony in favor of one party, had at some previous time offered or agreed for a consideration to suppress the very testimony she has given; for, if she did, it would certainly throw discredit upon her testimony as given, in the same manner as would the fact that she had made different statements upon a former occasion.

On cross-examination of the witness Speegle, a convict in the penitentiary, whose deposition was there being taken on behalf of the defendant, the plaintiff asked this question: "While you were in jail at Tehama, did you send word to Barkly to come and see you at all? Answer: I am pretty certain that I did. I got out of jail the same night I was put in there. I was arrested after my escape in Nevada. While I was out I had no communication with plaintiff. I neither wrote to him nor sent any word to him. When I was brought back I was in jail ten or twelve days before I was convicted. During that time, I neither saw the plaintiff nor sent for him. I had counsel at my examination. Do not know who paid him. Made no defense at all in the justice's court. After I was arrested I told Leland Clark to tell plaintiff to go to Wiley Clark and get some money, so that the matter could be settled. Afterwards, Charley Tait told me the whole thing was settled, about the cow business,—stealing. The whole affair was settled with Polk, and I would have been loose the next morning if I had not got out of jail that night. Tait told me that while I was in the cell. He said all that was necessary was for me to go before the justice of the peace the next morning, and I would have been dismissed. In that conversation plaintiff's name was mentioned, but I do not remember whether he said that plaintiff had settled it up. After my conviction, I sent no word to the plaintiff about the matter, nor did I then, nor have I since, called on him for assistance, nor have I written to him." Afterwards Charles Tait was called by the plaintiff as a witness, and, after testifying that he was at the jail, and saw Speegle after his arrest, and had a conversation with him, he was asked if he had at that time a conversation with Speegle in which Tait told him "that the whole affair relative to the cattle stealing had been settled." This was objected to by defendant's counsel as irrelevant, immaterial, and incompetent, and that it was an attempt to impeach Speegle's testimony on a collateral point that was brought out by plaintiff on his cross-examination. The objection being sustained, exception was taken. After this, two other questions were asked Tait, evidently intended to contradict Speegle as to matters testified to by him on his cross-examination brought out by the plaintiff, and relating

to this conversation at the jail, to which Speegle alluded in his testimony. To them the same objection was made, ruling given, and exception taken. This matter of the Tait conversation was clearly collateral matter brought out on cross-examination, and it was not permissible for the cross-examiner to impeach the witness by contradicting his statement thus brought out. *People v. Dye*, 75 Cal. 112, 16 Pac. Rep. 537.

Again it is urged, as error, that the trial court would not permit the plaintiff to prove certain entries in his books showing that he had put down therein the stolen cattle as being purchased by him, etc., with a view to show his good faith in receiving them from Speegle. It is said by appellant that these entries were part of the *res gestæ*, and as such admissible. "A litigant is not permitted to strengthen his case by his own declarations, whether written or verbal. They may be used against him, but not for him." *Hausman v. Hausling*, 78 Cal. 286, 20 Pac. Rep. 570; Code Civil Proc. § 1870. Referring to a certain sum of \$23, which the appellant, when on the stand as a witness, had stated that he had paid to one Polk, the owner of the cattle that Speegle had stolen, the witness was asked by his counsel if he afterwards brought suit against Speegle for that amount. This was objected to by defendant's counsel, on the ground that it was irrelevant, immaterial, and incompetent, and that a party's own acts and declarations are inadmissible as evidence in his favor. The objection was sustained, and the plaintiff excepted. The ruling, we think, was clearly right. This transaction was no part of the *res gestæ*. The suit was brought some days after the cattle were stolen, and Speegle had been arrested for stealing them.

There were various questions on cross-examination asked the witness Laura Mandeville, as to acts which went to show her a woman "destitute of moral qualities." They were objected to, and objection sustained. This was properly done. She could not be impeached by evidence of specific wrongful acts. Section 2051, Code Civil Proc.; *Sharon v. Sharon*, 79 Cal. 633-673, 22 Pac. Rep. 26, 131.

Finally it is contended by the appellant, that the trial court erroneously admitted, over his objection, statements of Speegle to Laura Mandeville concerning his visit to Tehama, and his conversations with the plaintiff. These matters were related by Laura Mandeville when on the stand as a witness; the questions, to which answers were returned, being: "When he came back, [meaning Speegle,] did he tell you what he had done? What did he say Barkly said he would do with the cattle, if he would drive them over to him, if anything?" The objection was upon the ground that the matter sought to be brought out was irrelevant, immaterial, and incompetent, and was not responsive to any issue in the case, and was hearsay. Upon the other hand, the defendant by his counsel contended that the statements were those of a conspirator with the plaintiff in the theft of the cattle by Speegle, made before the theft, and while the con-

spiracy was in full force and effect. There was evidence by Speegle tending to show that he had made a bargain in the latter part of July, or the first of August, 1884, with the plaintiff, Barkly, to drive cattle to him, and that as early as June of that year the plaintiff had said to Speegle that he, Speegle, had been to a good deal of trouble; had the name of it, and might as well have it again; and that, if Speegle wanted to, to drive them up, and Barkly would do "the square thing" by him; and that, in accordance with this understanding, Speegle had delivered the cattle to the plaintiff. This tended to show a joint agreement between Barkly and Speegle as to the criminal enterprise; and the statements related by the woman Mandeville, as made to her by Speegle, were made before the cattle were stolen, and related to the enterprise with reference thereto in which he and Barkly were embarked, and, within a day or two after the last statement was made to her, Speegle drove the cattle to Tehama, and delivered them to Barkly. In the case of *People v. Collins*, 64 Cal. 295, it was said: "The conspiracy, according to the testimony, contemplated the robbing of stages and their passengers whenever and wherever opportunity offered. The law holds each party to it responsible for the acts of each co-conspirator, done in pursuance and furtherance of the common design, which extends to the consequences which might reasonably be expected to flow from carrying into effect the unlawful combination. There was therefore no error in admitting in evidence against Collins the acts and declaration of Thorne, in relation to the gun with which the murder was committed." So here, the conspiracy having been testified to by Speegle, his acts and declarations relative to the taking and delivering the cattle to Barkly, in pursuance of the common design, was evidence against Barkly as to his complicity in the affair, afterwards consummated. On account of the error pointed out, we advise that the judgment and order be reversed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(86 Cal. 493)

BARKLY v. COPELAND. (No. 13,521.)

(Supreme Court of California. Nov. 27, 1890.)

COSTS—FEES FOR TRANSCRIPT.

1. Under Code Civil Proc. Cal. § 274, as amended by Amend. Codes 1880, p. 54, which provides that "in causes where a transcript has been ordered by the court the fees for transcription must be paid by the respective parties to the action in equal proportions," the fees paid by defendant are a necessary part of the costs incurred in his defense, and if he succeeds in the action he is entitled to recover them from plaintiff.

2. But where such transcript is ordered by defendant alone, he cannot recover the fees therefor, or any part of them, but must pay the whole himself, as provided by the same section.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Clay W. Taylor and Jackson Hatch, for appellant. Chipman & Garter, John F. Ellison, and L. V. Hitchcock, for respondent.

FOOTE, C. This is an appeal from an order refusing to retax a bill of costs presented by the defendant, who had succeeded in the action. There had been two trials of the case, and on each trial the evidence had been transcribed by the shorthand reporter. In the first instance this was done upon the order of the court; at the second trial it was done upon the order of the defendant, without any from the court. It is not entirely clear how much of the amount due to the shorthand reporter for the first transcript was paid by defendant and plaintiff, but it appears as if each one had paid half the fees. As this transcription was made upon the order of the court, but without any direction as to how the fees due therefor should be proportioned between the parties and paid, each side should have paid half, as they did. "In cases where a transcript has been ordered by the court the fees for transcription must be paid by the respective parties to the action, in equal proportions, or by such of them, and in such proportions, as the court, in its discretion, may order." Section 274, Code Civil Proc.; Amend. Codes 1880, p. 54. By the order of the court, this half of the fees thus paid by the defendant in the first instance became a necessary part of the costs and disbursements incurred by him in defense of the action. He was therefore entitled to recover it from his adversary against whom he obtained judgment.

As to the second item, which was \$559.40, paid by the defendant for the second transcription, he could not recover that, or any part of it, from the plaintiff, as neither the latter nor the court had ordered it, but the defendant alone. In another part of section 274 of the Code of Civil Procedure, as amended in 1880, it is said: "The party ordering the reporter to transcribe any portion of the testimony or proceedings must pay the fees of the reporter therefor." The court should have retaxed the defendant's bill of costs, and struck therefrom the item of \$559.40, above mentioned. For these reasons, we advise that the order appealed from be reversed, and the court below directed to retax the bill of costs as herein indicated.

We concur. BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the court below is directed to retax the bill of costs as therein indicated.

86 Cal. 423

HULING v. ABBOTT *et al.* (No. 12,909.)
(Supreme Court of California. Nov. 21, 1890.)

NOTICE OF MORTGAGE—BONA FIDE PURCHASER.

An assignee of a certificate of purchase of land took it with knowledge of an unrecorded mortgage by the assignor, and assigned it to one who had no knowledge of the mortgage. The latter assignee, having obtained a patent to the land, conveyed it to the first assignee, who conveyed it to a person having notice of the mort-

gage. Held, that the mortgage could be enforced against the last grantee, as his grantor, though taking from an innocent purchaser, became, by reason of his former position, a purchaser with notice of the mortgagee's rights and equities.

Department 2. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

E. W. Wilson and Henry L. Ford, for appellant. G. W. Hunter, (J. N. Gillett and J. F. Coonan, of counsel,) for respondent.

THORNTON, J. Action to foreclose a mortgage on a parcel of land situate in Humboldt county. Defendant Abbott was the mortgagor. Abbott made default, judgment of foreclosure was made and entered against defendants, and from this judgment defendant Bull alone prosecutes an appeal. The following facts are found: On July 7, 1885, Abbott was the owner of the tract of land which he, on the 28th of July, 1886, conveyed to plaintiff by mortgage to secure the payment of a debt due by Abbott to the plaintiff. Abbott's title to this land was derived under a certificate of purchase from the state of California, bearing date the day first above mentioned. On the 28th of July, 1886, Abbott assigned his certificate of purchase, and all his title in the land mentioned therein, to one M. H. Crissmon, who purchased with actual notice of the existence of plaintiff's mortgage. On April 15, 1887, Crissmon assigned the certificate of purchase and all his title in and to said lands to C. C. Fitzgerald. Fitzgerald purchased with actual notice of the existence of plaintiff's mortgage, and agreed, as part consideration for the assignment, to pay at maturity the debt secured by the mortgage, and for this purpose retained in his hands from the purchase price the full amount of the principal and interest due on the debt. On July 1, 1887, Fitzgerald assigned the certificate of purchase, and all his title to said lands, to one R. W. Rideout, who at the time of his purchase had no knowledge of the existence of plaintiff's mortgage. Thereafter, Rideout, while the owner of the land, received from the state of California, as assignee of the certificate of purchase, a patent for said lands. The plaintiff placed the mortgage on record in the proper office in the county of Humboldt, on the 19th day of September, 1887. On the 20th of October, 1887, and while the mortgage of plaintiff was of record, Rideout conveyed the lands described in the certificate of purchase above mentioned to the above-named C. C. Fitzgerald. On the 2d day of January, 1888, Fitzgerald conveyed to the defendant Bull (appellant here) the lands above referred to. At the date of the conveyance last named, Bull had full notice of the record of plaintiff's mortgage, and of the execution and existence of such mortgage. On the facts above stated, the court rendered judgment in favor of plaintiff. We think the judgment should stand. When Fitzgerald, who was the grantor of Rideout, and who had actual notice of plaintiff's mortgage when he purchased, and at the time he conveyed to Rideout, received a conveyance from the latter, he

occupied the same position he formerly did, viz., that of a purchaser with notice of plaintiff's rights and equities. He was not protected by the fact that Rideout, his grantor, was an innocent purchaser. *Talbert v. Singleton*, 42 Cal. 391; 2 Devl. Deeds, § 748; 2 Pom. Eq. Jur. § 754. When Fitzgerald secured the conveyance from Rideout, he occupied the same position he did when he purchased from Crissmon,—that of a purchaser with notice of and bound by all the equities of Huling. The court finds that Bull took his conveyance from Fitzgerald with full notice of plaintiff's equities. We cannot see in what way the conclusion can be avoided that plaintiff had a right to enforce his rights against Bull. It may be further observed that it does not appear that Bull paid any money on his purchase. He must, then, be held to occupy the same position that Fitzgerald did, and alike subject to the enforcement of plaintiff's rights. Judgment affirmed.

We concur: McFARLAND, J.; SHARPESTEIN, J.

86 Cal. 479

COOKE v. AGUIRRE, Sheriff. (No. 13,867.)

(*Supreme Court of California*. Nov. 26, 1890.)

JUDGMENT IN REPLEVIN.

1. In replevin, plaintiff alleged his ownership and right of possession, the value of the property, and defendant's wrongful taking and retention of possession. The answer put in issue all said allegations except value. *Held*, that a judgment for the return of the property could not be sustained, there being no finding that plaintiff was entitled to possession, but only that plaintiff was the owner and in possession, and that defendant, as sheriff, wrongfully took possession under a writ of attachment against another person.

2. A judgment for the possession of personal property, which merely describes it as "two stallion horses," without reference to other pleadings or papers for such description, is bad for uncertainty.

3. In an action to recover possession of personal property, a judgment for possession only, and not for possession or the value thereof, as provided by Code Civil Proc. Cal. § 667, is erroneous.

Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

H. H. Appel, Gage & Robarts, and *Willis & Appel*, for appellant. *William Young*, (*H. C. Carr*, of counsel,) for respondent.

WORKS, J. This is an appeal on the judgment roll from a judgment for the recovery of personal property. The plaintiff alleged that he was the owner, and entitled to the immediate possession of the property, giving its value, and that the defendant had wrongfully, and without the plaintiff's consent, taken and retained possession thereof, and detained the same from him; that he had demanded possession of the property, which was refused; and that he had been damaged in the sum of \$100. The defendant answered denying the ownership of the plaintiff, or his right to possession, or that he had wrongfully taken, or wrongfully detained, the property, or that the plaintiff had been damaged; and alleging, also, that

the property was owned by one Cyrus F. Cooke. He also justified, as sheriff, by alleging that said Cooke was the owner of the property, and that he had taken possession of the same by virtue of a writ of attachment regularly issued against Cooke, and placed in his hands, for service, as such sheriff. The answer did not put in issue the value of the property, as alleged in the complaint. The court found that the plaintiff was the owner, and in possession, of the property, and that the defendant, in his official capacity as sheriff, by virtue of a writ of attachment issued against said Cyrus F. Cooke, wrongfully took possession of the property, and still held the same. There was no finding that the plaintiff was entitled to the possession of the property, or its value, or the amount of plaintiff's damages. The property was sufficiently described in the complaint. The court rendered the following judgment: "Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that James A. Cooke, the plaintiff, do have and receive of A. G. Aguirre, (sheriff,) the defendant, judgment for the return of the property, to-wit: Two stallion horses, together with said sheriff's costs and disbursements, incurred in this action, amounting to the sum of sixty-two and 5-100 dollars, (\$62.05)." The appellant contends that the findings do not support the judgment; that the court did not find on all the material issues; and that the judgment is invalid, because it does not sufficiently describe the property, and is not in the alternative, as required by law.

The questions whether the plaintiff was entitled to the possession of the property, and whether he was damaged by the taking, were put in issue by the pleadings. Both of these were material issues. One of them, at least, must have been found in favor of the plaintiff to entitle him to recover. There was no finding as to his right to the possession. For this reason, the judgment is not supported by the findings. The question of damages should have been found upon, but the appellant cannot reasonably ask for a reversal of the case, because a judgment for damages was not rendered against him. The judgment was erroneous because not in the alternative, as required by section 667 of the Code of Civil Procedure, (*Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. Rep. 605.) And for the further reason that it contained no sufficient description of the property. It contains no sufficient description of the property, nor does it refer to any other pleading or paper for such description. Such a judgment is bad for uncertainty. *Welch v. Smith*, 45 Cal. 230; *Kelley v. McKibben*, 53 Cal. 13. Judgment reversed.

We concur: PATERSON, J.; FOX, J.

86 Cal. 445

MADDEN v. OCCIDENTAL & ORIENTAL S. S. Co. (No. 12,799.)

(*Supreme Court of California*. Nov. 26, 1890.)

INJURY TO EMPLOYEE—EVIDENCE.

While plaintiff's decedent was employed in loading defendant's ship, the sling to the ap-

paratus provided by defendant for loading the ship broke, precipitating freight onto deceased, causing his death. *Held*, that defendant's negligence could not be inferred from the mere breaking of the sling, in the absence of proof that it was being properly used by defendant's employees, and in the ordinary manner.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Taylor & Craig, for appellant. *W. H. L. Barnes*, for respondent.

WORKS, J. This is an action by the appellant against the respondent for damages for the death of her husband, claimed to have resulted from the negligence of the appellant. The deceased was the employe of the respondent, engaged in loading one of its ships. The amended complaint alleges: "That, on the 18th day of October, A. D. 1886, the said Patrick Madden was an employe of the said defendant, employed by it, and for it, on the lower deck next above the lower hold of the ship *Belgie*, (one of said ships,) at the mail dock or wharf in the said city and county of San Francisco, as a laborer, assisting to load said ship by stowing cargo; that on the said 18th day of October, A. D. 1886, and while said Patrick Madden was engaged at said work, on said lower deck of the ship, as such laborer, four bales of cotton goods, each bale firmly packed so as to form a solid body, weighing from about 180 to 250 pounds avoirdupois, were, by means of a sling manufactured of rope, hoisted and worked by block and tackle, and operated by steam-power, transferred from said dock or wharf to the main-deck of said ship at the hatchway known and designated as 'Hatchway No. 5,' the said sling, block, and tackle being parts of the machinery and appliances provided by the defendant for the use of its laborers, employed by it in the business and work of loading said ship *Belgie*; that said four bales should have been, by means of said machinery and appliances, carefully lowered to and stowed on said lower deck of said ship, but because of the insecurity and unsuitableness of said sling, and because of the negligence of the defendant in failing to provide and maintain a safe and suitable sling, which insecurity, unsuitableness, and negligence were unknown to or by said Patrick Madden, said sling parted, and two bales of cotton were violently precipitated from the main-deck of said ship down said hatchway No. 5 to the place on said lower deck where said Patrick Madden was engaged in his work, a distance of from eighteen to twenty feet below said main-deck, and one or both of said two bales, containing cotton cloth, as aforesaid, violently struck the said Patrick Madden, without his fault or negligence, producing a fracture of the cervical *vertebra* which pressed on the spinal cord, and also producing an injury of the chest, and a fracture of some of his ribs, and said Patrick Madden was thereby otherwise greatly bruised and injured; and also, by means of the premises, the said Patrick Madden became and was sick, sore, lame, and disabled, and so remained and languished for the space of

four days, and until the 22d day of October, A. D. 1886, when, by reason and as the result of said injuries, and by reason of the premises and of the negligence of the defendant, the said Patrick Madden died." These allegations of negligence were denied by the answer. The cause was partially tried, and upon the evidence of the plaintiff a nonsuit was granted. A motion for a new trial was made, and denied, and the plaintiff appeals.

It is contended that the court below erred in sustaining a demurrer to the original complaint. But the plaintiff did not stand upon her original complaint, but filed an amended one, whereby she waived any error of the court in ruling upon such demurrer, if any error was committed. The nonsuit was properly granted, for the reason that there was no evidence of negligence on the part of the defendant. It was shown that the rope-sling, by which freight was being carried into the ship, and lowered through a hatchway to the lower deck, broke, whereby two bales of freight were precipitated down such hatchway, and the deceased thereby fatally injured, as alleged in the complaint. But there was no evidence showing, or tending to show, that the sling thus used was unsuitable or insecure, as alleged in said complaint, unless the mere proof that the sling broke was *prima facie* evidence of the fact. It is contended by counsel for the appellant that it was only necessary for her to prove that the sling broke, and that, from such proof alone, it must be inferred, in the absence of any evidence on the part of the defendant tending to show that the accident occurred from other causes, that the accident was the result of the neglect of the defendant to furnish a proper sling. It may be that in some cases it would be sufficient to prove that an accident occurred, in order to establish a *prima facie* case of negligence, and cast upon the defendant the burden of explaining away the inference resulting from such proof; and it may be conceded that such would have been the case here, if it had been shown that the sling was being properly used by the co-employees of the deceased, and in the ordinary way. It might be said that, if a railroad train were being properly and carefully run and operated, and that, notwithstanding, some part of the machinery broke, and an accident occurred, negligence would be inferred. *Griffin v. Railroad Co.*, 148 Mass. 143, 19 N. E. Rep. 166. But, as was said in the case cited, "no general rule can be laid down that the mere occurrence of an accident is, or is not, sufficient proof of the actionable negligence; for each case must depend upon its own circumstances." In this case there is no evidence as to what amount of freight this sling was intended to or should carry, or that it was being properly used at the time of the accident. It may have been intended to carry a weight of 500 pounds, and may have been entirely sufficient to carry such a weight, and, for aught we can tell from the evidence before us, it may have been overloaded, and the accident have happened from that cause alone. When it is said in some of the cases that the occurrence of an accident is *prima*

facie evidence of insufficiency of the machinery or appliance being used, it must be confined to cases, if the rule is conceded to be the correct one, where the machinery or appliance is shown to have been used in the usual and proper way, at least where the same is being used by the party injured, or his co-employees. This was not shown in this case, and therefore the rule contended for does not apply here.

A certain question asked by the defendant was objected to by the plaintiff, and the objection overruled. This is complained of. But, as the question did not in any way relate to or affect what we regard as the proper reason for granting the nonsuit, the ruling was harmless, conceding that it was erroneous. One of the grounds for the motion for a new trial was newly-discovered evidence, and certain affidavits in support of this ground are set out in the record. The evidence set out in these affidavits does not supply the facts necessary to make out the plaintiff's case, or tend to strengthen her case, where it needs support. Therefore the motion for a new trial on this ground was properly denied.

We concur: PATERSON, J.; McFARLAND, J.; FOX, J.; SHARPSTEIN, J.

86 Cal. 433

CORSON v. BERSON *et al.* (No. 12,604.)

(Supreme Court of California. Nov. 26, 1890.)

LANDLORD AND TENANT — RENT — FRAUDULENT OVERCHARGE—CLAIMS AGAINST DECEASED PARTNER.

1. A lease of a store for two years, at the monthly rental of \$300, gave the lessees the privilege of a renewal at the same rental. The lease also provided that if the lessees should hold over after the expiration of the two years, with the consent of the lessors, such holding should be construed as a tenancy from month to month. *Held*, that an oral agreement made after the expiration of the two-year term, which had not been extended, and while the lessees were holding as tenants from month to month, under which agreement they were to pay the same rent per month as the lessors should succeed in getting for an adjoining store, did not vary the terms of the written lease, as that had already expired.

2. Where the lease of the adjoining store on its face provides for a rental of \$300 per month, a written agreement, contemporaneously executed, under which the lessors agreed to allow the tenants of the adjoining store a rebate of \$100 per month, is admissible in an action by the lessees of the first store to recover the amount overpaid by them under the oral agreement.

3. Statements made by the lessors' agent on leasing the adjoining store, as to his reason for drawing the lease for \$300 per month, are competent evidence against the lessors.

4. Since the lessees of the first store were tenants from month to month, when the contingency happened on which they were entitled to a reduction of \$100 per month in their rent, the presumption, as provided by Civil Code Cal. § 1945, is that the hiring was at the same reduced rent for each of the succeeding months that they continued their occupancy; and they are entitled to recover the entire overplus which they had been induced to pay for nearly a year by the deceit of the lessors.

5. A claim against a partnership, one of the members of which has died, does not come within Code Civil Proc. Cal. § 1493, which requires claims against a decedent's estate to be presented within a specified time, or be forever barred.

6. The executors of a deceased partner are not necessary parties defendant in an action on a claim against the partnership; and, though they have been joined, a judgment in plaintiff's favor is not erroneous because it does not require that the amount awarded thereby shall be paid in the due course of the administration of the deceased partner's estate.

Commissioner's decision. In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Lloyd & Wood and *E. F. Preston*, for appellants. *Royce & Commings* and *C. E. K. Royce*, for respondent.

GIBSON, C. This action was brought by plaintiff Corson, as assignee, to recover from the firm of A. Berson & Son the sum of \$1,050, due for rent, for 3½ months, on a lease made and delivered to them by the firm of Ewing, Plum & O'Brien, plaintiff's assignors. A Berson & Son admitted by their answer that they occupied the leased premises during the period above mentioned, but denied that such occupation was under or pursuant to the lease relied upon by plaintiff, and averred that during that time they held under a verbal agreement with Ewing, Plum & O'Brien, by which they, A. Berson & Son, were to hold and pay rent for the premises, and did hold and pay for the same, at the rate of \$150 per month. With their answer, they filed a cross-complaint, bringing in, as parties to the action, Ewing and Plum, and Flood and Coleman, the executors of O'Brien, the deceased partner of Ewing and Plum. By this cross-complaint, they alleged that on or about March 1, 1884, Ewing, Plum & O'Brien let the premises to A. Berson & Son from month to month, upon the same rental that the lessors might get for an adjoining store which they, from and after said date and up to June 1, 1885, rented for the sum of \$150 per month, but fraudulently concealed the true amount of the rent thereof from A. Berson & Son, and fraudulently represented to them that the true rental of the adjoining store was \$300 per month, and thereby fraudulently induced A. Berson & Son to pay a greater amount of rent than they had agreed to pay. By reason of which Ewing, Plum & O'Brien became indebted to A. Berson & Son in the sum of \$150 per month, for every month's rent paid by the latter from March 1, 1884, to February 15, 1885, with interest thereon from the last day of each month, less 3½ months' rent from the latter date, at \$150 per month. After the commencement of the action, A. Berson died, and it was continued in the name of G. Berson as the surviving partner of the firm of A. Berson & Son. The case was tried without a jury, and the court found the facts in favor of G. Berson, as the said surviving partner, in accordance with the allegations of the cross-complaint, except that the rental of the adjoining store was found to be \$200 per month for one year from June 1, 1884, instead of \$150 per month from March 1, 1884; and that the rent due from A. Berson & Son for 3½ months from February 15, 1885, was at the rate of \$200 instead of \$150 per month. Judgment followed for

the cross-complainant, G. Berson, as surviving partner of A. Berson & Son, for \$178.50, overplus paid by the firm from June 1, 1884, to February 15, 1885, after deducting \$700 for rent due from the latter date until June 1, 1885, together with interest on the overplus from the date last mentioned. From this judgment and an order denying a new trial, the plaintiff Corson, and Ewing and Plum, and O'Brien's executors, viz., Flood and Coleman, appeal.

In order that the points made by appellants may be fully understood it is necessary to state the leading facts as shown by the evidence. A. Berson & Son, by a lease in writing, leased a store from Ewing, Plum & O'Brien for two years from May 15, 1881, at the monthly rental of \$300 per month, payable in advance each month, with the privilege of an extension of the term at the same rental up to the date of the expiration of the lease of Ewing, Plum & O'Brien, from J. G. Brooks. The lease also provided that, if the lessees should hold over after the expiration of the term of two years, with the expressed or implied consent of their lessors, such holding should be construed as a tenancy from month to month. On the expiration of the term on May 15, 1885, the lease was not extended, but the lessees continued to hold the premises as tenants from month to month at the same rate specified in the lease. While they were thus holding, the adjoining store, which also belonged to the lessors, became vacant in February, 1884, and Ewing, for his firm, in an answer to the repeated solicitations of A. Berson, of the firm of A. Berson & Son, agreed with the latter, as an inducement for them to remain as tenants, that, if the vacant store should be rented for less than \$300 per month, A. Berson & Son should have their store at the same rental. In May of the same year, the lessors leased the adjoining store for one year from June 1, 1884, at a monthly rental, expressed in the lease, of \$300 per month, and gave the lessee a separate paper in which the lessors stipulated to allow the lessee \$100 per month on the rent of \$300 per month, during the term. This stipulation was concealed from A. Berson & Son, to whom it was represented by their lessors that the tenants of the adjoining store were paying \$300 per month therefor. Believing this representation to be true, A. Berson & Son continued to pay \$300 per month, until February 15, 1885, about which time they discovered that the tenants of the adjoining store were, and had been, paying only \$200 per month instead of \$300, but continued to hold the premises until June 1, 1885.

Appellants' first point is that the court erred in overruling their objection to the following question put to G. Berson by his counsel: "What took place when the lease expired?—I mean the original two years, or the first term, of the lease,"—on the ground that it called for testimony that would tend to vary the terms of the written lease. It is obvious that, as the question related to matters that occurred after the lease had expired, the question was not designed to, and in fact did not,

elicit anything that tended to vary its terms; and the objection thereto was properly overruled. Appellants' exception to the court's refusal to strike out the testimony of the same witness, as to what was said relative to the reduction of rent upon the same ground upon which the objection was placed, cannot be sustained, because, when the verbal agreement was made with them regarding the reduction of rent upon the contingency, which happened, viz., of not obtaining \$300 per month for the adjoining store, they were holding as tenants from month to month, as provided for in the original lease which had expired; and it was competent for them to make any parol agreement as to the continuation of their tenancy for any period not exceeding one year. Besides, the testimony was relevant, and tended strongly to support the agreement for the reduction of rent, which constituted the gist of the cross-action.

Appellants' third objection is that the court erred in receiving, in evidence, the paper that had been given to the tenants who leased the adjoining store at the time they obtained a lease of it from Ewing, Plum & O'Brien, by which paper it was provided that such tenants should receive a rebate of \$100 on each month's rent, on the ground that the paper was signed by Ewing alone, and could not bind his firm. The fact that the paper was given with the written lease to the tenants of the adjoining store, and formed a part of it, is sufficient to show that it was properly received in evidence; and the cases cited by us in support of our disposition of the next point of the appellants conclusively establishes that the trial court was right in its ruling in this respect.

After witness Connolly, who was a member of the firm that had leased the adjoining store, had testified: "I paid \$200 per month and no more. I had a conversation with Mr. Ewing and with Mr. Coffey, the young man with Easton & Eldridge at the time. He was the party with whom I negotiated the lease from Mr. Ewing,"—he was asked this question: "Well, now, what was the reason that the lease was drawn for \$300 given you then?" And it was objected to by the appellants, other than Corson, on the ground that anything said by Coffey not in the presence of Ewing, or any of the other parties to the lease as lessors, could not bind them. The objection was properly overruled, because, by the above testimony of the same witness, it sufficiently appeared that Coffey was acting as agent for the lessors in negotiating the lease; and anything he said while acting in that capacity, regarding the concealment of the true amount of rent from A. Berson & Son, under the direction of any member of the firm, was, we think, clearly admissible, for, no matter how slight the tendency of the evidence may be to prove fraud, it is not for that reason incompetent. *Hubbard v. Briggs*, 31 N. Y. 518. If the trial court had any doubt, at the time the question was asked, as to whether Coffey acted as agent for the lessors in negotiating the lease, it must have been removed by Coffey's own testimony given subsequent-

ly, in which he said: "I am the party mentioned in the testimony, who negotiated the lease from Messrs. Connolly & Borle for Mr. Ewing." He designated but one member of the firm, but as such partner was acting for the firm in the transaction of its business in effecting the lease referred to, any misrepresentations or concealments made or directed to be made by him in connection therewith were competent against the firm. *Mamlock v. White*, 20 Cal. 598; *Chester v. Dickerson*, 54 N. Y. 1; *Wolf v. Mills*, 56 Ill. 360.

Appellants further contend that, if they promised to reduce the rent at all, it was not for any stated period, but at most from month to month, and, in allowing A. Berson & Son to recover the overplus of rent paid for one year, the court committed error. The agreement for the reduction of rent was, it is true, for no definite period, but upon the letting of the adjoining store for but \$200 per month, A. Berson & Son became, under the agreement, entitled to have their rent reduced to that sum. And as they were at the time holding as tenants from month to month, the lessors, under section 1946, Civil Code, could, by proper notice, have terminated their tenancy, or, by giving the notice provided for in section 827, Civil Code, have increased their rent; but, thinking that, in all probability, A. Berson & Son would not discover their secret arrangement with the tenants of the adjoining store, and desiring to retain A. Berson & Son as profitable tenants, they did not deem it necessary to act under either of those provisions of the Civil Code. Section 1945 also provides: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly, nor, in any case, one year." Now, as A. Berson & Son, at the time the contingency happened upon which they became entitled to a reduction of \$100 per month in their rent, were tenants from month to month, every month that their lessors accepted rent from them, the hiring was presumably on the same terms for each month; that is to say, for the same rent per month as that paid by the tenants of the adjoining store. This being so, the court correctly allowed the amount they had overpaid, by reason of the concealment from them of the true rent of the adjoining store, less the 3½ months' rent that had accrued, from the time they stopped paying rent, upon discovering that they had been paying \$100 per month too much, which they were induced to pay by the deceit their lessors practiced upon them.

Another objection of appellants is that A. Berson & Son did not present their claim for rent overpaid, to the executors of the will of O'Brien, as required by section 1493 of the Code of Civil Procedure. That section provides that all claims arising upon contracts against the estate of a deceased person, whether due or not, must be presented within the time limited in the notice requiring such presentation, or be

forever barred, unless the claimant shall show that he was out of the state, and in fact had no notice, in which case his claim may be presented at any time prior to the final distribution of the estate. The claim of A. Berson & Son was not a claim against the estate of O'Brien, but against the firm of which he had been a member, and consequently did not come within the purview of that section.

For the same reason, the last point urged by appellants, to the effect that two of the appellants are sued in the cross-complaint as executors, yet the judgment against them does not require that the amount awarded thereby shall be paid in the due course of the administration of their testator's estate, must also fail. As there was no claim made against the estate of the deceased partner, the executors of his will were not necessary parties to the cross-action; and the same end could have been attained by proceeding against the two surviving partners alone. *Friermuth v. Friermuth*, 46 Cal. 42. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

86 Cal. 402

Ex parte BECKER. (No. 20,763.)

(*Supreme Court of California*. Nov. 21, 1890.)

HABEAS CORPUS—WANT OF PROBABLE CAUSE FOR COMMITMENT.

A person charged with crime will not be released on *habeas corpus* before trial on the ground of want of probable cause for commitment, when there is some evidence, other than the extrajudicial admissions of the party himself, that an offense has been committed.

Habeas corpus.

Carroll Cook, for petitioner. *J. D. Page*, Dist. Atty., for respondent.

Fox, J. The point made in this case is that the prisoner has been committed without reasonable or probable cause; and that question turns upon whether or not a public offense has been committed triable within this jurisdiction. I deem it improper at this time to prejudice the case of the prisoner by any analysis of the evidence which has been presented, and which may be different at his trial, and of the law applied thereto. Whether it is sufficient to convict beyond a reasonable doubt, it is the province of the jury to say, and ought not to be determined in advance on *habeas corpus*. It is enough now to say that an examination of the sections of the Code bearing on the question, and of such evidence as has been presented, fails to show that the commitment is without reasonable or probable cause. The cases cited by the petitioner are not in point, for here there is some evidence, other than the extrajudicial admissions of the party, tending to show that an offense has been committed. Let the writ be discharged, and the prisoner remanded.

86 Cal. 431

MCKAY v. SUPERIOR COURT OF SANTA BARBARA COUNTY. (No. 13,928.)

(Supreme Court of California. Nov. 25, 1890.)

APPEAL FROM JUSTICE OF THE PEACE—DISMISSAL
—POWER OF SUPERIOR COURT.

Code Civil Proc. Cal. § 129, gives courts of record power to make rules for their own government, not inconsistent with the laws of the state; and section 980 provides that for a failure to prosecute an appeal from a justice's court, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed. *Held*, that the superior court has power to make and enforce a rule that the record and transcript of a case tried in a justice's court must be filed in the superior court within 10 days after the perfection of the appeal, and that if not so filed, the appeal might, on motion, with notice, be dismissed.

In bank. *Certiorari* to superior court, Santa Barbara county; R. M. DILLARD, Judge.

R. E. Houghton, for petitioner. W. C. Stratton, for respondent.

McFARLAND, J. This is an original proceeding in *certiorari*, in this court, to review an order of the superior court, dismissing an appeal from a judgment rendered in a justice's court. The theory of the petitioner is, we suppose, that the superior court had no jurisdiction to dismiss the appeal. The Code does not prescribe any time within which an appellant, from a judgment in a justice's court, must file the record on appeal in the superior court. It merely provides that, after the filing of the notice of appeal and undertaking, and the settlement of the statement, if any, (and in the case at bar there was none,) and, "on the payment of the fees of the justice," the justice must, within five days, transmit to the clerk of the superior court certain papers which constitute the record. Section 977, Code Civil Proc. An appellant, therefore, by simply refusing to pay the justice's fees, might indefinitely postpone the presentation of the record in the appellate court,—so far, at least, as there is any specific statutory provision on the subject. But section 980 provides that, "for a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order an appeal to be dismissed, with costs." This is a matter which, we think, the superior court can regulate by reasonable rules; and, in the case at bar, the superior court (respondent here) had a rule that the record and transcript must be filed within 10 days after the perfection of the appeal, and that, if not so filed, the appeal might, on motion, with notice, be dismissed. We think that under section 129¹ the court had full power to make this rule. It was not "inconsistent with the laws of the state." In the case at bar, the appeal was perfected by filing and serving the notice of appeal, and filing the undertaking on appeal on April 24, 1890; and the transcript on appeal was not filed in the superior court until May 9, 1890, more than 10 days afterwards. For this reason the

appeal was, on motion, after notice, dismissed; and we see no tenable ground for denying the jurisdiction of the court to make the order of dismissal. This view makes it unnecessary to notice the other questions, both of fact and law, raised by respondent. The prayer of the petitioner is denied, and the writ dismissed.

We concur: PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; FOX, J.

86 Cal. 465

KRELING v. MULLER. (No. 13,488.)

(Supreme Court of California. Nov. 26, 1890.)

LOCAL IMPROVEMENTS—ASSESSMENT.

Act Cal. 1885 (St. 1885, p. 147), an act relative to assessments for street improvements, provides that "whenever the estimated or actual cost of any work contemplated or ordered to be done by the council, and chargeable under the provisions of this act against any lot," shall exceed one-half of the assessed value of such lot, such excess shall be assessed against and paid by the city. *Held*, that a property owner was not liable for more than 50 per cent. of the assessed value of his property for work called for by one resolution of intention and order, though it be let out by separate contracts, and separate assessments be made therefor.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

D. H. Whittimore, for appellant. H. H. Lo wenthal, for respondent.

HAYNE, C. This was a suit to foreclose the lien of a street assessment for \$145. The trial court gave judgment for the plaintiff upon demurrer to the amended answer, and the defendant appeals. The assessment in suit was for grading, macadamizing, etc., Noe street, from Twenty-Fourth street to Twenty-Sixth street; and the complaint alleges that the various steps leading up to and including an assessment were duly taken. The amended answer sets up, in substance, that the resolution of intention included other work than that for which the assessment sued on was made, viz., sewerage of the street for the two blocks mentioned, and work upon adjacent property; that the sum for which the defendant's lot has been and will be charged upon the plaintiff's theory amounts to more than one-half the sum for which it was assessed upon the preceding assessment roll for municipal taxation; and that he gave no consent to the imposition of such a burden. The law upon which the defendant relies is contained in the following provisions of the act of 1885, viz.: Section 3, p. 149: "Whenever the estimated or actual cost of any work contemplated or ordered to be done by the city council, and chargeable under the provisions of this act, against any lot or lots of land, or the owner thereof, shall exceed one-half of the assessed value of such lot or lots as borne upon the last assessment roll, whereon it was assessed, made for the levying of taxes for municipal purposes, the amount of the cost of said work, exceeding said one-half of the assessed value of said lot or lots, shall be paid out of the city treasury, unless the owner of such lot or lots shall, in writing signed by himself

¹ Code Civil Proc. Cal. § 129, provides: "Every court of record may make rules not inconsistent with the laws of the state for its own government and the government of its officers."

or his authorized agent, consent that the whole expense of said improvement may be made a charge against said lot or lots." Section 7, subd. 1: "The expenses incurred for any work authorized by section two of this act * * * shall be assessed upon the lots and lands fronting thereon except as hereinafter specifically provided: Each lot, or portion of a lot, being separately assessed, in proportion to the frontage, at a rate per frontfoot sufficient to cover the total expenses of the work. But whenever the said assessment upon any lot or portion of a lot would exceed one-half the valuation of said lot, or portion of a lot, as it was last assessed for municipal taxation, then, unless the owner or his attorney in fact shall have previously filed with the superintendent of streets a written waiver of the partial exemption herein provided, the assessment and the lien thereof upon said lot, or portion of the lot, shall be only to the amount of one-half of said last preceding municipal valuation, and the proper remainder of said assessment shall be assessed to the city, and be payable out of the city treasury." Page 152. The position of the appellant is that, under the above provisions, the defendant's lot could not be assessed in a greater sum than one-half of its value upon the preceding assessment roll, for all the work called for by the resolution of intention relating to the property in question, while the position of the respondent is that, inasmuch as the work was let in separate contracts, and separate assessments were made, it was sufficient, if no one of said assessments exceeded one-half of the assessed value for municipal taxation. All other questions have been waived. A stipulation has been filed containing the following provision: "It is hereby stipulated and agreed that the only question for the court to decide is, can the city, under the provisions of the act of 1885, (St. 1885, p. 147,) order several different kinds of work in one order and notice of intention, and assess the owners of the property fronting on the work more than fifty per cent. of the assessed value of their lots, if the work be let at different times by separate contracts, and separate assessments be made therefor?" It is apparent that if this question be decided in favor of the appellant the city is liable for the amount of the exemption; and since the act purports to apply to all the municipalities of the state, and as there must be in the various cities and towns a large quantity of property to which the decision would apply, it is obvious that the question is one of importance. Having this in mind when the record was first sent to us for examination, we recommended that the case be set down for reargument, and that the city and county attorney be notified, which was done. No additional argument, however, has been made. The city and county attorney, after examining the briefs, has declared himself satisfied with the argument of the respondent; and the parties directly interested have resubmitted the case upon the same briefs. It is to be noted, with reference to the stipulation referred to, that it does not expressly say that, if the

question be decided in favor of the appellant, the judgment is to be reversed, and, if in favor of the respondent, to be affirmed. But we think that this is implied; for the court would not examine a mere moot question, nor do we suppose that counsel would attempt to present such a question. It is to be further observed that the question is somewhat broadly stated in the stipulation. Its language might include a case where the same resolution of intention called for work in different and distant localities. But it is hardly necessary to say that in such case the improvement of one locality has no relation to or dependence upon the improvement of the other, and that the cost of the former would not be chargeable upon the latter. And the provisions quoted exclude such a case; for the language is, "whenever the estimated or actual cost of any work contemplated or ordered to be done by the council, and chargeable under the provisions of this act upon any lot," etc. And, accordingly, we construe the stipulation to refer to work in one locality, and affecting the property of the defendant. And, with reference to the question as thus limited, we think that the position of the appellant is correct, and that the property owner cannot be made liable for more than 50 per cent. of the assessed value of his property for work called for by one resolution of intention and order. The language of the statute indicates this. Each of the provisions quoted has a direct relation to the question. One is to the effect that the excess mentioned shall be paid by the city. The other is, in substance, that such excess shall not be assessed upon the lot, but shall be assessed to the city. These two provisions must be read together, and they mutually depend upon each other, for what the city is to pay is not to be paid by the property owner, and what is to be assessed to the property owner is not to be assessed to or paid by the city. Now, the language of the first provision is, "any work contemplated or ordered" and chargeable, etc. It does not say, "any work contracted for, or for which an assessment may be made." And it would be straining the language to say that it does not mean the work contemplated by the resolution of intention, and ordered by the order, but such portion thereof as should be let out by a separate contract, and for which a separate assessment should be made. We do not think that the language should be strained to bring about such a result. The evident purpose was to provide a safeguard for the property owner. It is a matter of judicial history that at least once it was attempted to make the property owner personally liable for a deficiency which remained after taking his entire lot for the cost of an improvement. And, while this attempt was defeated, (by a divided court,) it still remained possible to take the whole property. It is just that there should be some limitation in this regard. The theory of local assessments for local improvements requires it. For, while the property owners of the locality are more benefited by the improvement than the other inhabitants of the city, they would not be more

benefited if all their property in the locality should be taken. In such case, they would be in exactly the same condition as the other inhabitants of the city so far as benefits are concerned, but in a far worse condition with reference to the burden. Some limit, therefore, is demanded by the theory of such assessments, and by common justice; and the limitation of 50 per cent. of the assessed value seems a fair one. Now, the act expressly provides that its provisions "shall be liberally construed to effect the ends of justice." And we do not think that the language should be strained in order to render a just and salutary provision valueless, by permitting the work to be split up into parts, and allowing the full limit to be taken out of each part. The policy of the act in relation to accepted streets does not (as we were at first inclined to think) make against our conclusion; for it is expressly provided, by section 26, that "the city council may, in its discretion, order that the whole or any part of the cost and expense of any of the work mentioned in section two of this act to be paid out of the treasury of the municipality." And what may be done directly may be done by the indirect method above shown. We think therefore that the question submitted must be resolved in favor of the appellant, and that under the stipulation the judgment must be reversed.

It is proper to add that no question is presented as to whether the provisions referred to cover the case of work called for by different resolutions or orders, made either at the same time or at intervals. Nor is any question before us as to the way the assessment should be made up; that is to say, whether the 50 per cent. for which the property is liable is to be distributed equally among these several assessments, or whether the one which happens to be made first is to take the whole sum, if it amounts to so much, leaving the others to be paid by the city. The stipulation precludes the court from determining these questions; and we neither express nor intimate any opinion concerning them. We merely say that, whatever may be the result in the respects mentioned, our conclusion as to the question submitted would be the same. We advise that the judgment be reversed, and the cause remanded, with directions to overrule the demurrer to the amended answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the amended answer.

86 Cal. 459

GREENBAUM v. MARTINEZ *et al.* (No. 12, 678.)

(Supreme Court of California. Nov. 26, 1890.)

JURISDICTIONAL AMOUNT—DAMAGES FOR CONVERSION—SALE—WHEN TITLE PASSES.

1. Civil Code Cal. § 8336, provides, as the measure of damages for the wrongful conversion of personal property, (1) the value of the property; (2) a fair compensation for the time and

money expended in pursuit of the property. The complaint alleged the conversion by defendant of certain property of a certain value, and that plaintiff had expended a certain amount for attorney's fee in pursuit of the property. The amount claimed in the *ad damnum* clause was the sum of these two items, and was above the jurisdictional sum of the court, though either item was below such sum. *Held* that, even if money paid for attorney's fees was not within the rule of damages, the words "for attorney's fees" could be treated as surplusage and it would leave an allegation of damages which, together with the value of the property, would bring the amount claimed within the jurisdiction of the court.

2. Plaintiff purchased, by sample, 250 sacks of wheat at \$1.07 per cental, taking a bill of sale, paying \$250, and agreeing to pay the remainder when he should be informed of the exact weight. The vendor, at time of sale, transferred to plaintiff certificates of weight of such of the wheat as was then in a warehouse, and agreed to deliver the remainder at the same warehouse for plaintiff. Immediately after the remainder was delivered at the warehouse, and certificates of weight were issued to the vendor in his own name, and just before such certificates were transferred to plaintiff, the wheat was attached by defendant. *Held*, in an action for conversion, that title had passed to plaintiff prior to the attachment, within Civil Code Cal. § 1140, providing that "the title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Monterey county: JOHN K. ALEXANDER, Judge.

Geil & Morehouse, for appellants. Wm. H. Webb and F. Sherwood, for respondent.

GIBSON, C. Action against defendant Martinez as constable, and the sureties on his official bond, to recover, as damages, the sum of \$262.84, the value of 160 sacks of wheat, alleged to have been wrongfully taken and converted by Martinez as constable under a writ of attachment issued in an action prosecuted in a court of a justice of the peace, and, also, the further sum of \$100, alleged to have been expended for an attorney's fee in the pursuit of the wheat. Trial was had before the court, without a jury, and resulted in certain findings, among others, that the wheat was taken as alleged, and was of the value of \$256.08; and that plaintiff had not properly expended the sum demanded by him for an attorney's fee. Judgment was entered in accordance with the findings. Defendants appeal from the judgment, and from an order denying their motion for a new trial. There is no brief for the respondent on file.

The first error appellants assign is that the court erred in overruling their demurrer to the complaint, in which they attacked the jurisdiction of the court over the subject-matter of the action, on the ground that the value of the property sought to be recovered was below the jurisdictional sum of \$300, and could not be brought up to, or above, the latter sum by tacking on a demand for an attorney's fee. The complaint plainly discloses that the object of the action is to recover damages for the wrongful conversion of the wheat, which damages are alleged to con-

list of two elements, namely, the value of the wheat and money expended in pursuit of it. In order to give the superior court jurisdiction of the subject-matter of an action of this kind for unliquidated damages, the demand, exclusive of interest, that may be claimed under section 3336 of the Civil Code must amount to, at least, \$300. Const. Cal. art. 6, § 5; Code Civil Proc. § 76, subd. 3. It is therefore true, as urged by appellants, that the amount claimed here, to the extent of the value of the wheat alone, would not give the superior court jurisdiction, but to this is added the sum of \$100 expended in pursuit of the property, as an additional cause of damages, thereby making the whole sum claimed in the *ad damnum* clause of the complaint amount to \$362.84; and that clause, according to the settled rule in this state, constitutes the test of jurisdiction. *Dashell v. Slingerland*, 60 Cal. 653; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. Rep. 349; *Lord v. Goldberg*, 81 Cal. 599, 22 Pac. Rep. 1126. It may be said that the true amount of the demand, exclusive of interest, if any, may sometimes be increased in a complaint for the purpose of bringing the case within the jurisdiction of the superior court. While this may occur, yet the inevitable consequence of not being able to recover the jurisdictional sum, so as to carry costs under section 1022 of the Code of Civil Procedure, will, we apprehend, be sufficient to prevent such a practice from becoming common; and the saving of costs will compensate the defendants in the rare instances in which they may be first brought into the superior instead of the justice's court. Both of the causes of detriment, complained of here, are within the measure of damages applicable to cases of this kind, which is provided for in section 3336 of the Civil Code, as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party. (2) A fair compensation for the time and money expended in pursuit of the property." In *McDonald v. McConkey*, 57 Cal. 325, which was an action like the present one for damages for the wrongful conversion of personal property, it is strongly intimated that money paid out for attorney's fees in pursuit of the property is not within the rule of damages declared in the above section. This is the language there used by the court: "The allegation of damages in each count of the complaint, with the exception of the words 'attorneys' fees,' is in the words of section 3336 of the Civil Code. The words 'attorney's fees' may be rejected as surplusage. The evidence is not before us, and it cannot be assumed that the jury included attorney's fees in their verdict." Whether the intimation in that case is well founded or not, we are not called upon to determine, as the same reasoning, applied therein, will dispose of the point under consideration here. The

allegation of the complaint here, in respect to the expenditure of an attorney's fee, is as follows: "That plaintiff has properly and necessarily expended the sum of one hundred (\$100) dollars, gold coin, for attorney's fee in pursuit of said property." Now, by treating the words "for attorney's fee" as surplusage, we have a sufficient allegation of the fact that plaintiff necessarily and properly expended \$100 in pursuit of the property, and within the proper measure of damages, which, in addition to the amount of the other damages claimed, brings the whole amount demanded within the sum of which the superior court has jurisdiction. A similar course was pursued in *Howard v. Valentine*, 20 Cal. 282. That was an action first brought in the justice's court, under the forcible entry and detainer act, for the restitution of certain premises, and \$500 back-rent for the same. The sum demanded was in excess of that which a justice's court could render judgment for in any action upon contracts, or for torts, except for damages for the unlawful detention of real property. The complaint was demurred to for want of jurisdiction, and overruled. The county court, to which the case was subsequently appealed, sustained the objection to the jurisdiction, and dismissed the action. Upon an appeal from the latter court to this court, it was ruled that the action of the county court was erroneous, because the objection only went to a part of the relief sought, and, although under the act mentioned rents that had accrued prior to the unlawful detention of the property were not recoverable in an action under said act, but only such rents, regardless of the amount, that had accrued during the unlawful detention, the court should either have excluded the objectionable matter and directed an amendment, or disregarded it. We are therefore of the opinion that the same objection raised by the demurrer in the present case was properly overruled.

The appellants' remaining contention is that the property attached had not been delivered to the respondent by the defendant in the attachment suit when the appellant Martinez levied upon it, by virtue of a writ of attachment regularly issued in that suit. The Civil Code provides: "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Section 1140. The respondent, it appears, on October 4, 1886, purchased of Hartman, the defendant in the attachment suit, according to samples, 250 sacks of wheat at the rate of \$1.07 per cental, taking therefor a bill of sale, and paid \$250 as part payment, and agreed to pay the remainder when Hartman should notify him of the exact weight of the wheat. A portion of the wheat, at the time of the sale, was in a warehouse, for which certificates of weight had been issued to Hartman, who, at the time of the sale, transferred them to the respondent, and, at the same time, agreed to deliver the remainder of the wheat at the same warehouse for the respondent. On the 9th of the same month,

he delivered the remainder of the wheat at the warehouse, and had it weighed and certificates of such weight issued to him in the name of Hartman & Co. Just after the last portion of this lot of wheat had been put in the warehouse, the appellant Martinez appeared and asked the warehouseman in whose name it was stored, and was informed that it was in the name of Hartman & Co. He thereupon levied an attachment upon 160 sacks of the wheat, and subsequently sold them. Before making the levy, he was told by the teamster who hauled the wheat to the warehouse that it belonged to the respondent here. Hartman went, immediately after the levy was made, to the respondent and transferred the certificates of weight to him in accordance with the terms of the previous sale. Hartman testified that, in addition to the \$250 received at the time of the sale, he got, as part payment of the wheat, 34 tons of hay and some lumber. There does not seem to be any material conflict in the testimony from which the foregoing facts are deduced. It is not shown, and neither can it be inferred from the evidence, that the respondent made any effort to defraud any of Hartman's creditors, or had any knowledge of his indebtedness to others, at the time of the sale. We think it evident, from the foregoing state of facts, that the parties agreed upon and intended a present transfer of the wheat at the time of the sale, and that the same, which consisted of 250 sacks, was at the same time identified. The court below was therefore justified in finding that the title to the wheat had passed to the respondent, prior to the attachment levy. The judgment and order appealed from should therefore be affirmed.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

PATERSON, J., dissents.

86 Cal. 390

SIEBE *et al.* v. JOSHUA HENDY MACHINE WORKS. (No. 12,905.)

(Supreme Court of California. Nov. 15, 1890.)

APPEAL—RECORD—CORPORATIONS—AUTHORITY OF PRESIDENT — COMMERCIAL PAPER — INNOCENT PURCHASER.

1. Upon appeal there was no bill of exceptions, or settled and certified statement of evidence, but appellant filed in the trial court a document stating the points he would rely on in the appeal, but containing no statement of evidence. The transcript contained a copy thereof, and copies of the appellant's articles of incorporation, with a stipulation that the copies were correct and that the articles and by-laws were introduced in evidence. It contained no statement that no other evidence was introduced, that the record prescribed by law was waived, or that the evidence might be reviewed upon the papers mentioned. *Held*, that the evidence could not be reviewed upon such record.

2. The by-laws of a corporation engaged in "buying and selling machinery of various kinds, and kindred articles," authorized its president to "buy and sell the articles in which the corporation deals without first obtaining the sanction or consulting the board of directors." *Held*, that he

had authority to purchase a boiler on credit and give the corporation's note therefor.

3. That creditors of the seller obtained final possession of the boiler, thus causing a failure of consideration, was no defense to an action on the note by an innocent holder for value before maturity.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

C. E. K. Royce, for appellants. *Naphtaly, Friedenrich & Ackerman*, for respondent.

HAYNE, C. This was an action upon a promissory note. The trial court gave judgment for the plaintiffs, and the defendant appeals. We do not think that upon the record before us the appellate court can consider the question whether the evidence supports the findings of fact. The record provided by statute for bringing up the evidence is a bill of exceptions or statement, to be served upon the successful party, and settled and certified by the judge. There is no bill of exceptions or statement in the transcript. It is plain, therefore, that, unless there is some equivalent or substitute for the statutory record, the evidence is not before us. What is relied on as such equivalent consists of the following proceedings: After the appeal was taken, appellant filed in the trial court a notice specifying certain points that it would rely on upon the appeal. This document did not contain any of the evidence given at the trial. It does not appear to have been even served upon the respondent, though we suppose that it was. Nothing further seems to have been done in the trial court. The transcript filed in the appellate court contains a copy of this notice, copies of the appellant's articles of incorporation and by-laws, and a stipulation, which states in substance that the copies mentioned are correct copies, and that the articles of incorporation and by-laws were introduced in evidence at the trial. This is all the stipulation states in relation to the matter in question. It does not state that no other evidence was introduced at the trial. Nor does it purport to waive the record prescribed by law, or to provide that the evidence may be reviewed upon the papers mentioned. The mere statement that certain copies are "correct," is of no more force than the usual certificate of the clerk in authentication of the transcript. *Wetherbee v. Carroll*, 33 Cal. 549. And the mere admission that certain documents were introduced in evidence at the trial does not show that there was no other evidence. For all that the court can know to the contrary, other by-laws, subsequently adopted, may have been introduced in evidence. While a stipulation may be so framed as to dispense with the record provided by law, there ought to be something which would enable the court to say with some reasonable degree of certainty that such was the intention. The respondent objects that there is no record upon which the evidence can be reviewed, and we think that the objection must be sustained. This leaves the appeal to be heard upon the findings. Two questions arise upon the findings.

1. The defendant was a corporation engaged "in the business of manufacturing, buying, and selling machinery of various kinds, and kindred articles." The note was given in payment of the price of a boiler purchased by the president for the corporation. There was no resolution of the board of directors authorizing the purchase; and it is contended that in the absence of such a resolution the president and secretary had no authority to execute the note. But we think otherwise. The buying of machinery was part of the ordinary business of the corporation. And the by-laws (as established by the findings) authorized the president to "buy and sell the articles in which the corporation deals without first obtaining the sanction or consulting the board of directors." So far, therefore, as the buying of machinery was concerned, the president (in the absence of any interposition by the board) had the same authority as the board had. The matter was left to him. This being the case, the authority to buy included authority to buy on credit, and to do such a usual thing as to give the note of the corporation as evidence of its obligation to pay. See *Castle v. Foundry Co.*, 72 Me. 170, 171; *Tappan v. Bailey*, 4 Metc. (Mass.) 536, 537. It is probable that this rule would not apply to an agent for a particular transaction, or even to certain kinds of general agents. We express no opinion as to that; but we think that it applies to such an agent as the president of a corporation, empowered to transact its ordinary business without consulting the board.

2. It is contended that there was a failure of consideration for the note. This is based upon the fact that the creditors of the vendor, after litigation, succeeded in obtaining the boiler. But the findings show that the plaintiff was an innocent purchaser of the note for value before maturity. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

86 Cal. 441

In re BARTER'S ESTATE. (No. 13,588.)

(*Supreme Court of California.* Nov. 26, 1890.)

RIGHTS OF HEIRS—CHILDREN OMITTED FROM WILL.

Civil Code Cal. § 1307, provides that when a testator omits to provide "for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate." *Held* that, where at the time of the making and publishing of testator's will, by which he disinherited his daughter and gave all his property to another child, she was still living, her children did not take as heirs, though she died before testator, and her children were not mentioned in the will.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

J. D. H. Chamberlin, for appellants. J. H. G. Weaver, for respondent.

FOOTE, C. This is an appeal from a decree of distribution under the will of John Barter, deceased. The findings are as follows: "(1) That, on the 4th day of June, 1887, the said deceased, John Barter, made, published, and declared his last will and testament in manner following: 'In the name of God, amen. I, John Barter, of the county of Humboldt, state of California, of the age of seventy-two years, and being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whatever, do make, publish, and declare this my last will and testament in manner following, that is to say: *First*. I give, devise, and bequeath to my son, Howard Barter, a resident of Humboldt county, state of California, all my property, real, personal, and mixed, whether in possession or expectancy, whereof I shall die possessed, or to which I may be entitled. I have other children,—a daughter and a son,—but it is not my wish or desire to leave anything to them or either of them. *Lastly*. I nominate and appoint O. H. Spring the executor of this my last will and testament, and hereby revoke all former wills by me made. In witness whereof I have hereunto set my hand and seal this fourth day of June, one thousand eight hundred and eighty-seven. JOHN BARTER. [Seal.]'—Which said will was thereafter duly admitted to probate by this court. That said executor named in said will duly qualified and entered upon his duties as such executor, and thereafter such proceedings were had in the settlement of said estate. That on the 19th day of July, 1889, the said executor filed in this court his final account and petition for the distribution of said estate to Howard Barter, named in said will as sole residuary legatee. (2) At the execution of said will the said John Barter, deceased, had three living adult children, his heirs at law, to wit, John T. Barter, Dora C. Seidell, (wife of L. A. Seidell, and mother of said contestants,) and Howard Barter. (3) That the contestants, E. H. Seidell and L. A. Seidell, Jr., are the minor children of the said Dora C. Seidell. (4) That Dora C. Seidell died intestate on the 8th day of May, 1888, leaving, her surviving, her two said children, the said contestants. (5) That the said John Barter, deceased, died on the 1st day of January, 1889, not having revoked the will set forth in finding number one. (6) That L. A. Seidell was by this court duly appointed general guardian of the said contestants prior to August 8th, 1889, and duly qualified as such general guardian. Conclusions of law: That Howard Barter, named in said will as sole residuary legatee, is entitled to a decree distributing to him the whole of the residue of said estate to the exclusion of said contestants. Let a decree be entered accordingly." The appellants and contestants claim that as the grandchildren of the testator they are two of his heirs at law, and that, not being mentioned or provided for in his will, and nothing being contained in the will which shows such omission to have been intentional, as to them his estate is as if their grandfather had died intestate. Sec-

tion 1307 of the Civil Code, on which they rely, reads: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." At the time this will was made and published, and provision made for his son Howard Barfer, the mother of these contestants was alive, and they were not "the issue of any deceased child." Their mother, then living, was intentionally omitted from the will and unprovided for, and was not therefore protected by the statute. The object of that section is not to protect any grandchildren except those who, as presumptive heirs at law, would be entitled, had no will been made, to inherit at the time the will is published and made. That is the time when the children of the testator or the children of a deceased child are supposed, if not mentioned in the will, to have been omitted by oversight, because, at such time, their mother being dead, they would be presumptive heirs at law of their grandfather. But if, at the time the will was published, the mother had been living, she would have been an heir at law at her father's death, unless intentionally omitted from the will. The statute intended to put a child, or the children of a deceased child, on the same footing at the time when the will is made and published, and when the intentions of the testator are to control in the construction of his will. When the will in question was made the testator had no need to remember or mention the children of a living child, in order to prevent them from inheriting, at his death, as his heirs at law. Having intentionally omitted their mother, alive at the making and publishing of the will, the children had no rights under the section quoted, and obtained none when she died before the testator. It follows then that the judgment appealed from should be affirmed, and we so advise.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

80 Cal. 449

STANLEY *et al.* v. McELRATH. (No. 12,-187.)

(Supreme Court of California. Nov. 26, 1890.)

NEGOTIABLE INSTRUMENTS—RIGHTS OF INDORSER—JUDICIAL NOTICE—COUNTER-CLAIM.

1. Where one pays a note, on which he is indorser, by executing his own notes to the holder, who accepts them as payment, and either cancels or delivers up the former note so as to extinguish the maker's liability to him, this is such a payment of the note as will entitle the indorser to maintain an action against the maker for the amount so paid.

2. The requirement of notice of dishonor by protest or otherwise to the indorser of a negotiable note is for the indorser's own benefit and may be waived by him without prejudice to his right of recovery against the maker, in case he pays the note after such waiver.

3. Where a counter-claim is pleaded, the court cannot dispense with formal proof, and take judicial notice that the affirmative matters set out in the counter-claim had been formerly adjudicated by the same court in a different action.

In bank. On rehearing. For former report, see 22 Pac. Rep. 673.

William H. Fifield, (*Wilson & Wilson*, of counsel,) for appellant. Henry N. Clement, for respondents.

PATERSON, J. This action was brought to recover from defendant the sum of \$6,136.50, with interest thereon from March 28, 1883. It is alleged in the amended complaint that C. M. Hitchcock, plaintiff's testator, indorsed a promissory note, made by defendant, payable to said Hitchcock, for the sum of \$4,500, solely for the accommodation of defendant; that defendant assigned the note to the London & San Francisco Bank, limited, and received therefor the sum of \$4,500; that defendant paid on account of the interest due thereon the sum of \$231.25, but never paid any portion of the principal; that the note was duly protested, and notice thereof given to the indorser; that Hitchcock paid the sums of \$6,132.50, the amount due on the note, and \$4, costs of protest, to the bank on March 28, 1883; and that defendant has never reimbursed him for any part thereof. The defendant denied that the note was indorsed for his accommodation in any greater sum than \$3,631.28, the balance of said note being for money he had paid out for the use and benefit of said Hitchcock at his special instance and request; denied that the \$4,500 note was protested, or notice of dishonor given; and denied that plaintiff had ever paid the same or any part thereof. By way of counter-claim, defendant alleged that plaintiff was indebted to him in the sum of \$4,000 for services as attorney and counselor, performed at his special instance and request.

The court found that the note was made and assigned as alleged; that \$231.25 only had been paid on account of interest, and nothing on account of the principal; and that the offset to the note, and the counter-claim set up by defendant, had both been adjudicated against defendant in a former action. The court further found certain facts—which will be noted further along—showing demand, refusal to pay, protest, and notice thereof to Hitchcock, and payment by him to the bank. The court found that Hitchcock paid the defendant's note by giving his own note for the sum due thereon, including cost of protest, and that it was accepted and received by the bank, and an entry made in its books to the effect that the note had been paid. At the time of the trial, the note thus given by Hitchcock had not been paid; and appellant claims that, there having been no payment in money, an action for money paid out cannot be maintained. The payment of money is not necessary to the extinguishment of an obligation. A debt may be paid by the giving of a note, if it be offered and accepted as payment. *Weston v. Wiley*, 78 Ind. 54; 2 Daniel, Neg. Inst. p. 232. The evidence shows very clearly that the

Hitchcock note was offered by him and received by the bank upon the express understanding that it was a payment in full of the McElrath note.

Appellant claims that, in paying the \$4,500 note, Hitchcock was a mere volunteer, not having been duly "fixed" as an indorser by proper demand, protest, and notice of dishonor. As stated by him, "the question for the court to determine is precisely the same as if the same question arose upon an attempt by the bank to hold Hitchcock upon his indorsement." An indorser may be made liable either by showing demand, non-payment, and notice of dishonor, or by showing that, while the amount due on the note was an existing debt, enforceable against the maker, the indorser by his acts waived any want of or defect in demand, protest, and notice, and promised to pay the note. The record shows the proper demand and protest for non-payment, and we think the notice sufficient to "fix" Hitchcock as an indorser. The notice of protest directed to Hitchcock was sent by the notary in due time, and reached Mrs. Hitchcock at the residence of the family the next day. The notice was brought into court by the plaintiff, and identified by the notary as the notice sent by him on the day demand was made. The fact that Mr. Coyt and the mail clerk took the letter from the mail bag in violation of a regulation of the postal department, if such be the fact, is immaterial. It is sufficient that the notice reached its destination and served its purpose. Mrs. Hitchcock received it on Saturday evening, and on the following Monday visited the defendant, who promised then, and on several occasions afterwards, to pay the note. The officers of the bank acted with due diligence and care. They were told by Mr. Coyt that Mrs. Hitchcock actually attended to the doctor's business, and had his power of attorney. The notice was actually delivered to "a person of discretion [Mrs. H.] at the place of residence or business of such party [Hitchcock] apparently acting for him." This was sufficient. Section 3144, Civil Code; Kellogg v. Factory, 57 Cal. 327; McFarland v. Pico, 8 Cal. 626; Thompson v. Williams, 14 Cal. 160; Pierce v. Schaden, 55 Cal. 406; 2 Daniel, Neg. Inst. §§ 872, 1003. But as there was no post-office communication between San Francisco and Hitchcock's place of residence, and as Hitchcock—with knowledge of the fact—by his acts and his promise to pay waived any defect in the notice, his liability became fixed, and the bank could have recovered the amount of the note in an action against him. Section 3155, Civil Code; Keyes v. Fenstermaker, 24 Cal. 333; Curtis v. Sprague, 51 Cal. 239. Appellant admits that an indorser may waive his own rights so as to make himself liable to the holder, but claims that, if he be once discharged from liability by reason of the failure of the holder to give proper notice of dishonor, he cannot thereafter by any admission or promise prejudice the rights of the maker; and, if he pay the note, he does so as a stranger, and must be regarded as a volunteer. This contention is based upon an erroneous theory of the

use and purpose of notice of non-payment of a negotiable instrument. An indorser's undertaking is not an absolute one. It is conditional; and notice of dishonor is provided for his benefit. It is intended to protect him from loss which may occur by reason of delay in making demand of payment of the maker, or which he may sustain by having no notice of the fact that his principal has failed or refused to pay. When he waives this right to notice, he does not create a new liability which requires a new consideration like the waiver of absolute and strict conditions precedent in contracts as they are construed at common law. He has the right to either affirm or disaffirm his liability, and, with the exercise of the right thus provided for his benefit and left to his discretion, no one can complain. *Burgh v. Legge*, 5 Mees. & W. 418; 2 Daniel, Neg. Inst. § 1147. The finding of the court that the defendant's claim of offset and counter-claim had been adjudicated in a former action prior to the trial of this action is not supported by the evidence. The court could not dispense with formal proof of its judgment in another action, and take judicial notice of the fact that the affirmative matters set out in defendant's counter-claim and offset had been therein adjudicated. As no evidence was offered, however, by defendant, in support of his claim of offset or counter-claim, the failure of the court to find on the merits of the issue thus raised was without prejudice to appellant, and the finding that was made was immaterial. The court allowed 10 per cent. interest on \$4,500 of the \$6,136.50,—amount of the note given by Hitchcock to the bank,—from March 28, 1883,—date of said note,—and interest on the residue at the rate of 7 per cent. This was error. Plaintiff is entitled to recover the amount paid on the Hitchcock note, with interest thereon at 7 per cent. only. *Waldrup v. Black*, 74 Cal. 409, 16 Pac. Rep. 226. The judgment is reversed, and the cause is remanded, with directions to the court below to enter judgment against defendant for the amount of \$6,136.50, with interest thereon at 7 per cent. per annum, from March 28, 1883, and costs of suit, including the costs of this appeal.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

(86 Cal. 471)

MOWRY v. HENEY. (No. 11,705.)

(Supreme Court of California. Nov. 26, 1890.)

QUIETING TITLE — INSUFFICIENCY OF FINDINGS — DEEDS — PAROL EVIDENCE.

1. In an action to quiet title by the grantee of a deed against a judgment creditor of the grantor, who had purchased the land at execution sale, a finding that the deed, made by a mother while ill, and in the expectation of early death, to her daughter, was made with the intention, on the grantor's part, that it should not take effect except in case of her death, and, in such case, that it should operate in lieu of a will, and take effect after her death, will not support a defense that it was made to defraud creditors, although coupled with a finding that, after the grantor's recovery, it was placed on record for the purpose of defrauding creditors.

2. A finding that the grantor intended that the deed should take effect only in case of her death, and that the grantee knew of such intention, was insufficient to support an allegation that the grantee agreed, in case of the grantor's recovery, to hold the title in trust, and to reconvey upon demand.

3. When a deed has been duly executed and delivered to the grantee, parol evidence is inadmissible to show that it was made in anticipation of death, and with an agreement that, in case of recovery, the grantee should reconvey.

McFARLAND, J., dissenting.

On rehearing. For former report, see 24 Pac. Rep. 301.

R. Percy Wright and D. M. Delmas, for appellant. *Cowdery & McCutcheon*, for respondent.

WORKS, J. This is an action to quiet title. The plaintiff claims title under a deed from her mother, Laura A. Mowry, and the defendant claims under a judgment and execution sale of the property against the same party, the judgment having been recovered against the said Laura A. Mowry subsequent to her conveyance to the plaintiff. The judgment of the court below was in favor of the defendant, and the plaintiff appeals from the judgment, and from an order denying her a new trial. The defendant pleaded two defenses to the action. The first was that the deed to the plaintiff from her mother was made when the latter was insolvent, and was made to defraud creditors, and that the defendant was then a creditor who subsequently recovered judgment against the grantor, and levied upon and sold the property in controversy, under execution, himself became the purchaser, and received a sheriff's deed therefor. The second set up the recovery of the judgment, the levy of execution, sale of the property, the purchase, receipt of a sheriff's deed by him, and alleges further: "That, on said 11th day of May, 1881, said Laura A. Mowry was the owner of the real estate described in said second count of said complaint; that the legal title of said real estate was, until the conveyance to plaintiff, as hereinafter alleged, in one Charles Mayne, who held said title in trust for, and as the agent of, said Laura A. Mowry, and had no other interest therein; that on — day of —, 1882, and while said undertaking, made and executed by said Laura A. Mowry, was in full force and effect, she, the said Laura A. Mowry, was dangerously ill, and in apprehension of immediate death, and in lieu of a last will and testament, and to avoid an administration of her estate in the event of her death, she, the said Laura A. Mowry, made and executed, and caused said Charles Mayne, the trustee, as aforesaid, to make and execute with her a deed to said plaintiff of, in, and to said real estate; that said plaintiff was and is the daughter of said Laura A. Mowry; and said deed was made to her, without any valuable consideration whatever, but the same was made, and caused to be made, by said Laura A. Mowry, in view of immediate death; and it was understood and agreed, by and between the plaintiff and said Laura A. Mowry, that said deed should only have effect in the event of her

death, and that, in the event of her recovery from said illness, the said plaintiff would hold and retain the legal title thereto in trust for her, and would convey the same to her upon demand; that said Laura A. Mowry did recover from her said illness, and the plaintiff held and retained the legal title of said real estate in trust for her until the levy thereon, and sale thereof, under an execution issued upon said judgment against said Laura A. Mowry, as hereinafter alleged."

It is contended by the appellant that the findings of the court do not sustain the issues in behalf of the defendant, or support the judgment rendered. The findings are clearly insufficient to support the defense that the deed was made to defraud creditors. It is found that the intention of the grantor was that the deed should not take effect at all except in case of her death, and that in such case it should operate in lieu of a will, and take effect after her death. This not only does not amount to a finding that the deed was made with the intent to defraud creditors, but is wholly inconsistent with such a defense. It is true that the court finds, upon the recovery of Mrs. Mowry, the deed was placed on record with the intent to defraud creditors, but such a finding did not meet the issue presented by the answer.

The finding on the other issue is no less unfortunate. It will be seen that the allegation of the answer is that the deed was made under an agreement between the plaintiff and her mother that the same should be effective in case of her death, and that if she should recover the plaintiff was to hold the property in trust for her, and reconvey the same upon such recovery. The court did not find any such agreement, but found as follows: "That, on said 2d day of February, 1882, said Laura A. Mowry was dangerously ill, and in apprehension of immediate death, and desired to make a disposition of her estate, to take effect after her death, and in lieu of her last will and testament, and to avoid administration of her estate in the event of her death, she signed and acknowledged, and caused Charles Mayne, her trustee, to sign and acknowledge with her, a deed of grant, bargain, and sale, to plaintiff, of, in, and to said real estate; that when said deeds were signed, acknowledged, and delivered by said Laura A. Mowry, she intended that they should only be operative in the event of her death from said illness, and that in the event of her recovery from said illness said deed should be inoperative, and of no effect, and that plaintiff should not claim any right or property by or under it; that said plaintiff was present when said deed was signed, acknowledged, and delivered by said Laura A. Mowry, the plaintiff knew that said Laura A. Mowry was then dangerously ill, and in apprehension of immediate death, and that she desired to make a disposition of all her estate, to take effect after her death, and that said deed was executed in lieu of her last will and testament, and to avoid an administration of her estate in the event of her death, and for no other purpose; and

plaintiff further knew that said Laura A. Mowry, when she delivered said deeds to plaintiff, intended that they should be operative only in the event of her death from said illness, and that, in the event of her recovery therefrom, they should be inoperative, and of no effect." This finding was insufficient for two reasons: *First*. It was not responsive to the issue presented by the answer. Instead of finding an agreement to hold in trust and reconvey, as alleged, it finds an intention on the part of the grantor that the deed should not take effect, except in case of her death, and that the plaintiff knew of such intention. The difference between the allegation and the finding is too apparent to need comment. We do not wish to be understood as intimating that if this finding had conformed to the allegation of the answer it would have warranted the conclusion reached by the court below. The *second* objection to this finding is that if it should be construed as sufficient to uphold the issue made by the answer it would not support the judgment. Here was an absolute deed to the property delivered to the grantee. Its legal effect was to vest in the plaintiff the title to the property free from any conditions. The effect of the finding, if upheld, is to vary the terms of the deed, and render it one upon condition, and defeat its operation by parol proof of an intention on the part of the grantor that it should have an effect different from that apparent on its face. This cannot be done. Mr. Devlin, in his work on Deeds, says: "Whether a deed passes the title or not must be determined by its legal effect. If it has been executed and delivered, its effect is determined by its language. When so executed and delivered, its legal effect, as to the passing of the title, is not altered by the fact that one object of the transaction was to save the expense and trouble of administration upon the grantor's estate after his death; and, where a grantor executed a deed for this purpose to his wife, the fact that she placed the deed, after delivery, where her husband equally with herself could have access to it does not change its legal effect as a conveyance." Devl. Deeds, § 284. And, again: "A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may be contrary to the intention of the parties. One of the grounds upon which the rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition. 'A deed,' says HARRIS, J., 'can only be delivered as an escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must not be delivered to the grantee. Whether a deed has been delivered or not is a question of fact, upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely, or only upon the performance of some condi-

tion not expressed therein, cannot be determined by parol evidence. To allow a deed absolute upon its face to be avoided by such evidence would be a dangerous violation of a cardinal rule of evidence. The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed between the parties at the time the deed was delivered, it must be held as an absolute conveyance, operative from that time." Id. § 314. This is a rule of law well understood, and is amply supported by decided cases, many of which will be found in the section of the work on Deeds above cited. In this view of the case, we need not decide each point made or attempted to be made in the unnecessarily long and tedious brief of counsel for appellant. A great deal of space is taken up in an attempt to show that the findings are not sustained by the evidence, but, coming to the conclusion we have, this question becomes immaterial. Conceding that the findings were sustained by the evidence, as we have said, no defense was made out. It is further contended that the court failed to find on certain issues. This is no doubt true, but the appellant should not complain of this, as the failure to find some of the facts alleged in the first defense, mentioned above, leaves the judgment without sufficient support. The judgment of the respondent was recovered on an undertaking on appeal to this court, and was taken on motion without notice to Mrs. Mowry. It is contended that such a judgment, taken without notice, was void, and that, therefore, respondent's defense was without any foundation. But this point was decided against appellant in *Meredith v. Association of Baltimore*, 60 Cal. 617, and, however doubtful we may be as to the correctness of that decision, it has been acted upon as a correct exposition of the law, no doubt, in this very case, and we think it should be adhered to. There are other technical questions raised and discussed, but they do not deserve attention. Judgment and order reversed.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.

I concur in the judgment: PATERSON, J.

McFARLAND, J. I concur in the judgment of reversal, because, after a more exhaustive examination of the evidence, I think that it does not support the findings as to the circumstances under which the deeds to plaintiff from the mother were made. I do not think, however, that the findings (that prolific source of artificial and needless troubles) are themselves insufficient to support the judgment. They find the real facts as alleged in the answer; and, if there is any difference between the answer and the findings, it is a difference only as to legal effects. But I dissent from that part of the prevailing

opinion which is to the point (as I understand it) that when one member of a family, being sick and apprehending immediate death, makes a conveyance of his real property to another member of the family, with the intention, and upon the understanding of both, that it is not to be operative in the event of the recovery of the grantor, if the latter passes the deed over into the hands of the grantee, then the latter has the title irrevocably; and, although the grantor recover his health immediately, he has, and can assert, no further interest, legal or equitable, in the land described in the conveyance, upon the ground that the terms of a written instrument cannot be varied by parol evidence. I do not think that what Mr. Devlin says in his chapter on "Escrows" has any applicability to the question here involved. As to the point under discussion, I think, in the first place, that the correct legal view is that in contemplation of law there was no delivery at all; and, in the second place, if it be assumed that there was a delivery, then, upon the recovery of the sick grantor, the grantee holds the legal title in trust for the grantor, who has the equitable estate. I do not see how such case can, in principle, be distinguished from *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689. I agree with the opinion on the point that a judgment may be taken against a surety on an appeal-bond (under our Code) without notice. My views on that matter were expressed in my opinion on the former hearing.

86 Cal. 386

BANK OF CALIFORNIA V. BOYD. (No. 12,-998.)

(Supreme Court of California. Nov. 15, 1890.)

ATTACHMENT—AFFIDAVIT—SECURITY FOR DEBT.

1. Plaintiff's affidavit for attachment alleged that defendant was indebted to him in a named sum on a certain promissory note of specified amount, date, and maturity, made to the order of K., and indorsed by defendants. *Held*, that the affidavit sufficiently alleges plaintiff's ownership of the note.

2. Defendant's motion to dissolve the attachment alleged that the debt was K.'s, and that he had died leaving a will, by which he made his wife executrix, and conferred on her full authority, without any order of court, to pay his just debts, for which purpose he bequeathed her a large estate. *Held*, that this did not give plaintiff a lien securing his debt, within the meaning of the California attachment law.

Department 2. Appeal from superior court, San Francisco; J. V. COFFEY, Judge.

O. P. Evans and James T. Boyd, in pro. per. for appellant. P. L. Benjamin (Pillsbury & Blanding, of counsel), for respondent.

THORNTON, J. This appeal is prosecuted by defendant from an order refusing to dissolve a writ of attachment. It is urged that the affidavit on which the writ of attachment was issued was insufficient, and therefore the court below erred in its ruling. The insufficiency claimed is that the affidavit does not show that the promissory note, on which the indebtedness set forth has accrued, and which furnished the subject-matter for the issuance of the writ, was owned by the plaintiff.

We cannot concur in this contention. It does appear with sufficient certainty, in our judgment, by the statements of the affidavit, that the plaintiff owned the note. It is stated in the first portion of the affidavit that the defendants (naming them) are indebted to the plaintiff in a sum indicated, over and above all legal set-offs and counter-claims, upon an express contract, for the direct payment of money, viz., on a certain promissory note, which is described as being for \$20,000, dated March 14, 1887, payable May 13, 1887, made by the California Land & Timber Company to the order of Charles Kohler, and indorsed by defendants. Though, as argued on behalf of defendants, it is not stated that the note was indorsed by Charles Kohler to the defendants, or any one else, still, in our judgment, the manifest intentment of the language employed in the affidavit is that the plaintiff was the owner of the note. It is distinctly stated, as mentioned above, in the initial portion of the paper, that the defendants are indebted to plaintiff on a promissory note. This could not be the case if it did not own the note. Nothing in the affidavit is inconsistent with the ownership of the note by the plaintiff, and all its statements are consistent with and tend to show such ownership. In our opinion, the same particularity of statement showing title to the note in the plaintiff is not required in the affidavit for the issuance of the writ of attachment as in the complaint. It is sufficient if, by manifest intentment, the affidavit shows that the note is the property of the plaintiff. It is not necessary that it should be shown by direct averment. The indebtedness to plaintiff is the principal element required in the affidavit, and when that appears by direct statement, and there is nothing in the affidavit inconsistent with such direct statement of indebtedness, the affidavit as to such indebtedness should, in our judgment, be held sufficient. Consistent with the views above expressed are *Wheeler v. Farmer*, 38 Cal. 215; *Weaver v. Hayward*, 41 Cal. 117; and *Dunn v. Mackey*, 80 Cal. 104, 107, 22 Pac. Rep. 64. It is further urged that Charles Kohler was the payee of the note; that it was his debt; that Kohler died in April, 1887, nearly a year before this suit was brought, leaving a will, which was admitted to probate on the 6th day of May, 1887; that by this will he bequeathed a large estate to his wife, who was named executrix thereof, and conferring upon her authority, without any order of court, to settle and pay his just debts; that by the above provisions of his will Kohler created a trust for the payment of his debts, devoting his entire estate to that purpose, and constituting his widow and executrix, trustee of this trust; that thus the payment of the note was secured, within the meaning of the attachment law, and therefore the writ of attachment was improperly issued, and the court erred in refusing to dissolve it. It is assumed by defendant in this contention that Kohler was the debtor of the plaintiff when he died; but this does not so clearly appear as to authorize this court in so holding. *Non constat* but that

Kohler indorsed the note to the defendants without recourse and thus that he never became responsible to the plaintiff. We would not be justified in reversing the ruling of the court below by holding, on the evidence before us, that Kohler, when he died, was bound on this note to the plaintiff. To authorize such a conclusion as this case is here presented, the evidence of the indebtedness of Kohler to the plaintiff must be of a character more distinct and clear than any that appears in the record. But, conceding that Kohler was the debtor to plaintiff on the note, when he died, we are of opinion that no such lien securing the debt resulted on his death, upon the facts above stated, as to bar plaintiff of its right to an attachment. The lien, if there was any, was not one under the control of plaintiff. The debt had to be presented under the statute to the executrix and the proper superior judge for allowance, and when allowed filed in court, and paid in due course of administration as other debts of the estate. The plaintiff would have been thus compelled to await the course of administration, whether he desired to do so or not. In fine, though it may be conceded that, if Kohler had died indebted on the note mentioned to the plaintiff, the plaintiff would have had the security of a trust fund devoted to the payment of its debt, still, in our judgment, it had no lien on any real or personal property securing its debt, within the meaning of the attachment law. We find no error in the record, and, as the order must therefore be affirmed, the motion to dismiss the appeal is denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

86 Cal. 427

Ex parte GREEN. (No. 20,768.)

(Supreme Court of California. Nov. 22, 1890.)

CONCURRENT IMPRISONMENT—SEPARATE CONVICTIONS.

A prisoner convicted in the superior court of libel was sentenced to six months' imprisonment. After four days' confinement he was released on bail, pending an appeal. Pending the appeal he was convicted in the police court of conspiracy, and sentenced to a year's imprisonment. After serving one day, he was released on bail, pending an appeal therefrom. The first sentence was affirmed, and on November 22, 1889, he was confined for six months, less the four days already served. March 8, 1890, the second sentence was affirmed, and a bench-warrant placed in the sheriff's hands for the prisoner, who was still in his custody. *Held*, that the second, and longer, term, did not commence to run on November 22, 1889, but on March 8, 1890, and the prisoner can be held until one year from that date, less the one day served before the appeal.

Habeas corpus.

Pen. Code Cal. §§ 669, 670, provides as follows: "Sec. 669. When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other

subsequent term of imprisonment, as the case may be. Sec. 670. The term of imprisonment fixed by the judgment in a criminal action commences to run only upon the actual delivery of the defendant at the place of imprisonment; and if thereafter, during such term, the defendant, by any legal means, is temporarily released from such imprisonment, and subsequently returned thereto, the time during which he was at large must not be computed as part of such term."

Carroll Cook, for petitioner. *J. D. Page*, Dist. Atty., for respondent.

Fox, J. June 3, 1889, the prisoner was convicted in the superior court of the city and county of San Francisco of libel, and sentenced to imprisonment for the term of six months. Under this judgment he was confined in the county jail for four days, when he was admitted to bail, pending an appeal to the supreme court. Pending this appeal, and on August 22, 1889, he was convicted in the police court of conspiracy, and sentenced to be imprisoned in the county jail for one year, and to pay a fine of \$500, with the further order that in default of payment of the fine he be further imprisoned in said jail at the rate of one day for each \$1 of such fine. On this judgment he was imprisoned for one day, when he was admitted to bail pending an appeal therefrom to the superior court. Afterwards the judgment in the first-mentioned case was affirmed in the supreme court, and on the 22d day of November, 1889, a bench-warrant was issued, upon which he was placed in jail on the judgment so affirmed, the term for which was six months, less four days already served. On the 8th day of March, 1890, the judgment of the police court was affirmed in the superior court, and a bench-warrant or commitment issued thereon, and placed in the hands of the sheriff, the prisoner being already in his custody on the former judgment. It being settled that he cannot be held in custody for the collection of the fine,—imprisonment and fine having both been imposed,—it is now claimed that the moment he was arrested and imprisoned under the bench-warrant of November 22, 1889, his sureties on the undertaking, given on the appeal from the police-court judgment, were relieved from liability, and that, as a consequence, the 364 days of the unexpired term of that judgment then commenced to run, notwithstanding the fact that the judgment itself was not affirmed until March 8, 1890; and that from that date, November 22, 1889, the unexpired term of imprisonment under both judgments commenced and ran together; and that, the longest of these terms having now expired, the prisoner is now entitled to his discharge. Sections 669 and 670 of the Penal Code are relied upon, and numerous authorities are cited in support of the proposition that the sureties upon the second appeal were discharged the moment the prisoner was rearrested on the first judgment. Even if that be true, it does not follow that his term of imprisonment for the unexpired portion of the judgment in the case wherein they were sureties then commenced to run. Nor is there

anything in the sections of the Penal Code cited which makes such term commence before the appeal in the case was decided. In my judgment, the term of imprisonment under the unexpired term of the police-court judgment did not commence until the 8th day of March, 1890. I think it did commence on that day, and that, for so much of the term of the first judgment of six months as had not then expired, the two terms ran together, and that the prisoner will be entitled to his discharge at the end of one year, less one day, from the 8th day of March, 1890, and not before. Let the writ be discharged, and the prisoner remanded.

86 Cal. 495

MOORE v. SUPERIOR COURT. (No. 13,661.)
(Supreme Court of California. Nov. 28, 1890.)

VACATION OF FINAL ORDER—APPOINTMENT OF TRUSTEE.

1. Code Civil Proc. Cal. § 473, provides that for certain causes an order may be vacated within six months. *Held*, that a final order not void on its face cannot be vacated on motion after the expiration of such period.

2. Where a testator appoints his wife trustee to manage the estate, and in the event of her death before his grandchildren, who are to succeed her in the trust, come of age, then the trust to devolve upon his son, and the wife voluntarily renounces the trust, and procures an order substituting the son as trustee, such order is final as to the right of the widow and son to manage the property, and is not void because said infant grandchildren, who were not beneficiaries under the will, are not notified.

In bank.

Baker & Grant and Grove L. Johnson, for appellant. *E. R. Bush and C. W. Thomas*, for respondent.

WORKS, J. This is an application for a writ of *certiorari* to test the jurisdiction of the respondent, the superior court of Yolo county, to make an order vacating a former order of the same court in a probate proceeding. This same order was appealed from, and it was held that the order was not appealable. In *re Moore's Estate*, 24 Pac. Rep. 816. Most of the facts will be found stated in the opinion above referred to. The order there appealed from, and here attacked, on the ground that the superior court had no jurisdiction to make it, was made and entered more than six months after the former order, vacated by it, was made. It is contended that the court below had no power or jurisdiction to vacate its former order after six months, and that the order complained of is void. On the other hand, the respondent contends that the first order was void, because it appears from the record that the two minors, who were named as trustees upon the death of the widow, were not notified. But these minors were not beneficiaries under the will, or in any way interested in the question as to who should manage the water-ditch during the life of the widow. During that time, she and those persons who were beneficially interested in the property and its management were alone affected by the order made, and in the question as to who should act as such manager. It is apparent that the widow alone is now

complaining and objecting to the enforcement of an order voluntarily consented to and stipulated for by her. We think for these reasons that the first order was not void for the want of notice to the minor trustees. There are other objections made to the original order, but none of them affect its validity.

We are quite certain that the last order made was without authority of law, and was a nullity. The former order was not void on its face. It was final as to the right of the widow of the deceased, and the petitioner here, as to which of them should manage the property under the provisions of the will. The time within which such an order could be vacated must be held to be limited by section 473 of the Code of Civil Procedure. The court had no jurisdiction, after the expiration of six months, to vacate the order made on a mere motion for that purpose, the order not being void on its face. *Bell v. Thompson*, 19 Cal. 708; *Wakelee v. Davis*, 62 Cal. 514; *Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, Id. 473, 477; *Wallace v. Center*, 67 Cal. 133, 7 Pac. Rep. 441; *People v. Goodhue*, 80 Cal. 200, 22 Pac. Rep. 66; *People v. Harrison*, 84 Cal. 607, 24 Pac. Rep. 311. The order must be annulled, and it is so ordered.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

85 Cal. 436

ROACH v. CARAFFA *et al.* (No. 12,706.)
(Supreme Court of California. Sept. 4, 1890.)

TRUSTS—ACTION TO ENFORCE—PARTIES—LIMITATIONS.

1. A *cestui que trust* who is seeking to enforce the trust in property that can still be "earmarked" as trust property, against the administratrix of the trustee, does not come within Code Civil Proc. Cal. §§ 1493, 1500, which require claims against decedent's estate to be presented within a specified time to the administratrix for allowance; for the *cestui que trust* is seeking his own property, and not to enforce a claim against the estate and property of the deceased trustee.

2. In an action by the administrator of a deceased partner to enforce a trust in property in the hands of the administratrix of the surviving partner, plaintiff's evidence showed that the deceased partner left the country on account of ill health in 1865, but that his death did not occur until 1874. The surviving partner continued the business, remitting a stated sum quarterly to the deceased partner during his life-time, and permitting the balance of his share of the profits to accumulate. On the deceased partner's death, the partnership affairs were not wound up, but the business was continued by the surviving partner the same as before. With a part of the accumulated profits belonging to the deceased partner, he purchased land in his own name, but confessedly for the benefit of his deceased partner. From the rents of this land, and from the dividends of the partnership business, other moneys came into his hands from month to month, which, by his letters, he admitted he had ready for delivery, on call, to the deceased partner. After the death of the surviving partner, which occurred in 1882, a large fund in coin was found secreted about his premises which he had kept separate from his other funds. *Held*, that the evidence was sufficient to make out a *prima facie* case of the existence of an express trust, and also to earmark the trust property, and that it was error to grant a nonsuit because of the insufficiency of the evidence.

3. The fact that the trust in regard to the land was not declared in writing, as required by Civil Code Cal. § 852, will not defeat the trust therein. The trust, being originally created in personal property, was provable by parol; and the character of the trust in this respect was not changed by the fact that, by the acts of the trustee and by operation of law, it now affects real estate.

4. The trust being a continuing one, the statute of limitations did not begin to run against the *cestui que trust* until repudiated by the trustee brought home to the knowledge of the *cestui que trust*.

5. The trust property, on the death of the surviving partner, having come into the hands of his widow as the survivor of the marital community, and also as administratrix of her deceased husband, it was proper to make her a defendant, in both her personal and representative capacities, in an action to enforce the trust.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Mr. Roach, as administrator, etc., of Domenico Caraffa, deceased, against Margaret Caraffa, administratrix, etc., of Giovanni B. Caraffa, and another, for an accounting and settlement of the affairs of a partnership of which Domenico Caraffa and Giovanni B. Caraffa had been the principal members. The court ordered a nonsuit at the close of plaintiff's evidence, and plaintiff appeals.

Code Civil Proc. Cal. § 1493, provides that all claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within a specified time, and any claim not so presented is barred forever. Section 1500 provides: "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator," etc. Civil Code Cal. § 852, provides: "No trust in relation to real property is valid unless created or declared: (1) By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law." Section 853 provides: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

John A. Wright and Smith, Wright & Pomerey, (Edward B. Young, of counsel,) for appellant. Winans & Belknap, (J. B. Harmon, of counsel,) for respondents.

Fox, J. Domenico Caraffa and Giovanni B. Caraffa, brothers, entered into business as partners, in San Francisco, in the year 1859. Shortly afterwards, they sold a one-third interest in their business to one Raggio and admitted him into the partnership, the business being continued, as before, in the firm name of D. Caraffa & Co. In October, 1865, Domenico, being in failing health, returned to Italy, where he continued to remain until his death, which occurred in November, 1874. It is claimed on the part of plaintiff, who is administrator of the estate of Domenico, that, when he, Domenico, went to Italy, the partnership was not dissolved; that he continued to retain his interest, his broth-

er representing him, and, as his trustee, receiving from month to month his share of the profits of the business, and when so received holding it as his trustee; out of his said share paying \$40 per month for a man to work in the business in place of Domenico, remitting quarterly to Domenico, out of his said share, sums amounting to about \$100 per quarter, and holding or investing the rest as he should deem best, for Domenico's benefit; and that this continued down to the time of Domenico's death. The evidence pretty strongly sustains this theory of the plaintiff. In January, 1873, Raggio, with the consent of the other partners, Giovanni acting for Domenico, sold out his interest to the defendant Guinasso, who was thereafter the third member of the said firm. It is further claimed that, upon Domenico's death, there was no person in this country entitled to administration upon his estate (except the public administrator, who had no notice or knowledge of the existence of such an estate,) other than his said brother and alleged trustee, Giovanni; that said Giovanni failed to disclose the existence of such estate, and neither administered upon the estate, nor closed the affairs of the partnership, but continued to carry on the business of the partnership, as before, for some time, but finally changed the firm name to G. B. Caraffa & Co., and that in that name the business was continued, until October, 1882, when said Giovanni died, and, subsequently, the defendant Margaret Caraffa was appointed administratrix of said estate. The action is for an accounting and settlement of the affairs of the partnership, and for an accounting for and of, and for the delivery of, the trust property remaining in the hands of Giovanni, at the time of his death. The defendants deny the allegations of the complaint, and plead laches, and the statute of limitations. At the close of plaintiff's case, the defendants moved the court for a nonsuit, which was granted, and judgment entered accordingly, from which plaintiff appeals. Plaintiff also moved the court for a new trial, which was denied, and from this order an appeal is also taken. This brings up the evidence upon which the nonsuit was granted. The defendant Guinasso does not appear to have joined in the motion. On behalf of Margaret Caraffa, both in her individual and representative capacity, the motion was made on the grounds (1) that no claim had been presented against the estate of Giovanni B. Caraffa, and, by reason thereof, the action was barred by the provisions of sections 1493 and 1500 of the Code of Civil Procedure; (2) that the evidence failed to establish the existence of a trust in any fund or property in the possession of Giovanni at the time of his death; (3) that the evidence failed to identify any particular fund or property as coming into the hands of the defendant in her individual or representative capacity, under any trust; (4) that, as to the real estate mentioned in the complaint, the claim of plaintiff was barred by the provisions of sections 318, 319, and 322 of the Code of Civil Procedure; (5) that the evidence failed to show that the action was com-

menced within the time or times limited by section 353 of the Code of Civil Procedure; (6) that the plaintiff cannot sue the defendant in both her representative and private capacity, in the same action and count; and (7) that the evidence is insufficient to show that a trust was ever created in favor of Domenico Caraffa, his heirs or representatives, in any property which had come into the hands of the defendant.

1. The answer to the first of these points is that the plaintiff does not stand in the attitude of a creditor of the estate of Giovanni B. Caraffa. He is not seeking to enforce a claim as such, or for anything that belongs to the estate. The claim of plaintiff is that certain property that was in the possession of Giovanni in his life-time, and, by reason thereof came at his death into the possession of defendant, as the survivor of the marital community of which Giovanni was the head, and was, upon her subsequent appointment, as administratrix, inventoried by her as a part of his estate, did not, in fact, belong to the estate, but was held by Giovanni in trust for the estate of Domenico. Plaintiff attempts to ear-mark that property, and his evidence, it seems to us, goes far towards establishing the existence of the trust, and towards showing that certain of the real property designated was purchased with trust-funds, and certain of the moneys found upon the death of Giovanni also constituted a part of the trust-fund. The claim is not, therefore, one which is required to be presented for the allowance and approval of the administratrix and probate court. If there be a trust-fund, and in the mutations of business it had become so mingled with and absorbed into the property belonging to the trustee as to be no longer capable of being traced or identified, then the only remedy of the *cestui que trust* would be that of a creditor, and if he had failed to present his claim, as required by the probate law, he must fail in his action; but, if the trust property can still be ear-marked, or traced and identified, the *cestui que trust* may maintain his action against the administrator to enforce the trust; for he is seeking his own property only,—not to enforce a claim against the estate and property of the decedent. *Lathrop v. Bampton*, 31 Cal. 17; *Sharpstein v. Friedlander*, 54 Cal. 58; *In re Allgier*, 65 Cal. 228, 3 Pac. Rep. 849.

2, 3, and 4. As to these points, we have examined the evidence with some care. It is, of course, only that offered on the part of the plaintiff, and is open to rebuttal; but, as it now stands, it leaves no doubt in our minds of the fact of the creation of a trust, as early as the latter part of 1865, and that it was never closed during the life-time of either of the brothers. At first, so far as the evidence discloses, the trust-fund consisted wholly of money, but the evidence strongly tends to establish the fact that at a later period, as the trust-fund accumulated, the trustee invested a portion of the fund then in hand in certain real estate, in his own name, but confessedly, as it seems to us, for the benefit of his brother; that real estate is capable of identification, and is pretty

clearly identified by writing made by Giovanni himself. It does not appear to have consisted of an entire interest, but of an undivided interest, in the property. From the rents of this, and from the dividends of the partnership business, other trust-funds, in money, came into the hands of the trustee from month to month. By his own letters he gives proof of its accumulation, and of the fact that he had not invested it, but had it ready for delivery on call. In view of his sources of income, and of the investments he had made, it is difficult to account for the large fund found secreted in coin about his premises, and by him kept sacred and separate from the other funds which he had deposited in bank, upon the theory other than that it was the property of his brother. We do not say that the fact was established by the proof, but it makes a strong *prima facie* case,—so strong, at least, as that we think the court ought not to have granted the nonsuit, on the ground of want of evidence at that stage of the trial, but that it should have proceeded upon a further inquiry, and an accounting; or, at least, to a finding of the facts in the premises.

5. The action, as against the defendant upon whose motion this nonsuit was granted, is one wholly in relation to trust property, and for the enforcement of the trust. The trust, if there was one, was created before the adoption of the Codes. It was an express trust, within the meaning of section 6 of the practice act, and related entirely to personal property. The provisions of the Code have not changed the character of the trust. Civil Code, §§ 2216-2224. Having been established in relation to personal property, it did not need to be created in writing, but could be proved by parol. *Silvey v. Hodgdon*, 52 Cal. 363; *Zuck v. Culp*, 59 Cal. 142. Under the code it could be created, and was continued, by the acts of the parties, as shown by the allegations of the complaint and the evidence so far adduced. *Id.* §§ 2219-2222. If now, it affects any real estate, as at present it appears to do, it has been made to do so because of the act of the trustee, and by operation of law, under sections 852 and 853, *Id.*, but this does not change its character of express trust. A resulting trust, under section 853, may still be an express trust. It was not alone an express, but a continuing, trust, and the statute of limitations would not run against the *cestui que trust*, until repudiation by the trustee, brought home to the knowledge of the beneficiary. *Ord v. De la Guerra*, 18 Cal. 67; *Schroeder v. Jahns*, 27 Cal. 280; *Hearst v. Pujol*, 44 Cal. 230; *James v. Throckmorton*, 57 Cal. 368; *Zuck v. Culp*, supra; *Speidel v. Henrici*, 120 U. S. 386, 7 Sup. Ct. Rep. 610. So far as the evidence now shows, no repudiation of this trust occurred until demand by this plaintiff upon this defendant, shortly before the commencement of this action, at least none that was brought home to the notice of the beneficiary.

6. The defendant Margaret Caraffa is the survivor of a marital community, the deceased member of which was the original alleged trustee. As such, upon his death, the alleged trust property came by

operation of law into her possession, charged with the same trust to which it was subject in the hands of her husband. Upon her appointment as administratrix of his estate she, as such, inventoried and returned the property as property of the estate of her deceased husband. It was, therefore, not only proper but necessary to make her a defendant, in her representative capacity, in any proceeding brought to determine the question of trust. If, as she claims, there was no trust, and the property was properly returned as a part of decedent's estate, then, inasmuch as his entire estate, as seems to be the case, was community property, of which she in her personal capacity is the owner of one-half, subject only to administration, she would seem to have such a personal interest in the result of the action as to make it at least proper, if not necessary, to make her a defendant in her personal as well as in her representative capacity. We think she was properly made defendant in both capacities.

7. In the statement of the grounds of motion for nonsuit, it was conceded that a trust can be created by operation of law. We have already cited both statute law, and judicial decisions, showing that such a trust, as that declared upon in this case, may be created otherwise than by deed or writing, and proved by parol, and do not need to consider the question further. In the case made we do not think it material, but it may become so on a new trial, and, for that reason, we notice one other point made by appellant. We think the court erred in ruling out the evidence offered on the question as to whether or not other members of the Caraffa family came to this country after the death of Domenico. On the question of laches, and the statute of limitations, it might become important to show, as was proposed to be done, that Giovanni was the only person in this country, (other than public officers who had no knowledge of the facts,) entitled to administer upon the estate of his brother, the *cestui que trust*. Judgment and order reversed, and the cause remanded for new trial.

I concur: PATERSON, J.

BEATTY, C. J. I concur in the judgment. In view of what the evidence tended to prove, a nonsuit was improper.

86 Cal. 594

STONESIFER *et al.* v. ARMSTRONG, Judge.
(No. 13,989.)

(*Supreme Court of California.* Dec. 4, 1890.)

MANDAMUS—BILL OF EXCEPTIONS—SETTLEMENT.

A judge of the superior court, who has exercised his discretion in refusing to settle a bill of exceptions not presented to him within the time prescribed by law, owing to the mistake or excusable neglect of appellant's attorneys, cannot be compelled so to do by writ of mandate, conceding that he has the power to relieve against such mistake under Code Civil Proc. Cal. § 473, which confers on the superior court discretionary power to relieve a party from a "judgment, order, or other proceeding" taken against him through his mistake or excusable neglect.

In bank. Application for writ of *mandamus*.

Edward J. Pringle and Stonesifer & Minor, for petitioner. *William Matthews and Wright & Hazen*, for respondents.

PER CURIAM. This is an application for a writ of mandate to compel the respondent to settle a bill of exceptions in a case tried before him in Stanislaus county entitled "*Stonesifer et als. vs. Kilburn et als.*" The bill was not presented to the judge for settlement within the time prescribed by law, or by any order or stipulation extending the same. Upon presentation, although the judge found, and in his order certified, that the same was not served in time by reason of the mistake, inadvertence, and excusable neglect of one of the attorneys of the plaintiffs who had charge of the matter, he sustained the objection of the other party to the settlement thereof, on the ground that the same was not served in time, and that he had no power to relieve the party from such mistake, inadvertence, and neglect, and refused to settle the bill. In *Bunnell v. Stockton*, 83 Cal. 320, 23 Pac. Rep. 301, this court, in bank, said: "The moving party must prepare and serve his statement within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered, either at the hearing of the motion or on appeal to this court." The same rule of law, in this regard, applies to bills of exceptions as to

statements. When the objection was interposed in the court below, the plaintiff, upon notice and affidavits, moved to be relieved from the objection on the ground of mistake, inadvertence, surprise, and excusable neglect, and it was upon the hearing of that motion that the order was made, and the settlement of the bill refused. Assuming that the court has the power to grant this relief, under section 473, Code Civil Proc.,¹ (which, however, we do not now decide, for we do not think the case a proper one in which to determine the same,) whether it shall do so or not is a matter resting in the discretion of the court. We cannot command what its action shall be. At most, we could only command it to act. It has already done so. If there was error or abuse of discretion in its action, the same may be reviewed on appeal, but we cannot reverse its action by mandate. The writ must be denied.

(86 Cal. 589)

TAYLOR v. BLACK DIAMOND COAL MIN. CO.
(No. 12,965.)

(*Supreme Court of California.* Dec. 4, 1890.)

ATTORNEY'S CONTRACT—ASSIGNMENT.

The principle that an attorney cannot assign a contract for his services, and substitute another attorney in his place, without the client's consent, has no application where the attorney has practically rendered all the services he contracted to do before the assignment was made; and in such a case the assignment of the contract is valid, being substantially the assignment of a debt due.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. H. L. Barnes, for appellant. *Wm. M. Pierson*, for respondent.

McFARLAND, J. This action was brought by plaintiff, as assignee of Hoyt & McKee, attorneys at law, to recover from defendant a balance due for professional services. Judgment went for plaintiff in the court below, from which, and from an order denying a new trial, defendant appeals. Hoyt & McKee made a contract with defendant by which they were to receive a certain compensation for their services as attorneys, provided they should accomplish certain results. Afterwards McKee, as surviving member of the firm of Hoyt & McKee, (Hoyt having died before the services were quite all rendered,) assigned to the plaintiff Taylor all the right and title of said firm in said contract, and all the moneys due or to become due thereunder. Appellant contends that the assignment was invalid upon the ground that an attorney cannot assign a contract for his services, and substitute another attorney in his place, without the consent of his client, such contract being special, and founded upon personal qualities. The general principle thus invoked is no doubt sound, but we do not

think that it applies to the case at bar. A careful examination of the pleadings, the evidence, and the findings shows that the services which Hoyt and McKee promised to render, and the ends which they agreed to accomplish, were all practically rendered and accomplished before the assignment to plaintiff; and that appellant had received the full benefit of those services and the accomplishment of those ends before said assignment. The assignment, therefore, was substantially the assignment of a debt due. The judgment and order are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(86 Cal. 580)

PERKINS v. WAKEHAM. (No. 13,670.)

(*Supreme Court of California.* Dec. 3, 1890.)

QUIETING TITLE—SERVICE BY PUBLICATION—VALIDITY OF JUDGMENT.

A judgment, in an action to quiet title, is binding against a non-resident defendant, who does not appear or answer, and who is served by publication only while absent from the state, under Code Civil Proc. Cal. §§ 412, 413, providing that where a person on whom service is to be made resides out of the state, or has departed from the state, and the fact appears by affidavit to the satisfaction of the court, and it also appears that a cause of action exists against such person, such court may order that the service be made by publication of the summons.

Department 1. Appeal from superior court, Los Angeles county; W. P. GARDNER, Judge.

Wells, Guthrie & Lee, for appellant. *Victor Montgomery, J. W. Towner*, and *A. W. Hutton*, for respondent.

PATERSON, J. The appeal from the order denying the motion for a new trial, so far as it affects the respondent, town of Santa Ana, must be dismissed. The notice of intention to move for a new trial was not served on said respondent. There was an attempt to serve the statement, but the attorney upon whom it was served had no authority to accept service, which fact was known to appellant at the time of service. The motion of respondent, the town of Santa Ana, to dismiss the appeal from the order denying a new trial is granted, and said appeal, in so far as it affects said respondent, is dismissed. A motion was made on various grounds, also, to dismiss the appeal from the judgment, but as the findings support the judgment, and no error appears on the face of the roll, we deem it best not to pass on the motion to dismiss, but to affirm the judgment. The court found that in a former action, brought by Wakeham against Perkins and others to determine all adverse claims to the property described in the complaint herein, judgment was entered in favor of said Wakeham, defendant herein, adjudging him to be the owner of the property. It is claimed by appellant that the decree in the former action to quiet title is *in personam*, and not *in rem*, and that as the service of summons was by publication while he was absent from the state, and as he did not answer or appear, the judgment is void. If it be true that a state has no power by

¹ Code Civil Proc. Cal. § 473, provides that the court may, in its discretion, relieve a party from "a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

statute to provide for the determination of adverse claims to real estate lying within its limits, as against non-resident claimants, who can be brought into court only by publication; if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents, who will not voluntarily submit their claims to her courts for adjudication,—great evil must result. Certainty and security in the titles of real estate, and convenient and effective procedure for the determination of individual rights in such property, are essential to the prosperity of the community. If those who cannot be reached by the process of the courts may assert adverse claims to real estate, and hold unlawful clouds over the title of the owner, every homestead and lot in the state may have a cloud cast upon it for all time. We do not think that a sovereign state is so limited in its power. The state is paramount in power over all things real within its territorial boundaries, except so far as its authority is limited by the constitution and laws of the United States; and the courts of the state, acting within that limitation, have and may exercise all the jurisdiction over all persons and things which the constitution and laws of the state confer upon them. The manner of obtaining such jurisdiction, and the procedure for its exercise, are matters of state legislation. The legislature of this state has provided that: "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Section 738, Code Civil Proc. It has also provided: "Where the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation, having no managing or business agent, cashier, or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons. The order must direct the publication to be made in a newspaper, to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable,—at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months." Sections 412, 413, Id. Unless the method of giving notice above prescribed is unreasonable, or is in conflict with some provision of the constitution or principle of natural justice, it cannot be held invalid. In determining the question of its validity, the nature of the action and the effect of the judgment must be considered. While it is true, as a general proposition, that an action to quiet title is an action in equity,

which acts upon the person, it is also true that the state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be citizen or stranger. U. S. v. Fox, 94 U. S. 315. While a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem*. But it is not necessary, in support of a judgment in such an action, where service has been had by publication, to determine the question whether it is a judgment *in personam* or one *in rem*. This precise point has recently been decided by the supreme court of the United States. Mr. Justice BREWER, speaking for the court, said: "The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate?" Arndt v. Griggs, 134 U. S. 320, 10 Sup. Ct. Rep. 557. There the power of the state to quiet title as against non-residents by constructive service is upheld, and the cases upon which appellant herein chiefly relies are fully considered and elaborately reviewed. In that case, it is true, the statute of the state of Nebraska, which was under consideration, expressly provided for service by publication "in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or foreign corporation," but the authority conferred by the legislature of this state in section 412, supra, is as great as that given by the Nebraska statute. While our statute is general, and in terms applies to all actions, it is not invalid because it includes in its provisions proceedings purely *in personam*. If the judgment in the action of Wakeham is valid and binding,—and we hold that it is,—other questions raised by appellant need not be noticed. The judgment and order are affirmed.

We concur: FOX, J., WORKS, J.

86 Cal. 574

CUTTING PACKING CO. v. PACKERS' EXCHANGE. (No. 12,337.)

(Supreme Court of California. Dec. 2, 1890.)

ASSIGNMENT—RIGHT OF ASSIGNOR.

While the assignment, by the purchaser, of a contract for the purchase of fruit at a specified rate will not relieve him from his obligation to the seller, who has not consented to the assignment, as provided by Civil Code Cal. § 1457, yet, as between the purchaser and his assignee, the latter is bound to receive and pay for the fruit, under section 1589, which provides that "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it;" and the purchaser, who paid the seller the full contract price for the fruit on

his assignee's refusal to accept it, and who then sold it in the open market at a loss, is entitled to recover the difference from his assignee.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by the Cutting Packing Company against the Packers' Exchange of California for refusal to accept fruit under a contract assigned by plaintiff to defendant. There was a judgment for plaintiff, and defendant appeals. Civil Code Cal. § 1457, provides: "The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise."

A. N. Drown, for appellant. Olney, Chickering & Thomas, for respondent.

WORKS, J. This appeal is brought here on the judgment roll, which includes a bill of exceptions, from a judgment rendered in favor of plaintiff in an action for damages for breach of contract, tried before the court without a jury. In September, 1881, the plaintiff and one William C. Blackwood made the following contract of purchase and sale:

"San Francisco, September 17, 1881. Bought of W. C. Blackwood his crop of apricots, at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons, and not exceeding two hundred tons, per annum, at three cents per pound f. o. b. Haywards. CUTTING PACKING COMPANY. By A. D. CUTTER."

"San Francisco, September 17, 1881. Sold Cutting Packing Company my crop of apricots, at Haywards, for the seasons of 1882, 1883, 1884, 1885, and 1886, not less than seventy-five tons, and not exceeding two hundred tons, per annum, at three cents per pound f. o. b. Haywards. WM. C. BLACKWOOD."

Plaintiff assigned its interest in the contract to the defendant about March 15, 1882, but Blackwood refused to accept the defendant in place of plaintiff. Blackwood, between July 10 and August 15, 1884, in performance of the contract upon his part, delivered to plaintiff, in different lots, 235,693 pounds of apricots, which the plaintiff, from time to time as they were delivered to it, tendered to the defendant, which refused to accept or pay for each or any lot so tendered. Plaintiff, as each lot was refused, placed it on sale in open market, and realized from the whole, after the cost of freight and seller's commissions were deducted, the net sum of \$4,770.50. This sum was \$2,300.29 less than the amount it was compelled to pay Blackwood. The two papers above set forth were construed in *Blackwood v. Packing Co.*, 76 Cal. 212, 18 Pac. Rep. 248, to be a contract of purchase and sale. It was a non-negotiable contract in character, but, under section 1459, Civil Code, it could be transferred by indorsement the same as a negotiable instrument. "Such indorsement," the same section further provides, "shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement." But the burden of the obligation that rested upon the plain-

tiff—that is to say, to pay to Blackwood three cents per pound for any quantity of apricots between 75 tons and 200 tons for the seasons specified in the contract—could not be transferred without the consent of Blackwood. Civil Code, § 1457. And, as he refused to consent to a novation by accepting the defendant in place of plaintiff, so as to release the latter, which he might have done, (Id. § 1531, subd. 2,) the relations of himself and the plaintiff as to such burden were not affected by the assignment of the contract. Section 1457 is only intended to protect the party to be benefited from the effects of an assignment of an obligation. So far as the parties to this suit are concerned, the appellant contracted with the respondent to accept and pay for the fruit Blackwood had contracted to deliver to the latter. It could make no difference, therefore, whether the fruit was delivered to the appellant by Blackwood directly, or by the respondent. As between the parties to this suit, the appellant was bound to receive and accept the fruit, and it cannot relieve itself from this obligation by showing that Blackwood had refused to relieve the respondent from its obligation to him. As the fruit contracted to be sold was to be the product of trees presumably owned by Blackwood at the time the contract was made, it must be considered as having had a potential existence at that time, and was therefore subject to sale. *Arques v. Wasson*, 51 Cal. 620. This being so, although the contract was construed in *Blackwood v. Packing Co.*, supra, as not having passed the legal title to the fruit before the same was delivered, the plaintiff here at least acquired the right to purchase the fruit, and the assignment of the contract transferred such right to the defendant, whereby it became alone entitled to purchase the fruit for each of the seasons that occurred subsequent to the assignment. *Myers v. Water Co.*, 10 Cal. 579. Now, while the plaintiff was not released, as we have seen, from the burden of the contract by the assignment of it, yet when the defendant took the right to purchase the fruit, which was the benefit of the contract, it also assumed the burden of paying for the fruit, in accordance with the following principle of section 1589, Civil Code: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." The obligation thus assumed was apparent on the face of the contract. We therefore think it plain that as the plaintiff, as assignor, was still bound to Blackwood to pay the price stipulated in the contract, notwithstanding the assignment, and as the defendant, as assignee, assumed such obligation, the plaintiff, as between it and the defendant, stood in the nature of a surety for the latter for the performance of the obligation. If this be correct, it then follows that from the assignment an implied contract arose between the plaintiff and defendant, whereby the latter became bound to the former to receive and pay for the apricots, according to the terms of the original contract. This is,

we think, the proper construction of section 1457 of the Civil Code, under which the assignment of the non-negotiable contract in question was made. Although the liability of an assignee to his assignor under that section has never been determined by this court, still we are fortified in our conclusion by the analogous doctrine prevailing in the state of Ohio, where a similar liability arises upon the transfer of shares of the capital stock of a corporation. There, as in this state, the transferor of shares by constitutional and statutory provisions continues liable to the creditors of the corporation, who became such while the transferor held the shares. And in the recent case of *Harpold v. Stobart*, 21 N. E. Rep. 637, the supreme court of the state stated the doctrine under such provisions thus: "In construing these provisions, the holdings in this state are to the effect that the individual liability of stockholders attaches in favor of creditors at the time the debt is contracted, or the liability incurred by the corporation, and that such liability is not discharged by the subsequent assignment or transfer of the stock; but the successive assignees impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock." See, also, 2 Mor. Priv. Corp. §§ 879, 888. This doctrine, it seems to us, is just and reasonable, because, if the transferee should be insolvent, the creditors of the corporation whose claims attached while the transferor held the shares would not be affected by the transfer; while, on the other hand, if the transferrer, after the transfer, pays his proportion of any indebtedness of the corporation that he was liable for, such payment certainly adds that much to the value of the stock he transferred, and the transferee should reimburse him for the outlay. This last consideration would not apply in Ohio with the same force as in this state, for it appears, in *Harpold v. Stobart*, supra, that the liability of stockholders "is not a primary fund or resource for the payment of the debts of the company, but is collateral to the principal obligation which rests on the corporation, and is to be resorted to only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process." But in this state, such liability is a primary fund or resource to which creditors of a corporation may resort, regardless of the solvency of the corporation. *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. Rep. 354, and *Mitchell v. Beckman*, 64 Cal. 117. It is clear that a breach of the implied contract, thus created, between the parties here, was made when the defendant refused to accept and pay for the crop of 1884; and the plaintiff, upon the breach being so made, having stepped in and received and paid for the crop pursuant to the original contract, as it was obliged to do, thereby acquired the right to recover, as damages, from the defendant, the difference between the price paid under the contract to Blackwood and that realized from the sale of the fruit in open market at current rates. As the solution of this question is decisive of this appeal, we

do not deem it necessary to discuss the other points made by the appellant, but will add that we discover no error in the record. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

86 Cal. 591

WOLVERTON v. BAKER *et al.* (No. 13,766.)
(Supreme Court of California. Dec. 4, 1890.)

RES ADJUDICATA.

1. A judgment to the effect that a conveyance of land by a mother to her son was free and clear of any condition for the mother's support and maintenance, though palpably erroneous on the facts found, is a bar to another action between the same parties for a relitigation of the matters determined by such judgment.

2. In California, where both law and equity are administered by the same court, and where a party may have any relief called for by the case made by his complaint, whatever he may have denominated his suit, a decree in equity may, in a proper case, be pleaded in bar to a subsequent action at law.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; G. W. HUNTER, Judge.

J. H. G. Weaver and E. W. Wilson, (John F. Crowe, of counsel,) for appellant. J. D. H. Chamberlin, for respondents.

HAYNE, C. This was a suit for a reconveyance of real property conveyed by a woman over 70 years of age to her son, Erastus J. Baker, upon condition that he would apply to her support and maintenance so much of the rents and profits as should be sufficient to support and maintain her in a suitable manner during the rest of her life, and for the cancellation of certain deeds and mortgages made by the son, and a homestead declared by him. The trial court gave judgment for the defendants, and the plaintiff appeals upon the findings.

The findings show that the conveyance was without consideration, and upon the condition mentioned; that, for nearly two years before the commencement of the suit, the son has not applied any portion of the rents and profits to the support of his mother; that he declared a homestead upon the property, and conveyed half of it to other persons without consideration; and that he mortgaged it, "with the intent, on his part, to prevent the plaintiff from recovering anything from him." If these were the only facts, we should have no doubt of the right of the plaintiff to the relief she seeks, upon the ground of the breach of the condition, without reference to the other grounds alleged in the complaint. See *Blake v. Blake*, 56 Wis. 392, 14 N. W. Rep. 173; *Humphrey v. West*, 40 Mich. 597; Civil Code, § 1109. But the defendants have pleaded a judgment obtained in a former suit between the same parties, and we are constrained to say that, in our opinion, it is a bar to the present suit. The substance of the grounds of relief alleged in the complaint in the former suit are as follows: (1) That the plaintiff reposed confidence in her son. (2) That she was old and infirm. (3) That the property was conveyed "upon the sole

and only consideration that the said defendant should hold the same in trust for said plaintiff, and that the rents, issues, profits, and proceeds thereof should be applied in providing for, and maintaining, said plaintiff during her natural life, in a manner suitable to her station," etc. (4) That the son accepted the conveyance with the intent of defrauding the plaintiff. (5) That he failed to furnish her any support whatever, but declared a homestead upon the property, mortgaged it, and conveyed away portions of it without consideration. The prayer was for a reconveyance of the property, and for the cancellation of the homestead, and the subsequent deeds and mortgages, "and that the plaintiff have such other and further relief in the premises as to the court shall seem meet and equitable." The allegations of that complaint were put in issue; and after a trial a judgment was entered by which it was "ordered, adjudged, and decreed that the plaintiff is not the owner of the lands and premises described in the complaint herein, but that the defendants, as against the plaintiff, are the owners in severalty in fee-simple of the several distinctive pieces or parcels of land mentioned and described in the complaint herein, free and clear of any and all of the trusts, exceptions, limitations, and conditions set forth and alleged in the complaint." This judgment was palpably erroneous upon the facts found, but nevertheless it prevents a relitigation of the matters determined.

The complaint here is substantially the same as that in the former case. It alleges the plaintiff's confidence in her son, her age and infirmity, the want of consideration for the deed, and that it was made and accepted upon condition of support, etc., the fraud of the son, the failure to furnish support to the plaintiff, the declaration of homestead, the conveyance to other persons without consideration, and the other incumbrances. And the prayer is, in substance, for a reconveyance of the property and the cancellation of the incumbrances, etc., "and for such other and further relief in the premises as to the court shall seem meet and equitable." The counsel for the plaintiff says that the first suit was in equity and proceeded "upon the theory that the deed was void *ab initio*," and that the present suit is at law and proceeds "upon the theory that the deed was valid *ab initio*."

We think that the counsel is mistaken as to the character of the second suit. It is a suit in equity. But if it were otherwise the result would be the same. It is said that, strictly and technically, a decree in equity under the old chancery practice could not be pleaded as an estoppel or bar at law, but that resort must again be had to equity which would take measures by attachment and fine to prevent the defendant from proceeding at law. See 2 Smith, Lead. Cas. (8th Ed.) p. 918, 919. But however this may have been, we think that, under the practice in this state, where both law and equity may be administered by the same court, and in the same case, and where a party may have any relief called for by the case made by his com-

plaint, whatever he may have denominated his suit, a decree in equity may, in a proper case, be pleaded as an estoppel or bar to a subsequent action at law. See *Parnell v. Hahn*, 61 Cal. 131. So far as this case is concerned, the result reached is to be regretted. It is a shameful thing that a son should refuse to support his aged mother after obtaining her property without consideration upon the condition mentioned. But the law must be declared. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(86 Cal. 556)

KITTLE v. BELLEGARDE *et al.* (No. 12,-873.)

(Supreme Court of California. Dec. 2, 1890.)

DEATH OF PARTIES—SUBSTITUTION—JUDGMENT BY DEFAULT—QUIETING TITLE.

1. No notice of the substitution of an executor as plaintiff on the death of the original plaintiff need be given to defendants already in default for want of an answer; and, though it be conceded that their time to answer is extended, by the original plaintiff's death, until after the executor's substitution, yet, where judgment by default is entered in the executor's name, and recites the fact of substitution, the presumption is that the substitution was made at a date early enough to justify the entry of the judgment, in the absence of any showing to the contrary.

2. The failure to serve defendants with a notice of the entry of judgment by default is no ground for granting their motion to set it aside, made 20 months after the entry of the default, and 12 months after the entry of the judgment, of both of which facts they had actual knowledge at the time.

3. An action to quiet title may be maintained, though the complaint shows that the adverse claim of defendants rests on a sale of the land by a city for the non-payment of street assessments void on their face, under Code Civil Proc. Cal. § 738, providing for an action by any person against another claiming an adverse interest in real property.

4. Where the purchaser at such sale will become entitled to a deed if plaintiff does not redeem from the invalid assessment within a specified time, it is proper to grant an injunction against the execution of the deed as incidental to the main relief,—the annulment of the invalid assessment and the cancellation of the certificate of sale.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

R. Percy Wright, for appellants. Taylor & Haight, for respondent.

WORKS, J. When this action was before the department, the following opinion was prepared by Commissioner VANCLIEF:

"This is an appeal from an order denying a motion to set aside a judgment by default, and also from the judgment. The action was commenced by plaintiff's testator, September 29, 1886, against J. B. Bellegarde, and against William Patterson, as superintendent of public streets, etc., of the city and county of San Francisco. The complaint is in the usual form of complaints to quiet title to land under section 738 of the Code of Civil Procedure, and seeks to have determined the adverse

claim of defendants to two lots of land situate in said city, of which plaintiff's testator is alleged to have been the owner. The complaint avers the nature of the adverse claim to be that of an alleged lien upon the lots acquired by and through proceedings of the board of supervisors, and the superintendent of streets, under the act entitled 'An act to provide for the improvement of streets, lanes,' etc., 'within municipalities,' approved March 6, 1883; (St. p. 32;) that, to satisfy this lien, the superintendent of streets had sold the lots to defendant Bellegarde, and had given him a certificate of sale, and threatens to execute to him a deed in pursuance thereof, and will execute such deed if plaintiff fail to redeem from the sale within 12 months from the date thereof, unless enjoined from so doing; and that the defendants and each of them claim that Bellegarde will be entitled to such deed if no redemption is made, and also claim that such deed will convey to Bellegarde the title to said lots. The complaint further avers facts which, if true, show that the assessment upon the lots, to satisfy which the lien is claimed, is utterly void; and, consequently, that no such lien as claimed exists. The prayer of the complaint, in substance, is that the defendants be required to set out such claim or lien as they have upon the lots; that such claim and lien be deemed to be of no force or effect; that said assessment be annulled and set aside; that said certificate be canceled; and that defendant Patterson, as superintendent, etc., and his successors in office, be enjoined from executing any deed purporting to convey the lots to Bellegarde, or any other person. After having been duly served with summons, the defendants procured an order from the judge extending their time to answer until November 18, 1886. The plaintiff's testator, N. G. Kittle, in whose name, as plaintiff, this action was commenced, died, November 15, 1886. On December 8, 1886, the clerk of the court entered the default of the defendants, and nearly eight months thereafter, on July 29, 1887, the court rendered judgment in favor of plaintiff, as prayed for, but without costs, which judgment was preceded by the following recitals:

"Jonathan G. Kittle, as Executor of the Last Will and Testament of N. G. Kittle, Deceased, Plaintiff, vs. J. B. Bellegarde et al., Defendants. No. 18,593.

"JUDGMENT.

"In the above-entitled action, it appearing to the satisfaction of the court that each of the defendants in said action was duly served with the summons and complaint therein; that neither of said defendants, within the time required by law, appeared in said action or demurred to the complaint or answered the same; and that the clerk of the court has duly entered the default of each of said defendants, for not so appearing or demurring or answering. And it further appearing that plaintiff is entitled to the relief prayed for in his complaint. And it appearing that N. G. Kittle, the original plaintiff in said action, died after the commencement of said action, being at said time a resident of said

city and county of San Francisco, and leaving a document purporting to be a last will and testament, wherein Jonathan G. Kittle was named as the executor thereof; that said document was, in the probate department of this court, duly admitted to probate, as the last will and testament of N. G. Kittle; and that letters testamentary were issued accordingly to said Jonathan G. Kittle; that the court thereafter, in this action, on motion duly made in open court, ordered that said Jonathan G. Kittle, as such executor as aforesaid, be substituted as the plaintiff in said action in the place and stead of said N. G. Kittle, and that said action be continued in the name of said executor as such plaintiff.'

"Nearly one year after the entry of the judgment, to-wit, on July 27, 1888, the defendants moved the court to set aside the default and judgment on the ground that they were irregularly entered, because the defendants were not in default at the time said default was entered, nor at the time the judgment was rendered, and because the court had no jurisdiction to render a judgment in favor of the executor of the deceased original plaintiff, N. G. Kittle. The motion was heard upon the judgment roll, and the affidavit of the attorney of the defendants, of which affidavit the following is a copy: 'Percy Wright, being duly sworn, deposes and says: "(1) That he is an attorney and counselor at law, admitted to practice in all the courts of this state, and resides at No. 310 Pine street, in said city and county. (2) That he has examined the papers on file in the above-entitled action, originally entitled, 'N. G. Kittle vs. J. B. Bellegarde et al.,' also the papers on file in the office of the clerk of said superior court in the action therein entitled, 'No. 18,588, B. M. Hartshorne vs. J. McMullen et al.,' and also the papers on file in the office of the clerk of said superior court in the proceedings entitled 'No. 5,732, In the Matter of the Estates of N. G. Kittle, Deceased.' (3) That said N. G. Kittle, the original plaintiff in this action, died on the 15th day of November, 1886. (4) That at the time of the death of said plaintiff, N. G. Kittle, the time allowed for the defendants in this action, J. B. Bellegarde and William Patterson, superintendent of public streets, highways, and squares, in and for the city and county of San Francisco, to answer the complaint therein, had not expired, said time having been extended by an order of a judge of said superior court up to and including the 18th day of November, 1886, which said order was duly filed and served previous to said 15th day of November, 1886. (5) That, since the death of said plaintiff, N. G. Kittle, the complaint filed in this action has never been amended, nor has any amended complaint ever been filed therein. (6) That the only complaint filed in this action is still entitled: 'In the Superior Court of the City and County of San Francisco, State of California. N. G. Kittle, Plaintiff, vs. J. B. Bellegarde and William Patterson, as Superintendent of Public Streets, Highways, and Squares in and for the City and County of San Francisco, Defendants.' (7) That, since the death of said plaintiff, N. G. Kit-

tle, no notice or paper whatever in this action has ever been served on either of said defendants, nor has there ever been served on either of said defendants notice of the entry of judgment in this action in favor of Jonathan G. Kittle, executor of the last will and testament of N. G. Kittle, deceased, nor has there ever been any appearance by or on behalf of either of said defendants in this action." There was no affidavit or showing of merits, and no motion or request for leave to answer.

"1. On the appeal from the judgment, it is contended that the judgment is not warranted by the complaint, as it is not in favor of a person mentioned in the complaint. But it is in favor of a person substituted, by an order of the court, for the person named as plaintiff in the complaint, on suggestion and proof of the death of the latter, and qualification of the former as successor in interest; and such suggestion and proof may have been made *ex parte*, (Taylor v. Railroad Co., 45 Cal. 336;) and no notice thereof to the defendants in default was necessary, (Farrell v. Jones, 63 Cal. 194.) In Gregory v. Haynes, 13 Cal. 592, a judgment quieting title in favor of one Wenborne was attacked collaterally. Wenborne, the plaintiff, had died before the trial and verdict. The complaint, however, was not changed, and the judgment was entitled and rendered in favor of the original plaintiff, by name, but contained this recital: 'This action having been continued, in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for the plaintiff, it is now ordered,' etc. The court, by Mr. Justice BALDWIN, said: 'We think this recital clearly shows, whether with formality or not, the suggestion of the death of the original plaintiff, and a continuance of the case, or a revival of it, in the name of the executor. If there was any irregularity in all this, it cannot be corrected in this collateral way.' This judgment was again brought in question between the same parties in 21 Cal. 443, where the court, by Mr. Justice NORTON, said of it: 'The continuing of the name of Wenborne, instead of inserting that of Webb (executor) as plaintiff, in the title of the judgment order in which this recital is contained, and also in the more formal judgment, was an error of form, not rendering the judgment void.' The irregularities here admitted were that the judgment was entitled and rendered in favor of the deceased plaintiff by name, and that the recital did not expressly show that any order of substitution of the executor had been made by the court before trial and judgment. In the case at bar, however, no such irregularity appears. The recital in the judgment expressly shows that the death of the plaintiff, and the appointment and qualification of the executor, had been proved, and the order of substitution made before the rendition of the judgment, although the date of the order of substitution is not made to appear; and the judgment is entitled and rendered in favor of the executor by name, as the substituted plaintiff. In all this there appears to have been no irregularity if the defend-

ants were in default before and at the time the judgment was rendered; and that they were so in default is expressly admitted, unless the time allowed them by the court in which to answer was extended by the death of the original plaintiff until after service of notice upon them of the substitution of the executor. But we have seen that no such notice was required, and therefore the failure to serve it could not have had the effect to prolong the time to answer. The substitution of one party for another, by order of court, is not such an amendment of a pleading as is required to be made on notice, or to be engrossed otherwise than to be entered in the minutes of the court; so held in case of the substitution of the real name of a defendant for a fictitious name, (Brock v. Martinovich, 55 Cal. 516,) although all proceedings, after the order of substitution, should be in the name of the substituted party. The court's minutes of an order of substitution of parties is a part of the judgment roll which will always show and account for a change of parties by order of court more intelligibly than would a mere change of names in the pleadings. An order of court substituting a party is different from an order of court allowing 'a party to amend any pleading * * * by adding or striking out the name of any party' by authority of section 473 of the Code of Civil Procedure. The substitution is made by the court, whereas the amendment is allowed to be made by the party. A substitution may be made on suggestion and proof of the requisite facts, at the instance of either party, and might have been made on the suggestion, and at the instance of, the defendants in this case; whereas, an amendment by adding or striking out the name of a party is only allowed at the instance of the party whose pleading is to be so amended. Again, the substitution of a party plaintiff necessitates no change in the defense; whereas, the addition or striking out of a party by amendment may require or admit of a different defense. Conceding, without deciding, that, as contended by counsel, the death of the original plaintiff extended the time allowed the defendants to answer till after the substitution of the executor, still, the presumption must be that the substitution was made at a date early enough to justify the judgment, since the date of neither the order of substitution, nor of the qualification of the executor, is made to appear by the record. In the absence of a showing of the true date of the order of substitution, it is enough that the record expressly shows it to have been prior to the judgment. It devolved upon the appellants to show that it was not long enough prior to the entry of the judgment, if the fact was so. This they have failed to do. The same presumption should be indulged in favor of the ministerial act of the clerk in entering the default, if necessary to sustain the judgment; but, admitting that the default was entered by the clerk too soon, still the entry of the judgment was a sufficient entry of the default. (Montgomery v. Tutt, 11 Cal. 316; Miller v. Miller, 33 Cal. 355;) and from that alone,

in the absence of a showing to the contrary, it must be presumed that the defendants were actually in default before the rendition of the judgment.

"2. It is contended that the complaint does not warrant any relief, because it shows that the adverse claim of the defendants rests upon proceedings which are void upon their face; but this objection is not available in an action to determine an adverse claim, under section 738 of the Code of Civil Procedure. Such an action may be maintained against a person who claims under a void tax-deed. *Harper v. Rowe*, 53 Cal. 234; *Hearst v. Egglestone*, 55 Cal. 365; *Pearson v. Creed*, 78 Cal. 144, 20 Pac. Rep. 302; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. Rep. 1134. A judgment in such an action that the defendants have no right, title, or interest in, or lien upon, the land in question, is equivalent to a judgment canceling all papers and proceedings upon which the adverse claim is founded, and has the same effect; and therefore the defendants, having no right, title, or interest in or lien upon the lots in question, are not injured by this part of the judgment which purports to cancel the assessments and certificates of sale upon which their adverse claim is alleged to be founded, and which the objection itself admits to be void upon their face. *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *Head v. Fordyce*, 17 Cal. 149; *Pom. Eq. Jur.* § 1399.

"3. It is also objected that the injunction against executing deeds in pursuance of the certificates of sale is inappropriate and unwarranted. The injunction was merely ancillary to the principal relief, and was proper if necessary to make that relief effectual. *Axtell v. Gerlach*, 67 Cal. 484, 8 Pac. Rep. 34; *Brooks v. Calderwood*, 34 Cal. 563. If unnecessary to make the relief effectual, the injunction was superfluous, and did not injure the defendants, as they were simply enjoined from executing void deeds.

"4. Assuming that the defendants were in default when the judgment was rendered, the motion to set aside the default and judgment was entirely destitute of merit. It is not pretended that defendants did not have actual knowledge of the entry of the default by the clerk, and of the judgment by the court, at the times they were respectively entered, but only that 'no notice or paper whatever in this action has ever been served on either of said defendants;' yet, the motion was delayed nearly 20 months after the entry of the default, and nearly 12 months after the entry of the judgment. There is no affidavit of a meritorious defense, or of any supposed defense, and no intimation that the defendants desired to make any defense to the action, in any event."

We have re-examined the case in bank, and are satisfied with the above opinion, and, for the reasons therein stated, the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

KITTLE v. McMULLEN *et al.* (No. 12,874.)

(Supreme Court of California. Dec. 2, 1890.)

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

R. Percy Wright, for appellants. Taylor & Haight, for respondent.

WORKS, J. This case is the same in all material respects as *Kittle v. Bellegarde*, ante, 55, (just decided,) and on the authority of that case the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

86 Cal. 566

QUONG TUE SING v. ANGLO-NEVADA ASSUR. CORP. (No. 12,873.)

(Supreme Court of California. Dec. 2, 1890.)

INSURANCE—CANCELLATION OF POLICY.

1. An insurance broker does not become the agent of the insured for the purpose of accepting a cancellation of the policy, by the mere fact that he acted as the agent of the insured in procuring the insurance.

2. The conditions on which an insurance company is allowed to cancel the policy must be strictly complied with; and a policy which provides that it shall be terminated only on notice by the company to the insured of its intention to cancel, and a return of the full amount of the unearned premium, is not canceled by the fact that the company's agent notified the broker who procured the insurance that the policy had been canceled, and paid him a part only of the unearned premium, and delivered to him a policy in another company for one-half of the original risk.

3. The insured, who refused to accept the second policy, and who declined to take anything less than the full amount of the unearned premium, does not waive a strict compliance with the conditions of the original policy by finally keeping the second policy on the broker's erroneous representation that the original policy had been canceled, and that his property was entirely without insurance.

Fox, J., dissenting.

In bank. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

Lamar & Castle, for appellant. T. I. Bergin, for respondent.

WORKS, J. This is an action on a policy of fire insurance. The only question in the case is whether the policy sued on was canceled before the fire occurred or not. The policy was procured by one Brandon, acting as a broker, from the local agent of the respondent, and was paid by such agent a commission of 15 per cent. The company was not satisfied with the risk, and the local agent was notified to cancel it. The policy contained this clause: "This insurance may also be terminated at any time, at the option of this corporation, on giving notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of this policy, to any person named in this policy, whether as owner, mortgagee, or otherwise. It is a part of this contract that any person other than the assured, or the duly-authorized agent of this corporation, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in this policy, and not of this

corporation, under any circumstances whatever, or in any transaction relating to this insurance." The local agent attempted to cancel the policy through Brandon. Brandon represented to him that the appellant wanted other insurance, and the agent reported to him that he could place a part of the insurance for \$750, which was half of the amount of the original risk, in another company. He accordingly did so. The amount of the premium on the policy sued on, which had been paid by Brandon for the appellant, was \$110. The local agent gave Brandon the policy of insurance in the other company, the premium for which was \$60, and paid him the balance of the \$110 in money. What took place between Brandon and the appellant is best told in his own words. He testified: "I went down to see Quong Tue Sing. I did not see him there. He was not in, and next morning I went down and informed him that his policy was canceled; that the company would not carry it any longer. He seemed somewhat aggrieved over the matter, and he and several other Chinamen that were in the place at the time talked the matter over, and said they wanted their insurance; wanted to carry their insurance. I told them I would go and place it if I could." He then tells of his efforts to place the insurance, and the fact that he procured the \$750 policy above mentioned, and testified further: "I started to go to the Chinamen to deliver to the firm of Quong Tue Sing & Co. the money and the policy. I met Mr. William Patterson, the county license collector, on the road, and asked him to accompany me, which he did. I went in and talked to the one of the firm which was the butcher, and the one that was the book-keeper, both of which have been on the stand this morning, (the one that sits with the dark blue clothes, and the one this side of him,) and I stated to them,—neither of which could talk very plain English, but I always got along with the Chinamen well enough. I told them the condition of affairs. There was some little talk between them as to the matter. I tendered them at that time, in the presence of Mr. Patterson, the \$750 policy that I received from Mr. Wright, to which was added the amount of my premium, which would make it \$50. I tendered them \$60 in a policy for \$750, together with \$50 in coin, a portion of which was in silver. The Chinamen would listen to nothing. I asked the one that has not been on the stand, who is sitting back there, who seemed to understand English more than the rest, or better than the rest, to go for Charley and bring him in; that is, Quong Tue Sing. He went out and tried to find him, and could not find him for quite a little while. They came in and talked about the matter, and the Chinamen told me that it was a unanimous opinion of theirs that they wanted it all in one company, and then came back and they said that they wanted it right away. I came back and I saw Mr. William Stewart,—William D. Stewart. Mr. Patterson left me, though I told them at that time that they had better let this amount remain, as they had no insurance whatever. I

told them that there was no insurance on their stock of goods, and they had better receive this \$750; and they did take it. Quong Tue Sing was not present when the policy was taken, but the other two members of the firm were present. They accepted the policy; but they would not accept the money, and wanted nothing at all to do with it,—they wanted all one policy." The court, on this point, finds as follows: "Thereafter, and on the 28th, or 29th, or 30th of April, 1887, and certainly before the 1st day of May, 1887, the said Brandon visited the store of plaintiffs, at said San Jose, and then and there delivered to plaintiffs aforesaid policy of insurance for \$750, which plaintiffs, after they were told by Brandon that they then had no insurance on their said property, accepted and received and kept, and which neither they nor their assignee have ever since returned to said Brandon or to said Wright, or to said Prussian National Insurance Company of Stettin; that said Brandon also then and there, and at the same time that he delivered said \$750 policy to plaintiffs, tendered to plaintiffs, as part of the return premium due them upon the cancellation of the policy of insurance sued on, the sum of fifty dollars, of which forty-five dollars was in lawful gold coin of the United States, and five dollars in lawful silver coin of the United States. Plaintiffs did not then and there receive said fifty dollars, so tendered them by said Brandon; but they then and there authorized him to procure for them \$1,500 of insurance on the same personal property insured by the policy sued on herein, and, when he had obtained such \$1,500 insurance, they authorized him to cancel said \$750 policy of insurance." And the court, as a conclusion, found that, by the transaction between the local agent of the respondent, and between Brandon and the appellant, as above set out, "the policy of insurance sued on was properly canceled, and a correct proportion of the unearned premium thereon returned to plaintiffs before the destruction of the insured property by the fire mentioned in the complaint."

It is contended by the appellant that neither the evidence nor the findings of the court sustain or justify this conclusion. To maintain the conclusion reached by the court below, it must have been shown either that the conditions upon which the company was allowed to cancel the policy were strictly complied with, or that the insured, knowing all the facts, waived such compliance. *Bennett v. Insurance Co.*, 115 Mass. 241. It is an undisputed fact that the agent of the company did not act directly with the insured. The tender of so much of the unearned premium as was returned was tendered, not to the appellant, but to Brandon. Therefore, in order to render this tender effective, if otherwise sufficient, it was necessary to show either that Brandon was, at the time, the authorized agent of the insured for the purposes of the cancellation of the policy, or that, not being authorized at the time, his acts were ratified by the insured. There is an entire lack of any evidence even tending to show that Brandon had

any authority to receive the unearned premium under the policy, or to accept a cancellation of it, on any terms, unless such agency is established by a mere showing that he was the appellant's agent in procuring the insurance. That an agent authorized to procure insurance is not thereby made the agent of the insured to cancel the policy is well settled. *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. Rep. 341; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207; *Broadwater v. Insurance Co.*, 34 Minn. 465, 26 N. W. Rep. 455; *White v. Insurance Co.*, 120 Mass. 330; *Insurance Co. v. Hartwell*, 100 Ind. 566. This being so he was not the agent of the insured, and had no authority to bind him either by the acceptance of a strict tender of the unearned premium or the waiver of such tender, by the acceptance of an insufficient one. The tender in this case was not sufficient. There must have been an actual tender to the appellant, or his authorized agent, of the full amount of the unearned premium. *May, Ins.* § 69; *White v. Insurance Co.*, 120 Mass. 330; *Insurance Co. v. Hartwell*, 100 Ind. 566. This tender was not made. There was a tender of only a part of the premium, and another policy of insurance in another company. It only remains to inquire, therefore, whether the appellant in any way waived the repayment of the unearned premium. We are quite clear that he did not. Two things were necessary in order to effect the cancellation, viz., notice of intention to cancel, and the return of the unearned premium. The notice required was not given. Brandon, who, as we have seen, was not the agent of the appellant, simply informed the latter that his policy had been canceled, and that he had no insurance, neither of which statements were true.

It is contended by the respondent that because the appellant accepted a policy in another company he thereby waived the notice and strict tender required by the policy. But the evidence shows conclusively that he did not consent to accept the policy for \$750 tendered him, but refused to do so, although it was left with him, and insisted upon having \$1,500 insurance all in one company, and that he refused to accept the money tendered him. He did express a desire and willingness to procure and accept another policy for \$1,500, and, perhaps, if such a policy had been procured for him he would have been willing to accept it, and surrender the one sued on. But such a policy was not procured for him. He never at any time consented to accept anything else in lieu of the policy sued on, or to accept less than the full amount of the premium due him on a cancellation, or to deliver up the policy. He kept the \$750 policy on the strength of the erroneous statement of Brandon that the policy sued on had been canceled, and that he had no insurance. Counsel for respondent rely mainly on the case of *Hillock v. Insurance Co.*, 54 Mich. 531, 20 N. W. Rep. 571, to sustain the position that the appellant waived a strict compliance with the conditions necessary to effect a cancellation of the policy. But that case differs materially from this. The

conclusion reached by the court in that case was that actual tender of the unearned premium was unnecessary to the cancellation of the insurance policy, because the "minds of the parties had met on the point that the policy was to be canceled." Here the minds of the parties had not met. No assent on the part of the insured is shown. Judgment and order reversed, and cause remanded for a new trial.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

I dissent: FOX, J.

86 Cal. 542

FOLTZ v. COGSWELL. (No. 12,787.)

(Supreme Court of California. Nov. 29, 1890.)

ASSUMPSIT—PLEADING—COMPENSATION OF ATTORNEY—LOBBYING.

1. The complaint alleged that defendant retained plaintiff as his attorney, and agreed to pay her fully for her professional services, "to-wit, the sum of \$5,000," and further that she rendered specified services which "were and are reasonably worth \$5,000." *Held*, that the complaint as a whole showed that the action was on an implied contract, and evidence was admissible thereunder in support of a demand on a *quantum meruit*.

2. The evidence showed that a part of the services rendered by plaintiff consisted in personal solicitation of members of the legislature to act favorably on a bill she was seeking to have passed for defendant; but there was nothing to show that she used dishonest, secret, or unfair means, and there was evidence that such members knew she was acting for defendant. *Held*, that she was not "lobbying," within the meaning of Const. Cal. art. 4, § 35, which declares that "any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or other dishonest means, shall be guilty of lobbying."

3. The evidence showed that the legislation procured by plaintiff was to enable the board of regents of the University of California to reconvey to defendant land which he had donated to them; that, when the regents refused to reconvey, she prepared and submitted arguments designed to induce them to do so; and that she had prepared and was ready to bring an action to compel them to reconvey the land, when defendant discharged her. *Held*, that the fact that the legislation secured failed to accomplish the object of her employment—to procure a reconveyance of the land—will not bar her recovery of the reasonable value of her further services to that end.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

W. C. & Isaac Burnett and Garber, Boalt & Bishop, for appellant. J. C. Bates, for respondent.

WORKS, J. This cause was submitted in department 2, and the following opinion prepared by GIBSON, C.:

"*Assumpsit* to recover for services rendered as an attorney and counselor at law. Plaintiff alleges in her complaint that, between the 27th day of January, 1883, and the 9th day of March, 1883, at the special instance and request of defendant, who promised to fully pay her for her professional services, 'to-wit, the sum of \$5,000,' she devoted her

entire time and skill as a lawyer in the preparation of an act entitled 'An act authorizing and empowering the regents of the University of California to convey certain lands,' designed to enable the defendant to obtain from said regents a reconveyance of certain real property in San Francisco that he had donated to the university, and in making the legislature acquainted with her bill, and in making arguments before the various committees of that body, in order that the justice and merits of defendant's demand for the passage of the bill might be fully understood, all of which services resulted in the passage of the bill into a law, entitled as above, on the 9th day of March, 1883; that between the latter date and March 17, 1885, she counseled with and advised defendant as to various legal questions concerning the property, and prepared for and submitted to the regents of the university written arguments in relation to the same property; that on the date last mentioned defendant gave her notice that her services were no longer desired; that all of the said services rendered to defendant were and are reasonably worth \$5,000, no part of which has been paid. Defendant, in his answer, denies any agreement for any sum greater than \$200 for her professional services; and avers that on December 12, 1882, plaintiff contracted with defendant to perform all the services mentioned in the complaint, and, in addition, to conduct and prosecute a suit, then intended to be commenced against the regents of the university to recover the property referred to in the complaint, through the trial and appellate courts, for the sum of \$200; that all the services ever performed by plaintiff were pursuant to her own judgment as a lawyer, and in accordance with said agreement; and, as a further defense, that long before the present action was commenced defendant paid plaintiff in full for all services performed by her for him. The jury, upon the issues thus presented, rendered a verdict for plaintiff for \$1,450. From the judgment entered thereon, and an order refusing a new trial, defendant appeals. The appellant asserts that the claim of plaintiff is based upon an express contract for the sum demanded for her services, and that it was error to admit evidence in support of a demand upon a *quantum meruit*. The complaint, it is true, states in one place that she was to be fully paid for her services, to-wit, \$5,000, but reading the complaint as a whole, the substance of which we have set out above, we think it clearly shows that the action is upon an implied contract for the reasonable value of her services, alleged to be reasonably worth the sum demanded, and not upon an express contract for that sum. This construction was properly given to it by the trial court, and the evidence in support of it was admissible. Appellant, in his answer, does not deny that the services for which respondent seeks to recover were rendered substantially as alleged, but avers that they were rendered pursuant to an express contract, by the terms of which she was to receive, and did receive, \$200, and that all services rendered by her were fully paid for. The con-

tract referred to was in effect as above set forth in the substance of defendant's answer. But after visiting Sacramento, where the legislature was then in session, the respondent testifies that she found that she could not spend the time necessary to procure the passage of the act desired by the defendant, and upon returning to San Francisco, and informing him of that fact, he urged her to return to Sacramento and remain until the act was passed, believing that she could accomplish it, and agreed to pay her well for her services. She said they would be worth \$5,000. He did not assent to this amount, but assured her that she would be fully compensated. There is sufficient testimony in the record, aside from that of the plaintiff, strongly tending to establish this agreement, and to show that it took the place of the original written contract. It is admitted in the answer that plaintiff, between the 27th of January, 1883, and the 9th of March, 1883, 'devoted some time, and her professional skill, ability, and learning,' in acquainting the legislature and its committees with the merits of the act that defendant desired, which resulted in the passage of the act on the date last mentioned, and that since the date last referred to, at divers times and occasions, and prior to September 14, 1883, after which date defendant refused to accept any further services from her, she counseled with and advised defendant in relation to the property he was seeking to regain from the regents of the university, and prepared written arguments concerning the same property, and placed the same before the said regents, but denies that the latter were placed before said regents until April 10, 1884, about seven months after defendant had refused to accept any further professional services from her. There is testimony tending to prove that she prepared the bill, which afterwards became a law, and made arguments in support of it, and caused it to be introduced in both departments of the legislature, appeared and argued the measure before at least one committee of that body, and also before the governor when the bill reached his hands for consideration; and further, that the written arguments she sent before the regents of the university after the passage of the act were sent before she was informed by defendant that he no longer required her professional services; and according to her own testimony and that of another witness, the services she so rendered were of a greater value than the amount awarded by the jury. The only expert witness called for defendant on this point placed the value as high as \$1,000. Therefore, we do not feel justified in disturbing the verdict, unless, as claimed by defendant, the agreement relied upon by plaintiff was an agreement for compensation contingent upon success, and consequently void as against public policy. A sufficient answer to this objection is, that a careful review of the testimony fails to show, nor can it be fairly inferred therefrom, that plaintiff's compensation depended solely upon her success in obtaining the passage of the act. She, it is true,

insisted in her testimony that she was to and should receive five thousand dollars for her services; and, when the act became a law, she demanded that amount, but there is not a word indicating that, in the event of her failure to secure the passage of the act, she should receive nothing for her services; consequently we cannot say that she was to be compensated only in the event of success.

"It is further contended by defendant that a portion of her services, in connection with the passage of the act, consisted not of arguments addressed to the legislature or any committee thereof when in open session, but of personal solicitation of individual members of the legislature, which is contrary to public policy, and that such illegitimate services were so blended with what may have been legitimate as to taint the whole, and prevent a recovery. In *Miles v. Thorne*, 38 Cal. 335, an action to enforce a trust that arose upon an agreement, by which Thorne and Miles agreed that if a franchise for a toll-road could be obtained from the legislature in Thorne's name, for which Miles should draw a bill, that upon the passage thereof, each would construct one-half of the road, and be equal owners thereof, and divide the tolls between them, the court said: 'We find nothing in the contract, as alleged in the complaint, which sustains the point made by the defendant that it is against public policy, and therefore illegal and void. The point is founded upon the idea that by the agreement the plaintiff was to use his influence to obtain from the legislature a grant of the franchise in question. The complaint furnishes no ground for such a charge. The plaintiff was to draft a bill for the franchise and place it in the hands of some member of the legislature, to be introduced by him to that body; but there was no promise or undertaking on his part to labor, either secretly or openly, with the members of the legislature to secure its passage. Yet, having by virtue of the agreement an equal interest with the defendant in obtaining the franchise, he had a legal right, equally with him, to urge its passage by all honorable means, provided he did not conceal, but openly acknowledged, his interest in the measure. Even had he agreed to act as the advocate of the defendant, the agreement would not have been illegal, if it was understood that he was to act openly as such, and did so act when the time came.' Citing *Marshall v. Railroad Co.*, 16 How. 334. In the latter case, the court draws a distinction between the use of personal, or any secret or sinister, influence upon legislators by one who seeks the passage of an act which it holds to be contrary to public policy, and the open advocacy of the same before the legislature or any committee thereof in open session. Article 4, § 35, of our constitution defines 'lobbying' as follows: 'Any person who seeks to influence the vote of a member of the legislature by bribery, promise of reward, intimidation, or any other dishonest means, shall be guilty of lobbying, which is declared a felony. * * *' Now while the evidence does show that the plaintiff endeavored

to persuade some of the members of the legislature, individually, to act favorably upon the bill she was seeking to have passed, it does not show that she used any dishonest, secret, or unfair means to accomplish her object. Besides, if she did not tell them that she was acting as an agent for pay, they must have known from the character of the bill that she was acting as the agent of Dr. Cogswell, which fact was sufficient of itself to disclose her motive. Hence, this contention cannot be sustained. It is further urged that, as plaintiff acted upon her own judgment as to what course to pursue to regain the property for defendant, and the legislation procured having turned out to be ineffectual, her services in procuring it were consequently worthless, and she cannot recover upon a *quantum meruit*. In support of this position, *Timberlake v. Crosby*, 81 Me. 249, 16 Atl. Rep. 896, and *Bridges v. Paige*, 13 Cal. 640, are cited. In the first case, which was to recover a balance due for professional services, it was held that the unnecessary services rendered by the attorney could not be recovered for, and that his failure to expend the few minutes necessary in the examination of the Revised Statutes and Digest, the former of which contained a reference to, and the latter the substance of, a case which would have shown him the futility of the additional course he pursued, amounted to negligence. This is in accordance with the rule stated in *Weeks*, Attys. § 335. In *Bridges v. Paige*, an action on a *quantum meruit* to recover for services rendered as an attorney in a suit, in which the attorney was successful, evidence offered by the defendant, which tended to show negligence and want of skill in the conduct of the case, was excluded. This was held to be erroneous, because a trial might result successfully, and yet the attorney, by his negligence or want of skill in conducting the case, might put his client to great expense to redeem his blunder, and evidence of such negligence or want of skill should be received to reduce the value of his services. Neither of those cases, it is to be noticed, goes to the extent of holding that, where services rendered are made up in part of those which were proper, and those which were negligently or unskillfully rendered, no recovery can be had for the former. In the case at bar, the evidence to the effect that the legislation procured through the assistance of plaintiff was useless must therefore have been considered by the jury in estimating the value of her services, which not only consisted, as we have seen, of the legislation she obtained, but of arguments prepared and submitted by her to the regents of the university, designed to accomplish the object the defendant desired to attain. She also had made preparations, and was ready, to commence and prosecute an action against the said regents to compel a reconveyance of the property when she was discharged by the defendant. This being so, then, in the absence of any showing that the amount awarded by the jury is excessive, the last exception must also be overruled."

Subsequently, the case was ordered into

bank, and the same has been orally argued and resubmitted. Having given the case this further consideration, we are satisfied with the opinion of the learned commissioner, and the conclusion reached therein. Judgment affirmed.

We concur: SHARPSTEIN, J.; FOX, J.; PATERSON, J.; MCFARLAND, J.

88 Cal. 531

GIBBS v. RANARD. (No. 12,631.)

(Supreme Court of California. Nov. 29, 1890.)

CONTRACT TO PURCHASE—BREACH—EVIDENCE—DAMAGES.

1. Plaintiff agreed to sell to defendant his newspaper business, and defendant agreed to purchase it for a named sum, on condition that he should be able to make satisfactory arrangements with certain daily newspapers. Defendant refused to close the contract on the ground that he could not make such arrangements, whereupon plaintiff, after notifying defendant of his intention, sold out to the highest bidder, and sued defendant for the difference between the amount obtained, and that specified by their contract. There was evidence that defendant, before making the contract, knew of the arrangement subsisting between plaintiff and such newspapers, and expressed himself satisfied with the same; and that the newspapers agreed to continue the arrangement with defendant. Defendant himself testified that the objections of members of his family had some weight in inducing him to repudiate the transaction. *Held*, that the evidence warranted a verdict for plaintiff.

2. Evidence of what defendant stated to plaintiff with regard to the latter's arrangement with the newspapers was competent to show that he would be satisfied with a continuance of it, and that his repudiation of the contract was not in good faith, whether he made such statement before or after the execution of the contract to purchase.

3. As the contract was only an agreement to sell, and not a sale, and as title never passed to defendant, Civil Code Cal. § 1749 et seq., relating to the measure of damages in actions to rescind a sale or to enforce liens for purchase money, do not apply to plaintiff's action for the breach, and it is not necessary to prove the value of the property, as that was fixed by the contract.

In bank. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

W. B. Haskell and *E. S. Lippitt*, for appellant. *Rogers & Munday*, for respondent.

WORKS, J. The parties to this action entered into the following contract: "This agreement, made and entered into this 28th day of June, in the year of our Lord, one thousand eight hundred and eighty-six, between J. D. Gibbs, of the city of Petaluma, county of Sonoma, and state of California, the party of the first part, and J. H. Ranard, of the same place, the party of the second part, witnesseth: That the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained agrees to sell and convey unto the said party of the second part, and said second party agrees to buy the newspaper route, business, goodwill of said business, as carried on and conducted by the party of the first part, in said city of Petaluma, state and county aforesaid, and more particularly de-

scribed as follows: The buying and selling of daily and weekly newspapers; the buying and selling of magazines; the buying and selling of other reading matter, and the delivery of the same; and the buying and selling of stationery, books, and other goods, as conducted and sold at his newspaper stand, in the Masonic block, situate on Western avenue, in said city of Petaluma, for the sum of five thousand dollars, lawful money of the United States. And the said party of the second part, in consideration of the premises, agrees to pay to the said party of the first part the sum of five thousand dollars, lawful money, as follows, to-wit: One dollar in hand paid, the receipt whereof is hereby acknowledged, and the balance, four thousand nine hundred and ninety-nine dollars, (\$4,999,) by note on demand, drawing interest from date, at the rate of ten per cent. per annum, interest payable quarterly. It is understood and agreed on the part of both parties hereto that, in the event that such arrangements as shall be satisfactory to the party of the second part cannot be made with all the San Francisco daily papers, then this agreement shall be null and void. It is also understood and agreed that, on making a bill of sale of this said business by the party of the first part, he will enter into a written agreement not to go into the same kind of business in said city of Petaluma for the period of five years from this date. It is understood that this sale shall take place on the 1st day of July, A. D. 1886, and that the note shall be dated July 1, 1886. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties. In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written. J. D. GIBBS. [Seal.] J. H. RANARD. [Seal.] Signed, sealed, and delivered in the presence of H. P. BRAINERD." The complaint alleges the making of the contract; that the defendant, after the execution of said contract, made satisfactory arrangements with the proprietors and publishers of all the San Francisco papers; that he failed and refused to comply with the terms of the contract, and refused to pay the money or execute the note provided for therein. It is also further alleged: "That after the said defendant refused to perform his said contract as aforesaid, and refused to accept the said property and business as aforesaid, or to pay therefor, or to deliver his promissory note, as by him agreed, and to accept the said bill of sale as aforesaid, the plaintiff on the — day of July advertised the said property and business described in said contract by publication in the San Francisco Daily Chronicle, and offered the same for sale; and, after such publication and notice and advertisement, one J. E. Jewell offered to purchase the same, and pay therefor the sum of twenty-two hundred and fifty dollars. That, before selling the same to other parties than the defendant, the plaintiff notified the defendant of his (the plaintiff's) intention to sell the same; and, in case he could not within a reasonable time find a purchaser

ready and willing to pay as much as the defendant agreed to pay, that he (the plaintiff) would sell the same for the best price obtainable, and hold the defendant liable for all loss and damage by reason of his said refusal to take and pay for the said property and business, and for the difference between the contract price, and the amount which he (plaintiff) should and could obtain from the other purchasers; and plaintiff receiving no other or better offer than the offer of said J. E. Jewell, and the defendant still refusing to perform his contract, sold and delivered, at Petaluma, said property and business to the said J. E. Jewell for the highest market price obtainable, to-wit, the sum of twenty-two hundred and fifty dollars, (\$2,250,) to the plaintiff's damage in the sum of \$2,750, being the difference between the sum of \$2,250, the price at which J. E. Jewell purchased, and the contract price agreed to be paid by the defendant." The plaintiff recovered a verdict and judgment in the court below for \$2,749. A motion for a new trial was denied, and the defendant appeals.

The appellant contends that the evidence fails to show that he was able to make satisfactory arrangements with the San Francisco papers, and that therefore the verdict is against law. But the evidence tends to show that the appellant was buying the route for his son and one Dickenson; that, at the time the contract was being made, the terms upon which these newspaper agencies were held by the respondent were stated by him; that such terms were satisfactory to the defendant, if the same rights could be transferred to him, or his son and Dickenson, for whom he was buying; that it was understood that the appellant's son was to go to San Francisco with the respondent, and see if such arrangements could be made; that they did visit the different newspaper offices, and found that the arrangements could be made; that the arrangements were then and there made by the son, and each and all of the papers instructed to change the agency, and forward the papers thereafter to the address of the appellant, which was done. The respondent also testified that when the appellant refused to carry out the contract he simply said he was not going to have anything more to do with it, and assigned no reason therefor; and, although the appellant denies this, he testifies himself that some of his family were objecting to his going into the transaction, and that these objections had some effect in inducing him to repudiate the purchase. Taking all of the evidence, it is quite clear to our minds that the defendant did not refuse to comply with his contract for the reason that satisfactory arrangements could not be made with the newspapers. The contract cannot be construed as giving him the right to say, arbitrarily, that the terms to be procured from the papers were not satisfactory, if they were reasonable and just, as appears to have been the case. It is true counsel for the appellant contend that this testimony was incompetent, for the reason that it tended to show that what was said was a part of the negotia-

tions, and was merged in the contract when executed. The evidence is somewhat conflicting as to whether this conversation occurred before or after the contract was executed; but we think it makes no difference. It was competent for the purpose of showing that the defendant knew what the present arrangement with the papers was; that he would be satisfied with a renewal of the same arrangement; and that his refusal to consummate the agreement was not in good faith, and for the reason now assigned therefor.

It is further contended by the appellant that the respondent did not take the proper steps to fix the amount of damages he was entitled to recover from the appellant under section 1749 of the Civil Code and other sections relating to the enforcement of liens in such cases. But here there was no sale of the property, and therefore the sections of the Code relied upon have no application. The contract, a breach of which is alleged, was not one of sale, but an agreement to sell upon certain terms. This contract was never consummated by the execution of the bill of sale provided for, or the payment of the purchase money, or any part of it, or the execution of the note provided for therein. This action is not to rescind a contract of sale, or to enforce a lien, but to recover damages for the failure to execute a contract of sale as provided in the contract sued upon. The property not having been sold, the title thereto remained in the respondent, and he could not enforce a lien against his own property, or sell it as the property of appellant as provided in the Code. The evidence shows that the appellant, having refused to consummate the purchase, was notified by the respondent that he would sell the property to some one else for what he could get for it, and hold him responsible for the difference; that he advertised the route for sale in a newspaper, and finally sold it for \$2,250; and that that was the greatest sum he could procure for it. We think this evidence was competent as tending to show the amount of damage resulting from the breach of the contract, and that the jury were justified, from the evidence, in finding for the respondent in the amount of the verdict. It was not necessary for the appellant to prove the value of the property. That was fixed as between these parties by the contract. For these reasons the court did not err in overruling the motion for a nonsuit, and the verdict of the jury was not against law, and was sustained by the evidence. Judgment and order appealed from affirmed.

We concur: SHARPSTEIN, J.; FOX, J.;
PATERSON, J.; MCFARLAND, J.

86 Cal. 500

WATSON v. SUTRO. (No. 12,596.)

(Supreme Court of California. Nov. 29, 1890.)

VENDOR and VENDEE—BONA FIDE PURCHASERS—
CONSTRUCTIVE NOTICE—TRUSTS—ESTOPPEL—LIMITATIONS.

1. Tenants in common of land conveyed it to a trustee by a deed absolute on its face, which was duly recorded; the trustee executing a dec-

laration of trust, which was not recorded, reciting that the deed to him by the parties, naming them, had been made to facilitate the perfecting of title. Subsequently one of the tenants in common was substituted as trustee, and he also executed a declaration of trust to the same effect as the first, but omitting the name of one of the tenants in common, owning an undivided five acres, and crediting his share to one of his co-tenants. *Held*, that a purchase of this five acres by the substituted trustee from the co-tenant did not constitute him an innocent purchaser, as it was his duty, when he accepted the position of trustee, to know for whom he was acting.

2. In an action by the owner of the undivided five acres to charge the substituted trustee as a purchaser with notice, it appeared that the co-tenant who sold them had acted as administrator of the estate of plaintiff's father-in-law, and had acquired 15 acres, as tenant in common, during such administration. Long before the conveyance in trust, he had conveyed the five acres now in dispute to plaintiff, whose deed was duly recorded. After the conveyance in trust, plaintiff with his wife and other heirs, in settlement of the administration, executed to the co-tenant a written instrument reciting that the latter, during the course of his administration, had acquired land, "the legal and equitable title to which is now in him," and empowering him to sell such land. *Held*, that this instrument conferred no authority on the co-tenant to sell the five acres previously conveyed to plaintiff, as the co-tenant had neither the legal nor the equitable title thereto; the legal title being in the trustee, and the equitable title in plaintiff.

3. The distinct statement in the power of sale that it embraced only such lands, "the legal and equitable title to which is now" in the co-tenant, will limit a subsequent general description of such land as "15 acres or thereabout," and these general words will not enlarge the power of sale previously conferred.

4. Where the attorneys for a purchaser from the substituted trustee have examined all the various conveyances under which he claims the five acres now in dispute, their knowledge is the purchaser's knowledge, and he is chargeable with constructive notice of all that appears on the face of the instrument; and the fact that the attorneys made a mistake of law in interpreting the power of sale, and advised the purchaser that it embraced the five acres now in dispute, does not constitute him an innocent purchaser thereof.

5. As plaintiff deceived neither the substituted trustee, nor the purchaser from him, the power of sale, which was accessible to both, and which was actually examined by the attorneys for the latter, does not estop plaintiff from asserting his title to the land.

6. Code Civil Proc. Cal. § 752, which permits an action of partition to be brought by a tenant in common having an estate of inheritance, does not confine the right of action to the holder of the legal title, but a tenant in common having an equitable estate of inheritance may establish his right to the land, and have a partition thereof, in one and the same action.

7. As plaintiff was ignorant of the omission of his name from the second declaration of trust, and of the conveyance by his co-tenant to the substituted trustee, the possession of the substituted trustee, who was also plaintiff's co-tenant, must be deemed to have been for his benefit; and hence Code Civil Proc. Cal. § 319, which provides that plaintiff in an action affecting the title to land must have been in possession thereof within five years of bringing the action, and section 322, which provides that the possession of land by one entering under a written instrument purporting to convey it shall be deemed to be adverse, have no application to the case.

BEATTY, C. J., and Fox and McFARLAND, JJ., dissenting.

Lloyd & Wood, for appellant. *Stanley, Stoney & Hayes*, for respondent.

PER CURIAM. We have heard this case the second time, and upon a further examination of the record, and the briefs of counsel, we feel constrained to adhere to the reasoning of the former opinion, and the conclusion therein reached. The order appealed from is therefore affirmed.

We dissent: McFARLAND, J.; Fox, J.

BEATTY, C. J. I dissent. The deed executed in quadruplicate in April, 1870, by Watson, Sullivan, and the Davis heirs contains a distinct declaration—a solemn admission—by Watson that Sullivan was at that time the owner of the equitable interest here in controversy. The conduct of Watson, and of all parties to these transactions, was for many years consistent with that declaration, and inconsistent with any serious claim of ownership on the part of Watson. The holder of the legal title with knowledge of that admission, bought in the equity, and transferred both to Sutro. I do not think that Watson should now be heard to deny the truth of a solemn admission upon which others have acted.

86 Cal. 497

WILLIAMSON *et al.* v. TOBEY. (No. 12,-
885.)

(Supreme Court of California. Nov. 29, 1890.)

NUISANCE—INSTRUCTIONS—EVIDENCE—NEW TRIAL.

1. In a suit to restrain defendant from operating his foundry in such manner as to constitute a nuisance to plaintiff's dwelling, plaintiff alleged that he was the owner of the dwelling which he had occupied ever since it was built, 30 years before, and that its foundations had never been changed. The only evidence in rebuttal was that of defendant that the house was nine inches over on his land. *Held*, that it was proper to refuse an instruction that if the house was nine inches over on defendant's land, and that if the shaking complained of was due to this, and would not occur if the house was wholly on plaintiff's land, then plaintiff cannot recover damages.

2. Where this proposition was included in a single request with others that may have been proper, it was not incumbent on the court to separate the proper from the improper parts; and hence it was not error to refuse the whole request.

3. The error, if any there be, in allowing a witness to refresh his memory from a memorandum of the action of a committee of the board of supervisors which once investigated the alleged nuisance is immaterial where other witnesses testified as to the action of such committee, and defendant himself testified to substantially the same facts as did the witness who used the memorandum.

4. Affidavits of persons who did not testify on the trial that the acts complained of did not constitute a nuisance are merely cumulative evidence, and are no ground for a new trial.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Joseph Hutchinson, Frank Otis, and Hutchinson & Campbell, for appellants. *T. J. Crowley*, for respondent.

On rehearing. For former report, see 24 Pac. Rep. 172.

v.25P.no.2—5
Cal.Rep. 23-25 P.—57

HAYNE, C. The complaint in this action was for an injunction to restrain the defendant from operating his foundry in such a manner as to constitute a nuisance to the adjoining dwelling, and for damages. The case was submitted to a jury, and a general verdict in favor of plaintiffs for \$500 was rendered. The judgment did not award any injunction, but was for the damages only. The appeal is by the defendant.

1. It is contended that the court erred in refusing to instruct the jury as requested by the defendant. As we construe the transcript, the defendant requested one instruction involving several distinct propositions. The transcript is not substantially clear upon this point. But it is incumbent upon the appellant to show error; and we do not think that upon this record the court would be justified in saying that each proposition in the paragraph referred to was requested as a separate instruction. This being the case, if any one of the propositions contained in the request ought not to have been given, the court was justified in refusing the whole instruction. *Smith v. Richmond*, 19 Cal. 485; *Preston v. Keys*, 23 Cal. 194. And we think that at least one of such propositions was in this category. The plaintiffs alleged that they were at all times the owners of the premises described in the complaint, and the evidence was that they had been in possession for about 30 years. The house in which they lived was of that age, and its foundations had not been changed since it was built. From this the presumption certainly arose that the plaintiffs were the owners of the said premises. This presumption was not rebutted by the general statement of the defendant that the "house described in the complaint is nine inches over on my own property," and there is no other evidence on the subject. In this condition of the evidence it certainly would have been improper for the court to have instructed the jury that "if the plaintiffs' building stands nine inches or any other distance over upon the property leased by Mr. Tobey, and if the shaking of the house, claimed by the plaintiff to exist, is produced because of the fact that the plaintiff's house stands upon Mr. Tobey's ground, and if the Williamsons' house was upon their own ground, said shaking would not occur, then the plaintiffs cannot recover damages caused by the said shaking;" and, as above stated, it was not incumbent upon the court to separate the improper part of the instruction from the remainder, even if it be assumed that the remaining propositions were correct and applicable.

2. It is argued that it was error to allow the witness Farnsworth to refresh his memory from a memorandum as to the action of a committee of the board of supervisors who once looked into the question of the alleged nuisance. The objection shown by the record seems to go more to the admissibility of the memorandum than to the propriety of the evidence of the witness. Evidence as to what the action of the committee actually was, was given by several other witnesses

without objection; and the defendant himself, when called to the stand, testified to substantially the same facts testified to by the witness Farnsworth from his memorandum. Under these circumstances, if there was any error in allowing the witness to look at the memorandum, it was immaterial. Similar observations apply to the reading of the memorandum by counsel in his argument to the jury.

3. Assuming, as must be done at this stage of the case, that the plaintiffs' evidence was true, we have no doubt that the defendant's foundry was a nuisance; and under the circumstances we cannot say that the damages were excessive.

4. The court did not err in refusing a new trial on the ground of newly-discovered evidence. The affidavit of Gates was in relation to the action of the committee of the board of supervisors above mentioned. If this was relevant at all, it was thoroughly gone over at the trial, as is above stated. The affidavit of the attorney relates to the same subject, and to the question of diligence. The affidavit signed by 10 other persons was merely to the general effect that the acts complained of did not constitute a nuisance. It is too clear for discussion that all this was merely cumulative, and not such as to render a different result probable, if a retrial should be had. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

86 Cal. 554

CREW v. DILLER *et al.* (No. 13,572.)

(*Supreme Court of California.* Dec. 1, 1890.)

APPEAL—TIME OF TAKING.

A judgment was rendered in December, 1887, and an order denying a new trial filed September, 1889. A notice of appeal was filed October 25, 1889. The undertaking recited the appeal from the judgment, but made no mention of the appeal from the order. *Held*, that the appeal from the judgment was too late, under the laws of California, and the appeal from the order was not perfected.

Commissioners' decision. In bank. Appeal from superior court, Butte county; JOHN GALE, Judge.

John Gale, (A. P. Catlin and W. C. Betcher, of counsel,) for appellant. *Park Henshaw*, for respondents.

HAYNE, C. This is a motion to dismiss an appeal from a judgment, and an appeal from an order denying a new trial. The judgment was entered in December, 1887. The order was made in September, 1889. The notice of appeal was filed on October 25, 1889, and was served the next day. The undertaking recited the appeal from the judgment, and was conditioned to pay the damages on "the appeal," but made no mention of the appeal from the order. In May, 1890, the plaintiff presented a new undertaking, sufficient in form, to one of the justices of the supreme court, and it

was approved by him, and filed. The appeal from the judgment was too late. The appeal from the order was not perfected. In this regard, the case is precisely like *Schurtz v. Romer*, 81 Cal. 245, 22 Pac. Rep. 657. The counsel for the plaintiff say that this case should be overruled; but we think that it is in accord with the statute, and in the line of previous decisions. We therefore advise that the attempted appeals be dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the attempted appeals are dismissed.

86 Cal. 552

DALY *et al.* v. PENNIE *et al.* (No. 13,805.)
(*Supreme Court of California*. Dec. 1, 1890.)

JUDGMENTS—EQUITABLE RELIEF.

1. Mere error, either as to the law or the facts, in the decree of a probate court distributing an estate, is no ground for relief in equity; the remedy being by appeal, as provided by Code Civil Proc. Cal. § 963.

2. The dismissal of an appeal from the decree because of the inadvertent omission of the appellant's attorneys to file an undertaking on appeal within the time required by law is not a ground for equitable relief.

3. The fact that some of the heirs were not personally notified of the proceedings in the probate court, and that they failed to appear therein, does not authorize a court of equity to set aside the decree of distribution, as Code Civil Proc. Cal. §§ 1633, 1634, do not require personal notice of the final settlement and distribution of a decedent's estate, but only the posting of notices in three public places in the county.

Commissioners' decision. Department

1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

John F. Burris, (*Henry E. Wills*, of counsel,) for appellants. *A. H. Loughborough*, for respondents.

HAYNE, C. The defendants had final judgment upon demurrer to the second amended complaint, and the plaintiffs appeal. The material facts shown by the pleading are as follows: Anna J. Skerrett died in London, England, being a resident of said place at the time of her death, and leaving a will. This will was proved in an English court, and an administrator with the will annexed appointed there. A duly-authenticated copy was filed in the probate court of San Francisco, and the defendant Pennie was appointed administrator with the will annexed here. In due course, the San Francisco court made a decree of settlement of the final account of the administrator, and of final distribution of the property remaining in his hands. This decree recited, among other things, that there were unpaid creditors in England whose claims had not been presented here, that the estate in England was not sufficient to pay such claims, and that all the legatees and devisees resided in England, except one whose legacy had lapsed, and another who had received his share, and contained a provision that the sum remaining in the hands of the administrator here should be delivered to the admin-

istrator in England. See Code Civil Proc. § 1667. The plaintiffs are the successors in interest of certain heirs at law, and the suit is for the review of the decree of distribution, and for a decree of distribution in accordance with the plaintiffs' views of what is proper under the circumstances, and for an injunction to restrain the defendants from obeying the decree of the probate court. The main ground upon which relief is sought is that the decree of distribution is erroneous both as to the law and as to the facts; that the bequests were void under the law of this state and of England; and that upon a proper construction of the will the persons to whose interests the plaintiffs succeeded would be entitled to portions of the estate. But an appeal from the decree is provided by the statute, (Code Civil Proc. § 963,) and on such appeal the whole decree can be reviewed. If it be erroneous either as to the law or the facts, the remedy is by appeal. Mere error is not a ground for relief in equity.

It is alleged, however, that an appeal was taken, but that "the clerk having charge of such matters in the office of the plaintiffs' attorneys inadvertently omitted to file an undertaking on appeal within the time required by law, and said appeal was for that reason dismissed by the supreme court without hearing the merits thereof." This is not a ground for relief in equity. *Barnett v. Kilbourne*, 3 Cal. 327.

It is further alleged that the plaintiffs' assignors "received no notice of said proceeding, and did not appear therein." But the statute does not require that personal notice should be given. Code Civil Proc. §§ 1633, 1634.¹ And it is not alleged that the notice which is required was not given. In *re Griffith*, 84 Cal. 109, 23 Pac. Rep. 528, 24 Pac. Rep. 381.

The other matters do not require special notice. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

86 Cal. 538

REYNOLDS v. BOREL. (No. 12,616.)

(*Supreme Court of California*. Nov. 29, 1890.)

VENDOR AND VENDEE—PERFECT TITLE—RECOVERY OF EARNST MONEY.

Where a vendee makes a deposit to bind his purchase, upon an agreement that it shall be returned if the title is found to be "imperfect, and cannot be made good," he is entitled to recover the deposit when it is shown that one claiming an interest in the land adverse to the vendor's has conveyed that interest to a third person, who still holds it, and also that the land was conveyed to the vendor's grantor by her husband when he was heavily indebted, and while suits were pending to enforce his indebtedness.

¹ Code Civil Proc. Cal. §§ 1633, 1634, require the clerk of the court to cause notice of the final settlement and distribution of an estate to be given either by posting copies of the same in at least three public places in the county, or by publication, as the court may direct.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Sidney V. Smith, for appellant. *George D. Shadburne*, for respondent.

PER CURIAM. This action was brought to recover a deposit of money made by the plaintiff, Reynolds, to bind his purchase of land from the defendant, Borel. A part of the contract was that the plaintiff, the purchaser, should be allowed 20 days from the date of the contract, within which to search the title to the property, and if the title was found to be "imperfect, and cannot be made good, said deposit will be returned." The plaintiff submitted a proper abstract of title to the land to his attorney, who, within the specified time, pronounced the title imperfect, and objected to it on these grounds: "On the 4th day of June, 1880, Eugene Casserly, was the owner of the block of land including said land, and on said day conveyed the same to one R. Emmett Doyle in trust for the separate use and benefit of his wife, Theresa Casserly, in consideration of the love and affection he, Casserly, bore to his said wife, and to be conveyed to her in fee-simple as her separate property by said trustee whenever thereunto requested by her; and on the 5th day of June, 1880, the said R. Emmett Doyle did convey said block of real property to the said Theresa Casserly by grant, bargain, and sale deed,—consideration one dollar; and the title thus conveyed remained in said Theresa Casserly from thence until the 21st day of November, 1884, when she conveyed the same to Antoine Borel, but the deeds to Doyle, and from Doyle to Theresa Casserly, aforesaid, were not recorded until January 13, 1884. That on the 6th day of February, 1866, John Treat, who claimed to have some interest in said real property, conveyed the same to John Center, who still holds the interest thus conveyed to him. That at the time of the conveyances to Doyle and Casserly, aforesaid, to-wit, on the 4th and 5th days of June, 1880, said Eugene Casserly was subject to the following debts, claims, judgments, and liabilities: The claim and demand of J. F. Eagan for \$15,225, and the claim and demand of Charles Mayne for \$1,713.85. And upon these claims and demands actions were brought, judgments obtained, and appeals therefrom taken, without stay-bonds, or stay of proceedings affected, as follows, viz: 'In the fifteenth district court, San Francisco. Eugene Casserly, Plaintiff, vs. McNevin, et als., Defendants. (No. 10,227.) Action commenced September 28, 1877. Judgment entered therein against said Eugene Casserly on May 29, 1883, for the sum of \$15,225, and costs, in favor of J. F. Eagan, as intervenor in said action; which judgment was appealed from to the supreme court of California, on the 7th day of February, 1884, and was not decided at the commencement of this action. An action in the nineteenth district court of San Francisco entitled "Charles Mayne, Plaintiff, vs. Eugene Casserly, Defendant. (No. 6,891.)" Commenced May 31, 1879, and judgment therein entered on the 13th day of February, 1882,

against said Eugene Casserly, for \$1,713.85, and costs; which judgment was appealed from to the supreme court of the state of California on the 21st day of February, 1882, and was not decided at the time of the commencement of this action.' And said claims, demands, judgments, and liabilities have in no wise been satisfied, vacated, or set aside, and are still in full force and effect against the property and estate of said Eugene Casserly, who died on the 14th day of June, 1883. But said defendant, Antoine Borel, purchased said block of land, inclusive of said real property described in plaintiff's complaint, without knowledge of any intent on the part of said Eugene Casserly to defraud his said creditors by the conveyances to said Doyle, and from him to said Theresa Casserly, other than from the record thereof, and of the actions aforesaid, and purchased the same for a valuable consideration. That at the time of the conveyances from Casserly to Doyle and from Doyle to Casserly, aforesaid, and by such conveyances, the block of land aforesaid, bounded by Twenty-Fifth street, Folsom street, Treat avenue, and Twenty-Sixth street, including the property in question, was transferred to said Theresa Casserly. That, upon the demise of said Eugene Casserly, his estate was appraised by the appraisers thereof at the sum of \$12,091.46." These imperfections were duly reported to the defendant, and a demand made that they be removed and the title made good, or that the defendant warrant the same against all demands, which, being refused by the defendant, the plaintiff demanded the return of his deposit of \$360, with which the defendant refused and still refuses to comply. The court below gave judgment for the plaintiff, from which, and an order denying a new trial, the defendant appeals.

There is nothing in the record to explain a claim of John Center to an interest in the land beyond the allegations of the complaint, and the finding of the court that at the time Eugene Casserly conveyed this property to R. Emmett Doyle, and Doyle to Mrs. Casserly, "one John Treat, who claimed to have some interest in said real property, conveyed the same to John Center, who still holds the interest thus conveyed to him." As it seems to us, this fact, existing with reference to a title, would not constitute it free from reasonable doubt, or make it improbable that litigation might grow out of it. Again, there is a state of facts presented from which a prudent man might infer that, at the time Eugene Casserly made this conveyance to Doyle, he was not able to pay his debts; for a conveyance is made in trust to Doyle, who carries out the trust the next day by making a deed to Mrs. Casserly. These deeds were delayed to be recorded for several years,—until after Eugene Casserly's death. Meanwhile, certain large judgments, which were rendered in suits brought before his death, are in existence, unstayed, but on appeal, and unpaid, which amount to more than the value of Casserly's whole estate at his death. Can it be said that, under this condition of things, (even ad-

mitting that the defendant here knew nothing but the fact that these judgments were existing and unsatisfied at the date of his purchase, and the delay of recording the deeds from Casserly to Doyle and Doyle to Mrs. Casserly,) these judgment creditors will not hereafter probably commence litigation with Borel as to his title to the premises, if they have not already done so? We think not. As it seems to us, it is very doubtful but what they may litigate. Is, then, the plaintiff here to be required to take the title of Borel as a perfect one, when this sort of reasonable doubt exists? "A perfect title must be one that is good and valid beyond all reasonable doubt. Whether the particular title is good or not is a question which it is often difficult to determine, and one upon which the lawyers and judges sometimes disagree." *Turner v. McDonald*, 76 Cal. 179, 18 Pac. Rep. 262. "A title to be good 'should be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record.'" *Id.* 76 Cal. 180, 18 Pac. Rep. 264. It seems to us, under the facts of this case and the refusal of the defendant to warrant the title, the plaintiff here was warranted in considering the title imperfect, and subject to grave doubts. For the foregoing reasons, the judgment and order are affirmed

86 Cal. 617

HARMON v. SAN FRANCISCO & S. R. Co.
(No. 12,017.)

(*Supreme Court of California*. Dec. 8, 1890.)

APPEAL—CONSOLIDATION OF ACTIONS—MECHANICS'
LIENS—STATEMENTS OF CLAIM—EVIDENCE.

1. Where two cases are consolidated in the trial court, and the plaintiffs, being both defeated, move separately, upon different grounds, for new trials, take separate appeals, and file separate bills of exceptions, the reviewing court must decide each case on its own record, and cannot

consider the evidence in the record of the other.

2. The mere fact that the lienor claims for more lumber than was actually used, or places too high a value on it, does not, in the absence of fraud, defeat his right to recover the value of what was used.

3. Under Code Civil Proc. § 1187, requiring a lienor's claim to state "the name of the person * * * to whom he furnished the materials," one who furnishes materials to a railroad contractor, and afterwards to his assignee, need not state what portion he furnished to each, since there is but one contract, and the company has to settle only with the assignee.

In bank. For former reports, see 22 Pac. Rep. 407, and 23 Pac. Rep. 1024.

J. H. Boalt and H. A. Powell, for appellant. *E. S. Lippitt, Chas. F. Hanlon, and Lloyd & Wood*, (*O. P. Evans*, of counsel,) for respondent.

PATERSON, J. This cause was heard in bank, and the judgment and order were reversed, and the cause remanded for a new trial in May last. We are satisfied with the conclusion then reached herein. The evidence shows that "the work on the contract was completed on June 2, 1884." We are asked to consider the evidence in the record on appeal in the case of *Gordon Hardware Co. v. San Francisco & S. R. Co.*, *infra*, (No. 12,030.) because that case and the one at bar were consolidated by order of the court below upon consent of counsel for the respective parties; but this we cannot do. The plaintiff in each case was defeated in the court below, and each one moved separately for a new trial, the grounds of which were peculiar to the respective cases; separate bills of exceptions were prepared and filed, separate appeals were taken, and each case was presented in this court on its own record. Respondent claims that the claim filed by plaintiff, and upon which this action is based, must have included material for which no lien could be maintained, because the plaintiff testified that of the lumber he furnished "there was used \$1,159.13 worth in the building of temporary houses," and \$577 paid on the lumber for freight and cartage. It does not clearly appear whether there was extra material included in the claim of lien, or an erroneous statement as to the value; and, as the claim filed contained no articles except such as are the subject of lien, we cannot see that a lien for so much lumber, etc., as was actually used in the construction of the road should be defeated by reason of this testimony. The bare fact that the plaintiff had filed for too much lumber, or set too high a price on it, would not, in the absence of fraud, defeat his right to recover. Whatever may be the rule in ordinary cases, where the material-man furnishes materials to several independent contractors, we do not think it was necessary for the plaintiff to segregate the amounts in the claim which he filed. Hawley was the only person with whom the company had to settle. The latter was liable only for the balance of the contract price held by it. It was in no way interested in the question how much had been furnished McDonald before the assignment. Hawley had simply stepped into McDonald's shoes, with the knowl-

edge and consent of the company, and had assumed all liabilities. There was but one contract on the part of the defendant. On final settlement McDonald was entitled to nothing, and we are unable to see how the company could be prejudiced by the failure to designate the amount furnished to each. No question of priority is involved herein. Where a statute required a claimant to state from whom the debt was due, it was held that a mistake in the name of the contractor would not defeat the lien, if it appeared that the owner was not harmed by the error. *Putnam v. Ross*, 46 Mo. 337. In the case at bar, the proof segregates the amount furnished to Hawley from that which was furnished to McDonald, so that no injury could possibly result. We think that the court erred in rejecting the notice of lien. Other points made by the respondent need not be specially noticed. If the facts shown by the evidence of the plaintiff are true, he is entitled to have his lien declared good to an amount not exceeding the amount of the contract price in the hands of the company at the time the notice of lien was filed. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

86 Cal. 620

GORDON HARDWARE CO. v. SAN FRANCISCO & S. R. CO. (No. 12,030.)

(*Supreme Court of California*. Dec. 8, 1890.)

MECHANICS' LIENS—TIME OF FILING—LIENABLE ARTICLES—DIFFERENT CONTRACTORS.

1. In determining whether a mechanic's lien against railroad property was filed within 30 days from the completion of the work, it is proper to count as part of the work two weeks spent by direction of the chief engineer in removing materials wrongfully placed upon the lands of another by the contractor, when the latter's obligations to the company did not terminate until such removal was completed.

2. Where the lien filed by a material-man against a railroad is in part for picks, shovels, and similar articles, for which no lien can be asserted, he may segregate the non-lienable articles by proof, and is entitled to have a lien declared for the remainder.

In bank. For former reports, see 22 Pac. Rep. 406, and 23 Pac. Rep. 1025.

Hepburn Wilkins and H. A. Powell, for appellant. *Lloyd & Wood, E. S. Lippitt, and Chas. F. Hanlon*, (*O. P. Evans*, of counsel,) for respondents.

PER CURIAM. Upon further consideration of this case we are satisfied that the conclusion we reached on the former hearing—viz., that the claim of lien was not filed within 30 days after the completion of the work—was based upon a misapprehension as to the evidence. The claim was filed June 18, 1884. While it is true the work done after May 17th was work not contemplated by the contract, it nevertheless appears that it was done under the direction of the chief engineer, and that the obligations of the contractor to the company were not extinguished until the *débris* which he had placed upon Mr. Porter's lot was removed therefrom. The testimony of Mr. Walsh on this subject con-

sists largely of conclusions, but it went in without objection on that ground, and, as against a motion for nonsuit, must be considered as sufficient to establish appellant's contention that the work was not completed until June 2d. He testified as follows: "The work on the railroad under the contract was completed June 2, 1884. The last two weeks of the work was occupied in moving rock which had been dumped at the end of the tunnel in section No. 1, on Mr. Porter's ground, contrary to the terms of the contract. The rock was moved back to the right of way to make it comply with the contract. I was instructed by Mr. Zook, chief engineer, to do this work, May 17, 1884. The last day we were at work was June 2, 1884." We have carefully examined the record in the case of *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. Rep. 772, and think it sustains appellant's contention that, although the claim of lien was in part for articles (picks and shovels) not the subject of lien, the court should permit the plaintiff, by proof, to make the necessary segregation, throw out the value of such articles, and declare a lien for the balance. In the case referred to, the claim of lien included an item of deer and bear meat, but the lien was held to be good to the amount of the lienable articles; and the rule seems to be that, unless there is something to show a willful attempt to claim a lien for the non-lienable articles, the lien is not lost. *Whitford v. Newell*, 2 Allen, 427; *Phil. Mech. Liens*, § 355. Upon the same principle it was held in *Barber v. Reynolds* that, notwithstanding the fact that the claim filed was for too much, it would still be valid unless it should appear it was a "willfully false claim," within the meaning and intent of the statute. 44 Cal. 533. It was not necessary for the plaintiff to designate what portion of the materials was furnished to each of the contractors, as *Hawley* was the only person with whom the company had to settle, and the latter was liable only for the balance of the contract price held by it at the time the notice of lien was filed. *Harmon v. Railroad Co.*, ante, 124, (this day filed.) Judgment and order reversed, and cause remanded for a new trial.

86 Cal. 584

TRENOUTH v. GILBERT et al. (No. 12,507.)
(*Supreme Court of California.* Dec. 3, 1890.)

ADVERSE POSSESSION.

The repudiation of the claim of the purchaser of an undivided one-fifth interest in a Mexican grant by the persons in possession of the land under a patent from the United States, claiming the whole title, and their continuous, exclusive, and adverse possession of the land for more than five years thereafter, is a bar to the title of the purchaser of such one-fifth interest.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

This action by *Trenouth* against *Gilbert* and others was in the supreme court once before, and the following statement of facts is taken from the opinion in that case, (63 Cal. 405:) "By the deeds of *Maria Louisa* and *Juan B. Buelna*, plaintiff acquired whatever right or interest they had

in the rancho *San Gregorio*, at the date of said deeds. They never had more than an undivided fifth interest in said rancho, and previously to their conveyance to the plaintiff they had conveyed all their interest in 4,000 acres of said rancho to one *Hamilton*, so that the interest conveyed to the plaintiff is not more than an undivided one-fifth of the residue of said rancho. In 1839, said rancho was granted by the Mexican government to *Antonio Buelna*, who, in 1842, made a will by which he devised the entire rancho to his wife, *Maria Concepcion Valencia*, *Juan Bautista Buelna*, and three others, share and share alike,—that is, to each an undivided one-fifth. In 1842, said *Antonio* died, leaving said will and all of said devisees surviving him. In 1846, said *Juan Bautista* died intestate, leaving him surviving, as his only heirs at law, the said *Maria Louisa* and *Juan B. Buelna*. After the death of her husband, said *Maria Concepcion* made a conveyance of one league of said rancho to one *Castro*; and, in 1852, said *Castro* and said *Maria Concepcion* presented a petition to the board of land commissioners to have the claim of said *Castro* to one league, and the claim of said *Maria Concepcion* to the other three leagues, confirmed, and their said respective claims were accordingly confirmed and patented to them in 1861. That they held the legal title to an undivided interest in said rancho in trust for the said *Maria Louisa* and *Juan B. Buelna* is too clear to admit of any doubt. The court found that 'the defendants, and those from and under whom they hold and claim the possession, have been in the open, notorious, and exclusive possession of the premises described in the complaint, holding separately, as stated in their several answers, claiming to own the same, and to have the whole title thereto for more than five years next before the commencement of this action. The defendants, and those from and under whom they respectively hold and claim, more than five years before the commencement of this action,—to-wit, in the year 1857,—being in possession respectively as aforesaid, acquired by purchase all the right, title, and interest of the patentees, and all of the legatees, under the said will of *Antonio Buelna*, except said *Juan B. Buelna*, to their respective portions of said land, and still hold and own the same. The plaintiff's cause of action arose and accrued to him more than four years before the commencement of this action; and the defendants and each of them had held all the land described in said complaint, claiming to own the title to the same, and in open and notorious hostility to the plaintiff's claim, and to any trust or equitable interest claimed by him for more than five years before the commencement of this action.' The evidence sustains the finding that the defendants and those under whom they claim were in possession of the premises in 1857, and that while so in possession 'they acquired by purchase all the right, title, and interest of the patentees, and of all the legatees, under the will of *Antonio Buelna*, except said *Juan B. Buelna*, to their respective portions of said land, and

still hold and own the same." On the first appeal, a judgment in defendants' favor was reversed. On a retrial of the case, defendants again had judgment, and plaintiff appeals.

York & Whitworth and E. J. & J. H. Moore, for appellant. *John Reynolds, M. G. Cobb, Cope & Boyd, Arthur Rodgers, and Pillsbury & Blanding*, for respondents.

FOOTE, C. This case has been here before. 63 Cal. 405. It is an action to establish a trust by one claiming to be co-tenant with others of a tract of land in San Mateo county, and for other relief in connection therewith. The question determined on the former appeal seems to have been that the findings of fact to the effect that the defendants held an adverse possession of the lands in dispute for a time sufficient to bar the plaintiff's right of action were not sustained by the evidence. That finding was, in substance, that the plaintiff's cause of action accrued more than four years before the commencement of the action, and that there had been a continuous adverse possession by the defendants for more than five years prior thereto. It was then said that the only evidence to sustain the finding was that of one witness,—Mr. Teague. Upon the trial of the case now on appeal, which seems to have been tried with a view to obviate the objection sustained on the former appeal, there was other evidence which tended at least to show that all of the contesting defendants held adverse possession for more than five years after plaintiff's right of action accrued before suit brought. First there was a deposition of Mr. Teague read, taken since the former trial. He testified "that the defendants answering in the suit were all in the occupancy, cultivation, inclosure, and pasturage of the entire four leagues; some claiming to own 1,000 acres, and others a less quantity, and claiming to own separately. 'They claimed all the legal title to the land in their possession, dating back as far as 1858, through themselves and their grantors.' They claimed the whole legal title." As to the equitable title, he says that he knew of their having notice of the equitable title (bought by the plaintiff on 20th day of April, 1866,) as early as 1867, and previous, running back to 1864; conversed with them individually and separately about this equitable title, purporting to arise under the will of one Buelna. They all refused to recognize it, except Mr. Bell, who is not a party to this action, he having bought the plaintiffs title to his (Bell's) tract of land. He also said that in 1867, or 1866, Trenouth requested him to speak to these defendants in possession, and propose to them a compromise. He did so, and reported progress, but the defendants all repudiated Trenouth's claim. He states that he is confident that it was in 1866 that he first told Trenouth that the chances for a compromise with the defendants seemed bad; that the defendants said they had all the legal title; that they had improved the land; that they had bought up one bogus claim purporting to have arisen under this will, (that of Buelna, the

Mexican grantee of the land,) and did not propose to buy off any more. Moses Davis, who testified that he was interested with the plaintiff in his purchase of this equitable interest from Juan B. Buelna and Maria Louisa Buelna, made on the 20th of April, 1866, states that he had been employed by all the settlers on this rancho to work up the evidence in another case pending against them,—that of Wilson et al. vs. Castro,—and that in order to do that they had to show that the Mexican grantee (Buelna) had made a will, and that in working up the evidence he discovered this fifth interest that Trenouth bought, and on which this suit is predicated, had never been conveyed. He endeavored to get "our people" to purchase, but they would not, and he then arranged for the plaintiff to purchase it. Mr. Raynor testified that he, and other parties holding under the same title that he claimed, by genuine patent title from the United States government, through Wilkins & Hepburn, had possession of the whole ranch from 1858 to 1872; that he had a conversation with the plaintiff just after he bought his claim, (April 20, 1866,) and told the plaintiff he was sorry that plaintiff had got himself into such a speculation; that the title he (plaintiff) was trying to get was of no value whatever, and Moses Davis had just led him into it for the purpose of making money out of him. He always told Trenouth there was nothing in it for him; he could get nothing out of it; that Trenouth wanted him to talk to the other settlers and see what compromise could be made. Mr. Gordon testified that he and most of the defendants had been in possession since 1863. While he was acting for the settlers to resist Trenouth's claim, as well as that in Wilson et al. vs. Castro, some time in the summer of 1866, not more than three or four months after Trenouth's purchase, he had a conversation with Trenouth, in which the latter was trying to induce him to help have a settlement made with the other settlers, and held out certain inducements to him. He replied that "he did not consider there was anything in it." That the settlers and himself did not consider his (Trenouth's) title worth anything. That he told Teague and Trenouth that he had already advised the settlers to resist Trenouth's claim. That he had been employed in this matter by all the settlers but Bell and Seale. That this was in 1866, not more than three or four months after Trenouth's deed went on record. Mr. Seale testified that he purchased his ranch from Lloyd Tevis on the 4th of August, 1863. He had used the land for his own purposes. It had been under fence all the time he had used it. Had a dairy for several years, and for the last 13 or 14 years had rented it. It had been under fence all this time. He claimed under the title obtained from Lloyd Tevis, which was the title of the original heirs of the Buelna title under the patent. He had talked with Tevis about Trenouth's title, and to Bell and Gordon, when he bought, but to none others. He had resisted Trenouth's claim when suit was brought by him against Dail and others in 1868. That

all this time he claimed under his deed from Tevis, and received all his rents and profits, without accounting to any one.

Taking the whole testimony in this case, it presents this aspect: Trenouth bought the equity he claims on a speculation, after the settlers had refused to have anything to do with it, in April, 1866. He was not certain, according to his own evidence on his cross-examination, whether he had title or not. He waited to see the result of the Wilson vs. Castro suit. The settlers, defendants here, who had bought the patent title, which was the legal title, when informed of Trenouth's purchase, would not acknowledge, but repudiated, his title, according to the evidence of witnesses called for them, and whose evidence we have quoted. Then, after his efforts to induce them to compromise with him and pay him for his alleged title had failed, and he had hesitated a long time, to await the result of other litigation, uncertain as to his title, he brings suit on March 13, 1872, a little less than six years from the date of his purchase, and about five years and a half from the time when these defendants, in possession by themselves or their agents, when approached by him to settle with him, repudiated his claim and refused to settle, having always claimed, since their purchase, to hold under that patent the whole legal title. As it seems to us, the findings as to adverse possession for the statutory period sufficient to bar the plaintiff's right of entry are, at the most, based upon conflicting evidence, and should not be disturbed. We therefore advise that the judgment and order be affirmed.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

I concur in the judgment. BEATTY, C. J.
Fox, J., took no part in the decision of the above case.

(36 Cal. 615)

MCDOWELL v. BELL, Judge. (No. 13,855.)

(Supreme Court of California. Dec. 8, 1890.)

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—
JURISDICTION—PROHIBITION.

A judgment was recovered and proceedings supplementary to execution were instituted against debtor's wife, alleging that she held lands which belonged to him. On the same day she conveyed to another. The court adjudged that the land belonged to her husband, ordered execution to issue in the original case, and appointed a receiver to take possession and subject the land to the satisfaction of the debt. Held, that these proceedings were beyond the court's jurisdiction, and will be restrained by prohibition, since Code Civil Proc. Cal. § 720, simply provides that in supplementary proceedings the court may make an order authorizing the judgment creditor to institute an action against any person who holds property of the debtor and claims an adverse interest therein.

In bank.

Code Civil Proc. Cal. § 720, provides that "if it appears that a person or corporation alleged to have property of the judg-

ment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt, and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

H. S. Brown, for petitioner. T. B. Dozier, for respondent.

PER CURIAM. Application for writ of prohibition. In September, 1889, one Primm commenced an action in the superior court of Shasta county against one Edson. In the action such proceedings were had as that judgment was duly given and made in favor of the plaintiff, and against the defendant, October 4, 1889. Execution was issued to the sheriff of Shasta county, and returned unsatisfied. Upon proceedings supplemental to execution, Bertha Edson was examined touching certain property held by her, to-wit, a house and lot in the town of Sisson, Siskiyou county, claimed by the judgment creditor to be the property of the judgment debtor. On the same day that the affidavit was filed for the institution of these proceedings supplementary to execution, Bertha Edson conveyed the property to one Wright, who subsequently conveyed the same to this petitioner. Upon the hearing upon such supplementary proceedings, it was found and adjudged by the respondent that the lot in question was the property of the judgment debtor, and that neither Bertha Edson nor Wright ever had any interest therein, and ordered that execution issue in the case of Primm vs. Edson, (in which case all the proceedings were conducted,) and the property be subjected to the satisfaction of said judgment; and further ordered that a receiver be appointed to take possession of the property, and subject the same to the satisfaction of said judgment. In this the respondent exceeded his jurisdiction, and the jurisdiction of his court. His only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court, against the parties claiming the property, for the recovery of the property, and the subjection of the same to the satisfaction of the debt, and forbidding a transfer of the property until such action could be commenced and prosecuted to judgment. Code Civil Proc. § 720; Hartman v. Olvera, 51 Cal. 501. Let the writ issue and be made perpetual commanding the said respondent, Aaron Bell, judge of the superior court of the county of Shasta, in the state of California, to forever desist and refrain from proceeding further under, or in enforcing, the judgment and order made and given by him in the case of E. P. Primm, plaintiff, against H. J. Edson, defendant, dated January 11, 1890; and let the petitioner herein have judgment for his costs of this proceeding.

86 Cal. 633

GOING v. DINWIDDIE. (No. 13,694.)

(Supreme Court of California. Dec. 6, 1890.)

FALSE IMPRISONMENT—PLEADING.

A complaint which alleges that defendant, a justice of the peace, imprisoned plaintiff, "unlawfully and with force and without probable cause," on a pretended charge of contempt of court for the disobedience of a writ of restitution "wrongfully and unlawfully" issued by him, is insufficient, because it does not state facts showing that the acts complained of were without, or in excess of, defendant's jurisdiction as justice; and the use of the words "unlawfully" and "wrongfully" does not supply the omitted facts.

Department 2. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

James L. Copeland and Hunsaker, Britt & Goodrich, for appellant. W. H. Fuller and H. L. Titus, for appellee.

McFARLAND, J. This is an action for alleged false imprisonment. Defendant demurred to the complaint. His demurrer was overruled, and, upon his refusal to answer, judgment was rendered against him. He appeals from the judgment, and relies for reversal upon the insufficiency of the complaint. In the complaint it is first averred that, on a certain day, defendant "imprisoned plaintiff, and caused her to be imprisoned and deprived of her liberty for a period of five days, unlawfully and with force and without probable cause, on a pretended charge of contempt of court." The "circumstances attending and immediately surrounding and preceding the said false imprisonment" are then averred, and are substantially these: That a short time prior to said alleged imprisonment, the defendant, "acting as a justice of the peace for Bear Valley township, in said county," did "wrongfully and unlawfully" issue a writ of restitution requiring plaintiff to quit and surrender a certain house and premises; that the writ was given to a certain constable, who, with a posse, attempted to serve the same; that an "altercation and affray ensued," in which, among other immaterial things mentioned, "the plaintiff was then and there roughly used and handled by said constable and his posse;" "that said writ was never served on plaintiff;" that defendant "wrongfully caused her to be arrested as for a contempt for the disobedience of said writ of restitution, and imprisoned the plaintiff for a period of five days, as above set forth;" and that, "by reason of the said false and wrongful imprisonment," the plaintiff was damaged, etc. The above are all the material averments. We think that the complaint is fatally defective, and that the demurrer should have been sustained. It is clear that the acts complained of were done by the defendant in his official capacity as a judicial officer, and there is no averment, in terms, that said acts were without, or in excess of, his jurisdiction, nor are any facts averred from which such want of jurisdiction appears. And that a judicial officer is not liable for acts done in his official capacity, and within his jurisdiction, is as thoroughly established as any other principle of law. One of the best expositions of that principle is found in

the opinion of SHAW, C. J., in *Pratt v. Gardner*, 2 Cush. 68. This court has also had frequent occasions to state the principle. *Downer v. Lent*, 6 Cal. 94; *Turpen v. Booth*, 56 Cal. 68. The question here is not one of evidence or burden of proof; it is a question of pleading. A complaint, to be sufficient, must contain a statement of facts which, without the aid of other conjectured facts not stated, shows a complete cause of action. As said by this court in *Gates v. Lane*, 44 Cal. 397: "The pleadings but poorly subserve the purpose intended, if the court, before declaring the law upon the points presented by the parties, is compelled, as in this case, to surmise many of the essential facts on which the points turn." In the case at bar, we are left to assume, to imagine, to "surmise," that the defendant, as justice of the peace, for some unrevealed and unknown reason, had no jurisdiction to do the acts complained of. A plaintiff, attempting to state a cause of action in his complaint, has no right to presume that a justice of the peace acted outside of his jurisdiction. Where the burden of proof is when a party relies on the validity of a justice's judgment is an entirely different question. The only plausible answer to the above stated objection to the complaint rests upon the averment that defendant "wrongfully" caused plaintiff to be arrested, and "unlawfully" did certain other things. There may be some relations where "wrongfully" and "unlawfully" and similar adverbs have some significance, but the ordinary rule is that for purposes of pleading they are utterly valueless. In *Miles v. McDermott*, 31 Cal. 274, the court say: "Such words as 'duly,' 'wrongfully,' and 'unlawfully,' so frequently used in pleadings, might better be omitted. They tender no issue." In *Triscony v. Orr*, 49 Cal. 617, which was an action in the nature of trover for the conversion of certain sheep, the complaint merely alleged that the defendants took the property "unlawfully, fraudulently, willfully, and maliciously." A demurrer to the complaint had been sustained in the trial court, and, on appeal to this court, the judgment was affirmed. This court, among other things, say: "Whether the defendants took the sheep is a question of law, and not the statement of an issuable fact. If they took them 'fraudulently,' the facts constituting the fraud should have been averred; otherwise, no issuable fact is stated." In *Reardon v. City and County of San Francisco*, 66 Cal. 496, 6 Pac. Rep. 317, the court say: "If the defendant was empowered by law to do the work counted on in Army street, the averment in the complaint that such work was unlawful and wrongful would amount to nothing. Such epithets in a pleading are, in general, meaningless. They may be and are generally inserted with no valuable purpose, but only to round off or swell out a sentence. Unless the matters averred show the acts complained of to be unlawful or wrongful, such words are mere superfluous verbiage." And in *Pratt v. Gardner*, supra, which was an action against a justice of the peace, and very similar to the case at bar, the complaint

was, as Judge SHAW says, "thickly sprinkled" with such epithets as "unlawful," "wrongful," "illegally," "groundless," "false," "willfully," "maliciously," etc.; but judgment for the defendant on the demurrer was sustained, and the court said that such epithets "cannot change or qualify the material facts." Our conclusion is that the complaint is insufficient, because it does not show that the acts of defendant complained of were without, or in excess of, his jurisdiction as justice of the peace; and that the use of the words "wrongfully" and "unlawfully" does not supply the omitted facts; and that therefore the demurrer to the complaint should have been sustained. The judgment is reversed, with directions to the superior court to sustain defendant's demurrer to the complaint.

We concur: SHARPSTEIN, J.; THORNTON, J.

(86 Cal. 631)

Ex parte PALMER. (No. 20,765.)

(*Supreme Court of California.* Dec. 9, 1890.)

EMBEZZLEMENT—VENUE.

The superintendent of a ranch in Yolo county kept books there of his receipts and expenditures, making monthly reports to his principal in San Francisco. He shipped horses to Sacramento, and there received the proceeds of their sale, but made no book-entry or report thereof. Held, sufficient evidence that the embezzlement was committed in Sacramento county to justify the magistrate in holding him for trial there.

In bank. *Habeas corpus.*
A. L. Hart, for petitioner.

BEATTY, C. J. The petitioner was held to answer by a justice of the peace of Sacramento on a charge of embezzlement alleged to have been committed in that county. He asks to be discharged from custody upon the ground that he was committed without reasonable or probable cause, (Pen. Code, § 1487,) claiming that there was no evidence that he was guilty of the crime charged, or of any crime, and especially that there was a total failure of evidence that he had committed any offense in Sacramento county. We think, however, that the evidence is sufficient to make out a *prima facie* case, and to justify the holding of the petitioner to answer before the superior court of Sacramento. It appears that he was superintendent of a ranch in Yolo county; that the owner of the ranch resided in San Francisco; that monthly reports of receipts and disbursements on the ranch were made by the petitioner to the owner, and books were kept on the ranch by a book-keeper, under the direction of the petitioner, in which it was his duty to preserve an accurate account of all receipts and disbursements. This being the case, petitioner, about a year before his arrest, sent some horses from the ranch (the property of his principal) to a dealer in Sacramento, who sold them, and paid over the net proceeds (\$385) to the petitioner in Sacramento. No account was ever rendered of this sum, and no entry of it was made in the books. This, in the absence

of any satisfactory explanation of his failure to account, was sufficient to justify the committing magistrate in holding petitioner to answer in Sacramento county. He received the money in Sacramento county, and there is no evidence that he ever took it out of Sacramento county. If he did appropriate it to his own use, as the evidence seems to indicate, it is reasonable to assume that he did so in the county where he is last shown to have had it in his possession. Writ discharged, and prisoner remanded.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

(86 Cal. 639)

TOOMEY v. DUNPHY. (No. 12,904.)

(*Supreme Court of California.* Dec. 10, 1890.)

STATUTE OF FRAUDS—REAL-ESTATE BROKER—ADMISSIBILITY OF EVIDENCE.

1. Under the statute of frauds, (Civil Code Cal. § 1624,) which includes "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission," a writing, which states that plaintiff "can arrange for the sale of my ranch in Nevada as per within memorandum," is sufficient without stating that he is to have a commission therefor.

2. Since section 1614 declares that "a written instrument is presumptive evidence of a consideration," the agent is entitled to show, by parol evidence, the reasonable value of his services in effecting a sale under the authority of the memorandum.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

C. V. Grey and J. E. McElrath, (George W. Chamberlain, of counsel,) for appellant. H. I. Thornton and Lloyd & Wood, for respondent.

GIBSON, C. Plaintiff brought this action to recover of the defendant \$18,750, as the reasonable value of his services rendered in procuring a purchaser for defendant's ranch in the state of Nevada, with the live-stock and farming implements thereon, at the fixed price of \$750,000, payable in three several installments under a writing signed by the defendant, the material part of which is as follows: "Henry Toomey can arrange for the sale of my ranch in Nevada as per within memorandum. * * *" On the trial the plaintiff, to sustain the issues upon his part, after proving that he was a real-estate broker and agent, and the execution and delivery of the memorandum, above referred to, offered it in evidence, and upon the objection of the defendant that it was incompetent, etc., because it neither specified that the employment of plaintiff was for compensation or a commission, nor the amount of any compensation or commission for his services, it was excluded. The plaintiff next offered to prove that he found a purchaser, able, ready, and willing to purchase, who was acceptable to the defendant, and that his (plaintiff's) services were reasonably worth the amount demanded. The evidence so offered was excluded on defendant's objection, on the ground that there was no evidence tending

to show that the plaintiff had been employed by a contract, in writing, as broker or agent to sell the property for compensation or a commission. Then, after other evidence of the same character as the last was offered and excluded, the plaintiff rested his case. The defendant, without offering any evidence, did likewise; and thereupon the judgment, from which plaintiff appeals, was rendered against him. The exclusion of the memorandum presents the gist of the controversy. The appellant contends that all that a writing employing a broker or agent to purchase or sell real estate for compensation or a commission need show is the fact of employment; and that it is not required to express that such employment is for compensation or a commission; while, on the other hand, the respondent contends that, to be valid, it must disclose that the employment is for compensation or a commission.

By section 1624 of the Civil Code, it is provided: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent. * * * (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission." This section was applied in the following cases: *McCarthy v. Loupe*, 62 Cal. 299; *Myres v. Surryhne*, 67 Cal. 657, 8 Pac. Rep. 523; *Zelmer v. Antisell*, 75 Cal. 509, 17 Pac. Rep. 642. In each of those cases it was held that no recovery by a broker or agent for effecting a sale of real estate could be had, unless he was employed by an agreement in writing for that purpose. But none of them involved the precise point in question here. The sixth clause was added to the above section of the Code in 1878. Prior to which time, it seems that the absence of an express contract might have been supplied by proof of usage regulating transactions like the one here. *McCarthy v. Loupe*, supra. The change thus made was to prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which could be done with facility under the former rule. Thus we perceive that the clause is remedial in its object, and if its meaning is doubtful as suggested by this controversy, its words will have to be construed so as to suppress the mischief adverted to, and advance the remedy. The agreement referred to in the clause, it is true, is one defining the right of the agent to effect a purchase or sale of realty, and the liability of the principal to recompense him for his services. But it is to be observed that the chief element in it is the employment. This must necessarily be so, because as appears by the cases above cited, without proof in writing of the employment, no recovery can be had. If, then, no recovery can be had without such proof of the employment, it seems to us that the object of the clause will be fully subserved by holding that, in an agreement like the one in question, the expressing of the fact of employment, without stating that it is for compensation, will suffice. If there were any doubt of this it would be resolved by reading in connection

with the above clause section 1614 of the same Code, which bears upon the same subject-matter, and which is as follows: "A written instrument is presumptive evidence of a consideration." This provision is general, and applies to all contracts where a different rule is not expressly prescribed. And we think that had the legislature intended that contracts, like the one in question, should state a consideration for the services to be rendered by the broker or agent, it would have expressly said so. From this it follows that the memorandum of agreement offered in evidence by the appellant was erroneously excluded; also the evidence tending to prove that he had rendered services under the contract of employment. *Waterman v. Boldinghouse*, 82 Cal. 659, 23 Pac. Rep. 195; *Zelmer v. Antisell*, supra. And as the written contract of employment raised a presumption that the defendant, as principal, had agreed to pay the plaintiff, as his agent, a consideration for services rendered under that contract, and as no certain amount appeared to have been stipulated for, the evidence tending to show the reasonable value of such services should have been admitted. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

(3 Cal. Unrep. 311)

BLUMENTHAL v. GOODALL. (No. 12,638.)¹
(Supreme Court of California. Dec. 6, 1890.)

AGENCY—REVOCATION.

A person authorized by the owner of land to sell it gave a contract to a third person for the price named, but "subject to perfect record title. Thirty days allowed for examination of title." The owner of the land let such third person take the abstract to examine, but told him he could not have 30 days. Held that, as the agent had not produced a purchaser ready and willing to take the property on the terms embraced in the authority, the owner might, before such unconditional acceptance, revoke the authority of the agent. *WORKS and THORNTON, JJ.*, dissenting.

Department 1. Appeal from superior court, city and county of San Francisco; *T. H. REARDEN*, Judge.

H. C. Firebaugh, for appellant. *Geo. E. Towle*, for respondent.

Fox, J. Action for the recovery of commissions claimed to have been earned by a real estate agent, in the sale of certain lands belonging to defendant. Judgment for defendant; motion for new trial denied, and appeal from both judgment and order. The record contains no bill of exceptions, or statement of the case. Consequently, there is nothing upon which we can review the order of the court refusing to grant a new trial. The only examination we can make is of the judgment roll, and the only inquiry is whether the findings support the judgment. The court found that the defendant, being the owner of the land in question, on the 13th

¹ Rehearing granted.

day of July, 1887, gave to L. Oestreicher, a real estate agent, an authorization in writing, of which the following is a copy: "I hereby authorize Mr. L. Oestreicher to sell blocks 899, 900, 901, 903, outside lands, for the sum of fifteen hundred dollars (\$1,500) each; will allow him one hundred dollars (\$100) as commissions for his services on each block. This contract to be in force for ten days from date hereof." Which paper was duly dated and signed by defendant. The court further finds that on the same day Oestreicher agreed with one Fulda, orally, for the sale of the blocks at the price named, but, Fulda failing to put his agreement in writing, Oestreicher afterwards, and on the same day, executed with O. F. Von Rhein & Co. the following agreement in writing: "Received of O. F. Von Rhein & Co. the sum of three hundred dollars (\$300) on account of purchase of outside land, blocks 899, 900, 901, and 903; price agreed upon, six thousand dollars, (\$6,000;) subject to perfect record title. Thirty days allowed for examination of title. If title does not prove perfect, deposit to be returned." On the same day Oestreicher notified the defendant in writing of what he had done with Von Rhein; that on the 14th, Von Rhein applied to defendant, told him of his agreement to purchase, and asked for the abstract of title. Defendant told him that he would not allow 30 days to examine title. Von Rhein replied that he would make the examination earlier if possible, and received and receipted for the abstract, the same to be returned to the defendant, but no time for its return specified. Later in the same day defendant received from Fulda a letter, notifying him that he (Fulda) had agreed with Oestreicher for the purchase of the blocks, and that he was prepared to examine the title, and complete the purchase if the title proved satisfactory, demanding of defendant to complete the sale, and offering to deposit \$500 on account thereof; that on the next day defendant served written notice upon both Oestreicher and Von Rhein & Co., reciting that Oestreicher had procured the authorization given to him, upon his representation that he had an eastern party who was about to depart, to whom he could sell those blocks, if he had authority to act at once, but he had not time to hunt up other blocks for him before his departure; that, instead of selling them as he said he could, he had negotiated a sale of them to two different resident purchasers, and, in view of these complications and misstatements, he revoked the authority of Oestreicher, and declined to proceed further in the consummation of the sale of the property through him; that on the 19th day of July, Von Rhein completed his examination of the title, and offered to complete the purchase, but the defendant refused to accept the money, or make the deed; that demand of the commission had been made and refused, and the claim therefor had been duly assigned to plaintiff. It was also found that the authorization from defendant had not been secured through any fraud or misrepresentation on the part of Oestreicher. On these facts the court

found, as conclusion of law, that the plaintiff was not entitled to the relief demanded, and judgment was entered for defendant.

Although the rule may in some cases be a harsh one, the conclusion of the court was correct. Goodall had the right to revoke the authority given to Oestreicher, at any time before complete performance on his part. Civil Code, § 2356; Masten v. Griffing, 33 Cal. 114; Brown v. Pfirr, 38 Cal. 553; Janin v. Browne, 59 Cal. 47; Flanagan v. Brown, 70 Cal. 254, 11 Pac. Rep. 706. Up to the time of the revocation in this case, there had been no performance on the part of Oestreicher. Performance on his part, to entitle him to his commissions, would have been the production of a purchaser, then ready and willing to make the purchase upon the terms embraced in the authority. No such purchaser had been found and produced when the authority was revoked. Neither of those who are claimed to have been such had up to that time signified their willingness to take the property unconditionally, upon the terms proposed. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

We dissent: WORKS, J.; THORNTON, J.

86 Cal. 596

BUCKLEY v. HOWE. (No. 12,711.)

(Supreme Court of California. Dec. 6, 1890.)

PUBLIC LANDS—PATENT HELD IN TRUST—AMENDMENT OF PLEADINGS.

1. In a suit to procure a decree that defendant held the title to certain lands, for which he obtained patent as a pre-emptor, in trust for plaintiff, on the ground that plaintiff had a better right thereto, and that defendant procured the patent by fraud and through mistake and misconception of the law, by officers of the land department, plaintiff as the basis of her right to attack defendant's patent averred that certain persons, each being entitled to an additional homestead entry, made applications at the land-office to locate portions of said lands, that said applications were rejected, that the applications were made for plaintiff's benefit, and that plaintiff had become owner of all the title and interest of said applicants. There was no appeal from the order rejecting their applications, and they did not contest defendant's right to pre-empt said land. Held that, the proceedings of the land-office having been acquiesced in, plaintiff had no ground for attacking defendant's patent.

2. The privilege of amending after the sustaining of a demurrer is, under Code Civil Proc. Cal. § 472, one not of right, but rests in the discretion of the trial court, and it is too late to raise the point for the first time on appeal that it was error to sustain the demurrer without leave to amend.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Gray & Haven, for appellant. George Pearce, for respondent.

Fox, J. This is a bill in equity to procure a decree that the defendant holds the title to certain lands in Marin county, for which he procured patent as a pre-emptor, in trust for plaintiff, on the ground that plaintiff had a better right thereto, and that defendant procured the patent by fraud, and through mistake and mis-

conception of the law on the part of the officers of the land department of the government. That a patent may be attacked in this way, and such relief be had in a proper case, has been held in very many cases. *Bludworth v. Lake*, 33 Cal. 256; *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. Rep. 641; *Hosmer v. Wallace*, 47 Cal. 461; *Rutledge v. Murphy*, 51 Cal. 388; *Plummer v. Brown*, 70 Cal. 544, 12 Pac. Rep. 464; *Sanford v. Sanford*, 13 Pac. Rep. 602; *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Smelting Co. v. Kemp*, 104 U. S. 636. And such a ruling is in accord with section 2224 of the Civil Code. But in such a case it is not enough to show that the defendant was not entitled to have received the patent. Plaintiff must also show that she herself occupies such a *status* towards the property as entitles her to control the legal title. *Plummer v. Brown*, *supra*. If she claims priority of right to become the purchaser, and to receive the patent, it is not enough to allege that she had or has such right, for that is a mere conclusion of law; but she must show the state of facts which gave her the right, and also the facts showing that she took the legal steps to avail herself of such right. *Aurrecochea v. Sinclair*, 60 Cal. 532. The allegations of the complaint tending to show that the defendant was not entitled to pre-empt the land; that the same was not at the time subject to pre-emption; and that he was not entitled to have or receive the patent, —are, in our judgment, sufficient to constitute a cause of action in that behalf, and to put the defendant to his defense, so far as that branch of the case is concerned, but they show the legal title to be vested in the defendant, and before he can be called upon to defend that title against the plaintiff's allegations of fraud, or be adjudged to hold it in trust for plaintiff, she must show a better right to have received the patent. She cannot recover on the weakness of defendant's right alone, but must do so on the strength of her own. On this branch of the case, the complaint sets out a series of facts tending to show that, at the time of the filing of the township plat, the plaintiff had a priority of right to purchase the lands in question, under the act of July 23, 1866, to settle land-titles in California, on the ground that she was a *bona fide* purchaser, and in possession under a Mexican grant from which her lands had been excluded under the final survey; but the complaint failed to show the subsequent acts on her part necessary to preserve her right, and on the hearing she abandons all claim of right on that ground.

But as the basis of her right to attack the defendant's patent, upon which she now relies, plaintiff avers that on the 8th of October, 1878, one Laney and one Parks were each entitled to an additional homestead entry, under the laws of the United States, and each made application to the register of the proper land-office to locate portions of the land in question, accompanying their said applications with proofs that the lands were non-mineral, and paying to the register the fees and charges required by law for the entry,

which applications were refused by the commissioner of the general land-office; that afterwards, and on the 5th of April, 1879, they respectively renewed their applications, and were again refused; that afterwards, and on the 27th of August, 1880, Laney again renewed his application as to a part of the lands, and again was refused; that on the 8th of September, 1880, one Holly was entitled to an additional homestead entry, and applied to the register of the land-office to locate a portion of the lands, accompanying his application with proof that the land was non-mineral, and paying the fees of office for such entry, but his application was refused. The complaint avers that at the time of each of said applications there was no valid adverse claim to the land. The complaint fails to state upon what ground the original applications of Laney and Parks were rejected, but there is no difficulty in determining, from the facts alleged, the ground upon which such rejection was based. The township plat of the lands had then just been returned by the surveyor general to the district land-office, but it had not been finally approved by the land department; and shortly after such application was withdrawn, and was not finally filed, and did not become an authenticated public record, until the 5th of February, 1879, four months after the making of such application. The lands were not, therefore, at the time of such application, open to entry, or to selection under the additional homestead law. Meantime the lands were not in possession of the applicants. They never attempted to take possession of them; but, as shown by the complaint, they were in part within the exterior boundaries of inclosures of plaintiff, and in part within the exterior boundaries of inclosures of one Brackett, and when the plat was finally approved and filed, they were a part of the public domain, inclosed, as aforesaid, in common with other lands held by the owners of the respective inclosures. It does not appear that either of the persons so having the lands inclosed ever filed a petition in the land-office, or any paper, claiming a right of priority of entry or purchase, under the act of 1866, or put the government upon any notice that they were in possession, or claimed to be purchasers under a Mexican grant from the final survey of which they had been excluded. The applications of Laney and Parks, made April 5, 1879, are not shown, as in all the other cases, to have been accompanied by any of the proofs required by law as to the character of the land, and presumptively were not so accompanied. It is probably for this cause that they were then rejected, the complaint failing to state what, if any, reason was given for this rejection. All the applications made by Laney, Parks, and Holly, in 1880, the complaint shows, were rejected because the defendant had acquired the right of pre-emption of the lands; and it further appears from the complaint that defendant had filed his declaratory statement as a pre-emptor as early as April 18, 1879, and was then in possession of a portion of the demanded and pre-

empted premises, which had before that time been included within the inclosures of Brackett. It does not appear that Brackett ever objected to defendant's entry or possession. Neither does it appear that the applicants for homestead entry, or either of them, ever appealed to the commissioner of the general land-office from the order of the register and receiver, rejecting their applications, or took any proceedings whatever to secure the approval of their applications, or contest the right of the defendant. On the contrary, the rejection seems to have been accepted as final, and they and their successor in interest remained silent and passive until the defendant had proved up, paid for his land, and secured his patent. Plaintiff further alleges that these several applications to make additional homestead entries were made for her benefit, with her assent, and by her procurement, and that for a valuable consideration she has become the owner of all the right, title, and interest of the said applicants, and of the said Brackett, in the lands described in the complaint. Concede all this to be true, the complaint fails to show that they, or either of them, ever had any right, title, or interest in the lands to convey. Neither naked possession of the public domain, nor a rejected application for leave to enter it, under whatever law it may be made, if acquiesced in, as was done in this case, so far as appears from the complaint, will give any such right or title as will enable the party successfully to attack a patent issued by the government to another. Assuming that these additional soldiers' homestead entries might, under the law, be made in the name of the soldier, at the instigation and for the benefit of a third party, (a matter, however, upon which we do not pass,) and having been made and approved might thereafter be alienated before patent, as was held in *Rose v. Lumber Co.*, 73 Cal. 385, 15 Pac. Rep. 19, cited by appellant, it does not help the plaintiff in this case at all, for here the entry was not made, and no right was acquired by a mere application, abandoned at the first adverse decision. From these views, it appears that the plaintiff has failed to show any right in the premises which entitles her to attack the defendant's patent, and therefore has failed to state in her complaint facts sufficient to constitute a cause of action. The demurrer to her complaint was properly sustained.

The complaint in this case had already been once amended. The demurrer was sustained without leave to amend. At the conclusion of the oral argument upon the hearing here in bank, it was suggested that this was error, and that the court below should have given the plaintiff leave again to amend. The privilege of amending, after trial of the issue of law raised by demurrer, is not one of right, but one resting in the discretion of the trial court. Code Civil Proc. § 472. If the plaintiff desired again to amend, she should have applied to the court below, and, if refused, exception should have been taken. It is too late to make the point for the first time in this court, when nothing appears

on the record to show an abuse of discretion. Judgment affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

86 Cal. 643

BUCKLEY v. ALTHOFF. (No. 13,824.)

(Supreme Court of California. Dec. 10, 1890.)

STATEMENT ON APPEAL—DISMISSAL.

1. Code Civil Proc. Cal. § 661, provides that, when a motion for a new trial is made on the minutes of the court, the judgment roll, and a statement to be subsequently prepared, shall constitute the record on appeal. Section 659, subd. 4, declares that the notice of a motion for a new trial on the minutes must specify the particulars wherein the evidence is claimed to have been insufficient, and the errors of law relied on. Held that, where the notice of the motion contained no such specifications, a statement, on appeal, afterwards prepared, was unauthorized, and could not be considered by the appellate court.

2. A statement on appeal which is not served until five days after the expiration of an additional period allowed by the court for its preparation cannot be considered by the appellate court.

3. When there is no "statement on appeal" or bill of exceptions which can be considered, or transcript filed within the time limited, the appeal must be dismissed.

In bank. On rehearing. For former report, see 24 Pac. Rep. 635.

Hassett & Tevlin, for appellant. Chas. J. Heggerty, (Gunnison & Booth, of counsel,) for respondent.

PER CURIAM. On the 28th of July, 1890, an order was made and entered in this cause dismissing the appeal, and, under the rule of the court, *remittitur* was issued forthwith. Subsequently, upon an *ex parte* showing, which seemed to be sufficient, the *remittitur* was recalled, and the appellant moved the court to vacate or modify the order dismissing the appeal, on the ground that the same had been improvidently made, through a misconception of the facts and the records in the cause. The reasons for making the order were not then fully stated in the opinion, nor was it entirely correct in its statement of the rule of practice under the Codes. The reasons then given will therefore be stricken out, but the motion to vacate the order dismissing the appeal, or to modify the same, must be denied.

The action was for forcible entry and detainer. Judgment for plaintiff, March 5, 1890. On the 8th of March, notice of intention to move for a new trial, to be heard on the minutes of the court, was given. The motion came on regularly to be heard on the 11th of March, and was then overruled. On the same day, notice of appeal was given, and undertaking on appeal filed March 13th. On the 21st of March, appellant procured from the judge of the court below an order granting to defendant "twenty days' further time from date hereof in which to prepare and serve his proposed statement on appeal herein." On the 10th day of April, he procured from the judge another order giving him "five days from the date hereof in which to prepare and serve his proposed statement on appeal herein." This time expired April 15th. In law and in fact he

was not entitled to have settled in the case any "statement on appeal." His motion for new trial having been submitted on the minutes of the court, he could only bring to this court, on appeal, matters other than those appearing in the judgment roll by bill of exceptions, or a "statement of the case subsequently prepared." Code Civil Proc. § 661. And he was entitled to such a statement only upon having made a motion on the minutes of the court, upon notice duly given as provided in subdivision 4, § 659, Code Civil Proc. That subdivision provides that a notice of motion to be heard on the minutes of the court must specify the particulars wherein the evidence is claimed to have been insufficient, and the errors of law relied upon. It does not appear that any such specification was given, or assignment made, in the notice given in this case. Even when the notice is so given, the "statement of the case subsequently made" must be confined to the errors and particulars specified in the notice. As none were so specified, no subsequent statement of the case was required or authorized. The extensions of time were therefore secured to do something which the law did not authorize to be done, or which could not be used on appeal if done, whether that something was to prepare and serve "proposed statement on appeal," or "statement of the case subsequently made." The extended time expired on April 15th. The proposed statement was not served until the 21st day of April, six days after the expiration of the time allowed by law, and by all extensions given, so that, on this ground also, the statement was one which the court was not called upon to settle, and which could not be used upon the appeal. No transcript was filed within 40 days after the perfection of the appeal, and there was no statement or bill of exceptions to be used, or which could be used, upon the appeal, settled, or pending to be settled. The transcript was not therefore filed in time, and the order dismissing the appeal was properly made. No sufficient cause is shown why said order should be vacated, and the motion to vacate the same is denied. Let *remittitur* herein issue forthwith.

86 Cal. 623

SAN FRANCISCO WATER CO. v. PATTEE *et al.* (Nos. 11,326, 11,823, 11,912.)

(Supreme Court of California. Dec. 9, 1890.)

CORPORATIONS—PURCHASE OF PROPERTY BY OFFICERS.

1. Under Civil Code Cal. § 2228, which requires the highest good faith from a trustee towards his beneficiary, and under section 2230, which prohibits the trustee from taking part in any transaction adverse to the beneficiary, the secretary of a corporation, who is also its general manager, and to whom all its affairs are committed, is guilty of a fraud against the corporation in secretly purchasing its property in his own name at execution and tax sales.

2. To redeem from such purchases of the secretary, the corporation need repay him only his expenditures incurred in that behalf, and not his claim for salary, as the payment of such claim would be giving him an advantage over the other creditors of the corporation, in violation of Civil Code, § 2228, which prohibits a trustee from ob-

taining any advantage to himself in dealing with the trust property.

3. The title to the corporation's property acquired from the secretary by one who himself occupied fiduciary relations to the corporation, and who had full knowledge of the manner in which the secretary acquired his title, must stand or fall with that of his grantor.

In bank. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

Action by the San Francisco Water Company against Solon Pattee, and others. Both parties appeal. Civil Code Cal. §§ 2228, 2230, 2233, 2234, are as follows: "Sec. 2228. In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." "Sec. 2230. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary." "Sec. 2233. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed. Sec. 2234. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust."

Wm. M. Pierson, for appellant. Mesick, Maxwell & Phelan, for respondent.

Fox, J. The pleadings and findings in this case are somewhat voluminous, and we do not deem it necessary to recite them with any considerable detail. The case and its facts, briefly stated, are as follows: The plaintiff was incorporated in July, 1867, for the purpose of acquiring and supplying water to the inhabitants of the city and county of San Francisco. Its by-laws provided for the appointment of a secretary, and very fully defined his duties. Under them, the defendant Pattee was appointed secretary in 1867. There is a dispute as to when he ceased to be such,—he claiming that he resigned in August, 1878, and the plaintiff insisting that he continued to be secretary, and to act as such, until January 4, 1881. Some time prior to the 26th of February, 1878, the plaintiff had become the owner and possessed of certain lands in San Mateo county, taken up as government lands, the title to a part of which was not perfected until some time afterwards. No assessment was ever levied upon the stock of the corporation. Whenever money was needed to pay expenses or liabilities, the secretary went to the president, or others of the directors, and got the money required, or in default thereof the liabilities remained unpaid. The enterprise was unsuccessful; and it would seem that as early as 1872 the hope of bringing it to a successful issue was abandoned, for in October of that year the board of directors passed a resolution allowing the secretary the sum of \$1,000 as compensation for his services up to that time, and authorizing the same to be placed to his credit on the books, to bear interest at the rate of 1 per cent. per

month, to be compounded semi-annually until paid, and the president assured him that when they made a sale of their lands and water-rights, as they hoped to do, he should be well compensated for his further services. This anticipated sale, however, was never effected, and in May, 1878, the company was in debt, with no funds to meet its obligations. A meeting of the directors was holden, and the secretary reported these facts to the board, calling attention, among others, to a debt due one Rosenblum. The board refused to levy any assessment, and the stockholders refused to advance further funds, but the board passed a resolution authorizing the president and secretary to make a loan of \$2,000 to meet the outstanding liabilities, and to secure the same by a mortgage upon the company's property. The secretary undertook to negotiate this loan, but was unsuccessful. In August or September, 1878, the secretary told the president that he had been unable to make a loan, and that he was so annoyed by the bills that he would not longer act as secretary. About the same time, he told the defendant Boyd, who was the attorney and one of the directors of the company, the same thing, in substance, and in October, 1878, he made a pencil entry in one of the books of the company: "Resignation of secretary filed." It does not appear, however, that any resignation was ever in fact filed, and Pattee kept and retained all the books and papers of the corporation until January, 1881. No meeting of the directors was held after that of May, 1878, until January 4, 1881. In August, 1878, Rosenblum commenced an action against the company for the amount of his claim before a justice of the peace in Santa Clara county. When the officer attempted to serve the summons upon the secretary, he refused to accept the service, and told the officer that he was not the secretary; thereupon service was made upon the president. The papers were turned over to Boyd, who was the attorney, and a director of the company, and he employed the defendant Travers to appear specially in the case, and move to dismiss for want of jurisdiction. This Travers did, but his motion was denied, and judgment entered against the company. Travers reported the facts to Boyd, who paid him for his service, and dismissed him from further service in the case. In November of that year, execution was issued upon this judgment, the property sold, and at the sale Travers appeared and bid in the property in his own name, but with money furnished by Pattee, and at Pattee's request. In due time, the sheriff's deed was regularly issued under this sale, and the title thus acquired was transferred to and became vested in Pattee. During all former years it had been Pattee's custom to collect the necessary funds from some of the stockholders, and pay the taxes upon the company's property, but in 1877 he did not do so, and in February, 1878, the property was sold for delinquent taxes of the year 1877-78. Pattee procured an assignment of the certificate of sale, and ultimately the tax-title under sheriff's deed also became vested in him. In the fall of 1879, having secured

the title under these two sales, Pattee entered into possession of the land by securing attornment from the tenants to him, he having theretofore had the general charge of the leasing of the land, collection of the rents, and of other matters connected with its management. None of the officers or stockholders of the corporation, except the defendant Boyd, to whom Pattee conveyed a half interest in the property so acquired, in consideration of the payment to him of one-half the cost thereof, had any knowledge of these transactions, by which Pattee and Boyd had come into the title and possession, until very shortly before the 4th of January, 1881. At the meeting held on that date, Pattee was asked about the matter, and then openly, and for the first time, so far as notice to the company was concerned, declared that he had acquired and held the property in his own right, and in hostility to the company; a claim which the company by its directors there and then repudiated. In 1878 and 1879, it ought to be stated, Pattee had been inquired of in regard to the delinquent taxes, and replied that it was all right, that he had bid in or redeemed the property; but he did not say that he had bought it in for his own benefit. In April, 1884, the president of the company, by authority of the board of directors, offered to reimburse Pattee and Travers all moneys they had paid out in securing their said titles, as well as certain moneys which Pattee had expended in procuring patent from the United States for a part of the land, together with interest thereon, and demanded that they respectively reconvey to the company; but they each refused to accept such reimbursement, or to make such conveyance. Shortly afterwards, this action was brought. Meantime, and in 1882, the defendant Pattee had executed to the defendant Low a quitclaim deed of his half of the property, which the court finds was given as security for present and future loans made by the Anglo-California Bank, Limited, of which Low was one of the managers, and that such conveyance was so accepted without notice of any equities of the plaintiff, and for valuable consideration.

The action is to declare a trust, and to compel reconveyance of the property, upon repayment of all the moneys expended in securing those adverse titles, and procuring the patent, with interest thereon; the plaintiff claiming that because of the fiduciary relations of the defendants, Pattee, Boyd, and Travers, neither of them could acquire and hold these titles, as against the corporation, without first giving the corporation notice of their intention in the premises, and also claiming that Low was not a *bona fide* purchaser without notice and for value. The court found in favor of the plaintiff upon all the questions as to the fiduciary relations of the defendants, Pattee, Boyd, and Travers, (the latter of whom, however, seems to have been a mere agent of the other two,) and found in favor of the defendant Low, and the bank,—that the conveyance to Low was made without notice, and for valuable consideration,—and judgment was entered accordingly. Motion for new

trial made and denied, and the plaintiff appeals from that part of the judgment in favor of Low and the bank; defendant Pattee appeals from that part of the judgment against him, and from the order denying his motion for new trial, and the defendant Boyd takes a like appeal as to that part affecting himself.

The defendant Pattee appeals on the ground of errors of law, insufficiency of evidence to justify the decision, and that the decision is against law. We have carefully examined the record on his appeal, and find no prejudicial errors of law in the matters covered by his assignments of error. The evidence also seems to sustain the findings, and the findings support the judgment. The issue upon which it is claimed that there was no finding—that of the value of the property—is an immaterial one. In his argument, counsel for this appellant claims that the court should have found in favor of this defendant under his plea of laches, and the statute of limitations. We think that in that regard the finding supports the judgment, and is supported by the evidence, but, if it was not so, there is nothing in this defendant's assignments of error, or specifications of insufficiency, upon which to base the argument.

It is also claimed for this defendant that his relations to the company were not of a fiduciary character, and that even if they were, he was not for that reason forbidden by law to buy in the property for his own benefit at a forced sale not made by himself, or at his instigation. The terms of the by-laws make him in large degree the general agent and manager of the corporation. The supervision of nearly all its affairs was committed to him, and the evidence shows very conclusively that during many years, while the corporation was in a state of inactivity, he was its head and front; it had no knowledge of its own affairs except as he gave it, and met or moved only as and when he suggested. He was therefore bound to act towards the corporation in the highest good faith, and was not at liberty to obtain any advantage over the corporation by concealment from its directors of the true condition of its affairs. Civil Code, § 2228. Under section 2230 of the same Code, he had no right to take part in any transaction concerning the property of the corporation, all of which was practically in his keeping, adverse to the interests of the company, without the consent of its directors, given upon full knowledge of the facts. If he did so it was a fraud against the company, (section 2234;) and if by doing so he acquired any interest adverse to the interest of the company, it was his duty to give immediate information thereof, (section 2233.) See, also, *Baker v. Whiting*, 3 Sum. 475.

It is also claimed that he ought not to be decreed to make restitution, except upon payment not only of his expenditures in that behalf with interest, but also of all other indebtedness of the corporation to him. For all claims except such as it is provided in the decree that he shall be reimbursed, he was, in common with others, a simple creditor of the corporation, without resort to, or waiting for, the

sales under which he acquired the titles in question, he could at any time have subjected the property of the corporation to the satisfaction of his claim, and if insufficient, or whether insufficient or not, he had also his remedy against the stockholders. We know of no law, and have been cited to none, which would justify him in secretly procuring an adverse title to the company's property, and then compelling the company to give him a preference over all other creditors before it could be redeemed. When redeemed, he and other creditors will stand upon a common level, as they did before. If the doctrine thus contended for were sustained, he would have gained an advantage by his forbidden act, in direct violation of the provisions of the Code which we have cited.

The defendant Boyd appeals upon the ground that the evidence was insufficient to justify the decision, that the decision was against law, and of errors of law. His specification of grounds of insufficiency and of errors is much more elaborate than on Pattee's Appeal, but much to the same effect; and on the argument it was conceded that, as to most, if not all the points made, the judgment must necessarily follow that rendered on Pattee's Appeal. But in Boyd's Case it was expressly found that no demand had been made upon him for conveyance, and no refusal to convey, before suit brought. If Boyd held by a title independent of that acquired by Pattee, this fact might raise a question for serious consideration; but as he holds under Pattee, and took with a full knowledge of Pattee's relations to the company, and of the manner in which Pattee's title was acquired, himself also occupying fiduciary relations to the company, his title must stand or fall with that of his grantor.

The plaintiff appeals from the judgment on an exception taken to the 17th finding, in favor of the defendant Low, and that portion of the judgment which is based thereon. In the bill of exceptions, all the evidence upon which said finding is based is set out, and we think it fully supports the finding. It in turn supports the judgment.

On each of said appeals, the judgment and order is affirmed.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON J.

(86 Cal. 605)

GRIFFITH v. HAPERSBERGER. (No. 12,644.)¹

(Supreme Court of California. Dec. 7, 1890.)

BUILDING CONTRACT—PERFORMANCE.

1. Plaintiff contracted to construct for defendant the foundation of a public monument, payment to be made when the work was completed and accepted by the architects, and after plaintiff should satisfy the architects that the work and material furnished by plaintiff had "been fully paid, so that no lien can be filed against" it. Plaintiff through his subcontractor constructed one foundation which was rejected, and then built another which was accepted. Plaintiff paid his subcontractor for the first foundation but not for the second, but it did not appear that plaintiff was under any greater or other

¹ Modified on rehearing, post, 487.

obligation to pay his subcontractor for both than defendant was to pay plaintiff for both. Besides, it was not found that any lien had been filed or that there were any bills unpaid for which a lien could be filed. It was found that there was not a strict performance of the letter of the contract, but it was found that there was a substantial compliance, and that the work was accepted and approved by the architects of the monument association. It was found that the work was not accepted by defendant's architects, and that plaintiff did not satisfy them in regard to liens, but it was also found that defendant had, prior to the completion of the work, discharged such architects and had not thereafter employed any. *Held*, that plaintiff was entitled to judgment.

2. It is no defense to such action that plaintiff's subcontractor in an action against defendant, to which plaintiff was not a party, obtained judgment against defendant for work and material furnished in the construction of said foundation.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Edward P. Cole, for appellant. *A. N. Drown*, for respondent.

Fox, J. Appeal from the judgment, and the case comes up on the judgment roll alone, appellant claiming that the findings of fact are such as entitle him to judgment, and that the court erred in its conclusions of law, and in rendering judgment on the findings for defendant. The complaint is in *indebitatus assumpsit*, for the recovery of \$2,050, for work and labor done, and materials furnished. The answer denies the allegations of the complaint, and then sets up as a further defense that all the work and labor done and materials furnished for or to the defendant by plaintiff were done and furnished under a special agreement in writing, and that plaintiff has not performed the agreement on his part, and is not entitled to any further compensation thereunder. Defendant then, by way of counter-claim and cross-complaint, sets out the substance of the agreement, and alleges divers failures on the part of plaintiff, by reason whereof he claims to have suffered damage in the sum of \$2,000, for which he prays judgment against plaintiff. There was an answer to this cross-complaint, and, upon the issues thus framed, the case was tried before the court without a jury.

The court found that the plaintiff did not perform labor or furnish materials for defendant, and the defendant did not undertake or promise to pay, otherwise than in accordance with the terms of a written contract, dated December 1, 1882, which is set out in the findings in full. From this contract it appears that the defendant was the original contractor for the erection of the Garfield monument, in Golden Gate park; that he entered into this subcontract with the plaintiff to do all the work and furnish all the material for the excavation, concrete foundation, and granite base of the monument, ready for the statue. The details of the work which the plaintiff undertook to do are very fully set out, but need not be as fully repeated here. The contract price was \$5,650. The work and material were, among other things, to be according to plans and specifications made by Townsend & Wyneken, architects in the em-

ploy of defendant. One thousand two hundred dollars was to be paid when the corner-stone and the first base course was set, and the balance "when all is cut and set in position and accepted by the architects." By another paragraph, however, it was provided that "before any payment is made under the contract, the party of the second part [plaintiff] shall satisfy the said architects" that all materials furnished, and all the work of mechanics, laborers, and others, employed or hired by the plaintiff "have been fully paid, so that no lien can be filed against said work or such materials, mechanical work, or labor." Also "no payment to be made, without a certificate be obtained and signed by said architect that the said payment is due, and according to the terms of the contract." It is further found that the plaintiff, by and through one M. F. Redmond, "his subcontractor," built a concrete foundation, and, in another finding, that plaintiff paid Redmond for building it, but that this foundation was not in accordance with the contract between plaintiff and defendant, and was rejected; that after such rejection "plaintiff's agent and subcontractor, Redmond," built another concrete foundation beside the first, which was accepted, and upon it the iron, granite, brass, and copper work, and, in short, the monument complete, was subsequently erected.

The court further finds that for this second concrete foundation the plaintiff has not paid Redmond; also that some of the copper clamps and rods used in the other work of plaintiff were not set in lead, as required by the letter of the contract, but were set in sulphur instead; but that the work in this behalf was satisfactory to and was accepted by the monument association, the parties with whom defendant made his original contract, and was a substantial compliance with the terms of plaintiff's contract. There is no finding of any failure to pay for all materials furnished, and all labor done, except the one above mentioned, of the non-payment of Redmond for the building of this second concrete foundation; nor is there a finding that any lien was ever filed against the structure in any form whatever, although, according to another finding, Griffith's work was finished in or before September, 1883, and this action was not commenced until July, 1885. It is found that plaintiff's work was not done to the satisfaction, or under the direction, of said Townsend & Wyneken, and that plaintiff never procured their certificate, as required by the contract; but the court finds further in that behalf on the 15th of May, 1883, defendant dismissed the said Townsend & Wyneken from his service, and in writing released them from all responsibility as his architects of said monument, and that, by reason thereof, the plaintiff was prevented from procuring their approval or certificate. It is further found that from and after May 15, 1883, no architect was employed by defendant in the premises, and none were connected with the construction of the monument, except Wright, Kenitzer & Macy, who were competent and experienced archi-

fects, employed by, acting under, and representing, the monument association; that on September 15, 1883, plaintiff did procure from them a certificate that he had "completed his contract for the excavation, concrete work, granite work, iron and copper work, required in the erection of the Garfield monument in Golden Gate park, city and county of San Francisco, as per contract dated the first day of December, 1882;" that no certificate of any architect was ever furnished that all or any of the work or materials used or furnished for the building of said second concrete foundation had ever been paid for; that in fact the same had not been paid for; and that there was, at the time of the filing of said findings, another action pending in the same court, brought by Redmond against one Weismann, the agent and representative of defendant, for the recovery of the sum of \$948.60, for such materials and labor.

We may remark here that this finding as to the pendency of another suit is not within the issues in this cause. After he had procured the certificate of Wright, Kenitzer & Macy, above mentioned, payments were made to plaintiff to the amount of \$3,700. No other or further sum is found to have been paid to him. The findings are voluminous, but we think we have here given sufficient of the substance of them for the purposes of the consideration of the point made by appellant. The conclusions of law upon these findings were all in favor of the defendant, and judgment was entered accordingly. Even with the assistance of the able counsel for the respondent, we are unable to discover any principle of law upon which these conclusions and judgment can be sustained. For every technical failure to comply with the strict letter of the contract, found by the court, the courts also expressly found the antidote. The first concrete foundation was a failure, but the court finds that plaintiff paid for a concrete foundation, and that "his agent and subcontractor" built a second one, which was approved and accepted. It is said that the plaintiff did not pay for this second one. Both were built by a subcontractor under him, and it does not appear that he was under any other or greater obligation to pay his subcontractor for both than defendant was to pay him for both, and there is no pretense of such an obligation. But it is further said that the court has found another suit pending, brought by that subcontractor against the agent of defendant, to recover for the second foundation, and counsel cites the records of this court (*Redmond v. Weismann*, 77 Cal. 423, 20 Pac. Rep. 544) to show that judgment has gone against the agent of defendant in that suit. The finding was not within the issues of this cause, and cannot be regarded. The judgment in the case cited was on the findings in that cause, a cause in which this plaintiff was not a party, and in which his rights could not be tried. If through any mistaken theory of that case, or want of proper defense, judgment went against Weismann, when if the real facts had been known it would have gone otherwise, it may be Weismann's misfor-

tune, but it is one by which this plaintiff cannot be estopped, for in it he was not heard, and had no day in court. This case must stand upon its own findings, and they, taken as a whole, will bear no other construction than that the accepted foundation was built by plaintiff, as well as the rejected one.

There is a finding that plaintiff has not paid all the bills, as it is claimed that under the contract he was bound to do. That finding, however, has reference solely to the non-payment of Redmond for this second foundation. Besides, it is not found that he has not so paid the bills as that no liens shall be filed or accrue, and the contract shows that this was the only purpose of that clause in the contract. It was a clause evidently taken from an ordinary builder's contract, and, in this case, was an unnecessary one, for the monument, though built by private contribution, was erected upon and as an adornment of one of the public parks of the municipality, and could not be made subject to lien. It was affixed to the freehold, and thus became a part of the land, the property of the municipality. *Manufacturing Co. v. School-Dist.*, 10 Pac. Rep. 350; *Leonard v. City of Brooklyn*, 71 N. Y. 498. Plaintiff has alleged full performance. The court has found how he performed, and in this regard we think it amounts to a finding of full performance. It is found that there was not a strict performance of the letter of the contract, in the matter of the setting of certain clamps and rods, but it is also found how plaintiff performed in that regard, and it expressly finds that it was a substantial compliance with the terms of the contract, and was accepted and approved. This was all that was required. *Voorman v. Voight*, 46 Cal. 393. It is also found that plaintiff did not procure the approval or certificate of architects Townsend & Wyneken, but in the same connection it is found that defendant by his own act rendered it impossible to do so, and that plaintiff did get the certificate of the architects in charge. This was a sufficient compliance with the contract in that regard. *Reynolds v. Jourdan*, 6 Cal. 111; *Steinbach v. Leese*, 13 Cal. 367; *Wolf v. Marsh*, 54 Cal. 228; *Houghton v. Steele*, 58 Cal. 424; Civil Code, § 1512. Under these findings we are clearly of the opinion that the conclusions of law and the judgment should have been in favor of plaintiff. It was suggested on the argument that, if this conclusion was reached, the judgment should be for the balance unpaid on the contract, less the amount of the judgment, and costs in the case of *Redmond v. Weismann*. The record in this case furnishes no justification for such an order. The plaintiff has never had an opportunity to be heard as to whether he was liable for any part of the sum for which that judgment was recovered. Judgment reversed, with directions to the court below to enter judgment on the findings in favor of plaintiff, and against defendant, for the sum of \$1,950, that being the unpaid balance of the contract price, with interest thereon from September 15, 1883, the date of the architect's certificates.

We concur: PATERSON, J; SHARPSTEIN, J.; MCFARLAND, J.; WORKS, J.; THORNTON, J.

ON REHEARING.

(Jan. 7, 1891.)

PER CURIAM. Petition for rehearing is denied, but the judgment is modified to this extent: The superior court will compute interest on the amount awarded to respondent from January 1, 1885, as prayed for in the complaint, instead of September 15, 1883, the date of the architect's certificate.

(87 Cal. 34)

SAUER v. MEYER. (No. 13,699.)

(Supreme Court of California. Dec. 12, 1890.)

FORFEITURE OF LEASE—RE-ENTRY—RIGHTS OF
SUBTENANT.

A lease provided that the rent should be payable on the 1st of each month in advance. It also gave the lessee the right to sublet, and provided "that, if any rent shall be due and unpaid for * * * ten days after the same should have been paid under the conditions hereof, * * * then it shall be lawful for the said party of the first part to re-enter," etc. The rent for three months being due and unpaid, the lessor agreed that it should stand until the 1st of the next month. *Held*, in ejectment by the lessor against a sublessee of half the property, that, forfeiture having been waived for those months, the action could not be maintained until demand for the rent had been made on or after the 10th of the next month.

Commissioners' decision. Department 2.
Appeal from superior court, San Luis
Obispo county; V. A. GREGG, Judge.

J. M. Wilcoxon and Graves, Turner & Graves, for appellant.

BELCHER, C. C. This is an action of ejectment. The court below gave judgment for the defendant, and the plaintiff appeals on the judgment roll. The facts of the case, as found by the court, are, in substance, as follows: In November, 1883, the plaintiff leased the demanded premises for the term of ten years and one month from the 1st day of December following, the rental during the last five years of the term to be "forty dollars per month, payable in gold coin on the first of each and every month in advance." The lease provided that at the expiration, or sooner determination thereof, the lessees should have the right to remove from the premises all improvements placed thereon by them, and to sublet the premises or any part thereof, and "that if any rent shall be due and unpaid for the period of ten days after the same should have been paid under the conditions hereof, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom, in the manner prescribed by law." During the year 1889, the defendant was in possession, as sublessee, of one-half of the leased premises. On the 1st day of October of that year the whole rent, \$120, for the months of August, September, and October was then due and unpaid, and on that day the plaintiff agreed orally with the defendant's lessor, who was one of the original lessees, that the same should stand unpaid until the 1st day of November following. On the 1st day of November the plaintiff demanded of the defendant the payment of all rents then due, and the defendant denied that he owed plaintiff, and refused to pay anything. On the 4th day of the last-named month this action was commenced, and on that day, before defendant knew of its commencement, he offered to pay the amount due plaintiff for rent under the lease, and asked the amount due, and told her he was ready to give her a check for the same on a local bank, in which he had money sufficient to pay the sum due. The plaintiff refused to tell defendant the amount due, but made no objection to the offer of payment by check. On the 26th day of November, and before defendant filed his answer herein, he offered, in writing, to pay to the plaintiff the sum of \$160, in gold coin, the same being the amount due for rent under the lease up to and including that month, and the plaintiff refused to accept the same, but specified no objection thereto. The case was tried in December, and on the trial thereof, and before its submission, the defendant brought into court, and delivered to the clerk of the court, for the use of the plaintiff, the sum of \$220, the said amount being more than enough to pay all the rent then due and the costs of the suit. The value of the improvements placed on the premises by the lessees is \$5,000. Upon these facts, we think the defendant was entitled to have judgment entered in his favor.

To maintain an action of ejectment, the plaintiff must show that he was entitled to the possession of the demanded premises at the time he commenced his action. *Hestres v. Brennan*, 37 Cal. 385; *Bank v. Hynes*, 50 Cal. 195. The appellant here claims that she had a right to recover, because there had been a forfeiture of the lease for non-payment of rent. Forfeitures are not favored, and our Civil Code contains this provision: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Section 1442. To give a landlord a right of re-entry for non-payment of rent, a demand of the rent, upon or after the last day which the lessee has to pay, is essential to complete the forfeiture and enable him to maintain an action. *Tayl. Landl. & Ten.* (8th Ed.) § 297; *Wood, Landl. & Ten.* (2d Ed.) § 514. It does not appear here that any demand for the payment of the rent due in August and September was made during those months, and the agreement of October 1st that the rents for August, September, and October should stand unpaid until November 1st, was a clear waiver of any forfeiture, if demand had been made. The plaintiff demanded on November 1st that the defendant pay all the rents then due, and, conceding that this demand was sufficient, and that the rents should then have been paid by defendant, notwithstanding he was only a subtenant of half the leased property, still no forfeiture then occurred, or could occur, until the expiration of 10 days thereafter, for the reason that the lease only provided that the lessor should have the right of re-entry in case "any rent shall be due and unpaid for the period of 10 days after the same should have been paid." As the action was commenced four days after the demand, it was evidently prematurely brought. Other grounds are urged for the affirmance of the judgment, but they need not be considered. We advise that the judgment be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

87 Cal. 38

URTON v. WOOLSEY. (No. 13,699.)

(*Supreme Court of California.* Dec. 12, 1890.)

VENUE—ACTIONS TO FORECLOSE VENDOR'S LIENS.

The complaint averred plaintiff's right to enforce and foreclose a vendor's lien on lands in another county. After the complaint was filed, the prayer was amended so as to expressly ask for foreclosure of the lien. *Held*, that under the provisions of Const. Cal. art. 6, § 5, that "all actions for * * * the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, * * * is situated," the court had no jurisdiction over the case, and no authority to enter judgment of foreclosure.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Jud C. Brusie, S. R. Hart, and Taylor &

Hall, for appellant. *Graham & Monson*, for respondent.

McFARLAND, J. Judgment was given for plaintiff. Defendant appeals from the judgment; also from an order refusing a change of venue; also from an order refusing to set aside a default, and vacate the judgment because taken against him through surprise, excusable neglect, etc. The motion for change of venue was on the ground that defendant resided in a county other than the one in which the action was commenced; and perhaps the denial of the motion may be sustained on the very technical ground that the notice and demand state that "defendant is a resident of" and "resides in" the other county, instead of stating, in the language of the Code, that he so resided "at the commencement of the action." It is possible also that, on the record before us, the ruling of the court denying the motion to open the default cannot be reached, although that denial seems to have been somewhat harsh, because while the defendant resided in Amador county, and his attorneys in Sacramento, (the cause pending in Fresno,) the motion for change of venue and a demurrer to the complaint were denied and overruled on September 20th, in the absence of defendant and his attorneys. No leave to answer was given. Default was entered the next day, and final judgment was entered on the 23d. It is not necessary, however, to thoroughly examine these questions, because, in our opinion, judgment itself should be reversed for want of jurisdiction.

The action was commenced in the superior court of Fresno county. The complaint sets forth a written contract between plaintiff as vendor, and defendant as vendee, for the sale and purchase of certain lands situated in the county of Tulare, and avers facts showing plaintiff's right to enforce and foreclose a lien upon said lands for the purchase money. The prayer of the complaint, as originally filed, did not ask in terms for a foreclosure of the lien; but a short time afterwards, and while an amendment could be made as a matter of right, the plaintiff amended the prayer of the complaint so as to make it ask expressly for a foreclosure of the lien, and the judgment forecloses said lien, and decrees the sale of said lands. The action, therefore, is an action to enforce a lien upon real property; and the constitution provides that "all actions for * * * the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." The superior court of Fresno had, therefore, no jurisdiction over the case, and no authority to enter the judgment. We do not just now recall any case where this point has been directly decided by this court, although in *Gurnee v. Superior Court*, 58 Cal. 88, the law is clearly assumed to be as above stated; but we are fully satisfied, upon principle, that no court has jurisdiction to entertain an action like the one at bar unless it has been commenced in the county where the land is situated. The judgment is reversed, with

directions to the superior court to dismiss the action.

We concur: THORNTON, J.; SHARPSTEIN, J.

3 Cal. Unrep. 314

OHM v. CITY AND COUNTY OF SAN FRANCISCO *et al.* (No. 13,689.)¹

(*Supreme Court of California.* Dec. 9, 1890.)

MEXICAN GRANTS—VALIDITY—LIMITATIONS—PLEADING.

1. A Mexican grant of 800 *varas* square, "as a place called Rincon, embraced within the limitation of Yerba Buena," is so vague and uncertain that nothing passes by force of the grant alone, nor will it be helped out by possession taken under it by the grantee, as the Mexican law, then in force, required possession to be given "by judicial authority, with the citation of all those bounded upon him."

2. Such grant is also fatally defective, where the original application, to which is attached each successive paper or certificate up to and including the final grant, fails to show on its face that the grant was made with the approval of the pueblo, of the governor, and of the departmental assembly, and that a record of such fact was made in the public archives, as required by the laws of Mexico then in force.

3. Under Code Civil Proc. Cal. § 1875, subd. 3, which permits courts to take judicial notice of the acts of the judicial department of the state, the supreme court will judicially notice the vacation of a decree confirming a Mexican grant.

4. One who alleges that he has a perfect title to land under a Mexican grant, not barred by the statute of limitations, may maintain a legal action for the possession, and there is no necessity for the interference of a court of equity to enable him to assert his rights.

5. Since the passage of St. Cal. 1863, p. 327, which gives five years "from the date of its passage" in which one claiming title to land under a Spanish or Mexican grant may commence an action for its enforcement, the want of confirmation, patent, or survey of such a grant by the United States government has not operated to interrupt the running of the statute.

6. Where a pleader, in his complaint, alleges a fact, and then sets out the written evidence on which he relies for proof of the fact, the complaint will be held good for only what the evidence proves.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

A. Everett Ball and J. M. Kinney, for appellant. Pillsbury & Blanding and Geo. Fournoy, Jr., City Atty., for respondents.

Fox, J. This is an action in equity for a decree declaring the appellant to be the owner of certain premises situate in the city and county of San Francisco, commonly called, in early times, the "Sherrebeck Claim," and adjudging that the defendants hold the legal title in trust for plaintiff; and also for rents and profits up to the time of the filing of the complaint, in the sum of \$1,500,000, and at the rate of \$250,000 per month from that date (August 1, 1885) to the date of judgment. Defendants demurred to the complaint on several grounds, and, among others, that it failed to state facts sufficient to constitute a cause of action; that plaintiff's claim was stale; also that it was barred by the provisions of sections 318, 319, 322, and 343 of the Code of Civil Procedure. The demurrer was sustained, and defend-

¹ Rehearing granted.

ants had judgment, from which plaintiff appeals.

In his complaint, plaintiff claims as successor in interest of Peter T. Sherrebeck, the alleged grantee of a Mexican grant of a tract of land 800 *varas* square, within the pueblo of San Francisco. He does not content himself with alleging the ultimate fact of grant and title, but sets out with great particularity all the proceedings had in applying for, and in the making and delivery of, the alleged grant. He shows that a pueblo was already established; that the land was within the pueblo; that the applicant applied to the prefect of the district for a grant; that the prefect, as the law required he should do, referred the application to the alcalde of the pueblo, who reported the land vacant, and the applicant as possessing the requisite qualifications; but that, in his opinion, only land upon which to build a house and corral, and to plant, can be granted to him, which means that only a house lot of 50 *varas* square, and a planting lot of 200 *varas* square, could be granted to him. Whereupon the prefect, according to the allegations of the complaint, made a grant to the applicant of 800 *varas* square, "at a place called 'Rincon,' embraced within the limitation of Yerba Buena," which grant is set out in the complaint, and from which the quotation just made is copied. It contained no description or boundaries whatever, other than that so quoted. It did not require that juridical possession be given, and the complaint does not show that any ever was given. It, however, alleges that under it the grantee took possession of 800 *varas* square, claimed to be the property now sought to be recovered. The complaint fails to show a valid grant. The description given in the paper grant was so vague and uncertain that nothing would pass by force of this paper alone, nor would it be helped out by possession taken under it by the grantee. Under the law, juridical possession by the public authorities was required to be given. "No person," reads the law, "though his grant be older than others, can take possession for himself, or set limits to his landed property, unless it be done by judicial authority, with the citation of all those bounded upon him, (*colindantes*,) for whatever is done contrary to this will be null and of no validity or effect." "As the grantee could not locate his land by his own survey, it would seem a necessary conclusion that he could not do so by mere occupation, and the assertion of a claim to any particular place." *Waterman v. Smith*, 13 Cal. 411. This survey or juridical possession made or given was requisite, in order to attach the grant, if it was one having any force whatever, to any specific tract of land, and must have been made by competent authority. *Steinbach v. Moore*, 30 Cal. 508, affirmed in *More v. Steinbach*, 127 U. S. 79, 8 Sup. Ct. Rep. 1067; *Leese v. Clark*, 18 Cal. 536.

This grant was also fatally defective in other particulars. It is a matter of common knowledge, as well as of law, that the initial paper, in all these cases of Mexican grants, was the petition, or application for a grant. Each successive paper

or certificate, to and including the final grant, and the certificate of juridical possession, was indorsed upon or attached to this petition, so that when the last step was taken which perfected the title, the grantee had in his possession all the original papers in the case constituting one instrument, records of the different parts thereof having been made in the public archives as the proceedings progressed, and this instrument constituted his muniment of title. In this case the plaintiff has alleged that the grant was made with the approval of the pueblo, the governor of the territory, and of the republic of Mexico. The law required that it should be so made, and that a record of the fact should be made in the public archives. The plaintiff has made his paper title a part of his complaint, by setting it out *in hæc verba*. By so doing, he has proved that the averments of his complaint above referred to are not true. The grant was not made with the approval of the pueblo, but against the objection of the chief executive officer, who spoke for the pueblo, as shown upon the face of the paper pleaded. The paper fails to show that it was with the approval of the governor of the territory, or of the republic of Mexico. Without such approval, attested by the signature of the governor, and the order of the departmental assembly, it was without authority of law. Such was the rule, even where the lands were not municipal. *Luco v. U. S.*, 23 How. 515, 543. Being municipal lands, the fact of the grant must be registered in the public archives of the municipality. *S. F. Land Titles*, p. 144, art. 17; *Dwinelle's Colonial History of San Francisco*, *addenda*, p. 11; *Plan of Pictie*, § 17; *Donner v. Palmer*, 31 Cal. 508. The paper fails to show registration anywhere, either in the archives of the nation, the department, or the municipality. The complaint alleges that it was recorded by the prefect in the archives and registers of his prefecture; but the paper fails to show even such recording, and there was no law making the archives of the prefect, if he kept any, public archives for the registration of land-titles. It may be said that since there is an allegation of the recording, whether it was recorded or not becomes a matter of proof, and cannot be questioned on demurrer. The answer to this is that the fact is one which ought to appear upon the paper itself according to the laws and usages of the country; that these laws, usages, and customs of the country are matters of which the court will take judicial notice, as well as of the principal fact that they are not so recorded. *Fremont v. U. S.*, 17 How. 567; *Romero v. U. S.*, 1 Wall. 721. The complaint is to be taken most strongly against the pleader. When he alleges a fact, and then sets out the written evidence upon which he relies for proof of the fact, the complaint will be held good for only what the evidence proves.

There are other points of objection taken to the validity of this grant, but they do not need to be considered here. To obviate these defects the complaint alleges decree of confirmation of this grant, on the 5th day of December, 1859, and sets out the

decree. This decree is equally indefinite with the grant in the matter of description, and on its face requires a survey and location. More than 25 years had passed after this alleged decree before the filing of this complaint, and there is no allegation of survey whatever. But more than this; the pleading of this decree was unwarranted in law, and almost without precedent in the history of jurisprudence. The decree itself was vacated and set aside within six months afterwards, and there is no decree of confirmation of the grant. This fact does not appear upon the face of the complaint, but it is a matter of common history and knowledge of the country, and is an act of the judicial department of the government of the United States, of which this court will take judicial notice, under subdivision 3, § 1875, Code Civil Proc. *Sharon v. Sharon*, 79 Cal. 697, 22 Pac. Rep. 26, 131; *Romero v. U. S.*, 1 Wall. 742.

Plaintiff's cause of action, if any he ever had, is both stale and barred by the statute of limitations. There is no pretense in the complaint that the plaintiff or his grantor have been in possession of this property since the date of the treaty of peace, in 1848,—42 years since. It is alleged that the pueblo became a municipal corporation, by the name of the "City of San Francisco," (the predecessor of the present municipal defendant,) in April, 1850; that it applied for confirmation of its title to four square leagues, including said 800 *varas* square, in 1852; that, pending the proceedings thereunder, it disputed the title of said Sherrebeck, and the location of the same. According to the rules of construction of pleadings, it must be held that this is an admission that the title was disputed by the defendant as early as the institution of such proceedings,—July 1, 1852. Plaintiff's grantor had been then at least four years out of possession. If, as plaintiff claims, he had a perfect title under the Mexican government, or under the pueblo, his cause of action then at once arose, and he could at once, and if his title be, as claimed, a perfect one, and not barred, he can still maintain his action at law, for the recovery of the possession of said property. That such an action could be maintained upon such a title as he claims this to be was held by this court as early as *Reynolds v. West*, 1 Cal. 323; affirmed in *Cohas v. Raisin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 616; *Payne v. Treadwell*, 16 Cal. 231; and has never been overruled. According to his own theory of the case, there has therefore never been a necessity for a resort to a court of equity to assert his right. He had ample remedy at law, and a court of equity will not interfere.

But he has slept so long upon his rights, if he ever had any, that he cannot now recover at law, and the same rule that forbids his recovery at law forbids it in equity. His right of action accrued, and the statute of limitations commenced to run against him, at the latest, July 1, 1852. Before the expiration of five years, however, the statute of limitations was amended, so that the action could be maintained if commenced within five years from the

time of final confirmation of the title by the government of the United States, or its legally constituted authorities, if the title was one derived from the Spanish or Mexican government. St. 1855, p. 109. In 1863, the statute was again amended, giving five years from the date of the passage of that act in which to commence the action, where title was claimed under the Spanish or Mexican government, unless five years had already run since the date of confirmation. St. 1863, p. 327. Since the passage of that act, there has been no disability on account of want of confirmation, patent, or survey, against the running of the statute of limitations. A careful reading of that act can leave no doubt that the statute of limitations commenced to run in favor of the city and county of San Francisco, and its grantees, for the lands embraced in the grant to the pueblo of which it or they were in possession at the date of that act, (April 18, 1863,) no matter whether it be held that the confirmation of the grant was the act of congress of July 1, 1864, conveying the title to the land embraced within the Van Ness Ordinance, (of which the Sherrebeck claim was a part); the act of March 8, 1866, granting and relinquishing to the city the four leagues confirmed by the decree of the circuit court of May 18, 1865; the date of the final survey of the four leagues, or of the patent to the city. There can be no doubt that five years, without reference to date of confirmation, is the limitation under the Codes, and to our minds it is equally clear that such is the limitation under the act of 1863, when section 6, as there amended, is carefully analyzed, as it needs to be, for it is not clearly constructed, and at first reading is somewhat difficult of comprehension. This court, however, seems to have reached the same conclusion, as to its proper construction and effect, as long ago as *San Jose v. Trimble*, 41 Cal. 536. Judgment affirmed.

We concur: SHARPSTEIN, J.; WORKS, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment on the first point discussed; but what is said about the statute of limitations is very important, and may lead to serious consequences in other cases. It is the general understanding that the statute does not begin to run until after a patent. Does not this opinion overturn that doctrine?

87 Cal. 1

In re OSBORN'S ESTATE. (No. 13,372.)

(*Supreme Court of California.* Dec. 10, 1890.)

EXECUTORS—LIABILITY FOR ACTS OF CO-EXECUTOR.

1. An executor being about to leave the state temporarily, turned over to his co-executor the funds in his hands. Thereafter he took no part in the management of the estate, but his co-executor attended to the business. The executors filed a joint account four years after the time prescribed by the statute. At this time said executor knew that there was a shortage which he personally made up, without reporting it. He never made any effort to have a final settlement of such account. *Held*, that his co-executor having thereafter used the funds on hand at the time of such report, and having become insolvent, said executor was liable therefor.

2. The fact that the money and sole management of the estate was turned over to said co-executor, with the concurrence of one having a power of attorney to collect moneys due non-resident beneficiaries of the estate, in no way relieves said executor from responsibility.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Cope, Boyd & Fifield, for appellant. *Selden S. Wright and Wright & Wright*, for respondent.

PATERSON, J. Edmond Saul and the appellant, William E. Straut, were appointed executors of the will of William G. Osborn, and entered upon the discharge of their duties October 28, 1867. The value of the estate for which they accounted was \$32,667.20. Claims were presented amounting in all to only \$1,560.74. Nearly all of the heirs and devisees were non-residents, and constituted Hon. Seth M. Richmond, of New York, their attorney in fact with authority "to collect, receive, sue for, demand, and give acquittances for all legacies, moneys, and property due and payable from the executors and trustees of the estate, and to make and execute full and ample receipts therefor." In February, 1868, Mr. Richmond came to this state, and it was determined by the executors, with his concurrence, to sell beach and water-lot No. 588. It was sold for the sum of \$23,500, \$10,000 cash, and the remainder on mortgage. The mortgage was assigned to Mr. Richmond, and there was paid to him the sum of \$1,500, leaving \$8,500 of the purchase money received in the hands of the executors. Each executor deposited one-half of that sum (\$4,250) to his credit in the Hibernia Savings Bank, receiving a pass-book therefor. Appellant, having been called east on business, delivered his pass-book, containing his account with the Hibernia Bank to his co-executor, and transferred the account to him. Saul drew out the moneys deposited in Straut's name prior to September 1, 1868, and thereafter had the deposit entered in his own book. Richmond was aware of Straut's intention to leave the money and business of the estate in the care of Saul, and made no objection thereto. No account was filed until September 3, 1872, and no proceedings were ever taken for its settlement by the executors. No other account or exhibit was filed in the probate or superior courts until 1886, when the executors were, under a citation directed to them, ordered to file a final account of their administration. Straut only was served, Saul being absent from the state. Appellant filed an account on the 27th day of October, 1886, showing that the only moneys of the estate received by him was said sum of \$4,250, deposited in the Hibernia Bank, and subsequently turned over to his co-executor, and the further sum of \$650, received by appellant in March, and immediately remitted to the attorney for the heirs. From the time of the issuance of letters to the executors until the sale of beach lot 588, appellant had taken no active part in the management of the estate—had not received or disbursed any of its property. All collections made sub-

sequent to the sale of that lot were made by Saul. Straut was absent from the state from March to October, 1868. During all that time Saul was in business for himself, in good standing and credit in the community. At the time the account was filed in 1872, appellant knew that there was a shortage in the account of his co-executor, and contributed about \$2,500 to make it up, believing himself to be liable for one-half of the shortage. When the account of 1872 was rendered, there was in Saul's hands, belonging to the estate, the sum of \$3,714.43, of which \$3,060 was collected subsequent to January 1, 1869. Appellant took no part in the management of the estate after his return from the east in 1868. Saul became insolvent, but the precise time of his insolvency is not shown by the evidence. Appellant states in his testimony that he does not know what was the financial condition of Saul at the time the account of 1872 was filed, but he thinks he was then in business for himself; that Saul left this state about seven or eight years ago, and when last heard from was living in Mexico. The court below held that the appellant was indebted to the estate, as executor, in the sum of \$3,716.70, less the sum of \$1,000 allowed him as commissions. In view of the fact that there was no intentional wrong on the part of Mr. Straut, the court did not allow interest on the principal sum found to be due the estate.

An executor, who has money of the estate in his hands, and turns it over to his co-executor, or who actively assists to put it into the hands of his co-executor, is generally liable for any misapplication of it by the latter. There are exceptions to this general rule; but to avoid liability in such cases it must appear that good reasons existed for turning over the money to the co-executor, and that in allowing him to keep, control and disburse it, he acted in good faith, without notice of any purpose to misapply it, and with reasonable prudence and discretion. In the Sanderson Case, 74 Cal. 213, 15 Pac. Rep. 753, the court said: "It has sometimes been broadly stated that, if an executor turn over assets which he has received to his co-executor, he becomes responsible for the due application and administration of those assets by his co-executor." There are cases which go to that extent. *Crosse v. Smith*, 7 East, 246; *Douglass v. Satterlee*, 11 Johns. 16; *Edmonds v. Crenshaw*, 14 Pet. 166. But this is not a universal rule. There may be circumstances which would render it, not only appropriate, but necessary to make such a transfer of the assets of an estate by an executor to his co-executor in good circumstances and credit—such as inability to act by reason of sickness or imprisonment. *Sterrett's Appeal*, 2 Pen. & W. 419. The liability of the executor who has thus intrusted to his co-executor the fund for which he was himself primarily responsible, depends upon the circumstances of each case. Good faith alone will not save him from liability, nor will bad faith on the part of his co-executor subject him to it. If good reason existed for turning over the money to his co-executor, and if, in allowing him to

keep, control, and disburse it, he acted in good faith, and with reasonable care and prudence, so that it cannot be said those who are entitled to receive it have lost it through his fault or negligence, he will not be held responsible. A wrongful act or omitted duty lies at the foundation of his liability. He has the right to assume in all cases that his co-executor is an honest man. The testator by his appointment recommended him as such, and the fact that he is insolvent should create no suspicion upon which to base a want of confidence. An honest executor who is poor is as worthy of confidence and trust as an honest executor who is rich. *McKim v. Aulbach*, 130 Mass. 484; *Wilson's Appeal*, 115 Pa. St. 101, 9 Atl. Rep. 473; *Peter v. Beverly*, 10 Pet. 534; *Ormiston v. Olcott*, 84 N. Y. 346; *Langford v. Gascoyne*, 11 Ves. 333. But, where the estate or part of it has been lost through the failure of the executors to perform some duty required of them by the trust, such as to collect debts before the statute of limitations has barred action thereon, to preserve the estate, to prevent waste, etc., they are liable jointly and severally. In the *Sanderson Case*, supra, the court said: "The obligations of co-executors arise from their contract, and are several. Although one may in some cases make himself liable by placing the other in a position to do wrong, or by aiding him in his acts of misfeasance, the liability is still the several liability of each. And this is so, even if it be conceded the devisees or legatees may under some circumstances claim both to be liable. * * * If an executor stands by and sees a breach of trust committed, or about to be committed, by a co-executor, and does nothing to protect the estate, or to call the defaulting executor to account, he is liable. * * * When an executor is guilty of neglect with reference to assets in the possession of his co-executor, he is not made liable upon the theory that the assets are in the possession of both, which, in fact, they are not, but upon his neglect in delivering them to his co-executor without good cause, or in not seeing to it that they were taken out of the possession of the co-executor, or were not by him misapplied or lost." This decision is in line with current authority, and with the provisions of the Code. Section 2239, Civil Code, provides that "a trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enable the latter to commit, but for no others." See, also, *Story, Eq. Jur.* § 1284, note; *Croft v. Williams*, 88 N. Y. 384; *Lincoln v. Wright*, 4 Beav. 427; *Weigand's Appeal*, 28 Pa. St. 471. Applying these principles to the case at bar, we find no way to escape the conclusion that appellant was properly charged with the balance found by the court to be due from the executors on March 17, 1871, less commissions.

There is no doubt that Mr. Straut acted in the utmost good faith in all matters connected with the estate, and that he is a man of high character and excellent repute. There has been no intentional neglect of duty, and it is a matter of regret that his inadvertence, over confidence, and

good nature have brought upon him this loss; but we are not authorized by the hardship of this particular case to depart from well-settled principles, and establish a precedent which would open an avenue of waste, fraud, and speculation in the management of estates, and for which the guilty parties could not be held accountable. We cannot say that Mr. Straut was wrong or negligent in placing the money in the hands of his co-executor. He was about to leave the state for an indefinite period. The journey had to be made by sea and land, and was a perilous one. There was nothing to create a suspicion that Saul might misapply the money left with him. There were few claims against the estate, which was one that could have been and ought to have been speedily administered and distributed. Nor was there anything wrong in allowing Saul to manage the estate. Straut had the right to act alone, or not at all, as he chose. He could have renounced the trust entirely,—it is unfortunate for him that he did not do so; but in acting with Saul he made the latter's acts his own, and is bound by them. The delay in the filing of accounts and settlement of the estate was a direct violation of a statutory duty. The executors were required to file an exhibit under oath, showing the amount of money received and expended by them, the amount of all claims presented, names of the claimants, and all other matters necessary to show the condition of the estate, and to render full account within 30 days after the expiration of the time mentioned in the notice to creditors. Instead of filing an account, showing the amount of money received by him, and what had become of it, as he had a right to do to protect himself, and as required by law, Mr. Straut chose to allow four years to elapse without any showing by himself or his co-executor, and then joined in an account with his co-executor, which he adopted as his own, and prayed for its settlement. There is nothing upon the face of the report to show that he had received only the amount of money referred to, (\$4,250,) or that he had turned it over to his co-executor. If the facts had been made to appear in that account, the devisees would have had something to put them upon their guard. Appellant's neglect through a period of nearly 20 years to report to the court his own transactions with respect to the property of the estate was itself negligence, and, taken in connection with the report made by himself and his co-executor, wherein it was made to appear that they had received all the moneys therein accounted for jointly, is sufficient, we think, to render him liable. The court below evidently believed that the loss would not have been sustained if the appellant had exercised reasonable diligence and care in the performance of his duty as executor, and for that reason held him chargeable with the deficiency; and we cannot say that the court erred. In *Adair v. Brimmer*, 74 N. Y. 566, the court held that where an executor through his negligence suffered his co-executor to receive and waste the estate, when he had the means of preventing it by proper care, he

was liable to the beneficiaries for the waste. In *Thompson v. Finch*, 22 Beav. 316, an executor was held liable for failure to see that money was properly invested, although he had been informed by his co-executor that it had been properly invested. The executor in that case allowed a period of 10 years to pass without ascertaining what the co-executor had done with the funds, and for such negligence was held liable, although no improper motive was attributed to him. It has been held in a great many cases that it is the duty of executors to account within reasonable or statutory time, and a neglect to account which results in waste renders the executor liable the same as in case of failure to collect debts, before the statute of limitation has run against them. *Styles v. Guy*, 1 Macn. & G. 434; *Sutherland v. Brush*, 7 Johns. Ch. 17. By joining his co-executor in the account of 1872, appellant admitted the joint liability of the executors for the balance then in their hands. If the account had been settled by the court, as prayed for by them therein, the order of the court would have been an adjudication of their joint liability. *Ducommun's Appeal*, 17 Pa. St. 268; *Haage's Appeal*, Id. 190; *Hengst's Appeal*, 24 Pa. St. 420.

The fact that the money and the sole management of the estate were given into the hands of Saul with the concurrence of Mr. Richmond is immaterial. *Edmonds v. Crenshaw*, supra. Mr. Richmond's power of attorney authorized him only to collect moneys due non-resident beneficiaries, and gave him no authority to direct the management of the estate, or to waive any of the rights of those whom he represented. The court found that the sum of \$3,060 of the balance due from the executors was collected by Saul subsequent to January 1, 1869. From this finding it is apparent that only \$654.43 could have been money which appellant turned over to Saul, and as he is entitled to a credit of \$1,000, commissions as executor, he claims that the judgment should have been in his favor. It is true said amount of \$3,060 of the money turned over by him to Saul was actually and regularly disbursed by the latter in payment of claims and legacies, and if appellant had reported correctly and within reasonable time his transactions, so as to show the court and beneficiaries the limit of his responsibility, he would have been protected. Instead of doing this, however, under a mistaken idea as to his liability, and through fear "that if the matter were exposed in the courts it might seriously affect his credit, and the credit of his firm," he failed to disclose the fact that "he, Saul, was not doing right," and that "there was a shortage," borrowed \$2,250, which was one-half of the amount then due the legatees, and sent it to Mr. Richmond in satisfaction, as he believed, of all claims against him on account of the default of his co-executor. Subsequently, Saul prepared an account showing a balance due to the estate of \$3,622.79. Appellant examined the account, and it was signed and filed as the joint account of the two executors. Upon its face it appeared that the executors had

acted jointly in the receipt and disbursement of all the property of the estate, and retained a balance of \$3,622.79, including commissions. Here is where appellant made his greatest mistake. The law required prompt reports from both. Instead of reporting his own transactions, and permitting or requiring his co-executor to do likewise, which would have put all concerned upon notice of the several liabilities of each executor, he joined in an account which represented him to be jointly responsible with Saul, although he knew that Saul "was not doing right," and allowed it to slumber on the records for over 16 years, without any effort to correct it, or have it settled. In the meantime his co-executor became insolvent, and left the country, and is now, together with his property, if he has any, beyond this jurisdiction. When appellant discovered that there was a shortage, that his co-executor was not doing right, and was in failing circumstances, it was his duty to the beneficiaries and to himself to report the facts to the court, and prosecute a settlement of the account; this would have determined the liability of each, and put all concerned upon their guard. The exact time when Saul became insolvent is not shown, but appellant testifies that he was in business some time after the account was filed, but that "his reputation was not as good after that time as it was before." It is an unfortunate case; but upon all the authorities, and upon principle, we must hold the executor responsible when it is so apparent that only his own negligence and mistaken idea as to his liability have occasioned the loss. It would never do to permit an executor to appear to be acting and sharing in the responsibility with his co-executor, join in reports of what they have done jointly, and many years afterwards, when the co-executor is bankrupt, and out of the jurisdiction of the court, allow him to contradict the reports rendered, and avoid responsibility by showing that as a matter of fact he has done none, or only a part, of the things reported. There is but one safe course for one named as executor to pursue, either renounce the nomination and refuse to qualify, or make prompt and correct reports and accounts of his transactions as executor, and have them settled. The order affirmed.

WE CONCUR: BEATTY, C. J.; FOX, J.; MOFARLAND, J.; WORKS, J.; SHARPSTEIN, J.

(87 Cal. 610)

HOYT v. SAN FRANCISCO & N. P. R. Co.
(No. 14,066.)¹

(Supreme Court of California. Dec. 11, 1890.)

APPEAL—DISMISSAL.

Under Sup. Ct. Cal. Rule 3, providing that, if the transcript is on file when the notice of motion to dismiss appeal because the transcript was not filed in time is given, that shall be a sufficient answer to the motion, it is not sufficient that the transcript was filed on the same day that the notice was given, but later in the day.

In bank. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

¹ Affirmed on rehearing, post, 1066.

E. S. Lippitt and Charles F. Hanlon, for appellant. T. J. Crowley, for respondent.

PER CURIAM. This is a motion to dismiss appeal because the transcript was not filed in time. The judgment was rendered May 26, and appeal taken June 12, 1890. September 16th, 94 days after the taking of the appeal, the clerk of the court below issued his certificate showing that no transcript had been prepared or certified. September 20th, notice of motion to dismiss was given, accompanied with a copy of the clerk's certificate. This was served at 9:30 A. M. At 3:30 P. M. the fee for filing the transcript was paid to the clerk of this court, but the transcript was not then delivered to said clerk. At 8 P. M. of that day, the transcript was served on counsel for respondent, and at 11 P. M. the clerk found the transcript in the letter box at his residence, and marked it filed as of that day. Rule 3 provides that if the transcript is on file when the notice is given, that shall be a sufficient answer to the motion; and counsel now invokes the rule that the court will not take cognizance of fractions of days. We appreciate the force of, and the reason for, the rule so invoked, and have no doubt sometimes applied it on motions of this kind. But where, as in this case, an event had actually occurred, and a fact been established, under which rights had accrued before the happening of another event, which, if it had occurred a few hours before, might have defeated those rights, we think it the duty of the court to take note of the order of those events, even though they may all have happened on the same day. The court has been, and possibly ought to be, liberal in the matter of extending time for the filing of transcripts, or of relieving parties from the effect of failure, where the delay has been brief, and good cause has been shown; but in this case no attempt was made to secure an extension of time, and no cause or excuse is shown for a delay of nearly 60 days in filing a transcript so brief that it could have been, and finally was, in fact, prepared and filed in a single day. If the general rule in regard to fractions of days is inevitably to apply in every such case, rule 3 of this court may as well be repealed, and no limit fixed for the filing of transcripts. Such practice as that adopted in this case is peculiarly adapted to the encouragement of appeals for delay, and ought not to be countenanced by the court. The motion is granted, and the appeal dismissed.

87 Cal. 15

LEHMANN v. SCHMIDT. (No. 12,547.)

(Supreme Court of California. Dec. 11, 1890.)

FACTOR'S LIEN—CONVERSION—WAIVER—SPLITTING CAUSE OF ACTION—EVIDENCE.

1. Defendant agreed with the owner of some wine to receive and sell it, and under the agreement did receive part of it. He then refused to sell the wine or have anything more to do with the contract, or to return the wine which he had received, or to account for it. When demand was made on defendant, he made no claim of lien. He stated to witness that it was so mixed up with his wine that he could not make any statement of it. *Held*, that the court was justified in finding that there had been a conversion of the

wine, and that defendant had waived his lien for advances and expenses, if any he had. Reversing 22 Pac. Rep. 973, and 24 Pac. Rep. 120.

2. It being stipulated in the agreement that the owner was to receive for the wine 20 cents per gallon "net," defendant was not entitled to any allowance for sediment.

3. Defendant having converted the wine to his own use, the net amount per gallon that the owner was to receive by the terms of the agreement was some evidence of its value at the time it was converted.

4. Under an assignment to plaintiff by the owner of all his interest in a certain number of gallons of wine, "more or less," held by defendant or sold by him for said owner's account, plaintiff could maintain an action for the value of a less number of gallons than therein specified.

On rehearing. For former reports, see 22 Pac. Rep. 973, and 24 Pac. Rep. 120.

Chapman & Slack, for appellant. A. Heyneman, for respondent.

PATERSON, J. The authorities are clear upon the proposition that, when one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit* for the value thereof. *Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 380; *Berly v. Taylor*, 5 Hill, 577; 2 Greenl. Ev. § 108. But it is contended by appellant that the defendant had a lien on the wine for money paid out and advanced, and that his refusal to comply with the plaintiff's demand did not constitute a conversion. The court found, however, that the defendant advanced on account of said wines under the agreement the sum of \$678.50 and no more, and that he incurred no other liabilities on account of the wine under the agreement; and the answer of the defendant admits that he had received "as the proceeds of the sale of a portion of said wines mentioned in plaintiff's complaint" the sum of \$1,124.16. Thus it appears from the findings, evidence, and admissions of defendant that he had received more than he had advanced and expended. But if this were not so the defendant waived his lien, if any he had, for moneys advanced or expenses incurred on account of the wine by repudiating the contract, refusing to deliver the wine, and by declining to account to Smith for the amount received or expended. It has been held in England that a person having a lien on goods does not waive it by the mere fact of his omission to state that he claims them in that right when they are demanded, but, if a different ground of retention than that of the lien be assumed, the lien ceases to exist. In this country the weight of authority seems to support the contention that if the bailee refuse upon demand to deliver the property without setting up any lien thereon he waives his right to claim a lien after suit brought. *Hanna v. Phelps*, 7 Ind. 24; *Everett v. Saltus*, 15 Wend. 478. In the case at bar it is true the defendant was not merely a bailee for service, he was also a factor to sell; but he not only failed to assert a lien on the wine for advances and expenses at the time a demand was made upon him, but he notified Schmidt "that he would not have anything more to do with the contract," refused to go on with the sale

of the wine or have anything further to do with it, and refused to deliver possession of the wine, or make any accounting in relation thereto. He stated to one of the witnesses that he could not tell anything about the wine, as "it was so mixed up with his own wine that he could not make a statement of it." Upon this evidence the court was justified in finding that there was a conversion of the property, and that defendant waived his lien, if any he had. Section 2910, Civil Code; *McPherson v. Neuffer*, 11 Rich. Law, 267; *Ramsby v. Beezley*, 11 Or. 49, 8 Pac. Rep. 288; *Overt, Lieus*, p. 142, § 115.

We do not think that the defendant is entitled to any allowance for the 230 gallons of sediment, or for the money expended for freight, labor, and materials. He knew when he took the wine that there would be some sediment and waste in curing it, and it was stipulated in the agreement that plaintiff was to receive 20 cents per gallon net. He agreed to furnish the necessary labor and outlay for freight, labor, etc., in shipping and curing the wine. It is admitted that he received the 7,981 gallons of wine with which the court charged him, and, having converted it all to his own use, any expense or loss incurred in getting possession of that quantity or improving its quality must be borne by himself.

The finding of the court as to the value of the wines is supported by the evidence. Mr. Smith testified that if the defendant had sold the wine at once "he could have realized a great deal more than twenty cents per gallon, for wines were very high at that season, but his neglect and delay caused me a great loss." Furthermore, it was stipulated in the contract, as stated above, that plaintiff should receive 20 cents per gallon net; and, under these circumstances, having converted it to his own use, we think the price stipulated in the agreement is some evidence of the value of the property at the time of the conversion.

The point was made that the assignment to the plaintiff did not entitle him to maintain this action, but we think it is sufficient to support an action for the value, although it be for only a portion of the wines referred to in the agreement. The rule against the splitting up of the cause of action (*Zirker v. Hughes*, 77 Cal. 235, 19 Pac. Rep. 423), is inapplicable to this case.

The findings of the court are supported by the evidence, with the exception of the fourth finding, which states that defendant incurred no other liabilities and made no other advances than the \$678.50 cash, advanced to Smith. The latter testified that he received from the defendant the sum of \$678.50 in cash, and some casks that he had ordered from the defendant. The defendant testified that the casks referred to were furnished at the request of Smith, and were worth the sum of \$39.55, including drayage, which amount was charged to Smith as an advance under the contract. It is clear, therefore, that the defendant should have been allowed that amount as an offset in addition to the \$678.50. The cause is remanded, with directions to the court below to modify the

judgment by inserting therein \$912.95, instead of the words and figures "nine hundred and fifty-two and fifty-hundredths (\$952 50-100), dollars." As so modified the judgment will stand; but the respondent will be taxed with the costs of this appeal.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

87 Cal. 11

ROBINSON v. MERRILL *et al.* (No. 12,900.)
(*Supreme Court of California*. Dec. 11, 1890.)

STREET ASSESSMENTS—FORECLOSURE OF LIEN—
PARTIES.

In an action to foreclose a street assessment lien upon a lot under St. Cal. 1871-72, p. 816, it being required by the statute that the owners of the lot be sued, the burden of proof that defendants were the owners is upon plaintiff, though the answer alleges that the title was in certain persons, one of whom was not a party defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

J. M. Wood, for appellant. Geo. B. Merrill, for respondents.

BELCHER, C. C. This action was brought to foreclose a street assessment lien upon a lot of land in the city and county of San Francisco. The original complaint was filed in November, 1877, and an amended complaint in March, 1887. The court below gave judgment for the defendants, and the plaintiff appeals from an order denying his motion for a new trial. The complaint alleged, among other things, that the defendants were the owners of the property assessed. The answer denied this averment, and alleged that "at all the times and dates of the proceedings set forth in the complaint, and particularly on the twenty-first day of May, 1877, the defendant J. C. Merrill, and one Moses Ellis, who is not made a party defendant in this action, were the owners in common, each of one-half part undivided, of the land mentioned in said complaint." At the trial the plaintiff offered and read in evidence the original contract, assessment, diagram, and warrant, and affidavit of demand thereto annexed, together with the indorsements thereon, showing the due recording of all the papers, and also a deed of J. C. Merrill, by the sheriff of San Francisco, conveying all the undivided one-half part of the land in question to his co-defendant, the Hibernia Savings & Loan Society, on the 9th day of July, 1881, which was recorded on the 11th day of the same month. The plaintiff then rested his case, and the defendants offered no evidence. The court found that all the allegations of the complaint were true, except as to the ownership of the land, and, as to that, "that the defendants were not the owners of said land, on the 21st day of May, 1877, as alleged in said amended complaint, or at any other time;" and, as a conclusion of law, that the plaintiff was not entitled to a judgment and decree in his favor, but that defendants were entitled to judgment for their costs. To maintain his action, it was

necessary that the plaintiff make all the owners of the property assessed parties defendant. *Hancock v. Bowman*, 49 Cal. 413; *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525; *Harney v. Appelgate*, 57 Cal. 205. Whether the defendants were such owners or not was an issue distinctly raised by the answer, and the only question is, on which side was the burden of proof upon this issue? Counsel for appellant contend that the burden was on the defendants to show that they were not the owners of the property, but that Merrill and Ellis were, as alleged in the answer. In support of their contention, counsel cite section 13 of the act under which the proceedings were taken, (St. 1871-72, p. 816,) declaring what shall constitute a sufficient complaint, and section 17, declaring who are to be regarded and treated as owners, and also the case of *Whiting v. Townsend*, 57 Cal. 515. The portions of the sections cited read as follows: Section 13: "In bringing an action to recover street assessments, the complaint need not show any of the proceedings prior to the issuance of the assessment, diagram, and certificate; but it shall be held legally sufficient if it shows the title of the court in which the action is brought by the parties plaintiff and defendant, the date of the issuance of the assessment, the date of the recording thereof, the book and page where recorded, a general statement of the work done, a description of the lot or lots sought to be charged with the assessments, the amount assessed thereon, that the same remains unpaid, and the proper prayer for relief." Section 17: "The person owning the fee, or the person in the possession of lands, lots, or portions of lots, or buildings, under claim of ownership, or exercising acts of ownership over the same for himself, or as the administrator or guardian of the owner, or the person in whom, on the day the action commenced, appears the legal title to the land by deeds recorded in the recorder's office in the city and county of San Francisco, shall be regarded, treated, and deemed to be the owner, (for the purposes of this law,) according to the intent and meaning of that word as used in this act." In *Whiting v. Townsend* it was held that the complaint was sufficient under the thirteenth section of the statute, but there was no suggestion or intimation that all of the owners need not be joined as defendants. On the contrary, the court, on page 519, said: "The finding of the court below was that the defendants were the owners in fee of the land at the time the assessment was made, and at the date of the commencement of the action. This is a sufficient finding upon the question of ownership. * * * The whole lot was liable for the entire assessment, and no particular part of it was liable for any particular portion of the assessment. The statute requires that the owners of the land, lot, or portion of lot assessed shall be sued," etc. In the sections and case above cited we see nothing to sustain the theory of appellant. His complaint undoubtedly complied with the provisions quoted from section 13, but it does not follow, because this is so, that

the necessary parties were made defendants. In a case of this kind, the owners of the property assessed, or their representatives, on the day when the action is commenced, must be sued, or the action must fail. Whether the defendants were such owners or not was therefore an issuable fact, and the burden of establishing by competent proofs the affirmative of the issue was clearly cast upon the plaintiff. He offered no evidence upon the subject, and his theory seems to have been that the averment in the answer that Merrill and Ellis were the owners was new matter which relieved him of the burden, and cast it upon the defendants. This theory, however, is untenable. The averment referred to was not new matter, but was, in legal effect, merely a denial of the averment of the complaint as to ownership. *Goddard v. Fulton*, 21 Cal. 436. The appellant also says in his brief: "The Hib. S. & L. Society was the owner of one-half, and why not be compelled to pay a half, at any rate?" A full answer to this query is found in the cases above cited. In *Clark v. Porter* and *Diggins v. Reay* it was distinctly held that, in such a case as this, the statute gives no authority for a decree enforcing the lien, in the absence of any of the parties interested. We advise that the order appealed from be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

87 Cal. 166

EBY v. BOARD OF SCHOOL TRUSTEES *et al.*
(No. 13,172.)

(*Supreme Court of California.* Dec. 18, 1890.)

MANDAMUS—QUESTIONS DETERMINED—PARTIES.

1. On proceedings for a writ of mandate to compel the officers of a school-district to rebuild, on the old site, a school-house destroyed by fire, as they had been directed by the electors of the district in school meeting assembled, the officers cannot raise the question of the paramount title to the site, as its possession by the district for a

number of years for school purposes is *prima facie* evidence of ownership in the district.

2. While the question of title could not be litigated in this *mandamus* proceeding, the court below properly admitted evidence showing the dedication of the site to school-house purposes, and its possession by the district, so as to enable the court to determine whether or not, in its discretion, it should award the writ.

3. Under Code Civil Proc. Cal. § 1086, which provides for the issuance of a writ of mandate "on the application of the party beneficially interested," a tax-payer of the district, whose children attend the school, is a proper party to apply for a writ of mandate to compel the compliance of the officers of the district with a vote of the electors as to the location of the school-house site. Overruling *Linden v. Alameda Co.*, 45 Cal. 7.

In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

John F. Ellison, for appellant. Chipman & Garter, for respondents.

WORKS, J. This is a proceeding for a writ of mandate to the board of school trustees of Red Bank school-district, in Tehama county, and the members thereof—A. W. Coffman, C. L. Allen, and Alfred McClure—commanding them to immediately proceed with the erection and construction of a school building upon a certain lot within said school-district, of which the district is alleged to be the owner, and to complete the same within a reasonable time. The verified petition for the writ states, among other things, substantially, the following: That some years prior to October 14, 1886, the district had built and occupied a school-house on a lot therein described; that on October 14, 1886, said school-house had been destroyed by fire; that in April, 1887, the board of trustees called a meeting of the qualified electors of the district, of whom petitioner is one, to be held on the 25th day of April, 1887, "for the purpose of determining a proposition to change the location of the school-house of said district from the said old site to a position a little less than one-half mile south thereof;" that due notice of such meeting was given by posting notices as required by law; that said meeting was held at the time and place appointed, and was organized by electing J. G. Allnut, chairman, and A. W. Coffman, being the clerk of said district, acted as secretary; that it was resolved by a majority vote of the electors at said meeting that the site of the school-house should not be changed, but should remain upon the lot occupied by the house which had been destroyed by fire, and that the trustees of the district be "instructed to erect any school buildings or structures, contemplated or proposed to be erected, upon the location, and at the place above described, and not elsewhere," and that the minutes of the meeting be entered upon the records of said district; that the secretary, Coffman, neglected and refused to keep the minutes of the meeting, or to enter them upon the records of the district; that bonds of said district had been issued and sold for the purpose of raising money to build a school-house in and for the district, and that upon the 1st day of December, 1887, the proceeds of

the sale of the bonds, amounting to \$810, were deposited in the county treasury of Tehama county, to the credit of the district, and subject to be applied to the building of such school-house; that petitioner has demanded of the board and the several members thereof that they "proceed with the erection and construction of said school-house upon the premises known as the 'Old Site,'" but that they have neglected and refused so to do, and, contrary to the instructions and resolutions of said meeting, are proceeding to build a school-house at another and different place, and to use and apply the funds aforesaid for that purpose; that by the refusal of the board to build on the old site, and the building in a different place, taxation upon the property of the district will be increased, the property of plaintiff will be injuriously affected, and the school privileges and opportunities of the children of plaintiff will be greatly delayed and impeded, and the plaintiff is, and will be, greatly and irreparably injured and damaged, he being the owner of a large amount of taxable property in said district, and having children that are entitled to attend school therein. The answer of the board, and of a majority of its members, denies that at the meeting held on April 25, 1887, the electors of the district resolved not to change the site of the school-house, or that the board was instructed by that meeting to proceed to build on the old site, and alleges, on the contrary, that a resolution, offered at that meeting, to instruct the trustees to build on the old site was defeated by a majority of one vote; denies that the secretary neglected or refused to keep or record the minutes of that meeting, and alleges, on the contrary, that the secretary did take the minutes of that meeting and duly record them in the proper book of the district; denies that the district owns the old site; denies that, by building on a different site, taxation on the property of the district will be increased, or that plaintiff will be injured or damaged; alleges that, subsequent to the meeting of April 25th, another meeting was duly called and advertised for June 6, 1887, which was duly held on that day for the purpose of determining as to a change of the school-house site, and at which it was unanimously resolved to instruct the trustees to build the school-house on the new site, a little less than half a mile south of the old site, where the trustees have commenced to build it. The court found for the plaintiff on all the material issues, and awarded a peremptory mandate, which, after reciting the facts found, is in the following language: "Therefore we do command you that, immediately after the receipt of this writ, you proceed with promptness, diligence, and dispatch to construct and erect upon the said premises, location, and site, hereinbefore particularly described, a school-house in and for said Red Bank school-district, and to use and apply the said fund now deposited in the treasury of the county of Tehama, state of California." The appeal is from the judgment, and from an order denying defendant's motion for a new trial. The answer of the defendants denied that the

school-district owned the land on which the old school-house stood. It is contended by the appellants that the question of title to real estate could not be tried in a *mandamus* proceeding, and that therefore, upon an answer being filed, raising the question of title, the proceeding should have been dismissed. It is true that, where a question of title to real estate is directly in issue, *mandamus* is not the appropriate remedy to determine such question. *Babcock v. Goodrich*, 47 Cal. 508; *Weaverville & M. W. R. Co. v. Board Sup'rs*, 64 Cal. 70. But where the question is incidental merely, and may affect the discretion of the court in awarding or denying the writ, it is proper that the court should be satisfied on the subject. Here it appeared that the district was and had been for a number of years in possession of the school lot, using it for school purposes, under such circumstances as to authorize its continued use for those purposes. The mere fact of possession was *prima facie* evidence of ownership. Whether such possession was based upon a paramount title or not was a question which could not be put in issue by the answer and litigated in this proceeding, nor could the defendant ask for a dismissal on the sole ground that by its answer the title to real estate was put in issue. In *Weaverville & M. W. R. Co. v. Board Sup'rs*, supra, it was said: "It appears by the findings that the plaintiff was incorporated in 1863, and that it in some way obtained possession of the wagon-road which it was incorporated to construct and operate; and that it has ever since retained the possession of it. Such possession was *prima facie* evidence of ownership. Whether based upon paramount title or not was a question which could not be inquired into except in an action or proceeding in which some person who claimed a better title was a party; and it could not be tried by a board of supervisors, nor in a proceeding to determine whether a mandate should issue to compel the performance by said board of a duty imposed upon it by law. The question of title can be inquired into and determined in a proper proceeding, but clearly not in this." So in this case, if the proper residents in the school-district had taken the necessary steps to impose upon the board of trustees the duty of constructing the school-house on this property, the board could not evade the performance of its duty by asserting that the district had no title to the property. It was not a question for the board to pass upon. It was enough that they were directed, in the manner provided by law, to erect the school-house, and they should have acted accordingly. *Pol. Code*, § 1617, subd. 26. Certain evidence tending to show the possession of the property by the school-district, declarations of the owners of the land tending to show a dedication of the property to the district for school purposes, and other like testimony, was admitted, and it is claimed by the appellant that this was error for which the cause should be reversed. As we have said, the question whether the school-district had or had not a good title to the property was one not proper to be liti-

gated in this action. But it was entirely proper for the court below to be assured, by proper evidence, that the possession of the district was such as to secure to it the continued use of the property in case a school-house should be constructed upon it in order to determine whether the court should or should not, in its discretion, award the writ. For this purpose, the evidence was proper, although not necessary to the plaintiff's case. Other items of evidence admitted are objected to, but we find that no error was committed in ruling upon the evidence for which the case should be reversed. It is insisted that the finding that the school-district was the owner of the land was not sustained by the evidence. We think the evidence was sufficient to show a dedication and acceptance of the property, and the adverse use of it for school purposes, sufficient to sustain the finding, but if it were not, as the question of title was one not proper to be litigated in this action, an erroneous finding on the point would not be cause for reversal. Other findings are attacked for the same reason, but we think all of the findings, necessary to justify the issuance of the writ, are sustained by the evidence.

Appellant's counsel further contend that, inasmuch as it does not appear that respondent's taxes will not be increased by the matters complained of, he is not a party beneficially interested in the sense of section 1086 of the Code of Civil Procedure, which requires the writ of mandate to be issued "upon affidavit, on the application of the party beneficially interested;" and, therefore, that the proceeding cannot be maintained upon his application, in his name alone. There can be no doubt upon the findings, which are justified by the evidence, that it was the duty of the board of trustees to build the school-house upon the old site, as instructed by the meeting of April 25, 1887, within a reasonable time after the money for that purpose had been deposited in the treasury; and that a reasonable time within which to commence the building had elapsed before the commencement of this suit is sufficiently evinced by the admitted fact that the trustees had commenced to build on another site than that selected by the meeting of April 25th, before the commencement of this suit. The interest of the plaintiff in the performance of this duty by the trustees of the district resulted from his being a resident elector of the district, having a family of minor children entitled to school privileges therein. After the site for the school-house had been lawfully established and fixed by the meeting of the electors, he was entitled to all the benefits and conveniences incidentally resulting therefrom to him individually, besides his interest in common with other residents of the district, in having the trustees perform an official duty enjoined by law for the common benefit of all. It is claimed, however, that if the removal of the school-house works a detriment to him it must effect a corresponding benefit to others equally entitled to such benefits; and therefore that he has no right to complain. This may be true in the case of a lawful lo-

cation or removal of a school-house, but it is not true in case of an unlawful removal; for, while all would be entitled to the benefits and conveniences accruing from a lawful location or a lawful removal of a school-house, no one would be entitled to any benefit from an unlawful removal. It is true that the injury to respondent is the same in kind as that suffered by all others from whose residences the new site is more distant than the old, if any such there are, and this seems to be the only plausible ground upon which it is contended that respondent is destitute of the beneficial interest necessary to the prosecution of this action in his own name; and the case of *Linden v. Alameda Co.*, 45 Cal. 7, is cited to sustain this position. That was a case of *mandamus* to compel the board of supervisors to order an election to determine the question of removal of the county-seat, on the petition of 1,452 of the qualified electors of the county, of whom the applicant for the *mandamus* was one. In sustaining a demurrer to the application, the court held that the words, "on the application of the party beneficially interested," as used in section 1086 of the Code of Civil Procedure, necessarily mean that the interest of the applicant "must be of a nature which is distinguishable from that of the mass of the community;" and further said: "The party applying here appears to have no interest, beneficial or otherwise, other than such interest as each one of the fourteen hundred and fifty-one persons, besides himself, who signed the petition to the board of supervisors may be said to have. * * * The interest of each and all of them is only the general interest that every citizen has in the proper discharge of public duties confided by law to public officers. Obviously, this is not such an interest as would support an application by any private citizen who may see fit to volunteer to bring a suit in behalf of the public interests." But the principle announced in *Linden v. Alameda Co.* has been disregarded, and, in effect, that case has been overruled by later cases. The point decided in that case is that, to entitle a private party to apply for a writ of mandate, his interest in the subject-matter of the suit must be of a different nature from that of the mass of the community. Yet in *Hyatt v. Allen*, 54 Cal. 353, which was an application to this court for a writ of mandate to the assessor of the city of Stockton, in which the applicant appeared to have no other interest than that of a tax-payer, in common with all other tax-payers of that city, this court, through Mr. Justice SHARPSTEIN, said: "We think that the petitioner, who is a tax-payer within the district of which respondent is assessor, is 'a party beneficially interested' in having all the taxable property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ in this case." *Maxwell v. Supervisors*, 53 Cal. 390, was a proceeding for a writ of review to the board of supervisors to review the action of that body, in behalf of the county of Stanislaus, in entering into a contract for printing, in which the applicant was interested only

as a tax-payer in common with all other tax-payers of the county, and in which the objection that the applicant was not "beneficially interested," within the meaning of section 1069 of the Code of Civil Procedure, was overruled. The language of section 1069 as to the "beneficial interest" of the applicant for a writ of review, is identical with that of section 1086 relating to the interest of the applicant for a writ of mandate; and no reason is perceived why it has not the same meaning in both sections. These cases wholly disregard, and are utterly inconsistent with, the rule announced in *Linden v. Alameda Co.*, since the beneficial interest of one tax-payer in a question of taxation is not different in kind or nature from that of the mass of tax-payers, or from that of any other tax-payer in the same district or community. These later cases seem to be in accord with the weight of authority in other states and in England, as stated by Mr. Justice STRONG, in delivering the opinion of the court in the case of *Railroad Co. v. Hall*, 91 U. S. 354, in which *mandamus* was maintained at the suit, and in the name, of two merchants to compel the respondent to operate its road across the Missouri river, etc., although these merchants had no interest in the proceeding, except to receive and ship goods over the road, as did all other merchants engaged in like business. See, also, *Dill, Mun. Corp.* (3d Ed.) § 865, and notes. Besides, in this case, the respondent, as one of the patrons of the school, has, as such, an interest in the erection of the school-house other than that of a mere tax-payer, and his interest may have been different from that of any other tax-payer in that the removal of the school-house to a distant place might have deprived his children of the benefit of attending the public schools. The nuisance cases referred to are not in point. The rule as to the requisite interest of a plaintiff in this class of cases is specifically prescribed by section 3493 of the Civil Code, which does not apply to cases of *mandamus*. If the respondent has not the requisite beneficial interest to enable him to maintain this action in his own name, no other person except the district corporation has; and that corporation is controlled by the defendants. Therefore, there is no remedy at law whatever, in favor of any party, unless the respondent can maintain this action. Perhaps the illegal diversion and use of the building fund might be enjoined by a court of equity, at the suit of a member of the district corporation; but this would not be an adequate remedy; and, even if it were, it is well settled that an equitable remedy does not deprive a party of the legal remedy of *mandamus*. Judgment and order affirmed.

We concur: FOX, J.; McFARLAND, J.; SHARPSTEIN, J.

PATERSON, J. I concur in the judgment. I do not understand that *Linden v. Alameda Co.* has been overruled by the decision in any later case, and it seems to me the cases are distinguishable. A tax-payer has an interest "which is dis-

tinguishable from that of the mass of the community." Every citizen has an interest "in the proper discharge of public duties;" but every citizen is not the owner of property taxed for state or municipal purposes.

THORNTON, J. I agree with PATERSON, J., and concur in the judgment.

WINN v. SHAW. (No. 13,909.)¹

(Supreme Court of California. Dec. 5, 1890.)

INJUNCTION—TO COUNTY AUDITOR—ILLEGAL PAYMENT OF CLAIMS.

An injunction will not be granted at the suit of a tax-payer to restrain the county auditor from issuing a warrant for the payment of an alleged illegal claim allowed against the county by the board of supervisors, as the county may compel the auditor to refund the money in an action at law if the warrant is in fact illegally issued.

In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Action by W. B. Winn against Rody Shaw, as auditor of San Benito county, to restrain defendant from issuing a warrant on the treasury for the payment of a claim against the county allowed by the board of supervisors. The complaint alleged that plaintiff is a tax-payer of the county. Two newspapers are published therein, which are ready and willing to do the county printing at reasonable market rates. The county board directed its clerk to give notice of its intention to purchase land to be used for court-house and jail purposes, but no such notice was ever published in any newspaper. The county board, nevertheless, completed the purchase, and directed the auditor to draw his warrant on the treasury for the purchase price, and the auditor has declared his intention to comply with such order, wherefore plaintiff prays he may be enjoined. To this complaint, the auditor demurred, on the ground that it states no cause of action. The demurrer was overruled, and defendant excepted. On the trial it appeared that plaintiff was the proprietor of the Free Lance, one of the two newspapers published in the county; and that he and the proprietors of the Advance, the other paper, had entered into an agreement fixing the rates for county printing at about double the rates fixed by a resolution of the county board. In compliance with the order of the board, the county clerk offered to publish the notice of purchase in such papers at the rates fixed by the board, but both publishers declined. The clerk then posted notices in three public places in each supervisor district in the county, as required by section 25, subsec. 8, of the county government act, when there are no newspapers in the county. The board consummated the purchase, and then directed the auditor to draw his warrant for the price. The court below enjoined the auditor from so doing, and he appeals.

Briggs & Hudner, for appellant. Montgomery & Scott, (Michael Mullany and Wm. Grant, of counsel,) for respondent.

¹Reversed on rehearing, post, 968.

PER CURIAM. The demurrer to the complaint in this cause should have been sustained, on the authority of *Linden v. Case*, 46 Cal. 174; *McCoy v. Briant*, 53 Cal. 249; and *Merriam v. Supervisors*, 72 Cal. 519, 14 Pac. Rep. 137. If the claim was illegal as one not authorized by law, as claimed by respondent, the remedy of the county at law is ample. The county is fully protected, in the manner pointed out in the cases cited, and a tax-payer is not entitled to maintain injunction. As said in the last of said cases: "If other safeguards are needed, the legislature can provide them. It is not the province of the courts." Judgment reversed, and case remanded, with directions to sustain the demurrer to the complaint.

(36 Cal. 420)

WILLIAMS v. DENNISON. (No. 13,987.)

(Supreme Court of California. Nov. 25, 1890.)

APPEAL—NOTICE—BOND.

1. A notice of an appeal from a final judgment and from an order denying a new trial, "and from each and every order and judgment made and entered in said cause," will bring up nothing for review which would not be subject to review if the notice had omitted the words, "and from each and every order and judgment made and entered in the case;" and hence the notice is not open to the objection of being indefinite.

2. A single undertaking is sufficient on an appeal from a final judgment, and from an order denying a new trial.

In bank. Appeal from superior court, city and county of San Francisco.

Action by C. B. Williams against E. F. Dennison for money had and received. There was a judgment for plaintiff. Defendant served the following notice of appeal: "You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the state of California from the judgment therein entered, in the said superior court, on the 28th day of February, 1890, in favor of the plaintiff in said action, and against said defendant, and from the whole thereof. Also from the order overruling the motion for a new trial, and from each and every order and judgment made and entered in said cause." The undertaking on appeal was in double the amount of the judgment and costs, and recited that the appeal was from the judgment and the order denying the new trial, and from each and every order and judgment made and entered in said cause. Plaintiff moves to dismiss the appeal.

B. McKinnie, for appellant. J. C. Bates, for respondent.

Fox, J. The appeal in this case must be treated as an appeal from the judgment and order denying the motion for new trial. Under the notice, nothing will come under review on the hearing which would not be subject to review if the notice had omitted the words, "and from each and every order and judgment made and entered in said cause." Treating the appeal as being from the judgment and the order denying the motion for new trial only, as we think it must be treated, and the same not being separately taken, the undertaking is sufficient in form and in substance. *Chester v. Association*, 64 Cal.

42; *Corcoran v. Desmond*, 71 Cal. 102, 103, 11 Pac. Rep. 815. The other cases cited in support of the motion to dismiss the appeal are not in point. Motion to dismiss the appeal denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

WORKS, J. I concur. The notice of appeal and undertaking are in bad form, and in some cases might render the appeal abortive, but there is nothing in the record here to which the unnecessary recitals therein can apply except the appeal from the judgment and order denying a new trial. But, while this mode of procedure is harmless in this instance, it should not be encouraged.

87 Cal. 62

MITCHELL v. SOUTHERN PAC. R. CO. (No. 12,779.)

(Supreme Court of California. Dec. 12, 1890.)

CARRIERS—INJURIES TO PASSENGERS—EVIDENCE.

1. In an action against a railroad company for injuries to a passenger, occasioned by a train running off the track, evidence that at the time the accident occurred the train was running down a steep incline on a new and curved track, at an unusual and dangerous rate of speed, is sufficient to cast on defendant the burden of showing that the accident was not caused by any want of care on its part.

2. Where plaintiff was on the platform of the car when he was injured, and testifies that he went there because he feared that some accident would result from the unusual speed of the train, and intended in that event to jump into the sand on the side of the road, it is a question for the jury whether his action was that of a person of ordinary care and prudence.

3. Civil Code Cal. § 484, absolving railroad companies from responsibility for injuries received by passengers while riding on the platform of a car in violation of the printed and posted regulations of the company, does not apply where the person so injured went upon the platform, in the exercise of ordinary care and prudence, to escape the consequences of an accident which he feared from the unusual speed at which the train was running.

4. It is error to refuse to admit evidence that the other passengers remained seated in the car and were not injured, as their actions are part of the *res gestæ*, and tend to show what they regarded as prudent conduct under the circumstances.

5. The conductor testified that he left the smoking-car several minutes before the accident occurred, plaintiff going out with him; that the train was not then running as fast as it had been, and that he gave certain orders and then returned to the smoking-car, leaving plaintiff on the platform. *Held*, that it was reversible error to exclude a question put to one of the passengers whether the conductor did return to the smoking-car after he and plaintiff left it, and before the accident. THORNTON, J., dissenting.

SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Geil & Morehouse, for appellant. D. M. Delmas, for respondent.

PATERSON, J. This is an action to recover damages for personal injuries sustained by plaintiff while traveling as a passenger on one of defendant's trains. Appellant contends that the judgment and

order should be reversed because plaintiff failed to show negligence in the management of the train, or any defect in the defendant's railroad track. It is doubtless true, as claimed by appellant, that in cases of this character the burden of proof is upon the plaintiff to establish negligence on the part of the defendant, and that the mere fact that a passenger was injured while on his journey is not sufficient to raise a presumption of negligence on the part of the carrier. But in this case not only is the injury admitted, but the derailment and overturning of the car are undisputed facts, and there is evidence tending to show that at the time the accident occurred the train was running down a steep incline leading to the bed of a river on a new and curved track, at an unusual and dangerous speed. This showing was sufficient to throw upon the defendant the burden of proving that the injury was not caused by any want of care on its part. *Boyce v. Stage Co.*, 25 Cal. 460; *Lawrence v. Green*, 70 Cal. 417, 11 Pac. Rep. 750; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266; *Buel v. Railroad Co.*, 31 N. Y. 314.

At the time the accident occurred the plaintiff was standing on the platform of the smoking-car, and it is claimed that he cannot recover for the injury sustained by him, and that defendant is relieved from responsibility therefor by the provisions of section 484, Civil Code, which reads as follows: "Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section." Plaintiff admitted at the trial that defendant had proper notices as required by this section posted in all of its cars, and that he had full knowledge of their contents before the accident. He testified that he had gone out upon the platform immediately before the accident in consequence of the fear that some disaster would occur; that his attention was directed to the speed of the train as soon as it passed over the top of the grade and began to descend; that the great and unusual speed at which the train was going, taken in connection with the fact that the road was new and temporary, led him to believe that an accident would occur, and that he went out upon the platform intending to jump therefrom to the sand on the inside of the curve, where he believed he would escape with less injury than if he remained in the car, and that he had no sooner reached the platform than the car was overturned and he was thrown upon the ground; that he had been for a long time in the employ of Wells, Fargo & Co., had acquired a knowledge and skill in the movement of trains, could distinguish

between the degrees of speed by the motion of the train, and that the train ran faster on the day of the accident than ever before. The evidence of the defendant tends to show that the plaintiff had been upon the platform several minutes before the accident occurred, but if the jury believed the testimony of the plaintiff it was for them to say whether the circumstances were such as would lead a person of ordinary prudence to act as the plaintiff did. The inquiry is, where there has been an unsuccessful attempt to escape danger in an accident, was the attempt which was made an unreasonable or rash act, or was it one which a person of ordinary care and prudence might do under the circumstances? The answer to this inquiry cannot be made to depend upon the result of the attempt to escape, nor upon the result which would have occurred if the attempt had not been made. It would be unreasonable to require a passenger in case of accident to judge with absolute certainty the degree of danger attending him if he made no effort to escape, and the absolute consequences of an effort to escape. He must act upon the probabilities of an effort to escape as they appear to him, and choose that hazard which seems to him as a person of prudence to be the least. Of course the facts that he was injured in the attempt to escape, and that those who remained in the car escaped without injury, are circumstances which the jury should consider in determining whether he acted as a man of ordinary prudence would under the circumstances, but, where he has acted in the manner described, it cannot be said that his attempt to escape constituted contributory negligence. *Twomley v. Railroad Co.*, 69 N. Y. 160; *Railroad Co. v. Mowery*, 36 Ohio St. 418.

In *Buel v. Railroad Co.*, 31 N. Y. 319, the court said: "The statute exempts the railroad company from liability to a passenger who shall be injured while on the platform of a car, etc., in violation of the printed regulations of the company, posted up at the time in a conspicuous place, inside of its passenger cars then in the train, provided the company at the time furnish room inside its passenger cars sufficient for the proper accommodation of the passengers. Laws 1850, c. 140, § 46. There was in this case a printed regulation, pursuant to this statute, posted in a conspicuous place inside the car, prohibiting passengers from standing or riding on the platform of any car. But neither the statute nor the regulation has any application to a case like the present one. * * * The statute was intended to prevent the imprudent act of standing or riding on the platform, but not to absolve railroad companies from responsibility for every injury which might happen at that place, when a passenger is passing over it, while justifiably entering or leaving the cars." In that case it was held that, although the plaintiff was injured while attempting to escape from the car in a collision, and although the passengers in the same car with him, who kept their seats, escaped uninjured, he could not be held guilty of contributory negligence; that he acted

with ordinary care and prudence. We have carefully examined the instructions of the court to the jury, and find no error in any of them.

The court erred in sustaining plaintiff's objections to the questions asked by defendant as to the conduct of the passengers who remained in the car, and whether any of them were injured. Evidence of the action of other passengers in such cases is competent as a part of the *res gestæ*, and to show what they, being in the same dangerous situation, deemed prudent conduct. They all have an equal interest in protecting themselves, and will be presumed to have done what appeared to them to involve the least hazard. This error was cured, however, by other testimony—which appears not to be disputed—showing that there were only three passengers in the car besides plaintiff, and that they all remained in their seats until the car was overturned, and all escaped unhurt.

There is another error assigned, based upon the refusal of the court to allow defendant to ask how often plaintiff had traveled over the road, prior to the accident; but, as evidence on the topic went in afterwards without objection, no prejudice can be predicated on the ruling complained of.

There was one error which we think was prejudicial, and which entitles the appellant to a new trial. The plaintiff testified that the car left the track immediately after he reached the platform; that "just as I [he] had stepped out of the car-door the crash came." It was claimed by the defendant, and it attempted to show by evidence, that plaintiff was improperly on the platform; that he was not there through fear of an accident; that he had been standing on the platform in violation of its regulations several minutes before the accident occurred, and was consequently guilty of contributory negligence. The conductor testified that he left the smoking-car two or three minutes before the accident occurred, and that plaintiff went out with him; that the train was not going as fast then as it had on former occasions at the same point, and while plaintiff was on board; that he gave the brakeman orders to let off the brakes, walked back into the smoking-car, and took his seat while the plaintiff remained standing on the platform. The defendant then called S. W. Smith, who was one of the three passengers in the car at the time of the accident, and he was asked to state whether Mr. Clark, the conductor, returned into the smoking-car after he and plaintiff left it, and before the accident occurred. Plaintiff objected to the question on the ground that it was immaterial, the court sustained the objection, and defendant excepted. The question whether plaintiff went upon the platform under the circumstances narrated by him was a most important one; in fact the main question in the case is whether he acted as a prudent man would under the circumstances. In determining that question, the length of time he remained upon the platform, and the conduct of others on the train, including the officers of the

train, is material, competent, and important. The testimony of the conductor, if true, would tend not only to impeach the testimony of the plaintiff as to the length of time he stood on the platform, but directly to prove that there was no apparent reason for alarm at the time the accident occurred. To enable the jury to decide whether the conductor's version of the circumstances or that of the plaintiff was correct, the testimony of Smith, a disinterested witness, might have been important. It certainly was material and competent, and should have been admitted. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.; FOX, J.

I concur in the judgment. WORKS, J.

I dissent. SHARPSTEIN, J.

THORNTON, J. I dissent. The exclusion of the testimony of Smith, on which the reversal is ordered, could not possibly have caused any injury to the defendant. Evidence of the return of the conductor before the catastrophe occurred in which the plaintiff was injured was already in and uncontradicted. The conductor had already testified to the fact of such return. The time of the return of the conductor from the platform could not possibly show how long the plaintiff stood on the platform, as the conductor, when he returned, left the plaintiff standing on the platform. The evidence shows that the conductor and plaintiff went on the platform at the same time. The conductor returned, leaving plaintiff on the platform. How could the time of the return of the conductor show how long plaintiff remained on the platform after such return? If the return of the conductor from the platform could show anything as to the time when the plaintiff remained on the platform after such return, the fact of his return was already in evidence and uncontradicted. A case carefully and laboriously tried should not be sent back for a new trial for an error, if any, so trifling.

87 Cal. 84

CITY OF NAPA v. HOWLAND. (No. 12,800.)

(Supreme Court of California. Dec. 12, 1890.)

EJECTMENT—PARTIES—EVIDENCE—DEDICATION—FINDINGS.

1. In ejectment, where plaintiff city claims the land in dispute by dedication, and the court has found that there was such a dedication, a further finding that after the dedication the owners of the land directed that it be so designated on the maps of the city is immaterial, and the fact that it is not supported by the evidence will not affect the judgment for plaintiff.

2. Though the owner of the land had no title thereto at the time he dedicated it, he and his grantees are estopped to deny the fact of dedication; and a title subsequently acquired by him inures to the benefit of the public, by virtue of such estoppel.

3. Where defendant in ejectment admits that he is in possession of the land when it is demanded of him, the tenant from month to month by whom he holds possession is not a necessary party defendant.

4. In ejectment by a city for land claimed to have been dedicated as a levee and street, where maps are produced on behalf of plaintiff, the error of admitting them without evidence that the former owner of the land filed or adopted them is waived by defendant's failure to object to them, and his discussion of them in argument, as evidence on the issue of dedication.

5. A finding that land was dedicated as "a public levee" is supported by evidence of dedication as a "public landing," the word "levee," as applied to land such as that in question along a navigable stream, having the same meaning as "landing."

In bank. Appeal from superior court, Napa county; A. J. BUCKLES, Judge.

F. E. JOHNSON, for appellant. O. R. COGHLAN, for respondent.

PATERSON, J. This is an action of ejectment. The main question involved in the issues is whether the lands in controversy have ever been dedicated for the use of the public as a levee and street. The court found from the evidence that the property was dedicated to public use by the owners thereof about the year 1850, and that ever since said dedication the land has, by direction of the owners of the fee thereof, been designated and represented on the maps of the city of Napa, as public streets and levees; that the public used the same exclusively until March 1, 1875, when defendant, without authority or right, ousted plaintiff therefrom, and has ever since wrongfully held exclusive possession of the property. The plaintiff had judgment against defendant for the possession of the lands, but the defendant was permitted to remove his warehouses and fences.

1. The evidence on behalf of the plaintiff is ample to support the finding as to dedication.

2. The court found, finding 2, that the land had been dedicated by the owners, Coombs and others. This was the ultimate and essential fact, and the subsequent finding that the land by direction of the owners had, after such dedication, been designated on the maps of the city, was a finding upon an immaterial matter, at least upon a matter that was not controlling. The latter finding may be excluded as not supported by the evidence, and yet the judgment will be supported by the finding upon the question of dedication. The maps were not necessary to support the finding of dedication. The evidence of the acts and declarations of Coombs was sufficient to show a dedication.

3. If it be assumed that Coombs had no title at the time he dedicated the property, he and his grantees are nevertheless estopped from denying the fact of dedication. His claim was confirmed by the board of land commissioners in April, 1854, and a patent was issued to him in 1866. His newly-acquired estate "feeds the estoppel." God. Easem. p. 95, and cases cited in note; Tyler, Ej. pp. 725, 726; Washb. Easem. p. 62.

4. When the city marshal served a notice on defendant demanding that he deliver up possession of the premises, the defendant admitted that he held possession of the property, and said he would not surrender it. This testimony of the marshal was not contradicted by defendant. The

premises were in possession of a tenant of defendant under a letting from month to month. Under these circumstances it was not necessary that the tenant be made a party defendant. *Finnegan v. Carraher*, 47 N. Y. 497.

5. It is claimed that the court erred in its ruling in regard to the Thompson and Pierce maps. If the evidence necessary to render them proper for consideration under the ruling of the court was not produced by plaintiff, the defendant ought to have moved to strike them out. Instead of calling the attention of the court when plaintiff rested its case to the fact that there was no evidence showing that the former owners of the land had made, filed, or adopted the maps, counsel for defendant in the argument of the case considered and discussed the effect of the maps as evidence on the issue of dedication or no dedication. Therefore, if it be assumed that there was, at the time that the maps were offered and admitted in evidence, an express and binding understanding between counsel and the court such as is claimed, we think that the failure to move to strike them out, and the manner in which they were treated by counsel in the argument, constituted a waiver of the limitation. Furthermore, there is no exception in the record upon which error can be predicated. There is no ruling which we can review. The court did not err in admitting the map called "Plan of Napa City, filed for record at the request of Nathan Coombs."

6. It is said that the evidence does not support the finding of dedication "as a public levee and for public street purposes," because it shows a dedication, if any, for a public landing. It matters but little what name is given to the place, so long as the fact appears that it was dedicated for public use. "A landing is a bank or wharf to or from which persons may go from or to some vessel in the contiguous water." *State v. Graham*, 15 Rich. Law, 310. The word "levee," as applied to portions of the public highways bordering on navigable streams and sloughs in the interior cities and towns of this state, has the same meaning as "landing." The judgment and order are affirmed.

We concur: FOX, J.; WORKS, J.; McFARLAND, J.; SHARPSTEIN, J.

87 Cal. 78

Ex parte WILLIAMS. (No. 20,724.)

(Supreme Court of California. Dec. 12, 1890.)

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS
—IMPRISONMENT IN HOUSE OF CORRECTION.

1. St. Cal. 1877-78, p. 953, relating to the house of correction in the city and county of San Francisco, provides that the criminal court of such city and county may sentence a prisoner on conviction to the house of correction in any case where he might be imprisoned in the county jail. *Held*, that this is not a special or local act relating to the punishment of crime, within the meaning of Const. Cal. art. 4, § 25, as it does not change the punishment or degree of any crime under the existing uniform laws, but only provides a place where punishment may be inflicted.

2. Nor is it an act regulating the practice of courts of justice within the meaning of such sec-

tion of the constitution, as it relates only to the execution of their judgments, which is a matter subject to legislative discretion.

In bank. *Habeas corpus.*

N. S. Wirt, for petitioner. *Geo. A. Johnson*, Atty. Gen., and *J. D. Page*, Dist. Atty., for respondent.

PER CURIAM. In this case, by leave of the court, an amended petition was filed, after the decision which was filed July 24, 1890, (24 Pac. Rep. 602;) and on such amended petition the petitioner was permitted to reargue the case on the question of the constitutionality of the act of 1878, under which petitioner was sentenced to the house of correction. After a patient hearing and investigation we deem it necessary only to add to that which was said in our former opinion that, in our judgment, the act is not in conflict with section 25, art. 4, of the constitution. It is not special or local, either for the punishment of crimes or misdemeanors, or regulating the practice of courts of justice. The laws for the punishment of crimes and misdemeanors are uniform throughout the state, in the matter of determining what is a felony, and what a misdemeanor, and the legal consequences flowing from the conviction of either. They are uniform in prescribing the punishment of imprisonment, when such punishment is allowed at all, for each of the several offenses for which that punishment is provided. This act does not change the punishment, or the degree of the crime. All that it does is to authorize the court in San Francisco, in its discretion, to cause the punishment to be inflicted in one place, instead of either of two or three others where it might be done. If the legislature has no power to authorize courts to do this, then it is powerless to provide for imprisonment for felony in more than one place in the state. We find no such limitation upon the power of the legislature in the premises. If, as is claimed in argument, the imprisonment must be in a state-prison in order to be equal and uniform, then there must be but one state-prison; for if more than one, even though the government and discipline in all be the same, it would be impossible that the climatic and other conditions would be the same, and hence the conditions of punishment would be unlike. Such cannot be the meaning of the constitution or the law. It is the fact of imprisonment, and the labor during confinement, and the civil consequences that attach to the conviction, that constitute the punishment, and not the place where the imprisonment is carried out.

Nor is the act one regulating the practice in courts of justice. Practice is that course of proceeding by which the investigation is had, and the judgment reached. When reached, the place and manner of executing the judgment (it being uniform in character with other judgments in like cases) is subject to legislative discretion; and the legislature may prescribe that all judgments upon conviction for felony shall be executed in one place, or that those in different parts of the state may be executed in different places, or, having

prescribed different places for such purposes, it may, as it has, leave it to the discretion of the court in each instance to determine in which of them the judgment shall be executed. Let the writ be discharged, and the prisoner remanded.

(87 Cal. 40)

SPAULDING v. NORTH SAN FRANCISCO HOMESTEAD & RAILROAD ASS'N. (No. 12,685.)

(*Supreme Court of California.* Dec. 12, 1890.)

PETITION FOR STREET GRADING—PRESUMPTION OF REGULARITY.

1. St. Cal. 1871-72, p. 804, provides that certain street grading cannot be ordered by the supervisors unless a majority of the frontage of lots petition therefor. Certain grading was done upon a petition from which it did not certainly appear whether the petitioner owned a majority of the frontage or not. *Held* that, since the board must necessarily have passed upon the sufficiency of the petition before ordering the work done, it was properly presumed to be sufficient, and testimony to the contrary was rightly excluded. Distinguishing *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Supervisors*, 79 Cal. 388, 21 Pac. Rep. 849.

2. The act further provides that the board shall publish notice of its intention to order the work done, and that lot-owners who feel aggrieved by the proposed improvement shall file a remonstrance, which shall be passed upon by the board, and its decision shall be conclusive. *Held*, that one who failed to file such remonstrance was concluded by the decision, and could not attack it by way of defense to a suit to collect the assessment for the improvement.

3. Where a contract was made for doing the work for 50 cents per yard, but afterwards, without the contractor's request, the board published a new notice of intention, which resulted in a new contract with him to do the same work at 60 cents per yard, for which action no reason appears, it must be presumed that the board acted regularly, and that for some defect in the proceedings the new contract was necessary.

In bank. On rehearing. For former report, see 24 Pac. Rep. 600.

E. J. Pringle and *D. H. Whittemore*, for appellant. *W. H. H. Hart* and *J. W. Wood*, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment enforcing a street assessment against a lot on Lombard street. The case was heard in department, and the judgment was affirmed; and the facts of the case are stated in the opinion then rendered by Commissioner Gibson, filed July 8, 1890. A hearing in bank was ordered, because it was strenuously urged that the decision was in conflict with *Mulligan v. Smith*, 59 Cal. 206, and *Kahn v. Supervisors*, 79 Cal. 388, 21 Pac. Rep. 849. But, after argument on rehearing, and mature consideration, we are satisfied with the conclusions reached in department. *Mulligan v. Smith*, and *Kahn v. Supervisors*, arose upon a special statute which did not provide for an adjudication of the jurisdictional fact that a majority of the frontage of lots fronting on the work proposed to be done was represented by the owners thereof in a petition for the work; and did not provide for a hearing to any of the owners of such frontage on that issue. But we think that section 4 of the act in question in the case at bar (St. 1871-72, p. 805,) does not provide for such adjudication by, and such

hearing before, the board of supervisors, and that the decision of the board that a majority of such frontage was represented in the petition was a decision which the act says "shall be final and conclusive." In *Freeman on Judgments*, § 523, it is stated as a rule (founded on numerous authorities there cited) that "whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack." The rule embraces "a large number of persons and tribunals not ordinarily spoken of as 'judges' nor as 'courts,'" for "their authority in this respect is judicial," (section 539;) and it was expressly applied by this court to boards of supervisors in *People v. Hagar*, 52 Cal. 182. The rule stated in the latter case governs, we think, the case at bar. In *Turrill v. Grattan*, Id. 97, the only question which seems to have been raised was as to the sufficiency of the petition itself, which was a question not of fact, but of law. In the case at bar, we think that the petition was sufficient. A diagram, which was not as full in details as it might have been, was presented with the petition; but it was not inconsistent with the main body of the petition, which sufficiently stated the facts required by the statute. The point that the contract was invalid because there had been a previous contract is sufficiently answered in the said opinion of the commissioner; and we may add that the remedy for any such objection to the contract is provided for in section 12 of the act. It may be remarked also that it is doubtful whether the points which appellant seeks to make against the petition and to the rulings of the court are properly presented in the record. The judgment and order denying a new trial are affirmed.

We concur: **PATERSON, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.**

(87 Cal. 49)

BENSON v. SHOTWELL. (No. 12,661.)¹

(*Supreme Court of California.* Dec. 12, 1890.)

VENDOR AND VENDEE—CONTRACT OR OPTION—RIGHTS OF VENDEE.

1. In an action to quiet title, defendant claimed under the following contract, signed by plaintiff, which defendant contended was a contract of sale, while plaintiff insisted that it was an option: "Sept. 7, 1883. Received from * * * one thousand dollars, being deposit on account of sale by me to him of, [a described lot] for the sum of \$16,000. * * * Purchaser to have rent of lot from and after September 1st. Possession of lot given and guaranteed to purchaser on transfer of title. Fifteen days given to purchaser for examination of title and making of deed. If title not satisfactory to purchaser, sale to be null and void, and above deposit returned to him." *Held*, that this was a valid contract of sale and not an option.

2. The abstract of title disclosed that the title had at one time come into "H. P. Hepburn," and that there was no deed from him, but one from "H. P. Hopkins." Plaintiff claimed that the original deed in his possession was signed by H. P. Hepburn, but refused to allow defendant to submit this deed to his counsel, or to have it recorded, and on the last of the 15 days he tendered

¹ Rehearing denied, post, 681.

defendant a conveyance, and demanded the balance of the purchase money. *Held* that, though plaintiff had a good title, it was not satisfactorily proved according to the terms of the contract, and defendant was justified in refusing to complete the contract. *WORKS, J.*, dissenting.

3. The lot was occupied by various tenants, some of whom had attorned to plaintiff, and some had not. Those who had not attorned occupied shanties, and could not be found in the day-time at all. It also appeared that the buildings and fence of the adjoining lot on one side projected over the line, and had so projected for many years. The owner of the encroaching lot was a non-resident who had no resident agent authorized to act. *Held*, that plaintiff could not and did not give possession within the terms of the contract.

4. When, under such circumstances, plaintiff brings an action to quiet title, he can only have a decree upon condition that he restore the money paid by defendant upon the contract.

In bank. Appeal from superior court, city and county of San Francisco; *F. W. LAWLER*, Judge.

A. N. Drown, for appellant. *Edward J. Pringle*, for respondent.

Fox, J. Action in form *quia timet*, or one brought under section 738, Code Civil Proc., for the purpose of determining the adverse claim of defendant to beach and water lot No. 717, San Francisco. Defendant denies that he asserts any claim to the lot, other than that which he derives under a certain contract with the plaintiff for the purchase thereof; alleges payment of \$1,000 under said contract, with offer to fully perform on his own part, but inability and refusal to perform on the part of plaintiff; and, in addition, files a cross-complaint against plaintiff, demanding a return of said \$1,000, with interest, together with damages for non-performance on the part of plaintiff, and other relief. Findings and judgment for plaintiff, motion for new trial denied, and defendant appeals. Respondent claims that the transaction between himself and appellant was not a sale, or contract for the sale, of the lot, but a mere sale of an option to buy the lot; that the \$1,000 was paid for the option, and that defendant not having exercised the option, and made the purchase, the transaction is finally closed, and he, plaintiff, is entitled to have his title quieted, and to retain the \$1,000. Defendant, on the other hand, insists that the transaction was a sale. The contract was in the words and figures following: "San Francisco, September 7, 1883. Received from J. M. Shotwell one thousand dollars, being deposit on account of sale by me to him of beach and water lot No. 717, [describing it,] for the sum of sixteen thousand dollars (\$16,000.) Purchaser to pay the commission of two hundred dollars (\$200) for selling, to Messrs. Moxley and Fisher. Purchaser to pay for paying crossing of Howard and Steuart streets, now being done, at an amount not exceeding one hundred and twenty dollars (\$120.) The seller to pay all other street work now being contracted for or already done. Purchaser to pay taxes for current year 1883-4. Purchaser to have the rent of lot from and after September 1st. Possession of lot given and guaranteed to purchaser on transfer of title. Fifteen days

given to purchaser for examination of title and making of deed. If title not satisfactory to purchaser, sale to be null and void, and above deposit returned to him. [Signed] JOHN BENSON. Witness, CHAS. C. FISHER." The thousand dollars was paid simultaneously with the execution, delivery, and date of this paper. The 15 days consequently expired on the 22d of September. There is no question in our minds that this was a good and valid contract for the purchase and sale of the lot; the deposit to be returned in case the title did not prove satisfactory, or of inability on the part of the seller to comply with its terms. It comes fairly within the provisions of sections 1726 and 1729 of the Civil Code. It was signed by the party to be charged, and by the only party who was required to sign it. Civil Code, § 1741; *Fabian v. Callahan*, 56 Cal. 159. The payment of the deposit by the other party was a sufficient acceptance of its terms, and by the express terms of the paper that payment was not, as claimed by respondent, for an option, but "a deposit on account of sale." For the amount of that deposit, the vendee had and has a lien upon the property, in case of failure on the part of the vendor to make good his part of the contract, unless the vendee is himself first in default. Civil Code, § 3050; *Pom. Eq. Jur.* §§ 167, 1263, and cases there cited.

At or about the time of making the contract, respondent delivered to appellant an abstract of title, which appellant had revised and continued down to date at his own expense, and then placed it in the hands of a well-known examiner. On the 17th of September he received the report of his examiner, and immediately notified the respondent in writing of certain defects in the record title, calling his attention thereto, and, as to one which seemed to be an important one, suggesting that possibly it arose from clerical error in the record, and asking for the original papers, that he might submit them to his counsel and examiner; also calling his attention to certain facts in regard to the occupancy and possession of the lot, and to the fact that "to avoid trouble and give undisputed possession it will be necessary to oust them all." Receiving no response to this, appellant again wrote to the respondent on the 19th as follows: "I am waiting patiently your reply to my note of the 17th inst., referring to matters requiring your attention in clearing up title, etc., to water lot No. 717. If you will be kind enough to inform me where I can find you during business hours, and at what time, I will meet you. I wish to close up the business without further delay." After receiving this letter, respondent called, and claimed that he had the original of the deed to which exception was taken in the chain of title shown by the abstract, which, according to the record, was signed "Hopkins," but which he claimed was in fact signed "Hepburn," as it was required to be, in order to make the title correct, but he refused to let the appellant take it to submit it to counsel, or to put it upon record. His attention was then also particularly called to the condition of the lot as

to the matter of possession, but he took no measures to prepare himself for delivery of possession as required by his contract. On the 22d of September, the day when, by the terms of the contract, the transaction was to be closed, he sent his agent with his deed of the premises, and made a tender thereof, and demanded the remaining \$15,000. Appellant counted out to him the money, and, as he was about to put it in a bag and carry it away, appellant said, "Wait a minute, gentlemen, you must go down and put me in possession of the lot, and then you can take the money away," and added that upon receiving possession of the whole lot, and with the correction of the deeds, he was ready to complete the purchase. The evidence given upon the trial shows the title from two sources: (1) An alcalde grant, made January 3, 1850. (2) A deed from the California land commissioners, dated August 26, 1854. In tracing the title down from the alcalde grant, it came into H. P. Hepburn. There, according to the records of the recorder's office, and as shown by the abstract, there was complete break in the chain of title. The next deed in order of date was from H. P. Hopkins, and there was no deed of any date from H. P. Hepburn. It was admitted upon the trial, and so appears in the record, that the land is within the grant to the pueblo of San Francisco. If that is true, and it must be taken as true for the purposes of this case, here was a fatal defect in the record title. It could not be helped out by a good chain of deeds from the land commissioners down, for, if the land was within the grant to the pueblo, the commissioners had no title to grant, and nothing was acquired or taken under their deed. It therefore became important that the connection should be complete with the alcalde title. According to the record the plaintiff utterly failed to connect himself with that title. Under the contract defendant was entitled to a good paper title, sufficient in law, and was not bound to accept a title resting upon the statute of limitations, or take the risk of determining from facts which he might learn *de hors* the record, whether or not the statute of limitations could be successfully pleaded against an adverse claim. *Hartley v. James*, 50 N. Y. 42. True, plaintiff claimed, and upon the trial proved, that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn. But, at the time when it was his duty to show good title, he allowed the matter to rest upon his naked assertion, and refused to submit his proof for examination, or to permit the deed to be recorded correctly. Defendant had a right, therefore, to stand by the record, and to govern his conduct accordingly. Some other discrepancies in the chain of this title were also pointed out as defects, at the time, but they do not seem to have been seriously insisted upon, and, comparatively, at least, they were immaterial.

As to possession, the evidence shows that there were on the lot several tenements, a blacksmith shop, a shoemaker's shop, a stable, and several shanties, ships,

cabins, and the like; that one or two of these tenements were occupied by persons attorning to the plaintiff, and paying a small monthly rental; that others of them were occupied by persons whose names even could not be learned,—persons sleeping there at night, and absent during the day,—the regular tenant claiming that they slept there by his permission, but he did not even know the names of some of them. Along the rear end of the lot, certain buildings, supposed to stand on the corners, and a fence running from one to the other of them, constituted the rear line of occupancy, but it was found upon survey that these buildings and this fence were inside the line of the lot 1 foot 8½ inches, and that for at least 12 or 13 years this strip had been so fenced out of this lot, and used and occupied by the tenants on the adjoining lot, which belonged to Mrs. Klumpke, then in Europe, with no agent here authorized to act for her in the matter of determining or deciding whether she claimed it or not. These facts appear from the evidence, without substantial, and it seems to us without any, conflict. Under these circumstances, the defendant claimed and demanded that when he paid his money he should be given not only a good paper title, but the actual possession of the lot, and of the whole lot. When demand was made, and the money counted out, plaintiff's agent sent some persons down with defendant to put him into possession, but the tenants said they could not give it. Several of the small tenements were locked up, and the occupants absent, and the strip on the outside of the fence was completely covered, to a depth of several feet, with lumber belonging to the tenant of Mrs. Klumpke. The parties returned without a surrender of possession. It is claimed on the part of respondent that the tenants who were under lease from plaintiff said while there that they would acknowledge the defendant as their landlord, and attorn to him, and that this was all that was required. But this was not the measure of plaintiff's obligation, according to the letter of his bond. According to that paper, defendant was entitled to an actual *possessio pedis* of the whole lot. The language of the contract implied nothing less. Constructive possession, and the duty to attorn, would follow the title, and, if that was all that was meant, there was no need to have said anything about possession in the contract. But in that instrument it is expressly provided that the possession of the lot is to be both "given and guaranteed to purchaser on transfer of title." Nor is this relieved or modified by the other provision that he is to receive the rent from and after September 1st. That assures him, in case the contract is carried out, the rent from a day anterior to the date of the contract, but does not bind him to take the lot with all its incumbrances at the time of final completion of the terms of the agreement. Besides, this proposed attornment was from only two or three of the many occupants of that lot. The others knew no landlord, and were unknown to any. Their tenements were locked up, and access to them

could not be had, without a violation of law. Still more, as to an important portion of the lot, it was certain that an adverse right had grown up, which, if asserted, would defeat the title as to that portion, and it was not known then, or even at the time of this trial, whether it would be asserted or not. By the terms of the contract, delivery of possession and the transfer of title were to be simultaneous, and both were to be concurrent with the payment of the money. The conditions of the contract were mutual and dependent—concurrent—within the meaning of section 1437, Civil Code. Under it, respondent was not entitled to demand payment of the money until he delivered that possession. Civil Code, § 1439; *Hill v. Grigsby*, 35 Cal. 661–663; *Society v. Hildreth*, 53 Cal. 723. The word “possession,” as used in this contract, is to be understood and construed in its ordinary and popular sense. Civil Code, § 1644. According to the uncontradicted evidence, appellant offered to perform, according to the strict letter of the contract, (Id. §§ 1437, 1498;) and no objection was made to the mode of such offer, (Id. § 1501.) Nothing which transpired afterwards met the measure of his rightful demand. The subsequent written surrender of possession to plaintiff by his tenants, which was afterwards shown to defendant, did not meet the calls of the contract. It was a mere statement of surrender, not accompanied or followed by an actual surrender, and, as before stated, was from only a portion of the actual occupants. The court found in favor of plaintiff, and against defendant, on all these questions of performance, and offers to perform, on the part of the respective parties. Without specifying them separately, we think the findings upon these questions are clearly against the evidence, and that the evidence on the subject is without substantial conflict. The case must therefore go back for a new trial, and it remains only to consider the points made on the questions of remedy and relief.

Appellant, although not appearing to be in default, has not asked for specific performance. Respondent has not chosen to bring his action to rescind, but rather seeks to quiet title. If he had sought to rescind, appellant not being in default, respondent would not have been entitled to that relief until he had restored all that he had received under the contract. Id. § 1691; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. Rep. 772, and cases there cited; *Booth v. Hoskins*, 75 Cal. 276, 17 Pac. Rep. 225; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. Rep. 74. He cannot avoid this obligation by coming into equity to quiet his title. The complaint in this case must be treated as a bill in equity. *Brandt v. Wheaton*, 52 Cal. 430; *Hancock v. Plummer*, 66 Cal. 338, 5 Pac. Rep. 514. This action has always been held to be on the equity side of the court. *Polack v. Gurnee*, 66 Cal. 267–269, 5 Pac. Rep. 229, 610. He who asks equity must do equity. *Ballard v. Carr*, 48 Cal. 75; *Guttenberger v. Woods*, 51 Cal. 523. Under this contract and this evidence, plaintiff cannot come into a court of equity, and ask to quiet his title against

the claim of defendant, without restoring the money he has received. *Chandler v. Chandler*, 55 Cal. 269. The real subject of controversy here is the contract of sale, and the rights of defendant thereunder. The judgment must necessarily adjudicate those rights, and will pass only incidentally upon plaintiff's title. *Parnell v. Hahn*, 61 Cal. 131. It may be that respondent can make good title, but he did not at the time show good record title; was unable to put his vendee in possession, and has never yet shown that his title, even if good paper title, has not been defeated as to a part of the lot by adverse possession. Under such circumstances the appellant was entitled to recover the money paid. *Sanders v. Lansing*, 70 Cal. 429, 11 Pac. Rep. 702. It is suggested that we can order a modification of the judgment, requiring plaintiff to repay to defendant the sum of \$1,000, with interest thereon from September 22, 1883, and that thereupon plaintiff's title be quieted. On the evidence such a judgment would seem to be equitable between the parties, but it would not be supported by the findings as they now stand, and this court cannot make findings for the court below. If in the court below the parties shall consent to so adjust their differences, no doubt the court will facilitate them in so doing. All that we can do is to order that the judgment and order appealed from be reversed, and it is so ordered.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

WORKS, J. I concur in the judgment on the ground that possession was not given as provided in the contract. I do not concur in the conclusion reached that a good title was not shown. The respondent showed by producing his deed that the record was incorrect, and that the deed was made by the proper party. This was done on the day the contract was to be consummated, and was sufficient. Besides it was satisfactory to the appellant, as he only required as a condition upon which he was willing to pay the purchase money, that possession of the property be given him.

(3 Cal. Unrep. 321)

DE GUYER *et al.* v. BANNING. (No. 13,240.)¹

(*Supreme Court of California.* Dec. 12, 1890.)

MEXICAN GRANTS—DESCRIPTION—CONFIRMATION—CONFLICTING PATENTS.

In ejectment, plaintiffs claimed under a Mexican grant that had been confirmed by the federal district court in 1857, and had been patented to plaintiffs by the United States in 1858, in accordance with the decree of confirmation which described the land by specified boundaries, giving lines and monuments. The survey made by the surveyor general in carrying out the decree of confirmation conformed to the exterior boundaries, as described in the decree, which mentioned no reservation within the limits of these exterior boundaries. There was a clause in the certificate of survey which read: “Excepting, reserving, and excluding from the tract, as thus surveyed, that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines.” The land in controversy was an island lying within these lines. This island, to

¹ Rehearing granted.

gether with other land lying within the inner survey, was patented to defendant by the United States in 1881. *Held*, that the Mexican grant, as confirmed and patented by the United States to plaintiff, included the whole space lying within its exterior boundaries, and that defendant had acquired no title under his patent. BEATTY, C. J., and McFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; A.W. HUTTON, Judge. *Houghton, Silent & Campbell* and *J. S. Chapman*, for appellants. *Bicknell & White* and *Smith, Winder & Smith*, for respondents. *J. E. Foulds*, *amicus curiæ*.

Fox, J. This is an action of ejectment for the recovery of the possession of a tract of land, comprising 18.88 acres, commonly known as "Mormon Island," situate in the inner bay of San Pedro, in the county of Los Angeles. Defendant had judgment, from which, and an order denying a motion for new trial, plaintiffs appeal. Plaintiffs claim under a Mexican grant, alleged, in the petition for confirmation thereof introduced and received in evidence, to have been made early in the present century, under which it is claimed that juridical possession was given in 1817, and that the same was repeatedly acknowledged by the Spanish and Mexican governments, and particularly so by a decree of the governor of the province of California, dated December 31, 1822; of which grant, confirmation was made by the district court of the United States, February 10, 1857, and patent thereon issued December 18, 1858. Defendant claims under a patent issued by the government of the United States, as upon a sale of the property as government land, describing the same as lot No. 1 of section 8, in township 5 south, range 13 west, San Bernardino meridian, in California, dated December 30, 1881. In addition to pleading his title, the defendant pleaded the statute of limitations, but upon that plea the court found against the defendant. The only question, therefore, to be determined upon this appeal, is whether or not the title passed by the Mexican or Spanish grant as the same was finally confirmed and patented by the government of the United States. The grant is of the Rancho San Pedro, made to Christobal Dominguez. The decree of confirmation is for eight and a half leagues, a little more or less, of which specific boundaries are given in the decree, giving lines and named monuments, some of which are natural, and some artificial, and extending around all sides of the grant. One of these lines, as specifically described in the decree, runs directly across the outer or western border of "the inner bay of San Pedro" to La Coleta, and includes said inner bay within the exterior boundaries of the grant. As described in the decree, no exception within the exterior lines there given is made, but everything passes by the grant, which lies within those exterior boundaries. It is proved and conceded that the exterior boundaries, as described in the survey, made by the surveyor general, and recited in the patent, are identical with those given in the decree itself. But after completing the survey of the exterior bounda-

ries, as the same are described in the decree, the surveyor adds this paragraph: "Excepting, reserving, and excluding from the tract, as thus surveyed, that portion thereof covered by the navigable waters of the inner bay of San Pedro, and which are included within the following described lines, to-wit,"—and then follows with the courses and distances of the survey of such inner bay, and including therein 1,100.50 acres. What was the purpose, and what was the legal effect, of this paragraph in the certificate of survey, and the subsequent field-notes of the survey in this paragraph referred to? An understanding of the character of the "inner bay of San Pedro" may help to solve that problem, if it is one capable of solution. According to the map attached to the record it is a body of water jutting into the main body of the land, towards the east, from the principal or main bay of San Pedro, covering in its exterior limits 1,100.50 acres. The body of the main-land of the grant surrounds it on the north, south, and east. It was claimed by counsel at the argument, but we do not see that the fact appears in the record, that it is inaccessible to sea-going ships, but that at times of high water it is navigable with small craft. Manifestly, and we say this more from what seemed to be conceded at the argument than from any direct evidence in the record, it is a tract of water below ordinary high-water mark, but not a portion of the deep sea, or into which deep sea going vessels can be taken. Within it Mormon island is situated. At high water, this island consists of a pile of rocks, covering not much more than an acre, above the surface of the water, but at medium low water it is an island of considerable extent, and at extreme low water, according to the testimony of the defendant himself, it is not an island at all, but is accessible, dry shod, from the mainland.

The exception and reservation, if it be one in law, is "that portion thereof covered by the navigable waters of the inner bay," etc. The very language of this exception would certainly exclude from the exception the island, which cannot be, in the nature of things, "covered by the navigable waters," and this exclusion would extend to the island as shown at ordinary low-water mark. This conclusion must be inevitable, and not open to debate, if we are to be governed by these words of exception and reservation. If, on the other hand, courses, distances, and quantity are to govern in the construction of this clause, and the determination of what is covered by the reservation, then the island is necessarily a part of, and is not excluded from, the reservation. But the very language of the exception forbids such a construction. There is no word in the entire certificate of the surveyor to show that all within the survey of the inner bay is reserved, but only that part thereof which is covered by the navigable waters. This conclusion would determine this case were it not for the fact that the 18.88 acres patented to defendant, and of which he admits himself in possession, include much more than the island, as the same appears

at even ordinary low tide. Because of this fact, it becomes necessary to go further, and inquire whether the United States had any property right within that inner bay, at the date of the patent made by the government to defendant, which its officers had the power to convey.

Returning again to the Mexican grant, of which it is conceded that juridical possession was given in 1817, and final confirmation made by the constituted authorities of the Mexican government in 1822, we find that the judicial department of our own government, in 1857, finally adjudged, determined, and decreed that this inner bay was included within, and was a part of, said Mexican grant, and in and by said decree gave the entire boundaries, showing that it was so included. This was a final adjudication that the lands within the inner bay never were, never became, and never could become, unless by subsequent purchase, the property of the United States. It had passed into private ownership before the conquest, and this government was, by its treaty, bound to protect the title thereof in the Mexican grantee, or his successors in interest. By its decree of confirmation, the government did so protect this title, and determined that it had no interest in the lands. There was nothing in the decree to indicate or intimate that the inner bay, or any part thereof within the lines of the boundaries there given, was excepted or reserved from the grant, or to authorize the surveyor to either survey or make such an exception or reservation. The grant was one by boundaries, and not by quantity, and was complete within itself.

Turning to the patent, which, as before stated, is dated December 18, 1858, we find that it commences with and consists of recitals of the presentation of the grant for confirmation, and of all the proceedings down to and including the decree of confirmation, and the dismissal of appeal therefrom, followed by a recital of the certificate of survey and plat made by the surveyor general, and then, and not till then, proceeds with the granting clause, as follows: "Now know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the act of congress aforesaid of March 3, 1851, have given and granted, and by these presents do give and grant, unto the said * * * and to their heirs, the tract of land embraced in the foregoing survey, in the respective shares," etc. There is not in the entire granting portion of this patent, nor at any place in the entire instrument, except in the recital of the certificate of survey, a word to indicate that any exception or reservation whatever is made, either in the Mexican grant, in the decree, or in the grant or relinquishment finally made by the United States. The latter is "of the tract of land embraced in the foregoing survey." What "foregoing survey?" The one which is complete in itself, and confessedly conforms minutely to the original grant, the juridical possession given thereunder, the monuments then established, both natural and artificial, and to the decree of final confirmation; or to that survey amended by adding thereto a

complete, independent, and unauthorized survey, embracing 1,100.50 acres, lying wholly within the lines of the authorized survey, but to be taken out of the grant or relinquishment thereby made? This reference to survey in the granting clause of the patent is not free from ambiguity, but, when construed in the light of the decree of confirmation, under authority of which the patent was made, and of the law as to what the government then possessed, and could grant in the premises, it must be held that the words "foregoing survey" refer to the first of the complete surveys given in the recital,—the one which confessedly conforms to the original Mexican grant, and the decree of confirmation thereof; and that the second survey recited therein, descriptive of a reservation attempted to be made by the surveyor, but for which there was no warrant in law or in the decree, is surplusage, and of no effect. The patent was, in effect, but the execution of the decree of confirmation. *U. S. v. Minor*, 114 U. S. 242, 5 Sup. Ct. Rep. 836. The officers of the government had no power to execute the decree in part, and by the same act, or any other, to withhold execution of the balance, or make reservation of a part of that which had been adjudged to be already the property of the claimants. Nor is there anything in the language of the patent which necessarily leads to the conclusion that the president, in executing this patent, attempted to make any such reservation, or do less than execute the decree as a whole. The act of the surveyor in making this second survey, and describing it as of an exception or reservation, was without authority, not binding upon his superiors or the government. The presumption is that the officers whose duty it was to prepare and execute the patent did not consider themselves bound by it, nor attempt to act upon it, and there is no language employed by them in the patent which necessarily overrides this presumption. "When a decree gives the boundaries of a tract to which the claim is confirmed with precision, (as was done in this case,) it is conclusive not only on the question of title, but also as to the boundaries which it specifies," (*U. S. v. Hancock*, 133 U. S. 196, 10 Sup. Ct. Rep. 264;) and it was the duty of the surveyor, in making survey of the claim finally confirmed, "to follow the decree of confirmation as closely as practicable," (*Id.*; also Act Cong. July 1, 1864; 13 St. 334.) This statute, it is true, was passed after this survey, but it established no new law,—was merely declaratory of what always was the duty of ministerial officers in executing the decrees of court. In this case, it was practicable to, and he did, follow the decree of confirmation minutely and exactly, and made a complete and perfect survey according to the same. That which he did afterwards in the way of making *addenda* to his survey, was in excess of his authority, and void. That the court had authority to fix and determine these boundaries definitely in its decree was settled in the *Fossatt Case*, 2 Wall. 710, and *U. S. v. Fossatt*, 21 How. 447, and that when so fixed they are conclusive is affirmed in *U. S. v. Hancock*, supra.

probably the very last case decided by that court of last resort upon such a question. It was also so held by this court in its last decision upon this question. *Association v. Knight*, 24 Pac. Rep. 823, (filed September 4, 1890.) And it was long since established by the supreme court of the United States, and has been steadily followed in this court, that when a specific tract of land is so confirmed according to ascertained boundaries, fixed by the decree, the confirmee takes title, upon which he may maintain action in ejectment. *Stanford v. Taylor*, 18 How. 412; *Mining Co. v. Clarkin*, 14 Cal. 551; *Soto v. Kroder*, 19 Cal. 95. In such a case, the patent from the United States is evidence only of pre-existing title. *Waterman v. Smith*, 13 Cal. 418. "Segregation was made by the decree." *Mining Co. v. Clarkin*, supra. Both affirmed in *Mahoney v. Van Winkle*, 33 Cal. 456. That when the boundaries are fixed by the decree the survey must conform thereto was also held by this court in *Hale v. Akers*, 69 Cal. 167, 10 Pac. Rep. 385. "The survey is not an independent act, but is an act performed under the decree, and preparatory to its [the decree] being carried into effect by a patent," (*More v. Massini*, 37 Cal. 436,) and which patent is but the execution of the decree, (*U. S. v. Minor*, supra.)

But it is claimed on the part of respondent that, notwithstanding the authorities cited, and the principles therein established, the reservation attempted to be made by the surveyor general and the survey thereof was correct and lawful, for the reason, as he claims, that no title passed by the Mexican grant to any lands within the exterior boundaries of the grant, except such as were situate above ordinary high-water mark of the sea-shore. In the recent case of *Association v. Knight*, supra, we held that the pueblo did not take and hold, under the laws of Mexico, and under those laws could not acquire title to, lands situate below ordinary high-water mark of the sea-shore, and cited authorities to show that such was the Mexican law, and also the decree of confirmation in that case to show that by such decree the boundary of the pueblo, at the point under consideration, was fixed by and at high-water mark, and so found and established by the decree. But this is not a parallel case. Here there is no question of what are or can be the rights of a pueblo under the Mexican or any other law. There is no pueblo at this point, and neither party claims under one, or under the laws relating to pueblos. One is claiming under a Mexican grant, the other under the United States, direct. In that case it was conceded as having been long since established by the decisions of both state and federal courts that the Mexican government could, and sometimes did, make private grants of lands extending below the ordinary high-water mark of the sea-shore. This was so held in *Teschemacher v. Thompson*, 18 Cal. 11, and in *Ward v. Mulford*, 32 Cal. 365, and the grants there referred to, like the present one, were confirmed, patented, and respected by the government and the courts. But even if this contention of the

respondent, that nothing passed by the Mexican grant, or the patent issued in execution of the decree of confirmation thereof, lying below ordinary high-water mark, be true, it still follows that so much of the judgment appealed from in this case as adjudges and decrees that the defendant is the owner, and entitled to the possession, of the tract of land described in said judgment, to-wit, the 18.88 acres described in defendant's answer, and in the patent to him, is erroneous; for, according to his own testimony, which is uncontradicted, more than 17-18 of that tract lies below ordinary high-water mark, and is, therefore, land which, if it was not granted by the Mexican government, but remained a part of the public domain, became, on the 9th day of September, 1850, the property of the state of California; and the government of the United States, or its officers, had no power to make a grant thereof, or give title thereto, at the date of defendant's patent. Defendant makes no other claim to the property, except that based upon his patent from the United States, and his possession thereunder. If the island was not included in the grant under which plaintiff claims, defendant's title to that might be good, but even then it could not be good to the land below ordinary high-water mark. In our judgment, however, the title, not only to the island, but to the whole of said inner bay within the exterior lines of the Mexican grant, as described in the decree of confirmation, and in the survey of exterior boundaries, passed to the claimants under said grant, and is vested in the plaintiffs.

Judgment and order reversed.

WE CONCUR: SHARPSTEIN, J.; PATERSON, J.

I dissent: BEATTY, C. J.

THORNTON, J. I concur in reversing the judgment and order herein, but for other reasons than those stated in the opinion of Justice Fox. I am of opinion that the decree of confirmation of the Rancho San Pedro includes what is called the "Inner Bay of San Pedro." The patent, however, contains a reservation from grant, which reservation is confined to and embraces only that portion of the inner bay above mentioned which is covered by the navigable waters of the bay. It appears from the testimony that Mormon island is not so covered. It is not so covered by the waters of the bay at ordinary high tide. I am of opinion that plaintiff is entitled to recover the island, and such other portion of the tract of land sued for, described in the complaint as containing 18.88 acres, as is not covered by the navigable waters of the inner bay aforesaid. The judgment and order should be reversed, and the cause remanded, that the limits of such portion may be determined by the court below, and, when so determined, judgment should be rendered for it in favor of the plaintiffs.

McFARLAND, J. I dissent. This is a pure action of ejectment. Plaintiffs' asserted title to the demanded premises rests upon

a patent of the United States issued for a Mexican grant under the act of congress of March 3, 1851. By the thirteenth section of that act it is provided that after a claim under a Mexican grant shall have been confirmed, "a patent shall issue to the claimant upon his presenting to the general land-office an authentic certificate of such confirmation, and a plat or survey of the said land duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same." In the case at bar, plaintiffs claim title under a patent for a tract of land known by the name of "San Pedro." The patent recites a plat and survey made under said thirteenth section of said act of March 3, 1851, and contains full copies of such survey and plat; and it then conveys to the grantees "the tract of land embraced and described in the foregoing survey." There is no other description of the land granted. Now "the foregoing survey" does not include the land sued for in this action; indeed such land is expressly excluded; and that certainly seems to me to end the case. How can a plaintiff in ejectment recover land which is not included in the title-deeds on which he relies? I am clearly of the opinion that the judgment and order should be affirmed.

(87 Cal. 109)

JONES v. DUCHOW. (No. 13219.)

(Supreme Court of California. Dec. 13, 1890.)

LIBEL—EVIDENCE—RES GESTÆ—IMPEACHMENT OF WITNESS.

In an action for libel, in publishing that plaintiff had been compelled to leave his former place of residence to escape punishment by a mob, a letter, not under oath, written and signed by reputable citizens of the place, four months before the alleged departure of plaintiff, giving him a good character, is neither admissible as part of the *res gestæ*, nor to contradict witness for defendant, who testifies that plaintiff was, at the time of his departure, denounced by all good citizens. BEATTY, C. J., and Fox, J., dissenting.

In bank. On rehearing. For former report, see 23 Pac. Rep. 371.

F. D. & G. W. Nicol, F. W. Street, and E. A. Rodgers, for appellants. J. H. Budd and I. M. Kallloch, for respondents.

PER CURIAM. Upon rehearing and further consideration of this case we are satisfied that the court below did err in the particulars pointed out in the opinion filed herein, February 28, 1890, and the same will stand as the opinion and order of the court on this appeal.

We dissent: BEATTY, C. J.; Fox, J.

THORNTON, J. I concur in the judgment of reversal herein, for the reason that the letter allowed in evidence to contradict the witness, Gift, was erroneously admitted. It was admitted on the offer of plaintiff to contradict a statement of Gift brought out on cross-examination by plaintiff, which statement was collateral

to the issue. The plaintiff was bound by Gift's statement, and could not be allowed to contradict it.

(85 Cal. 603)

Ex parte BARRY. (No. 20,607.)

(Supreme Court of California. Sept. 11, 1890.)

CONTEMPT—PROCEEDINGS OF COURT—NEWSPAPER PUBLICATION.

A publication made by a newspaper immediately after a judge of the superior court has sustained a demurrer to a petition with leave to amend, falsely charging him, in so doing, "with deliberate lying about the law, deliberate, intentional falsification in his official capacity, and deliberate, intentional denial of justice," with being a "fool," an "impudent rascal, a criminal on the bench," is a flagrant abuse of the liberty of the press, and an "unlawful interference with the proceedings of a court," within Code Civil Proc. Cal. § 1209, subd. 9, and the offender is punishable by fine and imprisonment, as for a contempt.

In bank.

E. P. Cole, for petitioner. H. S. Philbrook, amicus curiæ.

WORKS, J. This is an application for a writ of *habeas corpus*. The following affidavit was filed in the superior court of the city and county of San Francisco, charging the petitioner with contempt of court: "State of California, city and county of San Francisco—ss.: William J. Dixon, being duly sworn, deposes and says that one Henry Bingham is the defendant in an action wherein the people of the state of California, upon the relation of Charles J. Swift, is plaintiff; that said action is now pending in the superior court of the city and county of San Francisco, state of California, and is still undetermined; that said Henry Bingham did interpose and file a demurrer to the complaint in said action, which said demurrer was, after full argument, on the 2d day of August, 1889, by the court sustained, and, on said last-mentioned day, the said plaintiff was given leave to amend his said complaint within ten days thereafter; that the time granted said plaintiff by said court to amend his said complaint has not yet expired; that one James H. Barry is the editor of a paper published weekly in the city and county of San Francisco, state of California, which said paper is called the 'Weekly Star;' that on the 3d day of August, 1889, and while said action was then and there pending in said superior court, said James H. Barry did published and cause to be published at the city and county of San Francisco, state of California, in the said paper, the Weekly Star, the following false, malicious, untrue, libelous, and defamatory matter of and concerning Honorable F. W. Lawler, judge of the superior court of the said city and county of San Francisco, state of California: 'A Criminal Judge. We charge Francis W. Lawler, judge of the superior court of San Francisco, with deliberate lying about the law, deliberate, intentional falsification in his official capacity, and deliberate, intentional denial of justice. He is not merely a fool, but an impudent rascal; a criminal on the bench. He ought to be impeached and removed from office, and disfranchised, indicted, and punished

by fine and imprisonment; made a convict of. But our criminal machinery and our legislature are so often elected and used, (just as Lawler acts,) not to punish wrong-doing, but on purpose to protect it, that such a proceeding is hopeless. If the information which we have received is wrong, let the editors of the Weekly Star be at once arrested on a charge of criminal libel. We invite and defy Lawler to venture to defend himself, even in a San Francisco court by this proceeding. We shall make the crime of this judge so plain, that even the wayfaring men, though fools, shall not err therein. The case is this: A suit has been brought against Supervisor Henry Bingham to determine whether he is entitled to the office of supervisor. This suit was assigned by the Buckley judge, Levy, to the other Buckley judge, Lawler, upon which every lawyer in town knew beforehand what Lawler would do, though they could not have foreseen just how he would begin to do it. When the case came up before Lawler yesterday, Bingham's attorney "demurred;" that is, he said the superior court had [no] authority to try a case like this. In reply, the complainant's attorney showed that the constitution expressly provides that the superior court has jurisdiction over all such cases. And this impudent falsifier of the law and denier of justice, Francis W. Lawler, allowed the demurrer, absolutely giving for a reason that, "although the constitution does give the superior court jurisdiction over all such cases, yet this is not all cases, but merely one case, and therefore this court has no jurisdiction over it. This seems impossible. But we affirm it to be true, and upon the affirmation, we are deliberately taking the risk of being publicly dishonored. It is exactly as if the burglar Jimmy Hope had been discharged by Judge Toohy without trial, on the ground that the "law only provided for the trying of all burglars, and therefore did not provide for trying this one"—* * * with intent then and there unlawfully to interfere with the proceedings of a court of justice, and to insult the said Francis W. Lawler, Esquire, judge of said court, in the discharge of the duties of his office, and to expose him to obloquy and contempt. W. J. DIXON. Subscribed and sworn to before me this 9th day of August, 1889. GEO. H. PIPPY, Deputy County Clerk."

Upon the affidavit being filed, the matter was referred for hearing to Hon. WILLIAM T. WALLACE, J. MCM. SHAFTER, and J. P. HOGE, judges of said court, who heard the same, found the petitioner guilty, and adjudged that he be imprisoned in the county jail for the term of five days, and pay a fine of \$500. The petitioner contends that there were certain defects in the manner of charging and bringing him before the court; but we think there were no such defects in the proceedings as would entitle the petitioner to his discharge.

Again, it is contended that the publication of the article above set out was not a contempt of court, because the case of *People v. Bingham*, therein referred to, had been finally disposed of, and therefore

the language used could not in any way affect or interfere with the proceedings of the court in said action. But the affidavit shows that the action was still pending and undisposed of. A demurrer to the complaint had been sustained with leave to amend. The time for amendment had not yet expired. A mere formal amendment might have been made, and the same question as to the merits again presented. The language was well calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure. It seems to us to be too clear for argument that the publication was made at such a time as to affect or have a tendency to affect the proceeding then pending in court, and this contention of the petitioner cannot prevail. The act complained of was an "unlawful interference with the proceedings of a court," and therefore within subdivision 9 of section 1209 of the Code of Civil Procedure. This being so, the citation of other authorities to support the contention of respondent that the publication of the article was a contempt of court was unnecessary.

We do not understand the learned counsel for the petitioner to attempt to justify the language used in this publication, but much is said about the liberty of speech and of the press. It is said in broad language: "The liberty of speech and of the press is unlimited and unrestrained upon all subjects whatsoever, whether it be the decision of the court, or the character of the judge. The only check upon this liberty is the responsibility for the abuse of it." This may be true in the sense that the liberty to speak and write on any subject cannot be restrained or prevented in advance, and that the only remedy is to punish subsequently for any publication that amounts to an abuse of such liberty. That is precisely what has been done in this case. If the language used was improper, but affected the judge in his individual capacity, and was not an interference with the proceedings of the court over which he was presiding, the remedy could not be by a proceeding for contempt. So the question is twofold,—was the publication an abuse of the liberty of the press? and, if so, was it an interference with the proceedings of the court? The last of these we have already determined. As to the former, the liberty of the press to fairly criticise the official conduct of a judge, or the decisions or proceedings of the courts, and to expose and bring to light any wrongful, corrupt, or improper act of a judicial officer, is one that should be carefully preserved and protected by the courts. If a public supervision and censure, through the press or otherwise, is necessary to suppress corruption, and keep the channels of justice pure and untainted, the right to exercise such supervision, and to censure and expose wrong-doing, should be and must be upheld by the courts. But the publisher of a newspaper who assumes to criticise or censure a public officer, or the proceedings of a court, must know whereof he speaks. If he censures unjustly or charges falsely, he must be held strictly accountable. While

his right of free speech is protected, his abuse of it must be punished. The great trouble with the freedom of the press at the present day, so far as it affects the courts, is that it is used indiscriminately in many cases, not with the laudable purpose of correcting abuses, and exposing wrong-doing, but to gratify ill will and passion, or pander to the passions or prejudices of others. This tendency should be severely condemned and punished, not only for the protection of the courts, and the preservation of a pure and independent judiciary, but as a means of upholding the liberty of the press in its true sense. The publication complained of here was a most flagrant abuse of the liberty of the press, and was justly punished as such.

Certain technical objections to the proceedings of the court below, including the form of the judgment, are raised and discussed at some length by the petitioner, but none of them are well taken. Writ denied, and prisoner remanded.

We concur: MCFARLAND, J.; PATERSON, J.; FOX, J.; THORNTON, J.

87 Cal. 91

Ex parte TAYLOR. (No. 20,733.)

(Supreme Court of California. Dec. 13, 1890.)

CONSTITUTIONAL LAW—VALIDITY OF CITY ORDINANCE—SPECIAL LEGISLATION.

1. Const. Cal. art. 11, § 6, provides that municipal corporations shall not be created by special laws, and that all charters heretofore granted shall be controlled by general laws. Pen. Code, § 370, and Civil Code, § 3479, declare the obstruction of a street a public nuisance, and Pen. Code, § 372, provides that one who maintains a public nuisance is guilty of a misdemeanor, when the punishment for the offense is not otherwise prescribed. Pen. Code, § 19, declares that, "except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail," etc. *Held*, that section 9 of the charter of San Jose, empowering the city council "to define, prevent, and remove nuisances," and to fix penalties by fine or imprisonment, is constitutional, and one imprisoned for maintaining a nuisance in a street contrary to an ordinance made in pursuance thereof, and providing a penalty of the same character, though less in degree than that prescribed by the statute, will not be released on *habeas corpus*.

2. But, even if the charter and ordinance are unconstitutional, the prisoner is not entitled to be discharged, since maintaining a nuisance in a public street is an offense under the above statutes, and the indictment charges that the acts were done "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

In bank. *Habeas corpus*
Morehouse & Tuttle, for petitioner.
William B. Hardy, for respondent.

FOX, J. The petitioner is convicted of violation of an ordinance of the city of San Jose, in relation to streets and sidewalks. It is claimed that the ordinance is void because in conflict with the constitution, and with general law; by reason whereof the city council had no authority to pass the same. The city of San Jose is a munic-

ipal corporation, existing under a special charter, passed before the adoption of the present constitution. By section 9 of that charter, the council is authorized and empowered "to pass all necessary and proper laws, * * * to lay out, alter, vacate, improve, cleanse, water, and repair streets and sidewalks, * * * to define, prevent, and remove nuisances, * * * to impose and appropriate fines, penalties, and forfeitures for any and all violations of city ordinances, and, for a breach or violation of any city ordinance, may fix the penalty by fine or imprisonment," etc. The ordinance referred to forbids the obstruction of the streets or sidewalks, and provides a penalty for the violation thereof. It is not contended that the act of the petitioner, for which he was arrested and convicted, was not a violation of the terms of the ordinance, or that the penalty imposed is in excess of or different from that authorized by the ordinance. Reference is made in support of the petition, to section 6, art. 11, of the constitution. This is the section which provides that municipal corporations shall not be created by special laws, and that all charters heretofore granted shall be controlled by general laws. Upon the faith of this provision, it is claimed that a municipal corporation has no authority to determine and declare what shall constitute a nuisance upon a public street, and to provide for the punishment of one who maintains such a nuisance, because the general law has provided for the same. In support of that proposition, we are cited to sections 370 and 372 of the Penal Code, and 3479 of the Civil Code. Section 370 of the Penal Code, and 3479 of the Civil Code, declare the obstruction of any public park, square, street, or highway, a public nuisance; and section 372 of the Penal Code provides that one who maintains a public nuisance, or willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor, when the punishment for the offense is not otherwise prescribed. Punishment therefor is not otherwise prescribed in that chapter of the general law, but section 19 of the Penal Code declares that, "except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both." It thus appears that, under the general law, the obstruction of a street or highway is a nuisance; that a person maintaining a nuisance in the street is guilty of a misdemeanor, and is upon conviction punishable therefor, as prescribed in said section 19. Is the ordinance in conflict with this general law? We think not. The ordinance does not declare the obstruction of the street to be a nuisance, or a misdemeanor; but, proceeding upon the theory that the state law itself so declares and provides, it simply forbids the obstruction, or declares that such obstruction shall be unlawful. In the exercise of its police power, and the authority expressly granted by the charter, it provides for the removal of the

obstruction, and prescribes a penalty for refusal to remove it upon the notice prescribed to be given by the municipal authorities having charge of that department of the local government. That penalty is not of a different character from, or in excess of, the one prescribed by the general law, but is of the same character, only less in degree. But why should the municipality legislate upon the subject at all? A brief review of the legislation, both state and municipal, and of the decisions of this court upon the subject, will furnish an instructive answer to this question. Municipal charters have in this state universally conferred upon local municipal governments power to legislate for the maintenance and care of their public streets. It is conceded here, and this court has held, that streets include sidewalks, as well as the road-way, (*Bonnet v. San Francisco*, 65 Cal. 230, 3 Pac. Rep. 815;) and that the obstruction of a sidewalk is a public nuisance, (*Marini v. Graham*, 67 Cal. 130, 7 Pac. Rep. 442.) But in the latter case it was also held that a legalized obstruction of the sidewalk was not a nuisance. This was under an ordinance which, by implication, authorized the obstruction of a sidewalk, to the extent of three-tenths the width thereof. It thus recognized the fact that, notwithstanding the statute, the power of the municipality over the streets was such that it might make a legal authorization of an obstruction. The act constituting the offense in this case was the obstruction of the sidewalk for the depth of 2 feet in width and 40 feet in length, of the inner side thereof. The ordinance in this case, from the date of its passage, December 10, 1881, until amended June 9, 1890, by clear implication, authorized the obstruction here made; but on the latter date it was so amended as to forbid it. This obstruction has been maintained for many years, but under the authority of *Marini v. Graham*, supra, it could not be punished as a misdemeanor because it was a legalized obstruction. Since the amendment, however, it has ceased to be legalized, and is now maintained in direct violation both of the statute and the ordinance. The passage of the ordinance in its original form was necessary to legalize the act, if it could be legalized; and, as seen, this court has held that it could be so legalized, and the parties had the right to act upon the authority of that decision so long as it remained unreversed. The effect of the amendment was to render the act no longer legal, and the continuance of the act thereafter constituted a public offense, for which the party was and is amenable to the law.

A somewhat similar question to the one here under consideration arose under the same general laws, and a municipal ordinance, in the case of *Ex parte Casinello*, 62 Cal. 538, and the conviction and judgment was there held valid. We are of the opinion that the city of San Jose had authority, under its charter, to pass the ordinance; that the same is not in conflict with the general law; and that a conviction under either is a bar to a prosecution under the other. Even if this is not so,

the prisoner is not entitled to be discharged, for it is conceded that the acts charged constitute a violation of the statute in relation to the obstruction of streets. The complaint states facts which constitute a public offense under the statute, and alleges that they were done "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of California," and the judgment is not in excess of that authorized by the statute. Both the offense and the penalty were within the jurisdiction of the justice's court. In *Re Sic*, 73 Cal. 142, 14 Pac. Rep. 405, relied upon by the petitioner, the question whether the judgment was valid, notwithstanding the invalidity of the ordinance, was not raised or considered. The defendant has acquired no right to maintain the obstruction, by prescription, for none such could be so acquired. *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. Rep. 433. Let the writ be discharged, and the prisoner remanded.

WE CONCUR: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

PATERSON, J. I concur in the judgment on the ground last stated by Mr. Justice Fox.

McFARLAND, J. I concur in the judgment. The defendant was convicted of placing, and suffering to remain, on the inside of a sidewalk something which obstructed the free passage of said sidewalk; and I do not think that an ordinance making such act an offense is in conflict with the general law of the state found in section 370, which declares the obstruction of a lake, river, park, street, highway, and other enumerated places, to be a public nuisance, and the person who maintains it to be guilty of a misdemeanor. There are many matters connected with streets, sidewalks, awnings, trap-doors, etc., which are particularly within the scope of municipal regulation, and which cities and towns may legislate about without intruding upon any general law now in existence. The charter of San Jose giving power to pass the ordinance in question was enacted after said section of the Code; and it is evident that the legislature, by passing a law preventing nuisances on public highways throughout the state at large, did not intend to prohibit the municipality from dealing further with streets and sidewalks within its corporate limits. The matter involved in the *Sic* Case, 73 Cal. 142, 14 Pac. Rep. 405, was smoking opium, and maintaining places where that vice might be practiced; and the legislature had legislated upon that subject in great detail. The crime was the same in all parts of the state. But it is quite apparent that acts, which would be of little consequence if done on public roads running through sparsely settled regions, might be very serious evils if done on the crowded streets and sidewalks of populous towns and cities. But I agree, also, that, in this particular case, the judgment

can be sustained under the state law, even though the ordinance be considered invalid.

(87 Cal. xxi)

Ex parte RINALDO. (No. 20,734.)

(*Supreme Court of California.* Dec. 13, 1890.)

In bank. *Habeas corpus.*

Morehouse & Tuttle, for petitioner. *Wm. B. Hardy*, for respondent.

PER CURIAM. This case is precisely like that of *Ex parte Taylor*, ante, 258, (No. 20,733, this day decided,) and on the authority of that case it is ordered that the writ be discharged, and the prisoner remanded.

(3 Cal. Unrep. 330)

RANKIN *et al.* v. AMAZON INS. CO. (No. 12,807.)¹

(*Supreme Court of California.* Dec. 13, 1890.)

INSURANCE—CONDITIONS OF POLICY—BREACH—WAIVER.

1. Where a fire insurance policy refers to a survey of the insured premises and the application as a warranty on the part of the insured, the right of the company to rely on such application and survey is not defeated by the fact that they were not furnished until after the policy was delivered, and that they were written on blanks prepared for the use of another insurance company.

2. In an action on a policy, evidence that the insured premises were idle for two months, during which time the insured employed only one watchman, who habitually slept in a building 300 feet away, with the approval of the insured, shows a failure on the part of the insured to comply with a condition of the policy requiring him to employ a watchman "to be in and about the premises by day and night" during the time that they are idle, and not merely negligence on the part of the watchman in performing his duty, and is a good defense to the action.

In bank. Appeal from superior court, city and county of San Francisco; JOHN W. ARMSTRONG, Judge.

Action by Ira P. Rankin and others against the Amazon Insurance Company on a fire insurance policy. From a judgment for plaintiffs, defendant appeals.

T. C. Van Ness and *Huggin*, *Van Ness & Dibble*, for appellant. *Doyle*, *Galpin & Scripture*, (*Philip G. Galpin*, of counsel,) for respondents.

Fox, J. 1. The policy of insurance upon which this action was brought was applied for November 21, 1884, and was written up assuming the risk from 12 o'clock noon on that day, for the term of one year, but was counter-signed by the general agents at San Francisco, November 24, 1884, and presumably was not delivered until that day. When delivered a part of the written portion thereof was on a rider attached and properly authenticated, the blank being insufficient to furnish room for all the written portion. On that rider, and as a portion of the written part of the policy, was the following: "Reference is hereby made to a survey and diagram, on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." The court below evidently concluded, and in that conclusion we concur, that in fact there was no survey and diagram on file in the office of Mitchell & Son,

either on the 21st or the 24th of November. But the uncontradicted evidence is that Mitchell & Son were the insurance brokers who acted for and on behalf of the assured in getting the insurance, and that they promised that such a survey and diagram should be prepared, and a copy thereof furnished the insurers. Such a survey and diagram was prepared by the engineer of the Owens River Mining & Smelting Company, owners of the property covered by the insurance, and was on file in the office of Mitchell & Son, on the 4th day of December, 1884; but the evidence still leaves it uncertain whether it was so on file on the 3d day of December, 1884, at which time the policy was taken to the office of the insurers, and the written portion thereof rewritten upon another rider, which was duly authenticated and attached, increasing the amount of insurance allowed by \$600, and winding up with the same expression as before: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell & Son, which is made a part of this policy, and a warranty on the part of the assured." At some time, but at what precise time does not appear, a copy of this survey and diagram, dated December 4, 1884, the survey constituting a voluminous document consisting of questions and answers, and written upon a blank prepared for the use of another insurance company, and not of this defendant, was presented to and filed with the agents of defendant, as and for a copy of the survey and diagram, and as and for the application, referred to in the written portion of the policy, which the brokers had agreed to furnish. This document was offered in evidence. It was signed "Owens River Mg. and S. Co., by Hoyt & Son, Applicants." The policy ran to the Owens River Mining & Smelting Company, "loss, if any, payable to Rankin, Brayton & Co." To this evidence "plaintiffs objected, upon the ground that at the time when the papers were presented to the company the insurance had already been effected, and the rights of Rankin, Brayton & Co. had vested; and upon the further ground that there was no authority upon the part of Hoyt & Son to make any contract on behalf of the Owens River Smelting & Mining Company; and upon the further ground that the paper was dated December 4th, and was made the day after the policy was made, according to the date of the last rider in the policy." This objection was sustained, to which ruling the defendant excepted, and it is now assigned as error. The question as to the authority of Hoyt & Son was unimportant. This policy, though taken in the name of the mining and smelting company, was for the immediate benefit of these plaintiffs, and the policy on its face was made, "loss, if any, payable" to them. The authority of Mitchell & Son to effect the insurance for them was amply proved, and uncontradicted. It is also uncontradicted that they promised to procure and place on file the survey and diagram. The only question is whether the fact that it was not on file when the policy was delivered defeats the right of the defendant to rely upon it, and in-

¹ Rehearing granted.

roduce it in evidence as a part of the contract. If this question depended solely upon the clause of the policy written upon the riders, and hereinabove quoted, the right of defendant to rely upon the diagram and survey as a part of the contract of insurance, and introduce it in evidence as such, might be seriously questioned, and there are several authorities which might be cited in support of the negative of that proposition, some of which are more directly in point than *Caldwell v. Center*, 30 Cal. 543, cited and relied upon by respondents. But appellant does not rest its right either solely or mainly upon that clause. There is in the policy another clause which provides: "For further particulars reference is made to an application and survey No. —, furnished by and a warranty on the part of the assured, which is hereby made a part of this policy." Mitchell testifies that when he procured the policy he promised to procure and furnish such an application and survey, and that he did procure and furnish this one in compliance with that promise, and it is uncontradicted that he did so, and that this was the only one furnished. The contract was to be in two parts, as all these contracts are, each dependent upon the other. One of the parts was finished at one time, and in this instance, either the other was finished at another time or has never been finished. If finished, they constitute one contract; if never finished, there was never any contract. This paper, which was furnished by the agent of the insured in pursuance of his promise, answers the calls of the other part of the contract; is in the form of an application and survey, accompanied by a diagram illustrating the survey, and furnishes the ordinary information upon which the insurer's part of such a contract is usually based. It was furnished and accepted as the basis of the insurers' part of the contract in this case. That the delivery did not occur at the same time, and that it was written upon a blank prepared for the use of another corporation, makes it none the less a part of the contract upon which this action is brought, and as such it was error to refuse to admit it in evidence. The fact that it was not made at or before the execution of the policy may have deprived it of the quality of an express warranty by operation of law, under section 2605 of the Civil Code, but it still operates as evidence of representations made as inducement for the issuance of this policy, (Civil Code, §§ 2571-2577,) and as such it was proper matter to submit to the jury. Whether warranty by operation of law or not, it was declared such upon the face of the contract, and unless unlawful the court has no power to eliminate it from the contract. In either event, whether warranty or mere representations, the defendant was entitled to have it go to the jury; particularly so since, even if mere representation, and found to be false in a material point, it gave the injured party a right to rescind the contract (Id. § 2580) at any time previous to the commencement of the action, (Id. § 2583,) and it was admitted that, before the commencement of the action, the defendant had tendered a re-

turn of the premium, and notified the parties that the policy was canceled.

2. The next point urged by appellant is that the court erred in refusing to give an instruction asked by appellant, and in giving the instruction which it did give, in reference to what is called the "watchman clause" of the policy. The policy, as originally written or printed, contained this clause: "It is understood and agreed that, during such time as the above mill is idle, a watchman shall be employed by the insured to be in and upon the premises day and night." This clause was changed at the instance of the insured, by striking out the word "upon," and inserting in lieu thereof the word "about." The clause as thus framed and accepted was an express promissory warranty on the part of the insured, and that it was made and accepted with full notice, and not merely an oversight on their part, is evidenced by the fact that the change was made at their instance. The question for the jury to determine was whether or not this promissory warranty was kept on the part of the insured. Exception is taken to the refusal of the court to give each of three separate instructions asked by appellant, but only one of these exceptions is urged in argument in this court,—the first. We think that instruction, as written, was correctly refused, not because it did not correctly state the law as applicable to such contracts, but because it not only stated the substance of certain evidence, but undertook to state the effect of the whole evidence tending to prove whether or not the contract had been complied with in that regard. In the instruction which the court did give, it correctly declared that the clause of the policy above quoted was a warranty that the insured would employ a watchman to be in and about the premises day and night, when the mill was idle, and that if they had failed to do so they could not recover. Neither do we think the court erred in what it subsequently said on the subject of the effect of an omission of the watchman to do his duty by negligence. That portion of the instruction is in harmony with section 2629, Civil Code, and the authorities cited in Deering's note to that section.

3. The verdict is not supported by the evidence, and is against the law as laid down by the court in its instructions, and as established by the authorities. Insurance contracts, like others, must be enforced according to the intention of the parties. *Wells v. Insurance Co.*, 44 Cal. 406, 407. There is no ambiguity about this contract in this particular. The insured covenanted to employ a watchman to be in and about the premises day and night, during such time as the mill was idle. There is no dispute in the evidence touching these facts: That for two months before this fire occurred the mill was idle; that the mill, "frame buildings, adjoining and communicating," with the machinery and property therein, was the immediate subject of the insurance; that during the two months the mill had so remained idle, up to and at the time of the fire, but one person had been or was employed as watch-

man; that he had no special instructions as to watching, either day or night; that as matter of fact he did not watch the whole of any night, but habitually, and with the knowledge and approval of the superintendent, slept at night in a building 300 or 400 feet away from the mill, and was sleeping there when the fire occurred. This building was situate upon land belonging to, or in possession of, the mining and smelting company, but it would do violence to common sense to hold that it was "in" or "about" the insured property, or that a man who habitually and nightly slept in it was, while sleeping there, a watchman in or about the insured property 300 or 400 feet away. And if, as shown without contradiction, he habitually and nightly slept there, with the knowledge and approval of his employer, it is too much to say that he was a watchman employed to be in or about the insured premises during the night-time. An employment which knowingly and habitually suffers such a course of procedure is not such an employment as is demanded by the terms of this contract. These facts do not show mere negligence in the performance of duty, but rather failure to employ for such performance. The evidence of a failure to comply with the conditions of this clause of the policy is much stronger than it was in the case of *Trojan Min. Co. v. Fireman's Ins. Co.*, 67 Cal. 27, 7 Pac. Rep. 4, and there it was held that recovery could not be had because of such failure. The facts here disclosed justify and call for the adoption and repetition of the language used in *Wenzel v. Insurance Co.*, 67 Cal. 440, 7 Pac. Rep. 817: "It is apparent from the uncontradicted evidence in the case that Lynch [McMurray] was not employed as a watchman of the premises, within the sense and meaning of the contract." There is nothing in *Sierra*, etc., *Min. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 236, 18 Pac. Rep. 267, cited by respondent, in conflict with this view. Judgment and order reversed, and cause remanded.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

I concur in the judgment: THORNTON, J.

87 Cal. 122

PEOPLE v. PEREZ. (No. 20,713.)

(*Supreme Court of California.* Dec. 15, 1890.)

CRIMINAL LAW—INFORMATION—DEMURRER—VERDICT—JUDGMENT.

1. A demurrer to an information will be overruled where the information is sufficient without the part excepted to.

2. Where one has been convicted on grand larceny, a verdict of "guilty as charged" is a conviction of grand larceny.

3. Where one has been convicted on an information for grand larceny, a judgment that for the crime of which he was charged and convicted he be punished by imprisonment in the state prison for the term of nine years is sufficient.

In bank. Appeal from superior court, city and county of San Francisco; MURPHY, Judge.

Carroll Cook and J. E. Foulds, for appellant. Geo. A. Johnson, for respondent.

Fox, J. 1. The demurrer to the information was properly overruled. All that part of it to which exception is taken may be stricken out, and it still remains a good information under the statute. The presence of the language excepted to does not prejudice the defendant, or affect the validity of the information.

2. The information is for grand larceny, and a verdict of "guilty as charged" is a conviction of grand larceny. *People v. Whitely*, 64 Cal. 211; *People v. Price*, 67 Cal. 350, 7 Pac. Rep. 745.

3. The judgment roll shows a full compliance with the requirements of section 1200 of the Penal Code at the time of the arraignment for judgment.

4. The information was for, and the conviction was of, grand larceny committed in the city and county of San Francisco. The judgment of the court was that for the crime of which he was so charged, and for which he had been so convicted, it is "ordered, adjudged, and decreed that the said Antonio Perez be punished by imprisonment in the state-prison of the state of California at San Quentin for the term of nine (9) years." This was sufficient, under the statute. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

87 Cal. 97

MARTIN *et al.* v. COOPER *et al.* (No. 12,862.)

(*Supreme Court of California.* Dec. 13, 1890.)

BOUNDARIES—NATURAL MONUMENTS—COURSES AND DISTANCES.

The patents for two grants of land did not call for each other as coterminous boundaries, and neither was described with reference to the other, but each grant was described as being bounded, along the sides nearest the other, by a river, one by the left bank and the other by the right bank, and in each courses and distances were given as the meander line of the bank referred to. In an action to establish the boundary between the two grants, the court below found that the river had changed its channel considerably since the patents were issued, and that the banks, as they then existed, could not now be found or traced. *Held*, that it was error for the court below to adopt, as the boundary between the two grants, a line established by plaintiffs' surveyors by running the courses and distances along the river bank as called for by defendants' patent, and then, for the purpose of establishing the line of plaintiffs' grant, laying off a line parallel to the line of defendants' grant so surveyed, and a uniform distance of seven chains therefrom, allowing that to be the width of the river running between the two grants, where the testimony is undisputed that the river, now and of old, varied in width at different points. BEATTY, C. J., and SHARPSTEIN, J., dissenting.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

William Matthews, for appellants. Julius Lee, for respondents.

Fox, J. This is an action to quiet title to a tract of land which the plaintiffs allege lies within the Rancho Rincon de las Salinas, for which they are the owners, as tenants in common, seised in fee. The defendants deny that the plaintiffs are the owners of said tract of land, and aver that the same is a part of the Rancho Moro-

Cojo, of which the defendants are the owners in fee. The court found in favor of the plaintiffs upon all the material issues, and decreed accordingly. Defendants moved for a new trial, which was denied, and from that order, and from the judgment, defendants appeal. It was incumbent upon the plaintiffs to prove that the lands in controversy are within the Rancho Rincon de las Salinas. Whether they are or not depends upon the location of the north-easterly line thereof, which, according to the patent issued to the plaintiffs' grantor, is along the left bank of the Salinas river. The Rancho Moro Cojo, under which defendants claim, lies upon the opposite side, and is bounded by the right bank of the river. The patent of neither rancho calls for the other as a coterminal boundary, but each is described as being bounded along the sides which are nearest each other by the river, one by the left bank and the other by the right bank, and in each course and distances are given as the meander line of the bank referred to. In each case, if the bank can be found, courses and distances must yield to the natural monument. The survey for the patent of the Rancho Rincon de las Salinas was made in 1861; that for the patent of the Rancho Moro Cojo some three years earlier. The court finds that since these surveys the course of the river has been subjected to several sudden, violent, and considerable changes, caused by freshets, cutting away its banks, and changing its channel. There is evidence sufficient to support this finding. But the court also finds that the left bank of the river, as it existed in 1861, cannot now be found or traced, and it therefore assumes to adopt the courses and distances given in the patent as establishing the boundary line, upon the theory that this is the next best evidence that is attainable for the purpose. The theory is correct, if the facts warrant its adoption; but we do not think that the evidence supports the finding that the left bank of this river, as it existed in 1861, cannot now be found or traced. While the testimony given on the part of plaintiffs shows that there has been a marked change in the course and banks of the river, and there is some evidence tending to show that at certain points the old banks have been washed away, it does not appear, even from this testimony, that there is not left sufficient evidence of the location and general course of that old bank so that it may be traced with reasonable certainty and accuracy. It does appear affirmatively that the surveys made on the part of the plaintiffs for the purposes of this trial were not made, or attempted to be made, on or along either bank, and that the surveyors were not instructed so to make them. Their instructions were to survey and plat the courses and distances, as given in the patent; and they were not instructed to find, or to attempt to find, the old bank of the river. And they did not even follow these instructions, but instead, they surveyed and ran the courses and distances along the river bank as given in the patent of the Rancho Moro Cojo, and platted the same, and then, for the purpose of estab-

lishing the line of the Rancho Rincon de las Salinas, they laid it off upon the map by a line parallel to the line of the Moro Cojo so surveyed, and a uniform distance of seven chains therefrom, allowing that to be the width of the river running between the two ranchos; and this, even though the witnesses testified that the river, now and of old, varied in width at different points. We do not think that such testimony as this will support a finding either that the left bank of the river cannot be found and traced or that the survey adopted as and for that boundary is correct. The engineer who made this survey and map himself says that he would not have made it as he did if he had been instructed to find and survey the river bank. On the other hand, another engineer, who seems to be equally competent and disinterested, testifies that he has examined the banks and course of that river, and that, in his opinion, the old bank can be found and traced. He has made a plat, showing the present bank, and points out diverse places where the line of the old bank is distinctly traceable. His evidence is, perhaps, not sufficiently full, and his work not sufficiently complete, to furnish the basis of a finding for a final settlement of the case; but to our minds it confirms a conclusion already reached from the testimony given on the part of plaintiff, upon whom the burden rested, that the evidence is insufficient to support the findings, either that the survey of courses and distances adopted is accurate or that circumstances existed which authorized the adoption of courses and distances in place of the natural monument. The judgment and order must therefore be reversed, and it is so ordered.

WE CONCUR: THORNTON, J.; PATERSON, J.

McFARLAND, J. I concur in the judgment, but I do not concur in the main reason given for it in the leading opinion. Upon this present record I think that the court below was justified in finding that the bank of the Salinas river, as it existed in 1861, cannot now be found or traced; and that, in the absence of that monument, it was proper to adopt the courses and distances given in the patent as establishing the boundary line. The evidence was not only conflicting on the point, but the weight of it was, in my opinion, with the finding. I think, however, that the evidence (although I am not without doubt on the subject) was not sufficient to support the conclusion that the true line of the Salinas rancho, run by courses and distances, is where the judgment establishes it to be. That line was never actually run by the surveyors who testified to it, but it was calculated and assumed from other data which I do not think sufficient to support the conclusion. They seem to have fixed a new line rather than to have found an old one. The case is a difficult one; and I doubt if a judgment will ever be obtained more favorable to appellants than this one from which they appeal. It is evidently a proper case for a compromise; but neither the court nor the surveyors can make a compromise for

the parties which they will not make for themselves.

BEATTY, C. J. I dissent. The evidence in my opinion fully sustains the conclusion that neither bank of the Salinas river, as it existed in the years 1858-61, could be traced on the ground at the time this controversy arose. The course of the river had very greatly changed. At some points it had cut off portions of the Moro Cojo ranch; at others it had cut off portions of the Rincon de las Salinas; and these changes had been suddenly wrought during high floods or freshets. At the places where the current had left the old channel, the space between the banks had been filled with sediment, and overgrown with willows. The existing banks of the river no longer constituted the true boundaries of the respective tracts, and the old banks were no longer to be found. If the owners of the Moro Cojo, the appellants, extended their possession to the right bank of the river, they would take land of the respondents, owners of the Rincon de las Salinas, and *vice versa*. Such being the case, I know of no means of determining the rights of the parties except to retrace the patent lines of the two ranches by following courses and distances according to the field-notes between such natural or other monuments on the ground, and called for in the field-notes, as are still capable of identification. This is what the parties attempted to do. Each employed a competent surveyor to trace out and re-establish the lines. The surveyors went on the ground, and, by actual survey from a known monument, established the original south-eastern corner of the Rincon de las Salinas ranch. At the time of the patent survey, this corner was on the left bank of the Salinas river, but was found at the time of the last survey to be a considerable distance beyond the opposite or right bank. An attempt was then made to run out the north-eastern boundary of the Rincon de las Salinas by following the courses and distances called for in the field-notes of the patent, but for some reason the attempt was abandoned as impracticable. The two surveyors then located by survey from natural monuments the north-west and south-west corners of the Moro Cojo ranch, and retraced the line between them; that is to say, they meandered a line which started from the north-west corner and closed upon the south-west corner, but in running this line they were compelled to depart from the courses called for in the field-notes of the patent by 1 deg. 47 min. It is contended that they failed to correctly trace the south-west boundary of the Moro Cojo by reason of this departure from the course called for in the patent. But since it is conceded that the fixed and ascertained corners must govern, and as they could not be connected without departing from the courses given in the field-notes, this contention seems to fail. In my opinion all the testimony goes to confirm the correctness of the survey of the south-west boundary of the Moro Cojo. But it is said this does not afford any certain or reliable means of fixing the north-

east boundary of the Rincon de las Salinas, because the two tracts of land being on opposite sides of the river, not coterminous, and neither being described by reference to the other, the location of the Moro Cojo does not fix the location of the Rincon de las Salinas. The force of this objection must be conceded, but it is much diminished by the facts that the field-notes of the river boundaries of the two ranches are connected by a call for a common object,—a township line; that the river is shown to be seven chains in width; that it is not shown to have undergone any changes between the dates of the respective patent surveys; and that there is so close a correspondence between the calls of the meandered lines of the two tracts along the river that their relative position as surveyed is perfectly demonstrated. There can be little doubt, therefore, that a line projected parallel to the river boundary of the Moro Cojo, and distant seven chains to the south-west, is, with reasonable exactness, the original river boundary of the Rincon de las Salinas, and cannot include any land to which the defendants have shown title, or any appreciable quantity of land to which the plaintiffs have not shown title. Besides, the south-eastern corner of the Rincon de las Salinas was, as above stated, established on the ground by actual survey, and connected by actual survey with the south-western boundary of the Moro Cojo, as surveyed; and, although no attempt was made to survey the north-eastern boundary of the Rincon de las Salinas on the ground, the line of said boundary, as platted on the map of the line surveyed, shows very clearly that it would include a very considerable amount of land that the decree excludes, and would exclude a very trifling quantity that the decree includes, so that the error in the method resorted to for establishing respondents' line, conceding it to have been erroneous, is shown to have been without prejudice, inasmuch as it gives the appellants more land than a correct survey would give them. It is for this reason, that the error in the method pursued was harmless to appellants, that I think the judgment and order should be affirmed.

SHARPSTEIN, J. I concur in the dissenting opinion of Chief Justice BEATTY.

87 Cal. 83

WIDMER v. MARTIN. (No. 14,018.)

(Supreme Court of California. Dec. 13, 1890.)

VENDOR AND VENDEE—RECOVERY OF PRICE—
JUDGMENT ON PLEADINGS.

Plaintiff made a payment under a contract with defendant wherein the latter obligated himself, as soon as he procured the legal title to certain land, to convey it to plaintiff, and in case of a defect in the title to return the payment. In an action to recover such payment, the complaint alleged that plaintiff had demanded a conveyance of the land, and that defendant had refused on the ground that the title was defective, and that the title was and is defective. The answer denied each of these allegations, and stated that he expected soon to obtain the legal title. *Held*, that these pleadings raised material issues which defendant was entitled to have tried, and that it was error to give judgment for plaintiff on the pleadings.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Church & Cory, for appellant. *Firman Church*, for respondent.

McFARLAND, J. Defendant demurred to the complaint, and his demurrer was overruled. He then duly served and filed a verified answer; whereupon plaintiff moved for judgment upon the pleadings, and judgment was accordingly given for plaintiff upon the pleadings alone. From this judgment defendant appeals. The practice of moving for judgment upon the pleadings in proper cases has been sanctioned by this court; but we think that in the case at bar the answer contained denials of material averments of the complaint, waiving the question of the sufficiency of the complaint itself. The action is to compel defendant to return to plaintiff the \$484 which constituted the first payment made by plaintiff to defendant on the following contract: "Fresno, January 19, 1888. Received of H. Widmer the sum of \$484 as a deposit on lots 1, 2, 3, 4, 5, 6, 7, and 8, in block 3, of the Donahou addition to the town of Fresno; the purchase price of said lots to be \$1,450, payable as follows: \$484 cash; \$483 six months from date, and \$483 twelve months from date, deferred payments to bear interest at the rate of ten per cent. per annum from date until paid. This receipt is to be taken up and deed given, and mortgage and notes received, as soon as the undersigned shall receive deed to said addition. In case of defective title from any cause, I agree to return said deposit. [Signed] J. M. MARTIN." The complaint contains a number of averments about what plaintiff did in performing his part of said contract, which are denied in the answer, and which are now claimed by plaintiff to have been immaterial; but, waiving the questions thus presented, it is clear that there is a denial of matter in the complaint that is material. It is apparent that the "defective title" mentioned in the contract did not refer to any title which defendant had, or professed to have, at the time the contract was made. The contract is based upon the mutual understanding that defendant then had no title, but was to get one through a certain "deed," which he was to receive in the future, and that he was to convey the property to plaintiff, and the latter was to give notes and a mortgage, "as soon as the undersigned shall receive deed to said addition." No one would seriously contend that plaintiff could have maintained an action for the return of the first payment on the very next day after the date of the contract on the ground that defendants' title was defective. Now, the complaint nowhere avers that the title which would come through said deed is defective, or that defendant cannot, or does not, intend to procure said deed, or had not exercised due diligence in trying to procure it, or that defendant had been guilty of unreasonable delay or neglect in the premises. The only averment in the complaint upon the subject, is that on a certain day plaintiff demanded of defendant

a deed to said lots, and that defendant "then and there failed and refused to make and deliver said deed to said lots of land, alleging that the title to said land was in dispute, and defective, and the plaintiff says the title was and is defective." But these averments are specifically denied. The defendant in his answer "denies that plaintiff demanded of said defendant a deed to the lots of land, in said receipt described, at said time, or at any time; denies that he (defendant) said at that time, or at any time, that the title to said land was defective; denies that the title to said land is defective." The answer, in addition, states how defendant expects and will be able soon to obtain the legal title. The parts of the pleadings above referred to—waiving the other points made by appellant—clearly raise material issues, which defendant is entitled to have tried. A single material issue precludes a judgment on the pleadings. The judgment is reversed.

We concur: SHARPSTEIN, J.; THORNTON, J.

87 Cal. 104

DUFF v. DUFF. (No. 13,978.)

(Supreme Court of California. Dec. 13, 1890.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

There being a conflict of evidence, the findings of the court will not be disturbed on appeal.

On rehearing. For former reports, see 23 Pac. Rep. 874, 12 Pac. Rep. 570.

S. M. Buck, H. L. Smith, John A. McQuaid, and W. C. Belcher, for appellant. *Wilson & Wilson, S. M. Wilson, J. D. H. Chamberlin, G. W. Gunter, and W. L. Duff*, for respondent.

WORKS, J. This case was heard in bank, and decided after being twice orally argued, and thoroughly and exhaustively briefed. 23 Pac. Rep. 874. A rehearing was granted mainly because it was thought that the court below, and this court, had not given sufficient weight to a certain letter written by the respondent's intestate containing certain admissions against his interest. This may have been so as to the court below, but it was not so as to the writer of this opinion, who wrote the opinion upon which the case was decided. In opposition to this admission, which was not by any means conclusive against the author of the letter, was the sworn admission of one of the defendants, at least, as a witness in a former case, to the effect that his brother, the deceased, was the owner of the property. It is true that in the litigation referred to it was to the interest of the defendant mentioned to establish the fact that the property was the property of the deceased, and that he may have testified falsely in that case in order to shield the same from the claims of other parties against him and his father, but the court below had the deposition containing these admissions before it, and, in connection therewith, heard the testimony of the defendant to the contrary in this case, and must have known better than we can know how much weight to give to

the testimony of the defendant on both of these occasions, and to the admission contained in the letter above referred to in the light of such admissions and testimony. Here were opposing admissions by the parties adversely interested. Why should one be considered absolutely conclusive and the other disregarded? We can see no reason. Nothing more can be said, even if these admissions were the only evidence on the point, than that here was a substantial conflict in the evidence, and this court cannot, under the well-established rule, disturb the finding of the court below. For the reasons here given, and those contained in the former opinion, the judgment and orders appealed from are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

Fox, J., (*dissenting*.) Upon a careful examination of the record in this case upon rehearing, it does not appear to me that the deposition referred to in the foregoing opinion contains a contradiction of the admission made in the letter referred to. I am also satisfied that there was no proper foundation laid for the introduction of said deposition, and that its admission was in violation of the law of the case, as established on the former appeal. 71 Cal. 513, 12 Pac. Rep. 570. It may be that a different judgment would never be reached in the cause, but for the reason stated, and under the rule established in this particular case on the first appeal, I cannot concur in the foregoing conclusion.

BEATTY, C. J. I concur in the dissenting opinion of Justice Fox.

87 Cal. 115

MCPHAIL v. BUELL. (No. 13,784.)

(Supreme Court of California. Dec. 15, 1890.)

REAL-ESTATE AGENT—CONTRACT—COMMISSIONS.

Defendant agreed to pay plaintiff a commission for selling land when the vendees paid defendant a certain sum, and gave their notes and mortgage for the balance. The vendees executed their notes, but never paid the money. *Held*, that plaintiff could not recover.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Cope & Boyce, for appellant. B. F. Thomas, for respondent.

WORKS, J. The appellant brought this action to recover for commissions alleged to have been due him for making sale of certain real estate for the respondent. The complaint is in different counts, one upon a special contract agreeing to pay the commissions, and the others relying upon a verbal contract, and upon the *quantum meruit*. There could be no recovery on either of the last two counts because the Code of this state requires that to entitle a broker to recover commissions in this class of cases his contract therefor must be in writing. Civil Code, § 1624; McCarthy v. Loup, 62 Cal. 302. It is equally clear to our minds that the appellant was not entitled to recover on the written con-

tract. The agreement was that the defendant would pay the plaintiff when the vendees paid to him (the defendant) the sum of \$20,000 on account of the price of said sale, and executed to him their notes and mortgage for the balance of the purchase money. The purchasers executed their notes and mortgage, but failed to pay the sum of \$20,000, either at the time of making the deed, or upon the notes given afterwards. Although the defendant extended the time of payment, and used all reasonable means to procure the money, he was finally compelled to take back the property. Their failure to pay the money was a complete bar to any claim of the appellant to commissions. The appellant contends that certain errors were committed by the court below in its rulings upon the admission of evidence, and in its instructions; but, conceding this to be so, the case could not be reversed on account of such rulings, as, for the reasons given, the appellant could not recover in any event. Judgment and order affirmed.

We concur: Fox, J.; PATERSON, J.

87 Cal. 117

PEOPLE v. BEMMERLY. (No. 20,707.)

(Supreme Court of California. Dec. 15, 1890.)

HOMICIDE—DYING DECLARATIONS—SENSE OF IMPENDING DEATH—REASONABLE DOUBT—INSTRUCTIONS.

1. It may be shown by evidence *abundant* that a document offered as a dying declaration was made under a sense of impending death.

2. The fact that the attending physician told declarant that he was going to die, and that the declarant himself, on another occasion, said he knew he was going to die, and wanted to talk privately with his cousin, was sufficient proof that a dying statement was made under a sense of impending death.

3. Where an attending physician took notes of the declarant's statements as he made them, and then retired to another room and wrote them out, after which he read the writing, sentence by sentence, to declarant, who affirmed it as being what he wished to say, the writing is shown to be the declarant's declaration, although the words used are not in all cases the same as those employed in the oral relation.

4. It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself."

5. Under Pen. Code Cal. § 1170, no exception can be taken to the disallowance of a challenge to a juror for actual bias.

6. A written instruction will not be reviewed when it bears no indorsement showing that it was given.

Department 2. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Clark & Aram, Craig & Hawkins, and J. E. Strong, for appellant. Geo. A. Johnson, Atty. Gen., and C. W. Thomas, for the People.

SHARPSTEIN, J. Upon the trial of the defendant, upon an information in which he was charged with murder, a document purporting to be the dying declaration of the deceased was offered in evidence by the prosecution. The defendant objected to its introduction. The objection was overruled and defendant excepted. The

grounds of objection appear to be: (1) The declaration does not show that it was made under a sense of impending death. It commences as follows: "I, Mat Faigle, aged 43, and a native of Germany, believing my life to be in great danger, being shot in the left side above the heart by a ball from the pistol in the hands of one John Wahlfrom, do now, before my God and the undersigned witnesses, make the following true statement, believing it to be my last." Whether the statement alone would be sufficient to satisfy the rule that the declaration must be made under a sense of impending death need not be decided in this case, as there was other evidence that it was so made. Prof. Greenleaf says: "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind." 1 Greenl. Ev. § 158. *Aliunde* the written declaration there is sufficient evidence that it was made under a sense of impending death. Three or four hours after declarant had received the fatal wound, he was told by his attending physician that he was going to die. And on one occasion decedent told those who were present at his bedside that he knew that he would die, and he wanted to talk privately with his cousin, who was also present. There is much more evidence of similar import.

Another ground of objection is that the declaration introduced in evidence is not the one made by the dying man. The manner of taking the declaration, as detailed by Dr. Dillon, by whom it was taken, is as follows: He sat on the side of declarant's bed and took notes of what declarant said. After taking said notes witness withdrew to an adjoining room, and from such notes wrote out the statement introduced as a dying declaration. After that was prepared he returned to the bedside of declarant and read him each sentence as he went along, and asked him if that was just what he meant, and he said "Yes;" and in that way the whole paper was read to declarant before he signed it. All this occurred in the presence of eight persons, who signed the declaration as witnesses. That this document was not literally copied from the notes taken by Dr. Dillon he admits. Nor is the language precisely that employed by the declarant in his oral statement to Dr. Dillon. But the doctor testified that he endeavored to give the substance of the statement made to him by the declarant, and he thinks he succeeded, although the written declaration contains some words that were not used by the declarant in his oral statement. However that may be, the declara-

tion introduced in evidence is nevertheless the dying declaration of the declarant. It was read to him sentence by sentence, and the accuracy of each sentence was assented to by him; and, after hearing it all read in that manner, he signed it in the presence of witnesses. It then became his dying declaration. If he made another declaration inconsistent with or contradictory of this, it did not render this inadmissible, but might be urged to the jury as affecting his credibility. Upon the facts disclosed by the record, we think the document which purported to be the dying declaration of Mat Faigle was properly admitted in evidence.

Under repeated decisions of this court, the ruling of the court upon the challenge of the juror, H. H. Smith, for actual bias, cannot be remedied here. *People v. Riley*, 65 Cal. 107, 3 Pac. Rep. 413; *People v. Cotta*, 49 Cal. 166; *People v. Vasquez*, Id. 560; *People v. Taing*, 53 Cal. 602. No exception can be taken to the disallowance of a challenge to a juror for actual bias. Pen. Code, § 1170. It was not error to permit the prosecution to peremptorily challenge the juror Hall after he had been sworn, good reasons being shown therefor. Pen. Code, § 1068; *People v. Montgomery*, 53 Cal. 576.

Instruction No. 10, given at the request of the prosecution, gives a lengthy definition of "a reasonable doubt," and contains this clause: "It must not be one that is merely fanciful, created ingeniously in your minds to escape the consequences of an unpleasant verdict. It must be an honest doubt; such a doubt as strikes the conscientious mind, and one that clouds the understanding of those who are honestly seeking to arrive at the truth; *such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself.*" In *People v. Brannan*, 47 Cal. 97, "the jury were told that it was their duty to convict if they should be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of a jury in the important affairs of life." This was held to be error. The court said: "The judgment of reasonable men in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of criminal cases, involving life or liberty, something further is required. There must be more than a preponderance of evidence. There must be in the minds of the jury an abiding conviction, to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused." In *People v. Ah Sing*, 51 Cal. 372: "The court below, after instructing the jury that the defendants on trial upon an indictment for murder are presumed to be innocent until proven guilty beyond a reasonable doubt, proceeded as follows: 'A reasonable doubt is that state of a case which, after the entire comparison and consideration of all the evidence, leaves

the minds of the jurors in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge. The doubt must not be vague and shadowy. Absolute certainty is rarely attainable, and is never required. *If the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there cannot remain a reasonable doubt within the meaning of the law.*' The defendants excepted to so much of the instruction as is italicized." The court said it is certainly a mistake to say that there cannot remain a reasonable doubt when even the evidence is such "that a man of prudence would act upon it in his own affairs of the greatest importance." Upon the authority of these cases we are bound to hold that so much of the instruction in this case as we have italicized is erroneous.

Instruction No. 4 is not erroneous. There is no indorsement showing whether instruction No. 24 was given, and in the absence of such indorsement we cannot review it. We fail to discover anything in the other points discussed by counsel that requires consideration here. But the errors which we have pointed out require that the judgment and order be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; MCFARLAND, J.

(57 Cal. 126)

Flickinger v. Shaw. (No. 12,609.)

(Supreme Court of California. Dec. 15, 1890.)

EXECUTED LICENSE—REVOCATION—INJUNCTION.

There was a parol agreement between plaintiff and defendant by which defendant gave plaintiff a right of way for a ditch over his land, plaintiff to survey, excavate, and keep in repair the ditch, which should be used by both plaintiff and defendant in irrigating their lands. Held, that plaintiff having constructed and kept in repair the ditch, and it having been used by both parties, the agreement became an executed license, which defendant would be restrained from revoking.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

T. H. Laine, for appellant. J. C. Black, for respondent.

THORNTON, J. That the object to be attained by the agreement between Flickinger and Smith on the one hand, and the defendant (Shaw) on the other, was to acquire by purchase a right of way over the land of the latter for the ditch constructed by the first-named parties, is, in our judgment, a fair, legal deduction from the facts disclosed in this case. Flickinger and Smith were seeking to acquire something more than a mere license or authority to do a particular act or series of acts on another's land, without possessing any estate therein, (Potter v. Mercer, 53 Cal. 673,) and which right might at any time be revoked by the licensor. In this case, the agreement between the parties is, in substance, that Shaw gives the right of way for a ditch over his land; that Flickinger and Smith survey and excavate the ditch and keep it in repair,

the ditch, when completed, to be used for the benefit of all the contracting parties in irrigating their respective tracts of land. Let it be observed (and it is so found) that Shaw agreed that Flickinger and Smith should have a conveyance of and give a right of way over his land for the ditch, and one-half of the water to be diverted thereby. The above facts clothe the transaction with the character of a purchase by one party and sale by the other of a right of way for a ditch. The license under which Flickinger and Smith entered was vested in them by a contract of purchase for a valuable consideration. Under this agreement Flickinger and Smith did survey and construct the ditch, and kept it in repair, and both parties made use of it for the purpose for which it was constructed, viz., the irrigation of their lands. Thus the agreement between the parties was executed. The license here given to Flickinger and Smith was one for the acquisition of an interest in land by purchase of Shaw, for which they paid by doing what they had agreed to do. After the ditch was constructed, it was used by all parties under the agreement for four or five years. Now, it would be highly inequitable, after the work has been done and money expended by Flickinger and Smith, to allow Shaw to recall his consent, fill the ditch, and cut Flickinger, who has succeeded to all the rights of Smith under the agreement above stated, off from the use of the ditch and the water flowing therein; nor should any such proceeding, in our view, be upheld by a court of justice. In *Rerick v. Kern*, 14 Serg. & R. 271, a case in some respects similar to the one under consideration, came before the supreme court of Pennsylvania. The case was one concerning the legal effect of an executed license. It was an action on the case to recover damages for diverting a water-course by which the plaintiff lost the use of his saw-mill. The facts were as follows: Kern, the plaintiff below, being about to erect a saw-mill on a stream designated as the "right-hand stream," a better seat for the mill was found by his mill-wright on what was termed the "left-hand stream." Kern thereupon applied to Rerick for permission to turn the water of the other stream into the left-hand stream, which was granted. In consequence of this permission, Kern built the mill on the left-hand stream. The mill was rendered a third more valuable by the union of the two streams than it would have been with the right-hand stream alone. No deed was executed, nor was any consideration given, but Kern, in consequence of the permission given by Rerick, built a very good mill, which did a great deal of business, and which he would not have built on the left-hand stream, if the permission had not been given. In this case, as will be observed, there was no element of purchase. The defense set up was that the permission to Kern was a mere license, which was revocable under all circumstances, and at any time. To this, it was said, in the unanimous opinion of the court, by Gibson, J.: "But a license may become an agreement on valuable consideration, as, where

the employment of it must necessarily be preceded by the expenditure of money; and, when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed *in specie*? That a party should be let off from his contract on payment of a compensation in damages is consistent with no system of morals, but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior should not be prevented by want of personal independence. Hence, the judgment of a court of law operated on the right of a party and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy." The same rule has been applied in case of an executed license, in *Pope v. Henry*, 24 Vt. 565, and also in *Swartz v. Swartz*, 4 Pa. St. 358. The principle on which these cases proceed is, as was said in *Swartz v. Swartz*, supra, "that the revocation would be a fraud, and that to prevent it a chancellor would turn the owner of the soil into a trustee *ex maleficio*." The case under consideration presents a stronger ground of relief than either of these above cited. Principle and authority in our judgment show that the plaintiff has rights here which should be protected by injunction. The facts show plaintiff's right to a specific performance. The statute of frauds is not in the way. There has been part performance and possession under the agreement, as far as the plaintiff could obtain possession, and though the agreement rests in parol, under the circumstances above mentioned, a party is entitled to a specific performance. *Rerick v. Kern*, 14 Serg. & R. 272. To refuse specific performance under the circumstances would be to sanction fraud, and to allow a statute passed for the prevention of frauds to become the means of accomplishing a fraud. To complete the purchase, nothing remains to be done but the execution of a conveyance of the right of way, and a proper proportion of the water to Flickinger. His equity to a deed is perfect, (*Morrison v. Wilson*, 13 Cal. 495,) and, when such is the case, a court of equity, in accordance with its familiar rules considering that as done which ought to be done, will protect it as readily and as fully as a legal title. If the legal title would be protected by an injunction, a perfect equitable title should also. In conformity with these views, in our opinion, the judgment should be affirmed.

We concur: BEATTY, C. J.; Fox, J.; PATERSON, J.

I dissent: MCFARLAND, J.

McGIVNEY v. PIERCE. (No. 12,271.)

(Supreme Court of California. Dec. 15, 1890.)

MUNICIPAL ELECTIONS—COMMON COUNCIL—CONTEST.

The provision of the city charter of Oakland, granted in 1854, giving the common council exclusive jurisdiction to determine an election contest for the office of councilman, was impliedly repealed by Code Civil Proc. Cal. § 1111 et seq., providing that any elector of a county or city, or of any political subdivision of either, may contest for causes therein stated, and that such contest must be determined by a special session of the superior court.

In bank. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Clunie & Young, for appellant. *Metcalf & Metcalf*, for respondent.

MCFARLAND, J. The appellant inaugurated a contest in the superior court of Alameda county for the office of councilman of the city council of Oakland, under section 1111 et seq. of the Code of Civil Procedure. The respondent demurred upon the ground of want of jurisdiction, and the court sustained the demurrer, and entered judgment dismissing the contest. From said judgment this appeal is taken. The judgment was rendered upon the ground that the act reincorporating the city of Oakland, which was enacted in March, 1854, gave to the common council of Oakland exclusive jurisdiction to hear and determine an election contest such as is involved in this proceeding. Waiving the question whether the language of the charter is broad enough to include the subject-matter of the present litigation, and waiving the constitutional question as to the authority of the legislature to grant such judicial power to the common council, it is clear to our minds that the sections of the Code above referred to, which were enacted long after the charter, necessarily repeal the provision of the charter here invoked. Section 1111 provides that "any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein for any of the following causes." Then follows an enumeration of various grounds of contest, including those set up in the complaint or statement in this case. The succeeding sections provide that an elector wishing to institute such a contest must file with the county clerk a written statement setting forth certain specifications of grounds of contest; that the clerk must inform the superior court of the filing of such statement; that the court must call a special session at a certain time at the courthouse to hear the contest; that a citation must be issued, etc.; and that "the court must meet at the time and place designated to determine such contested election, and shall have all the powers necessary to the determination thereof." It is further provided that "the court must pronounce judgment in the premises either confirming or annulling and setting aside such election." Of course a general statute does not always, by implication, repeal a special one. It is always a question of intention, to be gathered from the language

used, and from the subject-matter of the legislation. With respect to the matter before us we think that the legislature, when enacting the sections of the Code above mentioned, clearly intended to adopt a uniform rule for all election contests about the officers named in section 1111, and necessarily repealed all former statutes inconsistent with that intention. The judgment appealed from is reversed, with instructions to the trial court to overrule the demurrer.

We concur: BEATTY, C. J.; THORNTON, J.; FOX, J.; PATERSON, J.

87 Cal. 151

WHITE v. PATTON *et al.* (No. 12,876.)

(Supreme Court of California. Dec. 16, 1890.)

FORECLOSURE PROCEEDINGS — CROSS-COMPLAINT — JUNIOR MORTGAGE — NOTICE.

A junior mortgagee, who becomes a party defendant to a foreclosure proceeding, and prays a foreclosure of his mortgage, must serve the mortgagors with a copy of his cross-complaint, under Code Civil Proc. Cal. § 442; and, in the absence of such service, a foreclosure by default is erroneous, although the mortgagors, after proper service of summons in the original complaint, failed to appear at all in the case.

In bank. Appeal from superior court, Mendocino county; JOHN G. PRESSLEY, Judge.

T. L. Carothers, for appellants. J. A. Cooper, J. K. Chambers, and C. W. Rohrbough, for respondent.

Fox, J. Proceeding for foreclosure of mortgage. Defendants Patton, the mortgagors, made default, but the defendant Thomson, who was alleged to make some claim as a subsequent mortgagee, answered, setting up a junior mortgage made by the same mortgagors, and prayed that, after the satisfaction of plaintiff's mortgage, the proceeds of sale should be applied to the payment of the amount due upon such junior mortgage, and for judgment for deficiency, if any there should be, against the Pattons. The court rendered judgment accordingly, and the Pattons appeal.

Appellants claim that the answer of Thomson was really a cross-complaint. Such really was its effect, and for the purposes of this appeal we shall treat it as such. It prayed for, and under it there was granted to him, affirmative relief against his co-defendants Patton; and the question is whether the proceedings were such as gave the court jurisdiction to grant that affirmative relief. It is not pretended that the allegations of the pleading were not sufficient to support such a judgment; but the claim is that the court never acquired jurisdiction to render the judgment and decree of foreclosure of this second mortgage, for want of proper service, or of any service, upon the defendants against whom the judgment ran. In this contention we think appellants are correct.

By the service of the summons issued upon the complaint of plaintiff, the court acquired jurisdiction of the parties, and control of all the subsequent proceedings. Code Civil Proc. § 416. But what is meant

by those words, "all the subsequent proceedings?" Manifestly it means proceedings upon that complaint, and for that cause of action. It had jurisdiction to hear and determine the rights of all the parties as to the questions involved in the cause of action stated in that complaint. It could ascertain and determine the amount due to plaintiff, and enter a decree foreclosing his mortgage, as against the claims of all the defendants; or if it had found the mortgage of defendant Thomson to be a prior mortgage, instead of a subsequent one, it could have granted him proper relief as against the plaintiff, provided the plaintiff had been properly served with the cross-complaint. But *quoad* the plaintiff's cause of action, defendants Patton, the mortgagors, who alone were personally liable in the action, had a perfect right to make default, and let the plaintiff have the relief he prayed against them without contest. It did not follow that their default upon the plaintiff's summons would give the court jurisdiction to enter another, further, and different judgment against them, in favor of another and different party, upon another and different cause of action, and of which they were in no manner put upon notice, against which they had no "day in court." Such a proceeding, even if authorized by statute, would be in direct violation of a right guaranteed by the constitution, and one depriving the parties of their property "without due process of law." But such a proceeding is not authorized by the statute. Thomson was a proper party defendant. He might have made default, like his co-defendants, and like the defendant Marks, who was also sued as a junior mortgagee, allowed his right to be foreclosed at the same time that the right of the mortgagors was; but he elected to come in. In coming in, he might have set up his mortgage, by way of showing his right, and then contented himself with contesting simply the right, or the priority of the right, of plaintiff. But he attempted to go further, and seek to foreclose, in the same action, and against, not the plaintiff, but all his co-defendants, his mortgage, and to secure a deficiency judgment against the defendants Patton. This, too, the statute gives him the right to do, but not without giving notice to the persons against whom he sought affirmative relief. Even if those persons had been present in court, actively contesting the claim of plaintiff, they would have been entitled to actual and full notice of the claim set up by defendant Thomson, and of the affirmative relief which he demanded, and to an opportunity to defend against it. They were entitled to service of the cross-complaint, and to demur or answer thereto. Such is the express provision of the statute. *Id.* § 442.

The statute does not, in express terms, require that a summons should be issued upon the cross-complaint, and we are not disposed to hold that one should have been so issued in this case; but there should be at least the notice required by the statute,—service of the cross-complaint. This presented a new cause of action, in favor of a new party, and until the party

to be affected by that cause of action was brought in by such notice as the statute prescribed, the court failed to acquire jurisdiction to adjudicate upon or determine the same. The record fails to furnish proof of any such service. There is no appearance upon or response to this cross-complaint, nor any default for want of appearance; and the court has not found, nor certified in its decree, that any such service was ever made, although it has, with great particularity, recited the fact of service of summons "issued upon the complaint," and "of default in that behalf." This cross-complaint is as clearly a complaint against the Pattons as was the original complaint filed by plaintiff. It has not been answered, and is therefore one of the papers which must constitute a part of the judgment roll, under the first subdivision of section 670, Code Civil Proc. And although, for the reasons already shown, there was no summons issued upon it, the law requires that it must be served upon the party affected thereby. This being the law, the same subdivision requires that the judgment roll must contain the affidavit or proof of service, with a memorandum indorsed thereon, of the default of the defendant thereto, for want of answer. Nothing of the kind appears in this case. The court was, therefore, without jurisdiction to enter the judgment which was entered in favor of said defendant Thomson for affirmative relief against the defendants Pattons. The Pattons possibly might have moved the court below to set aside this portion of the judgment, on the ground of surprise, but this could only be done within six months from the date thereof. Section 473, Id. But it does not appear that they had any notice of the judgment within six months. The error was one against which they also had a right of appeal at any time within one year. That remedy they have taken, and on the appeal we are satisfied that they are entitled to have the error corrected. It is therefore ordered that so much of the judgment and decree entered in this cause as directs the foreclosure of the mortgage in favor of David Thomson against the defendants Milo and J. H. Patton, and directing judgment for deficiency against them in favor of said Thomson for any deficiency that may remain after the sale of the mortgaged premises, and the application of the proceeds thereof, be reversed, and the case remanded.

We concur: BEATTY, C. J.; THORNTON, J.; PATERSON, J.

87 Cal. 155

In re MAN WO CHAN'S ESTATE. (No. 14,019.)

(Supreme Court of California. Dec. 17, 1890.)

APPEAL—REVIEW.

In a contest over the probate of a will there was judgment for contestant. On motion for a new trial, petitioner for the probate of the will presented a statement containing the evidence and proceedings on the trial. Then, over objections of petitioner, facts which had previously been shown in a contest over the estate between petitioner and the public administrator, and which were adverted to on the argument in

the will contest, were made a part of the statement. *Held* that, though the judgment would have been sustained had only the evidence at the trial been considered, still the matters improperly made part of the statement by the court being such as may have had weight with the court in coming to its conclusion, the judgment would be reversed.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Nourse & Short, Goucher & Jones, Theodore H. Hittell, and Edw. J. Pringle, for appellant. Hinds & Merriam, for respondent.

McFARLAND, J. This is an appeal by W. W. Gray, petitioner for the probate of a proposed will of Man Wo Chan, deceased, from a judgment denying the admission of said will to probate, and from an order denying a new trial. The only evidence in the case was that introduced by the appellant. Two persons testified that they were subscribing witnesses; and their testimony (if they were credible witnesses) might be sufficient to establish the due execution of the proposed will. Another witness also testified with some degree of positiveness that the signature to the will was that of the deceased. The contestant, E. H. Cox, who had been appointed and was administrator, did not introduce any evidence. Still, the court must have believed that the will was a forgery, for the only finding of fact is "that the will propounded by said Gray is not genuine, and was not executed by said Man Wo Chan, deceased, in his life-time." Of course, the court below, sitting as a jury, was the judge of the credibility of the witnesses; and if the court had decided the issue upon the evidence before it, and had based its judgment upon a disbelief of the witnesses, we would not disturb it. It is evident, however, that the court considered matters not before it at all. Appellant presented a statement on motion for new trial which included the evidence and proceedings introduced and occurring on the trial of this contest between the appellant and the contestant Cox. The statement then contains the following: "On motion of counsel for contestant, Cox, and against the objection of counsel for respondent, Gray, the following amendments and facts that had been previously shown in the case, viz., the estate of Man Wo Chan, and were adverted to on the argument of the will contest, were made a part of this statement, to the allowance of which amendments counsel for respondent duly excepted. The amendments are as follows." Then follow statements that Ah Qui, a brother of the deceased, had on a former occasion signed a request that Cox be appointed administrator; that there had once been a contest between Cox and the public administrator in which it had been shown by testimony that Mr. Hinds, attorney for Cox, had made particular search among the effects of the deceased for a will, and had made inquiry about it of said brother Ah Qui and others, and that this will in contest was not produced, but that a certain other document was produced which was not attested; and

that the widow of deceased also requested the appointment of Cox as administrator, but died before the said contest between Cox and the public administrator had been heard. Of course these amendments should not have gone into the statement; for they confessedly contain things which did not occur at the trial. If contestant considered these things relevant and material he should have offered to prove them, and appellant would have had the opportunity to object, or to disprove or explain them. The fact, for instance, that Ah Qui, who was a brother of deceased and interested in the estate and named in the proposed will, and who, according to the subscribing witnesses, was present when the will was made, and took possession of it, made no mention afterwards of said will, and requested that Cox be appointed administrator upon the theory that there was no will, may have had, and possibly did have, great weight with the court. And, as the court put these amendments into the statement, it must be presumed that the court, in coming to its conclusion, considered the things which the amendments contained. It is apparent, therefore, that there was not a fair trial of the case. The appellant is entitled to have the issue as to the validity of the proposed will determined upon evidence introduced at the trial of such issue, and upon such evidence alone. For this reason the judgment and order must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

87 Cal. 158

FIRST NAT. BANK OF RIVERSIDE v. HOLT
et al. (No. 13,686.)

(Supreme Court of California. Dec. 17, 1890.)

MORTGAGE FORECLOSURE—COMPLAINT—DEMURRER
—UNCERTAINTY—APPEAL—OBJECTION NOT
RAISED BELOW.

1. A complaint to foreclose a mortgage alleged that defendants executed their promissory note to plaintiff on December 24, 1888, payable three months after date, "which note is in the words and figures following, to-wit," following which was a copy of the note, and after the signature the following words and figures:

"Due March 24, 1889. Indorsed:

"January 19, 1889, on B. note, \$107.30

"March 26, 1889, on G. note, 216.00

"May 22, 1889, paid 268.44."

The complaint alleged that \$591.74 had been paid on the note. *Held*, on special demurrer, that there was no uncertainty in the averments of the complaint as to whether the indorsements following the signature were part of the note at the time of its execution, or afterwards written thereon, or whether the note set forth was a copy of the one executed.

2. The mortgage provided that in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to the plaintiff." *Held*, that an averment that \$300 is a reasonable attorney's fee, "for the collection of said promissory note, and for the foreclosure of the said mortgage," was simply an averment that said sum was a reasonable attorney's fee in said foreclosure suit.

3. Even if the allegation as to attorney's fees were uncertain, it would not render the complaint demurrable, as the allegation is not necessary.

4. Even if from the finding of the court that

there was due plaintiff from defendants a certain sum for "costs, percentage, and necessary disbursements," and the fact that this sum was included in the judgment, it appeared that any part of the sum allowed was for percentage, still, want of authority in the court to allow percentage cannot be raised for the first time on appeal.

Commissioners' decision. Department 2. Appeal from superior court; San Bernardino county; JOHN L. CAMPBELL, Judge. *W. J. McIntyre and H. Goodcell, Jr.*, for appellants. *E. B. Stanton*, for respondent.

BELCHER, C. C. This is an action to foreclose a mortgage. The defendants demurred to the complaint and their demurrer was overruled. They failed to answer within the time allowed, and thereupon judgment was entered against them, from which they appeal. The demurrer was upon the grounds of ambiguity and uncertainty, and it specified three particulars wherein it was claimed that the complaint was defective.

The first specification is that it does not appear whether the indorsements on the promissory note, set forth in the complaint, were part of the note at the time of its execution, or afterwards written thereon, or whether the said note is a copy of the note executed by the defendants. The complaint alleges that the defendants executed their promissory note to the plaintiff on December 24, 1888, payable three months after date, "which note is in the words and figures following, to-wit," and then sets forth a copy of the note, with the following words and figures after the signatures:

"Due March 24, 1889. Indorsed:

"January 19, 1889, on Boyd note..... \$107 30

"March 26, 1889, on M. D. Godfrey note.... 216 00

"May 22, 1889, paid..... 268 44"

It is argued for appellants that the words and figures following the signatures appear, according to the averment, to have been a component part of the note, and yet that they show three dates, all later than the date, and two of them later than the maturity, of the note, which, without explanation, convey the idea that the indorsements were not part of the note as originally made, but were added subsequently; and it is said that this idea, being contrary to the apparent averment, and there being no explanation, makes the complaint uncertain in this respect. It is also argued that it does not appear whether or not the note set forth, with or without the indorsements, is a copy of the note executed by the defendants, because, from the averment that the "note is in the words and figures following," it is only a matter of inference that it was in the same words and figures at the date of its execution; and it is said that an averment which has to be helped out by inference is insufficient as against a special demurrer. We see no real uncertainty in the averments complained of. The indorsements were evidently intended to represent payments made and credited upon the note at the dates shown thereon. These payments aggregate the sum of \$591.74, and the complaint alleges "that the said defendants have paid up

on the note hereinbefore set forth * * * the sum of five hundred and ninety-one and 74-100 dollars, and there is now due and unpaid upon the said promissory note, from the said defendants to the said plaintiff, the sum of sixteen hundred and sixteen and 63-100 dollars, together with interest," etc. The last-mentioned sum is just the amount of the principal of the note, less the amount of the payments indorsed thereon. Looking, then, at the whole complaint, it is clear that there was no such uncertainty in its averments as could create or leave in the minds of the defendants any reasonable doubt as to their meaning; and, this being so, the complaint must be held sufficiently certain to meet the requirements of the law. The objection that it does not appear that the note set forth in the complaint is a copy of the note executed by the defendants is not even plausible. The complaint alleges that, on the 24th day of December, 1888, the defendants "made, executed, and delivered to the plaintiff their promissory note, bearing date on that day, which note is in the words and figures following." This certainly leaves no room for doubt or cavil that the note set forth is a copy of the note executed.

The second specification is that "it does not appear at what time the \$591.74 credited upon the note was paid, and it therefore does not appear upon what amount, or from what time, interest should be computed thereon." This objection is sufficiently answered by what has already been said; and, besides, the payments were credited upon the principal of the note, and there was therefore no uncertainty as to how the interest on the balance should be computed.

The third specification is that "it does not appear what would be a reasonable attorney's fee for the plaintiff in this action." The mortgage, as shown by the complaint, provides that, in the event of foreclosure, "reasonable attorney's fees, to be taxed by the court, shall be allowed to the plaintiff," and it is alleged "that two hundred dollars is a reasonable attorney's fee to be allowed to the plaintiff for the collection of the said promissory note, and for the foreclosure of the said mortgage." In this state there can be but one action for the recovery of any debt secured by mortgage. Code Civil Proc. § 726. The obvious purpose of this action was to recover the amount due on the note set out by a foreclosure of the mortgage, and the sale of the mortgaged property; and it was only to aid the plaintiff in accomplishing these ends that the allowance of an attorney's fee was authorized by the mortgage, and was asked for in the complaint. The averment that the sum claimed was a reasonable fee for the collection of the note and foreclosure of the mortgage was limited to the action in hand, and was therefore neither ambiguous nor uncertain. Besides, if the averment were uncertain, as claimed, still that fact would not aid the appellants here, for the reason that no averment as to what would be a reasonable fee was necessary. *Carriere v. Minturn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 571, 14 Pac. Rep. 514.

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The court found that there was due to the plaintiff from the defendants the sum of \$162.15, for "costs, percentage, and necessary disbursements, including attorney's fees," and this sum was included in the judgment. It is objected that there was no provision of law authorizing the court to add a percentage to the costs and disbursements, and that the judgment is therefore, in this particular, clearly erroneous. But it does not appear that any portion of the sum allowed was for percentage; and, if such was the fact, the defendants should have raised the point in the court below, where the error, if any, might readily have been corrected. We see no error in the record, and therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(87 Cal. 23)

NORTHERN RY. CO. *et al.* v. JORDAN *et al.*
(No. 12,768.)

(*Supreme Court of California.* Dec. 12, 1890.)

EJECTMENT—VERDICT—NEW PARTIES—EVIDENCE.

1. In ejectment, the verdict was that plaintiff was "entitled to the possession of the land described within the following boundaries," etc.; but there was nothing to show that the verdict referred to the land described in the complaint or answer or the patents and deeds introduced in evidence, and no natural monuments were mentioned in the boundaries given. *Held*, that the verdict and judgment based on it were insufficient.

2. A new plaintiff was substituted for the original plaintiff, who had conveyed to him pending the suit, by an order which declared that all the allegations and denials of the pleadings should apply to such new plaintiff. Among the allegations of the complaint to which the new plaintiff was thus committed was one that plaintiff at the time the action was brought was entitled to the possession of the land in dispute. *Held*, that it was error to admit in evidence the deed from the original plaintiff to the new one, as it was irrelevant to any issue made by the pleadings.

3. Evidence of the location of a house on the land which was one of the calls in the patent was admissible.

Department 1. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

J. B. Reinstein, J. M. Seawell, and Reinstein & Eisner, for appellants. *L. B. & L. Mizner and E. R. Chase*, for respondent.

Fox, J. Action in ejectment. Judgment for plaintiffs; motion for new trial denied, and defendants appeal from both the judgment and order. Plaintiffs deraign title under a certificate of purchase of tide-lands from the state, issued November 9, 1871, to L. B. Mizner, followed by patent issued June 14, 1877. Defendants deraign title under a United States patent for the Rancho Canada del Hambre de Bolsas, and a deed conveying the land in Little Bull valley down to the shore of the straits of Carquinez, in Contra Costa county. There is no question but that the patents are coterminous—the lands

described in the one being bounded by the lands described in the other—at and along the point under investigation in this case; but the point is, where is that coterminous line? Both patents give as a general description “the shore of the straits of Carquinez,” and in both patents this general description is followed by a specific one of courses and distances, and each corresponding to the other in such courses and distances. As matter of law,—and that seems to be conceded as law in this case,—if there is a conflict between the natural boundary, or shore line, and the line as given by courses and distances, the latter must yield to the former. The correct location of the shore line is therefore the matter to be ultimately determined in this case, but it will have to be determined upon another trial; for the verdict rendered upon this trial, in our judgment, determines nothing, and cannot stand. As the case will have to go back for a new trial, we suggest, preliminarily, that either the verdict or the complaint is all awry as to the points of the compass at the place under consideration. The exhibits which are brought up to us indicate that the first fault is in the complaint. If so, the new proceedings in the court below ought to commence with an amendment of that complaint, for it can hardly be expected that a judgment can ever be reached which will settle rights between litigants, unless the pleadings are framed to support it. It may also be found advisable to amend it for another reason, which will hereafter become apparent.

1. The first point made by appellants is that the verdict and judgment are erroneous for uncertainty of description. The verdict reads as follows: “We, the jury, find that the plaintiff is entitled to the possession of the land described within the following boundaries: Commencing at point (A) on the west line of railroad right of way, running west at right angles with the right-of-way line (70) seventy feet, thence a south-easterly direction to a point on the west line of right of way, thence northerly along said right-of-way line (180) one hundred and eighty feet to the point of beginning.” That is all there is of the verdict, save the signature of the foreman. There is nothing in the complaint, or in any part of the judgment roll, which corresponds in any particular with this verdict, or from which it could be determined that the verdict referred to the whole or any part of the land described in the complaint, or in the answer, or even to any lands described in either of the patents, or any of the deeds offered in evidence. Place the description given in any of the pleadings, or of the title papers offered in evidence, side by side with this verdict, and it would be impossible to tell even that the lands were located in the same state, much less that they or any part of them were the same. Point A is not a monument, and there is nothing of record anywhere by which it can be located. The judgment conforms to the verdict, and does not improve upon it, in this regard. This verdict, and the judgment based on it, is clearly insufficient under the rule laid down in *Crosby v. Dowd*, 61

Cal. 602, affirmed in *Emeric v. Alvarado*, 64 Cal. 621,¹ and in *Hill v. Wall*, 66 Cal. 132, 4 Pac. Rep. 1139. But it is claimed that *Crosby v. Dowd* was overruled in *De Sepulveda v. Baugh*, 74 Cal. 470, 16 Pac. Rep. 223. In the latter case it was held, modifying *Crosby v. Dowd*, that a judgment is not void for uncertainty because of the fact that it refers to some other paper for description. But it was still held that such a judgment may be erroneous, and subject to correction on appeal, even though it could not be held void on collateral attack, so long as there was some other paper, matter of record, to which reference might be had for description. But even under that decision this verdict is not good, for it refers to nothing of record or elsewhere, to which resort may be had for the purpose of locating the lands here attempted to be described. Respondent says the jury had before them during the entire trial, and in their jury-room, a diagram, upon which point A was distinctly marked. Suppose they had. They have not referred us to that diagram, and, if they had, the diagram is not a part of the record; it may be found to-day, it may be impossible to find it to-morrow, and when found it would be impossible to apply it with absolute certainty to any particular tract of land.

2. The action was commenced by the Northern Railway Company and A. J. Bryant as plaintiffs. Some time afterwards, upon the request of Bryant and of Floyd-Jones, the latter was substituted in the place of Bryant as plaintiff, and it was ordered that the name of Bryant be stricken from the complaint, and the action continued in the name of Floyd-Jones as plaintiff, “and that all the allegations and denials of the pleadings apply to said Floyd-Jones, and not to said Bryant, and that the said complaint be amended by striking out the name of said Bryant and inserting in the place thereof the name of said Floyd-Jones.” Floyd-Jones having succeeded by transfer to the interest of Bryant, he had a right to be substituted as plaintiff if he desired to do so, (Code Civil Proc. § 385,) but the method of doing it was a singular and unfortunate one. It left him to stand upon an allegation, and bound to prove, that he was the owner, or at least entitled to the possession, at the time the complaint was filed, neither of which was true. The court did err, therefore, in admitting in evidence, under the pleadings as they stood, the deed from Bryant to Floyd-Jones. It was incompetent, irrelevant, and inadmissible for the purpose of proving any issue in the cause. The difficulty would have been obviated by a proper supplemental complaint.

3. It was not error for the court to admit evidence tending to show the location of the John Travers house. That was one of the calls of the United States patent, and the parties were entitled to show where it was if they could. Whether the evidence was sufficient to prove the fact was for the jury to determine.

4. We do not think the point that the verdict is against law, because in disobedience

¹2 Pac. Rep. 418.

ence of the instructions of the court, is sustained. The jury are of course bound to take the law from the court, but it does not appear that they did not do so in this case. Under the instructions, the real question was one of fact,—where was the high-water mark? It does not follow, because the jury and the counsel do not agree upon that question of fact, that the jury disregarded the instructions of the court.

5. The point is also made that the evidence is insufficient to justify the verdict. As the case must be tried anew, we deem it improper for us at this time to discuss that question.

6. It is also claimed that the certificate of purchase and state patent to Mizner are void. We regard this contention as settled adversely to appellant by the decision in Upham v. Hosking, 62 Cal. 250, a case which seems to be directly in point.

Judgment and order reversed.

We concur: PATERSON, J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

I concur in the judgment: WORKS, J.

3 Cal. Unrep. 336

INGERMAN v. MOORE *et al.* (No. 12,733.)
(Supreme Court of California. Dec. 16, 1890.)

NEGLIGENCE OF MASTER—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an adult, had worked about defendant's saw-mill for about four years, and for nearly a year as helper to the sawyer at an "edger," consisting of eight circular saws arranged upon a table four feet high. Under the table, six inches below the saws was a revolving shaft, with a collar upon it fastened by a projecting set-screw. Plaintiff testified that on several occasions he had run the edger himself, by direction of his employer, after telling him that he did not understand machinery; that the saws were stopped and started at will by pulling, respectively, two ropes which hung near; that the morning of the accident was quite dark, but there were no lights; that he had been directed to run the machine, and, while doing so, a sliver dropped upon the shaft, which he attempted to remove, as he had seen the sawyer do, without stopping the saws, and while doing so his sleeve was caught by the set-screw, of whose existence he was ignorant, and his hand cut off. *Held*, that there was no evidence of negligence, and that he was guilty of contributory negligence. BEATTY, C. J., and McFARLAND, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Jarboe, Harrison & Goodfellow and *Wm. F. Herrin*, for appellants. *Pillsbury & Blanding*, for respondent.

WORKS, J. This is an action for damages for personal injuries brought by an employe against his employers. The defendants moved for a nonsuit, which was denied. There was a verdict and judgment for plaintiff for \$12,500, a motion for a new trial, which was denied, and the defendants appeal. The facts are stated in the appellants' brief as follows: "In the month of January, 1884, the defendants were the owners of a saw-mill at Port Discovery, Washington Territory, and the plaintiff was one of their employes, engaged in

their saw-mill in running an edger, or scantling machine, which was used for shaping lumber, and cutting it in various widths and thicknesses. The edger was about seven or eight feet in width, and from three to four feet in length, and had arranged upon it, at intervals upon its longest dimension, eight circular saws. These saws were moved by means of an engine, belt, and pulley, and made 860 revolutions a minute. The plaintiff stood in front of this machine, and, with the aid of a helper, who stood a few feet in the rear of him, ran the lumber through this edger to the rear thereof, where it was removed by others from the mill. About six feet to his rear, and close by his helper, was a rope, by pulling which, whenever it was necessary to stop the machine, the belt connected with it could be thrown off the pulley, and the movement of the saws stopped. The plaintiff commenced working at the mill in the year 1880, and from that time was continually employed there until the 14th of February, 1884. He had been at work on the inside of the mill, in connection with different saws, from the latter part of the year 1880. His special function from March, 1883, was that of an assistant to one Libben, who had charge of this edger or machine, and it was customary, when Libben was absent, for the plaintiff to take charge of the machine, with the aid of an assistant, who was detailed to help him. From the time he commenced his position as assistant to Libben, in March, 1883, he had at various times taken charge of and run the machine, at one time for several weeks in succession, and had been running it for several days prior to the accident. On the 14th of February, 1884, and for four days prior thereto, he was in charge of the machine, Libben being sick and absent, and, with the aid of his helper, one Hansen, was running the machine himself. On the morning of that day, at about half-past seven o'clock, a sliver had become detached from one of the planks that he was running through the saws and fell beneath the saws into an open box or frame upon which the saws were supported, and interfered with the free working of the machine. Beneath the saws, and six and a half inches below them, was a parallel shaft, revolving eighty-four times a minute, upon which this sliver rested. The floor underneath was open, for the purpose of allowing the chips and sawdust to fall through into the lower part of the mill. At the left-hand end of this parallel shaft, as you face it from the front, was a set-screw, which held a collar to it, and was placed there for the purpose of preventing its vibration. This screw projected about half an inch from the surface of the shaft, and was itself about half an inch square. When the plaintiff observed that the sliver had fallen into the box of the machine, instead of signaling his helper to stop the machine, he went around to the rear of it, while it was still moving at its usual velocity, and attempted to move the sliver with his hand. Instead of attempting to take it out with his right hand, he rested his right hand upon the frame of the box in which the machine was inclosed, and, with his left

hand, reacher across his body to the right-hand end of the machine, for the purpose of removing the sliver, when suddenly his hand was taken off, and his arm broken so that amputation became necessary. His hand was cut directly across at the wrist without any scratch or mutilation of any character, and, with some scraps of his clothing, fell down into the chute below the machine, where it was several hours afterwards found."

The plaintiff testified with reference to his employment in running the machine and the way in which the accident occurred, as follows: "I am 29 years old. I commenced to work at the mill of the defendants on the 24th of May, 1880. The mill was then owned by Mr. Mastick. The defendants took charge of it in 1881 or 1882. When I first went there I worked on the lumber pile. Then I commenced to work on the rollers inside, taking the lumber from the big saw. I did this kind of work about two years and a half. Then I went to work with John Libben on this scantling machine, where I got hurt. I had been at work on that machine about nine months before I was hurt. This machine was about seven or eight feet wide, and three or four feet long. Question. How was that machine worked? What kind of power? Answer. Steam power. Q. By a belt? A. Yes, sir; by a belt. Q. With a brake or wheel? A. We had a rope to pull. Six feet away from me was a rope to pull, and generally the man who was helping had to pull that rope when they wanted to stop the machine. Q. What did you do when you started it? A. Well, there were two ropes, one to start, and one to stop. Q. So you pulled one to start, and one to stop? A. Yes, sir. Q. Did you ever run that machine? A. Yes, sir, I did. Q. When was the first time you ran it, about as near as you can recollect? I will ask you first how many times do you remember running it before the time you got hurt? A. I ran it three times. Q. As near as you can remember, tell me the first time you ran it. A. The first time I ran it about four days. Q. How long before you got hurt, as near as you can tell? A. About five months before I was hurt. Q. How long did you run it that time? A. About four days. Q. How did you come to run it at that time? A. Mr. Libben was sick and absent. Q. I want to get at who, if anybody, asked you to run it, or directed you to. A. Well, Mr. McCann told me to go there. Q. Tell the jury how, just exactly how, it happened. A. Mr. McCann told me to go and run the machine; that is all. I did not know much about machinery. He thought I could do it. I said: 'I will do my best.' He said: 'Go ahead; I think you can run it.' Q. What else, if anything, was said? A. Nothing more said at that time. He told me to go there, and I had to go there. Q. Did he give you any further instructions or directions? A. No. He gave me no instructions whatever. Q. How long did you say you ran it at that time? A. I ran it about four days. Q. How soon was that after the first time? A. About a month or six weeks after. Q. You say you ran it two days. How

did you come to run it then? A. Well, Mr. McCann came and told me to run it. Q. What was said? Tell the jury all that was said about it. A. Well, I always told Mr. McCann I was no machinist, and didn't know much about machinery, so he had to take somebody else, and he always told me he thought I was able to run it, and I had to go there. Q. I am getting at the second time. You have told about the first time. Now I want to get at the other, as near as you can remember. A. Well, that is as near as I can remember. I always told Mr. McCann I did not know much about machinery. Q. Well, then, you went for about two days, you say? A. Yes, sir. Q. Then when did you run it again before you were hurt, if you did? A. I think I ran it some time in November. What time, I could not exactly say. Q. In November, before you were hurt? A. Yes, sir. Q. How long did you run it then? A. About nine days. Q. Where was Libben at that time? A. He was sick. * * * Q. Now, tell the jury what you were doing when you got hurt. A. I was trying to take the sliver out of the machine, and my hand got caught by the set-screw, and tore off. Q. Where was this sliver? A. Right underneath the machine,—right underneath the saw. It prevented me. I could not lift the rollers up to put the lumber into the machine. Q. How did you come to pull the sliver out, or be pulling the sliver out? A. I could not lift the rollers, so I had to get behind the machine, and try to get the sliver out; and it was a dark morning, the lights were out, so I tried to get the sliver out, and got my hand in the machine, and caught in the set-screw. I could not see the set-screw. I didn't know the set-screw was there. Q. What did the set-screw catch on, if anything? A. It caught my jumper, my outside shirt. Q. One of those strong jackets you wear outside to keep off the dust, was it? A. Yes, sir, and that caught inside, and pulled my arm around the shaft, and tore my hand off and broke my arm, and then I got out again. Q. Had you ever pulled a sliver out of there before? A. Not in that place, a good many other places. I done just exactly as I saw Mr. Libben do. I saw him pull slivers out of the same place."

It is contended by the appellants that the nonsuit should have been granted for two reasons, viz., that the evidence failed to show negligence on the part of the defendants, and that it did show contributory negligence on the part of the plaintiff. We feel constrained by the evidence, as it appears in the transcript, to agree with the appellants in this contention. We think the evidence fails to show negligence on the part of the appellants; but if there is any question as to this, there can be none as to the contributory negligence of the respondent. By counsel for respondent much stress is laid upon the fact that he was not regularly employed to run the machine which caused the injury, and was not competent to run and manage it; but his own testimony shows that he had been a helper on the machine for several months, and had himself run it a number

of times for several days on each occasion. Besides, the accident did not occur, in this instance, because of any mismanagement of the machine, but was the result solely of carelessness on the part of the plaintiff in attempting to remove the sliver from the machine by placing his hand in close and dangerous proximity to the running saws. It was wholly unnecessary for him to run this risk. He testifies that his machine could be stopped by pulling a rope, and started by pulling another. He was a man of mature years, and was bound to know the risk and danger of taking the course he did, and as it was unnecessary for him to do so he was guilty of negligence which must prevent a recovery in this case.

It is contended that there was negligence on the part of the appellants in not having the room in which the machine was operated sufficiently lighted, but, if this be conceded, the act of the respondent in putting his hand near the saws in the dark only proves his negligence more clearly. Again, it is contended that there was negligence on the part of the defendants in having a set-screw on the shaft connected with or near the machine. But it appears from the evidence that the set-screw was necessary for the proper running of the machinery, or a part of it, and, besides, the accident, which it is claimed occurred on account of the set-screw being there, could not have occurred but for the negligent act of the plaintiff above mentioned. For these reasons the court below erred in overruling the motion for a nonsuit, and in denying the defendants a new trial. Judgment and order reversed, and cause remanded.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

I dissent: McFARLAND, J.

BEATTY, C. J. I dissent. There was, in my opinion, sufficient evidence of negligence on the part of defendants to go to the jury, and not sufficient evidence of contributory negligence on the part of the plaintiff to justify the court in granting a nonsuit on that ground. It is clear that the machine was dangerous to a man unfamiliar with its construction, and ignorant of the proper method of keeping it in order. If the plaintiff had expressly represented himself as competent to run and manage it, or had impliedly done so by seeking the employment, there might have been no duty resting upon the defendants to instruct or warn him as to the dangers involved in its operation. But the plaintiff's evidence showed that, so far from seeking the employment, or leading the defendants by any express or implied representations to suppose that he was competent to operate the machine, he accepted the employment unwillingly, protesting that he did not understand machinery, and that some one else should be put in charge. When a man is set to work upon a dangerous machine, under such circumstances, I think the employer is guilty of negligence if he fails to give proper instructions as to the method of operating

the machine safely, and he is more specially guilty of negligence if he instructs the employe to operate it in a manner that is dangerous. Now, in this case, the only instruction ever given to the plaintiff, according to his evidence, was to do as he had seen Libben do, and in following this instruction he incurred the injury complained of. In this view of the case, a nonsuit would certainly have been improper, and the verdict of the jury is sustained by the evidence.

(87 Cal. 162.)

Ex parte HODGES. (No. 20,739.)

(Supreme Court of California. Dec. 17, 1890.)

CONSTITUTIONAL LAW—EXTERMINATION OF SQUIRRELS—ORDINANCE.

1. Under County Government Act Cal. § 25, subd. 28, giving boards of supervisors power to provide for the destruction of squirrels or other wild animals, such boards have no authority to require land-owners, under a penalty, to exterminate within 90 days the ground-squirrels on their respective lands, and thereafter to keep the lands clear thereof.

2. Neither does Const. Cal. art. 11, § 11, providing that any county may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws, authorize such a regulation, as it is not a police, sanitary, or kindred regulation.

In bank.

Latimer & Brown, for petitioner. W. S. Tinning, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The board of supervisors of Contra Costa county enacted the following ordinance: "An ordinance to provide for the extermination and destruction of ground-squirrels in the county of Contra Costa. The board of supervisors of the county of Contra Costa do ordain as follows: Section 1. Ground-squirrels infesting lands in the county of Contra Costa are hereby declared to be a public nuisance. Sec. 2. All owners and occupants of lands within the county of Contra Costa are hereby required, within ninety days after the taking effect of this ordinance, to exterminate and destroy the ground-squirrels on their respective lands, and thereafter to keep said lands free and clear therefrom. Sec. 3. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor. Sec. 4. This ordinance shall take effect and be in force on the 30th day of November, 1889." The petitioner was convicted of a violation of this ordinance, sentenced to pay a fine, and, in default of payment, was committed to the county jail. He now prosecutes this proceeding, and asks that he be discharged.

The question as to the constitutionality of the ordinance is gravely and learnedly discussed by counsel on both sides, and Cooley's Constitutional Limitations, Potter & Dwaris on Constitution, Sedgwick on Constitutional Law, and other constitutional authorities and decided cases innumerable, are cited in aid of and against its validity. It is certainly a most effective means of abating a nuisance, viz., the squirrels, and bringing about a very desirable end. We regret exceedingly that

we cannot see our way clear to uphold and enforce such an important and original piece of legislation. Indeed, it would give us great pleasure to see the power here assumed applied to snakes, tarantulas, ants, flies, fleas, and other reptiles, insects, and pests, which tend to make man's life a burden, and to have it exercised and enforced in every county in the state. But we are unable to see by what right or authority of law a board of supervisors can impose upon a land-owner the burden and expense of exterminating animals *feræ naturæ* on his own land or elsewhere. It is true the county government act (section 25, subd. 28) gives boards of supervisors power to "provide for the destruction of gophers, squirrels, other wild animals, noxious weeds, and insects injurious to fruit-trees, or vines, or vegetable or plant life;" and this is a power that should be upheld in all cases where the means employed are reasonable, and not otherwise objectionable. But certainly this authority cannot be so far extended as to require a land-owner, under a penalty, to exterminate wild animals, of which he is not the owner, and over which he cannot, in the nature of things, have any control or dominion. From our limited knowledge of the nature of the squirrel tribe in this state, such a task would seem to us to be almost, if not quite, impossible. The ordinance requires that all occupants of lands, "within ninety days," exterminate and destroy the ground-squirrels on their respective lands, and "thereafter to keep said lands free and clear therefrom." This might be successfully done by the free and judicious use of poison, and perhaps by some other means, on very small tracts of land, but on large tracts it would certainly require eternal vigilance, if it could be accomplished at all; and if, after the extermination of the intruders on his own land, one, only one, should come over from the land of his neighbor, the ordinance would be violated. The occupant of lands bordering on another county, where no such regulation prevailed, and the pesky squirrel was allowed to propagate and grow unmolested, would be in a most unfortunate condition. Such an ordinance differs materially from laws requiring an occupant of lands to keep it free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them in order to prevent the spread of the disease. These are matters over which the property owner has control, and the requirements are reasonable and just.

The respondent attempts to sustain the ordinance by and under section 11 of article 11 of the constitution of this state, which provides that "any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with the general laws." But the ordinance is not intended to preserve the peace and quiet of the county, or to prevent the use of one's property to the injury of another, or for the protection of the lives, limbs, or comfort of all persons, or to prevent the propagation or spread of disease, nor is it, in any proper sense, a po-

lice or sanitary regulation. What is meant by "other regulations" in the section cited may be a question, but it must certainly be limited to objects similar to those denominated "police" and "sanitary." If the board of supervisors had no authority to pass such an ordinance, then no offense was committed by the petitioner; the act or omission on his part was not a crime; the court had no jurisdiction to try or convict him; and he is entitled to his discharge. We know of no law which can be held to authorize a board of supervisors to enact such an ordinance, and we are quite clear that it cannot be enforced for the reason that it is unreasonable and burdensome in the extreme. Let the petitioner be discharged.

We concur: FOX, J.; SHARPSTEIN, J.; THORNTON, J.

We concur in the judgment: PATERSON, J.; MCFARLAND, J.

(87 Cal. 178)

STAPLES v. MAY. (No. 12,167.)*(Supreme Court of California. Dec. 18, 1890.)***MORTGAGES—DESCRIPTION—RECEIVERS—TRESPASS.**

1. A mortgage of a specifically described tract of land in which is a vein or lode of metal on which some mining has been done, with all the mines, minerals, mining rights, privileges, and appurtenances belonging or appertaining to the same, does not cover an undeveloped portion of the lode contained in land adjoining the tract described, and in which also is the *situs* of the lode.

2. On the same day that the mortgage was given on the specifically described tract, the owner, a mining company, executed a deed of trust thereon to secure other indebtedness. The trust-deed also covered all lands, mines, etc., owned by the company. It appeared that the title to said adjoining tract was in the United States, except that the mining company claimed it, and its claim to title was recognized by its immediate neighbors, though it had not extended its mining operations into said tract, or inclosed it. *Held*, that the trust-deed did not cover said tract.

3. At the time of commencing suit to foreclose the mortgage and trust-deed, an *ex parte* order was made on application of complainants, appointing a receiver of the company's property, to take charge of and preserve it, and he was authorized to borrow money to work the mine and do things necessary for the preservation of the property. At this time the company owned the adjoining tract of land, and had a station thereon connected with the mines in the mortgaged tract, and worked as a part of the same general system, under a single management. The minerals extracted from the whole system by the receiver did not pay the expenses, but in the mining done on said adjacent tract there was a profit. *Held*, that the receiver had no right to take ores from such tract, and that for such profit he was liable to a general creditor of the company on supplementary proceedings against the company.

Reversing 23 Pac. Rep. 710.

In bank. On rehearing. For former report, see 23 Pac. Rep. 710.

T. I. Bergin, for appellant. *S. F. Leib*, (*L. D. McKisick*, of counsel,) for respondent.

BEATTY, C. J. This is an appeal from an order overruling defendant's motion for a new trial. The cause was originally submitted in department 1, where the order appealed from was reversed upon grounds stated in an opinion by Commissioner FOOTE, opinion filed March 31, 1890, 23 Pac. Rep. 710. After a rehearing, and a more careful consideration of the record, we find it necessary to modify in some particulars the statement of the case as then made. The facts are as follows: On the 1st day of August, 1881, in the superior court of Santa Clara county, the plaintiff and respondent herein recovered a judgment against the Santa Clara Mining Association of Baltimore, a foreign corpo-

ration, for \$5,000, upon which execution was issued and returned unsatisfied. She then, proceeding under sections 717-720, of the Code of Civil Procedure, cited this defendant to answer as to his indebtedness to the corporation, and in due course obtained an order from the superior court, authorizing her to institute and prosecute an action to recover any indebtedness owing by said defendant to said corporation. In pursuance of that order she commenced this action in October, 1881. In her complaint she sets out the proceedings above mentioned, and alleges that, between July 19, 1880, and May 31, 1881, said corporation was the owner of a tract of land containing 161 acres in Santa Clara county, together with the minerals and ores therein contained. This allegation is not only not denied by the answer, but is expressly found by the court to be true, and is in no wise assailed by the appellant, so that this fact, at least, may be set down as unquestionable: that between the dates mentioned the Santa Clara Mining Association of Baltimore was the owner of the tract of land specifically described in the complaint, together with the ores and minerals therein contained. Whether the corporation was so the owner of said tract at a prior date—that is, at the date of the mortgage and trust-deed hereinafter mentioned—is, as will be seen, one of the principal questions in the case, and will call for some discussion in its proper connection. Returning to the plaintiff's complaint, her only other allegations, which it is necessary to note here, are that between said dates (July 19, 1880, and May 31, 1881,) the defendant entered into and upon said tract of land, mined and extracted therefrom ore of the value of \$100,000 and upwards, reduced the same to quicksilver, sold it, and received therefor over \$100,000, no part of which had been paid to said corporation. These allegations are denied in the answer, and, in addition to such denials, the defendant sets out, with great fullness, the proceedings in a foreclosure suit against said corporation, in which he was appointed receiver of the property mortgaged, which included, as he alleges, the land and mine specifically described in the complaint in this action.

The facts with respect to the mortgage, action to foreclose, appointment of defendant as receiver, and his proceedings under such appointment, are as follows: In the year 1873 said Santa Clara Mining Association was the owner of a tract of land in Santa Clara county, containing about 1,100 acres, and adjoining the tract described in the complaint herein. In this 1,100-acre tract there existed a vein or lode of cinnabar, upon which some mining had been done, but at that time the lode had not been worked or explored outside of the limits of that particular tract. Such being the case on the 14th of June, 1873, said corporation, to secure its bond for \$100,000, executed a mortgage to McCalmont, and on the same day, to secure its bonds to the amount of \$400,000, executed a deed of trust to a loan and trust company. In the year 1880 an action was commenced by the assignee of the McCalmont mortgage against the mortgagor

and numerous other parties, including the trustees under said trust-deed, to foreclose the mortgage. The complaint in this action alleged the insolvency of the corporation, the existence of mines and mining works upon the mortgaged premises, the danger of loss and destruction to the property, the mine especially, if the pumps were stopped, and mining operations suspended during the litigation, and prayed the appointment of a receiver to take charge of the property, and to protect and preserve it. Accordingly an order was made *ex parte* at the time of the commencement of the suit appointing this defendant such receiver, and from time to time thereafter other orders were made by the superior court, authorizing him to borrow large sums of money to enable him to work the mine, pay taxes, and do other things deemed necessary for the preservation of the property which was the subject of the litigation. In pursuance of these orders, the defendant entered into possession of the mine and other property, borrowed money, extracted ore, reduced it to quicksilver, which he sold, and applied the proceeds, with the general result of leaving himself, at the end of the litigation, indebted to the extent of about \$60,000 for borrowed money. But, although his entire operations resulted in the loss of this large sum, there was one part of the lode, known as "Station 8," from which he took about \$138,000, at a cost of about \$100,000, leaving a net profit of \$38,200, all of which was prior to May 1, 1881, and two years before entry of the decree in the foreclosure suit. It is to this \$38,200, or a share of it, that the plaintiff herein makes claim, upon the ground that station 8, the part of the lode from which the ore producing it was taken, is entirely outside of the mortgaged premises, and, consequently, that the appellant, as receiver in the foreclosure suit, had no right to enter there; that he was in fact a trespasser, and became liable to the corporation for at least the net value of the ore. Such was the view of the superior court, and such the theory upon which the judgment in favor of the respondent was based.

Against this view the appellant urges a number of objections, which we shall proceed to consider:

First. It is claimed that the McCalmont mortgage embraced station 8. But this position we do not think can be sustained. Station 8 is a part of the lode, the *situs* of which is within the 160-acre tract specifically described in the complaint herein, and wholly without the 1,100-acre tract to which said mining corporation had title at the date of the McCalmont mortgage, and at that time the lode had not been followed beyond the limits of said tract. The following is the description contained in the mortgage: "All that certain parcel or tract of land being and lying in the county of Santa Clara, state of California, designated as lot number thirty-nine, (39,) in township eight (8) south, of range one (1) east, and lot number forty, (40,) in township eight (8) south, of range (1) west, of the Mount Diablo meridian, containing eleven hundred and nine acres and sixty-seven hundredths of an acre, being

the same parcel or tract of land more particularly described and delineated by 'plat,' and to which title was confirmed in and by that certain patent issued by the United States of America on the twentieth day of September, A. D. eighteen hundred and seventy-one, recorded in Liber B patents, page 31, on the twelfth day of October, 1871, and being the same premises described in the above recited mortgage to R. D. Cullen, together with all and singular the buildings and improvements thereupon erected, made, or being, and the rights, roads, ways, waters, mines, minerals, mining rights, machinery, privileges, appurtenances, and advantages to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate and interest, right, title, use, trust, claim, and demand whatsoever, both at law and in equity, of the said Santa Clara Mining Association of Baltimore, in, unto, and out of the said described property and premises, or any part thereof." It is evident that this description cannot be stretched to cover an undeveloped portion of the lode contained in land adjoining the tract described. It is neither parcel of nor appurtenant to such tract, nor does it become so by being subsequently connected by workings on the lode with that portion of the mine included in the description.

Second. It is contended that the description in the trust-deed to the loan and trust company is sufficiently comprehensive to include station 8, and that, since the parties secured by the trust-deed were parties to the foreclosure suit, claiming affirmative relief, and concurring in the application for the appointment of May as receiver, he was thereby authorized to enter and mine at station 8. It is one objection to this proposition that it appears that the defendant extracted all the ore and made all the profit from station 8, with which he is charged in this action, before the loan and trust company sought the foreclosure of their deed, or asked for his appointment. But, without regard to this objection, the force of which we do not care to consider, we think it must be held that the description in the trust-deed embraces no more than that of the McCalmont mortgage, for it contains nothing material in addition to the description above quoted, except these words: "And all the lands, tenements, mines, minerals, real and personal property, rights, privileges, and appurtenances, of every kind whatsoever, of or belonging to said party hereto of the first part, in Santa Clara county, aforesaid." This part of the description would no doubt have embraced station 8, if the land in which it is found had belonged to the corporation at the date of the trust-deed. But it did not belong to the corporation at that time. The court so finds, by finding as it does that no part of the tract described in the complaint herein was included in said trust-deed, and there is nothing in the bill of exceptions to show that this finding was contrary to the evidence. The statement in respect to this

matter is as follows: "That it was the owner of the lands, premises, and property specifically described in the McCalmont mortgage in the answer of the defendant herein mentioned, and of the lands, premises, and property specifically described in the deed of trust to the 'Farmers' Loan and Trust Company' of New York, in the answer of the defendant herein mentioned, at the time of the execution of both of said instruments; that the particular piece of land in the complaint in this action described is not included in the specific metes and bounds of the lands described in the said McCalmont mortgage, or in the lands specifically described in the said deed of trust of the Farmers' Loan and Trust Company, mentioned therein; that at the time of the execution of the said McCalmont mortgage and said deed of trust the legal title thereto was in the United States, and has thence hitherto been, and still is, in the United States, otherwise than as such title may be affected or modified by the facts following,—that is to say: At the time of the execution of the said McCalmont mortgage and said deed of trust, and prior thereto, said Santa Clara Mining Association made claim of title thereto; that said particularly described parcel of land immediately joins upon the lands described in said McCalmont mortgage and in said deed of trust, and there was no fence, inclosure, or line separating said particularly described parcel of land from the lands included in the said McCalmont mortgage and in said deed of trust; that at that time said Santa Clara Mining Association had not extended its mining operations into or upon any part of said parcel of land in said complaint particularly described; that at that time the claim of title of said Santa Clara Mining Association to said parcel of land in said complaint particularly described was in fact recognized by the immediate neighbors in that vicinity, but the same was not then inclosed by any fence or inclosure separating the same from the lands surrounding it; that subsequently to the execution of said instruments the same was inclosed by inclosures, which, with the inclosures inclosing the land specifically described in the said McCalmont mortgage and in said deed of trust, would make a complete inclosure, save and except that on the southerly part of said parcel of land in said complaint particularly described there was no fence; on the side of said land not so fenced the same consisted of a cañon, which cañon of itself constituted a natural barrier, preventing cattle from getting into or going out of said parcel of land in said complaint particularly described, and which cañon constituted the only inclosure upon that side of said parcel of land in said complaint particularly described." This statement fully sustains the finding that at the date of the trust-deed the smaller tract, containing station 8, did not belong to the corporation, and also supports the finding, if it needed support, that during the time defendant was mining at said station said smaller tract did belong to the corporation, at least as against all persons not

connecting themselves with the source of title by compliance with the mining laws of the United States.

Third. The third point of the appellant is disposed of in saying, as we have already said, that neither the mortgage nor the trust-deed embraces station 8.

Fourth. It is contended that, even if station 8 was not covered by the mortgage or trust-deed, it was comprehended in the terms of the order appointing the receiver, and, being at that time connected with the mines in the larger tract, and worked as a part of the same general system, under a single management, and as the proceeds of that, as well as of other parts of the lode, were devoted to the care and preservation of the whole, it necessarily participated in the advantages derived from the appointment of the receiver; an advantage which inured to the mortgagor in enhancing the value of the security and diminishing its personal liability. Wherefore it is contended May could not have become liable to the corporation as a trespasser, and, if not, that he was never liable to the plaintiff.

This position also appears to be untenable. As to the terms of the order, if they embraced property not included in either of the securities, the order was to that extent in excess of the jurisdiction of the court, and void. But, construed with reference to the pleadings upon which they were based, the several orders appointing the receiver and defining his powers and duties did not apply to any property except that against which the foreclosure was sought. We do not think the receiver had even color of authority to extract ores within the tract described in the complaint herein, and thus destroy the very substance of an estate in which the mortgagees and beneficiaries of the trust had no direct interest, but which was, on the contrary, subject to the claims of the general creditors of the corporation. Nor do we think that the circumstance that station 8 was connected with other portions of the mine, with which it was worked as part of the same system, and under a single management, makes any difference. It was none the less a distinct piece of property, to which the mortgagees and the receiver, as their agent, had no right. While they remained in the hands of the mortgagor it was perfectly natural that both properties should be worked together, if that was the more economical plan; just as a farmer might work a mortgaged and an unmortgaged tract together, or, to give a more forcible illustration, just as owners of separate locations on the same vein often use the same shaft and hoisting apparatus for raising ores, or as many locators sometimes combine for the purpose of pumping water from the lower levels. In all such cases there is a common system of working, but the properties are distinct. A receiver of a mortgaged field would have no right to cut timber from other land of the mortgagor to build fences or houses on the tract covered by the mortgage, although it might be for the benefit of the mortgagor, by preserving or enhancing the value of the security and

lessening his personal liability. And, moreover, there is nothing to show in this case that the value of the security was in any degree enhanced by the extraction and reduction of the ores. No doubt it was necessary to pump the water out of the mine, and very probably it appeared at the time to be a wise measure to carry on mining at the same time with the pumping; but if this was so, we know of no principle upon which station 8 could be charged with the expense of keeping other parts of the mine free of water. And if it be said that the works at station 8 were also preserved by and participated in the benefits of the pumping, it may be replied that there is nothing to show that its equitable share of the expense of pumping was not included in the \$100,000 deducted from the gross value of the ores extracted from station 8.

As to the claim that the corporation stood by and saw what May was doing, and, by not objecting, tacitly approved his proceedings, it does not appear to be borne out by the record. The orders appointing the receiver were made *ex parte*. It is not shown that their terms, or the proceedings of the receiver under them, ever came to the knowledge of the corporation. It does appear that the corporation was insolvent, and it seems to have left its creditors to get what they could out of its property, without making any sign of approval or objection to their proceedings. The only presumption we are entitled to indulge under such circumstances is that it desired its property to go to its creditors according to their respective legal rights, viz., the mortgaged property to its mortgagees, and the rest to its creditors at large. No advantage could possibly accrue to it from any other disposition, for just so far as its ultimate personal liability to its mortgagees might be diminished by taking from its unpledged assets to enhance the security of the mortgagees, just so far was its ultimate liability to the general creditors increased. Assuming, therefore, as we ought to assume, that the actual desire of the corporation was that its unpledged assets should be devoted to the payment of its general creditors, and that it never either expressly or tacitly approved the proceedings of the receiver in removing the ores from station 8, we must hold that he became liable to the corporation for the net proceeds of such ores.

It is strenuously contended that this conclusion does a great injustice to the receiver, and that an opposite conclusion would do no injustice to the general creditors, because it is said the ores in place were not liable to attachment, and were only made available by means of a fund raised upon the credit of the secured creditors. We cannot, however, see the injustice of requiring the receiver to put back into the fund, where it belongs, a sum of money to which he never had a right; and as to the other proposition, we do not know why the 160 acres of land with all its ores in place was not liable to attachment, nor is there anything to show that the ores in place at station 8 were worth less than their net proceeds.

Fifth. It is contended that the liability of May, which sounded wholly in tort, was not the subject of garnishment or attachment. The question here, however, is not what classes of debts are the subject of garnishment or attachment, but what liabilities of third parties to an execution debtor can be reached by proceedings supplemental to the execution. We know of no reason to hold to any narrower construction of our statutory provisions on this subject than obtains in New York, where it is said that these proceedings can reach everything which could formerly have been made to contribute to the payment of judgments by the aid of creditors' bills, and where it was held that creditors' bills would reach choses in action arising from torts committed on the property of the judgment debtor to which his creditor would have a right to resort. *Freem. Ex'ns*, § 420; *Hudson v. Plets*, 11 Paige, 180.

The sixth objection of the appellant has been sufficiently stated and considered in connection with the fourth. We find no error in the order of the superior court, and it is therefore affirmed.

We concur: *Fox, J.; Sharpstein, J.; McFarland, J.*

REAY v. BUTLER et al. (No. 14,051.)
(*Supreme Court of California.* Dec. 19, 1890.)

APPEAL—DISMISSAL—LACHES.

1. A motion to dismiss an appeal for failure to file the transcript in time, made pursuant to a notice given before the settlement of the bill of exceptions, will be denied, where the bill of exceptions was settled and allowed only two days before the return-day of the notice.

2. Laches in having a bill of exceptions settled or allowed is a question which addresses itself to the lower court in allowing the bill, but is not a ground for dismissing the appeal in the supreme court.

3. Failure to file the undertaking on appeal within five days after the service of the notice of appeal, as required by Code Civil Proc. Cal. § 940, renders the appeal ineffectual for any purpose.

In bank. Appeal from superior court, city and county of San Francisco; *WALTER H. LEVY*, Judge.

Fisher Ames and *W. C. Burnett*, for appellants. *Flournoy & Mhoon*, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from an order refusing to strike out a cost-bill. The motion is made on several grounds:

1. That the transcript is not filed in time. The papers filed here show that at the time the notice of motion was given, the bill of exceptions to be used on the appeal had not been settled and allowed. It was so settled and allowed only two days before the return-day of the notice. The appeal cannot therefore be dismissed on that ground.

2. On the ground of laches, and that appellant is not acting in good faith. This is based upon laches in having the bill of exceptions settled and allowed. Laches in that particular might in certain cases be good ground for refusing to settle and

allow the bill, but it is a question which addresses itself to the court below, and this court cannot review its action in that regard except upon appeal.

3. That the appeal was not taken or perfected within the time allowed by law. The notice of appeal was served and filed March 24, 1887. The undertaking on appeal was not filed until April 30, 1887. Under section 940, Code Civil Proc., the appeal was "ineffectual for any purpose." It must, therefore, be dismissed, and it is so ordered.

(87 Cal. 203)

MARTIN v. MORGAN. (No. 13,783.)
(*Supreme Court of California.* Dec. 19, 1890.)

SPECIFIC PERFORMANCE—DILIGENCE BY COMPLAINANT.

A contract to convey land which provides for the payment of the purchase price within 60 days from its date, "otherwise this agreement to be null and void," clearly shows the intention of the parties to make time the essence of the contract; and the failure of the vendees or their assignee to make or tender payment within the specified time precludes them for maintaining an action for the specific performance of the contract.

Department 2. Appeal from superior court, Fresno county; *J. B. CAMPBELL*, Judge.

Church & Cory, for appellant. *R. H. Ward* and *Sayle & Coldwell*, for respondent.

SHARPSTEIN, J. This is an action to compel specific performance of a unilateral contract by which the respondent agreed to convey to appellant's assignors a certain tract of land at any time within 60 days from the date of said contract, upon the following express conditions: The said assignors to pay to respondent \$150 of the purchase money down on the delivery of said contract, and the balance within 60 days from the date thereof, otherwise said agreement to be null and void. One hundred and fifty dollars was paid on the delivery of the contract, but the balance of the purchase price, to-wit, \$4,850, was not paid or tendered within 60 days from the date of said contract. As an excuse for not paying said balance within said 60 days, the plaintiff in his complaint alleges that, before the expiration of said 60 days from the date of said contract, the defendant, for a valuable consideration, extended the time of performance on the part of his assignors to a reasonable time after the expiration of said 60 days. The court found that the defendant never extended the time for the performance of the conditions expressed in said agreement, or for the payment of any money stipulated to be paid as balance of the purchase price of said land, and rendered judgment in favor of the defendant. From that judgment and the order overruling his motion for a new trial, this appeal is prosecuted by the plaintiff. We cannot say that the finding, of which we have above given the substance, was not justified by the evidence. We shall therefore consider the case as we would were there no claim made of an extension of the time specified in the written contract for the payment of the deferred payment. As be-

¹ Reversed on rehearing, post, 685.

fore stated, plaintiff's assignors agreed to pay defendant \$150 of said purchase money down, upon the delivery of the agreement, and the balance within 60 days from the date thereof, (August 31, 1887,) otherwise the agreement to be null and void. Neither plaintiff nor his assignors performed, or offered to perform, the conditions expressed in said agreement within 60 days from the date thereof, and said agreement was not assigned to plaintiff within 60 days from the date thereof. The court finds that the plaintiff, after the assignment of said agreement to him, offered to pay and tendered all the balance of the purchase money required to be paid by said agreement. No other excuse or reason than the one above stated is alleged in the complaint, by plaintiff or his assignors, for non-performance of the condition expressed in the contract. The plaintiff alleges that, upon the delivery of said contract to his assignors, they entered into the possession of said land, and expended the sum of \$270 in valuable improvements. The court finds: "That said M. J. and P. B. Donahoo (plaintiff's assignors) accepted said agreement, and paid said sum of \$150, and plowed said land, surveyed, mapped, and platted it into lots, but did not expend any sum of money whatever in the improvement of said real property." This finding is justified by the evidence introduced by the plaintiff as to what his assignors did upon the land, although one of the witnesses stated that the expense of the plowing was \$30. We are not prepared to hold that what was done upon the land constituted an improvement. We think the finding last above quoted is a sufficient finding that plaintiff's assignor entered into possession of said land at the time alleged in plaintiff's complaint. The precise time at which plaintiff tendered the deferred payment provided for in the contract does not appear. But the court finds that he took an assignment of the contract after the time of making said payment had expired; and that, after he had received such assignment, he offered to pay all of the balance of the purchase money due thereunder.

This brings us to what we deem the principal question in the case. Was time made the essence of this contract? In other words, is the intent to make it so clearly, unequivocally, and unmistakably shown by the stipulation? The defendant's stipulation was that he would convey at any time within 60 days from the date of said agreement upon certain express conditions, one of which is that the final payment of the purchase money should be made within 60 days from the date of said agreement, otherwise the "agreement to be null and void." The contention of appellant's counsel, that the general rule of equity is that "time is not the essence of the contract," is not supported by any modern authority. The general rule, as expressed by 3 Pars. Cont. (7th Ed.) 339, and by this court, in *Grey v. Tubbs*, 43 Cal. 359, is that "time is not necessarily the essence of a contract." But it may be made so. Prof. POMEROY says: "It is now thoroughly established

that the intention of the parties must govern, and, if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or of performance or of complying with the terms will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary; but any clause will have the effect which clearly and absolutely provides that the contract is to be void, if the fulfillment is not within the prescribed time." Pom. Cont. 462. Among the numerous cases cited by the learned author in support of this doctrine is that of *Benedict v. Lynch*, 1 Johns. Ch. 370, decided by Chancellor KENT. In that case the contract was signed by the defendant only, and he agreed to give a deed upon certain express conditions being performed by the plaintiff at the specified times; "but if he should fail in them, or either of them, the agreement to be void." The plaintiff failed to perform within the time specified, but offered to after the expiration of that time. The opinion of the learned chancellor is the most full and satisfactory explanation of the question involved in this case that has ever fallen under our observation; but we deem it unnecessary to quote more from it than the following: "There was an express stipulation in this contract that, if the plaintiff failed in either of his payments, the agreement was to be void. The first question which naturally presents itself is whether the time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment." He held that it was, and decreed accordingly. In that case the intention of the parties to make time the essence of the contract did not more clearly and unequivocally appear than it does in this case. *Grey v. Tubbs*, supra, is in the same line as *Benedict v. Lynch*. In *Grey v. Tubbs*, this court said: "Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and, whenever it appears that the parties have in fact contracted that, if the purchaser make default in the payments as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase, and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default." Judgment and order affirmed.

We concur: THORNTON, J.; McFARLAND, J.

(87 Cal. 214)

GILLIS *et al.* v. CLEVELAND. (No. 13,969.)
(*Supreme Court of California.* Dec. 20, 1890.)

STREET ASSESSMENTS—ENFORCEMENT OF LIEN.

1. Laws Cal. 1885, p. 147, § 7, provides that the expense of work on a street under the act "shall be assessed upon the lots and lands fronting thereon, * * * each lot or portion of a lot being separately assessed in proportion to frontage." Section 8 provides that the assessment shall show the number of each lot, and the assessment thereon, with the name of the owner, or, if he is unknown, then "unknown" shall be writ-

ten opposite the number, and for a diagram showing the location of each lot with reference to the work done, and that the warrant of assessment shall then be recorded with the superintendent of streets. Section 9 declares that when so recorded "the several amounts assessed shall be a lien upon the lands or portions of lots assessed, respectively." *Held*, that the liability of each lot is a separate cause of action, and foreclosure of the lien upon one lot will not prevent a subsequent action against the same person to foreclose on another lot owned by him.

2. Under section 12, allowing an attorney's fee in all cases of recovery in actions to foreclose the lien, the fee may be allowed as to each lot, although owned by the same person.

3. Where the warrant of assessment was properly signed by the superintendent of streets, and countersigned by the mayor as required by the act, the fact that the signature of the mayor was omitted in recording the warrant did not invalidate the assessment.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

Luce, McDonald & Henderson, for appellant. *Hunsaker, Britt & Lamme*, for respondents.

GIBSON, C. This action was brought to foreclose a street-assessment lien for the grading of Logan avenue, in the city of San Diego. The defendant, in his answer, put in issue some of the material allegations of the complaint, and, as one of his affirmative defenses, set up a former recovery in another action between the same parties. This plea in bar was, upon plaintiffs' motion, stricken out, and upon the trial subsequently had before the court, without a jury, judgment was rendered for the plaintiffs, from which the defendant appeals. Appellant's counsel maintain that the court erred in striking out the plea in bar. The property affected in the former action was lot 2, in block 179, of Manassee & Schiller's addition to the city; while in this action it is lot 9 in the same block. They both were and are owned by the defendant, and front on Logan avenue, and were both assessed for the same grading, which was let as a single contract by the city to the plaintiffs, who performed the work. The latter brought a separate action against the defendant as to lot 2, and obtained a judgment, which appears to have been satisfied. And it is now claimed that, as that judgment was rendered in an action upon the same assessment, which constituted but one entire demand, it was a recovery upon a portion of such demand, and is good as a plea in bar of the present action. But we think an examination of the act of March 18, 1885, (St. 1885, p. 147,) under which the improvement and assessment were made, will show that the rule invoked by the appellant has no application here. It is provided in the first subdivision of section 7 of that act that the expenses incurred for any work authorized by the act "shall be assessed upon the lots and lands fronting thereon; * * * each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expenses of the work." And section 8 provides that "after the contractor of any street work has fulfilled his contract to the satisfaction of the street superin-

tendent of the said city, or city council on appeal, the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract, [including any incidental expenses.]" This assessment shall show, among other things: "The amount of each assessment, the name of the owner of each lot, or portion of a lot, [if known to the street superintendent.] If unknown, the word 'unknown' shall be written opposite the number of the lot, and the amount assessed thereon, the number of each lot, or portion of a lot assessed, and shall have attached thereto a diagram exhibiting * * * the relative location of each distinct lot, or portion of a lot, to the work done," etc. Section 9 provides that a warrant signed by the superintendent of streets, and countersigned by the mayor of the city, shall be attached to the assessment. The warrant, assessment, and diagram must then be recorded in the office of the superintendent of streets. "When so recorded, the several amounts assessed shall be a lien upon the lands, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged. After said warrant, assessment, and diagram are recorded, the same shall be delivered to the contractor, or his agents or assigns on demand, * * * and, by virtue of said warrant, said contractor or his agents or assigns shall be authorized to demand and receive the amount of the several assessments made to cover the sum due for the work specified in such contracts and assessments."

Thus it appears that the expense of the improvement is a charge upon the property benefited, and not a charge against the owner personally. In furtherance of this end, the identity of the lot assessed, and not the person who may be the owner, is made the essential requirement of the statute. The first must be specifically described, while the latter may be designated as "unknown," as in the present case. Nowhere in the statute does any intention appear to charge the owner personally. In *Taylor v. Palmer*, 31 Cal. 241, it was held that, in cases of this character, the owner could not be made personally liable for the proportion of the expense of the improvement assessed against his property. And in *Dyer v. Barstow*, 50 Cal. 652, it was held that there was no privity of contract between the owner and the person who contracted with the city to do the work. It is to be observed that the several assessments which the contractor is authorized to demand and receive are the particular assessments against each lot, or portion of a lot. He is not empowered, in cases where a person owns two or more lots liable for their proportion of the cost of the improvement, to demand the sum of the several assessments against two or more lots, but must make a several demand as to each lot. Thus, in a case like the one here, where a demand was made upon the premises assessed, as may now be done, where the owner named in the assessment, or his agent, cannot conveniently be found, and which must be done whenever the

name of the owner is stated as "unknown," (St. 1885, § 10,) a demand upon each of two lots for the sum of the assessments due upon both was held to be bad, and insufficient to support a recovery. *Schirmer v. Hoyt*, 54 Cal. 280. Again in the same section of the act last referred to, the assessment against each lot is treated as a separate and distinct demand, for the superintendent of streets "may release any assessment upon the books of his office on the payment to him of the amount of the assessment against any lot with interest, or on the production to him of the receipt of the party or his assigns, to whom the assessment and warrant were issued." And, by section 12, when suit is brought: "The court in which suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts." It is obvious that the lien here referred to is one for the particular amount assessed against each lot, and not the whole amount of several assessments against all the lots of one owner without regard to the proportion properly chargeable to each. Thus, in *Brady v. Kelly*, 52 Cal. 372, it was said: "Where two or more lots are assessed for the expenses of work on a street, each lot is chargeable only with the amount assessed upon it, and not for the amount assessed against another lot, and in enforcing the lien of the assessment the judgment should state the amount for which each lot is liable, and should order a sale of each lot, or so much thereof as may be necessary to satisfy such amount, and costs." We, therefore, think it manifest that each lot, or portion of a lot, is separately liable for its proportion of the cost of the improvement and that the liability of each is independent of any other, and constitutes a separate demand upon which a separate cause of action may be based. And, since this is so, the recovery as to lot 2, in the former action, although between the same parties, was not upon the same, but a different, cause of action, and therefore was not good as a plea in bar of this action, and was for that reason properly stricken out.

What we have said on this point also disposes of the suggestion regarding the allowance of \$15 as an attorney's fee, in addition to taxable costs, in all cases of recovery under the provisions of the statute, (section 12;) for it necessarily follows that if the charge against each lot, or portion thereof, is a separate and distinct demand, the attorney's fee prescribed by section 12 may be allowed in each case. And, in response to appellant's argument regarding this burden, it may be proper to add that such burden may be escaped by paying for the improvement before suit is brought. The appellant further maintains that the judgment is not sustained by the findings, since it appears from the latter that the warrant issued to the plaintiffs was never recorded in the office of the superintendent of streets. As already shown, a warrant of the character of the one in question must, in order to create a lien upon the property charged,

be recorded in the office of the superintendent of streets, before it is delivered to the contractor or his assigns. Act March 18, 1885, § 9. See *Himmelmänn v. Danos*, 35 Cal. 450; *Himmelmänn v. Bateman*, 50 Cal. 11; *Norton v. Courtney*, 53 Cal. 691. The findings here disclosed that the warrant, which was properly signed by the superintendent of streets, and countersigned by the mayor, was recorded in the office of the first-mentioned officer, but that the name of the mayor, and the designation of his office,—viz., "W. J. Hunsacker, mayor,"—were omitted from the record. And this omission, it is claimed, made the recording ineffectual. In *San Francisco v. Real Estate*, 50 Cal. 188, which was an action *in rem* to enforce a street assessment, the duplicate assessment roll required to be made under section 7 of the act of February 1, 1870, amendatory of the act of March 30, 1868, (St. 1869-70, p. 41,) did not contain the certificate of the mayor, which was appended to the original assessment roll. This omission on the trial was held to be immaterial, and in sustaining the ruling on appeal, this court said: "It appears in the record that the original roll was duly made, and properly certified by the mayor, who delivered it to the auditor; but in making the duplicate for the collector the auditor omitted therefrom the certificate of the mayor. The court below held the omission to be immaterial, and we agree in that opinion." So, here, the record shows that the warrant was properly signed and countersigned, but that the superintendent of streets, in recording it in the record book in his office, failed to copy the name and official designation of the mayor. We can see no difference in principle between this case and the one quoted from. The original warrant here was authenticated, as the original assessment roll was there, in the manner required by law, and the omission of the mayor's certificate from the duplicate of the original assessment roll in the latter case was deemed immaterial. And we think the omission complained of here is of the same character. This defect is not the same as those held to be fatal in *Himmelmänn v. Bateman*, and *Norton v. Courtney*, supra. In each of those cases the omission from the record was an essential part of the description of the premises against which the lien was sought to be enforced. In the first, the depth of the lot was, by mistake, omitted from the diagram; and in the second, the arrow showing the courses on the diagram was, in like manner, omitted. Compare this last case with *Whiting v. Quackenbush*, 54 Cal. 306. These omissions were fatal, because they rendered it impossible in either case to identify the property from the record. In *Himmelmänn v. Danos*, supra, which is to the same effect, the record of the assessment and diagram and warrant was held to be no record at all, because the same was not certified to by the superintendent of streets, or by any one for him. This disposes of the appellant's argument, and finding no error in the record we think the judgment should be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

37 Cal. 275

WOODRUFF *et al.* v. SEMI-TROPIC LAND & WATER CO. (No. 13,976.)

(Supreme Court of California. Dec. 22, 1890.)

VENDOR AND VENDEE—CONTRACT—TIME OF ESSENCE—RESCISSION.

1. Time is of the essence of a contract for the sale of land which provides for the payment of the purchase money in installments at specified dates, and for the execution of a good and sufficient deed by the vendor on the receipt of the final installment, and that, "in the event of a failure to comply with the terms hereof by the vendee, the vendor shall be released from all obligations in law or in equity to convey said property, and said vendee shall forfeit all right thereto."

2. The vendor is in default on his failure to execute the deed after a tender of the final installment by the vendee when due; and, where the vendee had elected to rescind the contract by a tender of a quitclaim deed of the land and a demand for the return of the installments already paid, no subsequent offer of performance on the part of the vendor will relieve him from the effects of his default.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge. *Willis, Cole & Craig*, for appellant. *Smith & Northrop*, for respondent.

FOOTE, C. The plaintiffs obtained judgment against the defendant for the sum of \$3,405.75, and costs. From that judgment this appeal is prosecuted on the judgment roll. The parties hereto entered into the following contract: "This agreement, made and entered into the 25th day of August, in the year of our Lord one thousand eight hundred and eighty-seven, between the Semi-Tropic Land and Water Company, a corporation, party of the first part, and Jesse W. Woodruff and George E. Baldwin, of the city and county of San Bernardino, state of California, the parties of the second part, witnesseth: That said party of the first part, in pursuance of a resolution of the board of directors of said corporation, duly passed, authorizing this agreement, and in consideration of the covenants and agreements on the part of the said parties of the second part hereinafter contained, agrees to sell and convey unto the said parties of the second part all that certain lot or parcel of land situated in the county of San Bernardino and state of California, and bounded and more particularly described as follows, to-wit: Farm block 28, containing 20.06 acres, (more or less,) in accordance with the map of the town of Rialto, and adjoining subdivisions, as recorded in the office of the recorder of deeds in and for San Bernardino county, California, —, 18—, book —, page —. The party of the first part reserves from premises above agreed to be sold the right of way to enter upon to ditch and to lay pipes for the distribution of water. And the said party of the first part agrees to sell said property for the sum of four thousand twelve dollars, gold coin of the United States. And the

said parties of the second part, in consideration of the premises, agree to pay to the said party of the first part the said sum of four thousand twelve dollars, gold coin, as follows, to-wit: Thirteen hundred thirty-eight dollars, cash on delivery of this agreement, receipt of which sum is hereby acknowledged by party of the first part; thirteen hundred thirty-seven dollars on or before August 25, 1888; thirteen hundred thirty-seven dollars on or before August 25, 1889,—with interest payable semi-annually upon the deferred payments, at the rate of eight per cent. per annum. And, if any part of the principal or interest be now (not) paid when due, it shall thereafter bear interest at the rate of twelve percent. per annum until fully paid, according to the terms of two certain promissory notes of said second parties of even date herewith, made in favor of said party of the first part, and payable at the Los Angeles National Bank, in Los Angeles, California. And the said parties of the second part agree to pay all state, school, and county taxes or assessments of whatsoever nature which may become due on the premises above described, and all assessments that may be lawfully made upon the shares of water-stock herein agreed to be delivered after the date of this agreement. In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligations in law or equity to convey said property, and said parties of the second part shall forfeit all rights thereto. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, agrees to execute and deliver to the said parties of the second part, or their assigns, a good and sufficient deed of bargain and sale, together with one share of stock in the Lytle Creek Water and Improvement Company for each acre of land above agreed to be sold. The party of the first part also agrees to pipe the water to a point adjacent to each twenty-acre lot of said tract, and to each town lot above agreed to be sold, after which the second parties, and other stockholders in said water company, must bear the expense of keeping up the water system. And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties." From the pleadings it appears that the plaintiffs here (the parties of the second part) paid to the defendant, on the 27th of August, 1887, \$1,338, on the agreement, and at the same time executed and delivered to it two promissory notes in accordance strictly with the terms of the contract, and at maturity thereof paid the first note, \$1,443, principal and interest, and \$160.44, being interest on the note due on or before August 25, 1889, and also \$13.30, the amount of taxes assessed on the land included in the contract. On the 26th of August, 1889, when the last note was due, the plaintiffs were ready and willing, and offered in writing, to pay it and the interest due thereon, and then demanded a good and sufficient deed of bargain and sale of the premises

above described, and also that the defendant deliver the water-stock included in the purchase. This the defendant failed and neglected to do. On the 21st day of November, 1889, the plaintiffs surrendered possession of the land and premises, and tendered to the defendant a quitclaim deed to the premises and to the water-stock, and demanded that the defendant pay back the payments in money that the plaintiffs had made, and interest at lawful rates from the date of making the payments, and that the defendant deliver up the promissory note due August 25, 1889. That the defendant refused to accept the deed of reconveyance, or pay the money. Damages in the sum of thirty-five hundred dollars were prayed for, the rescission of the agreement of August 25, 1887, and that the note due August 25, 1889, be given up and canceled. A demurrer was filed, and overruled, for want of prosecution. The defendant then answered denying damage done to the plaintiffs, and setting up the defense that prior to the service of summons in this case, it was able and willing to deliver a conveyance and the water-stock, upon the plaintiffs paying the balance of the purchase price, which offer the plaintiffs declined. And the defendant avers that it is still able and willing to carry out the contract upon the payment by the plaintiffs of the contract price for the property. The court found that all the allegations of the plaintiffs' complaint were true, and that they had suffered damage in the sum of \$3,405.75; that before November 29, 1889, the defendant failed and neglected to comply with the contract; that on that day, after the commencement of this action, but before the service of summons, the defendant offered to comply with the contract, but the plaintiffs would not accept it; and that, since that date, the defendant has been, and still is, ready to deliver the deed and shares of stock on the payment of the balance due by the plaintiffs. The conclusion of law is that the plaintiffs are entitled to judgment for \$3,405.75, and costs. Judgment was rendered accordingly on the 17th of June, 1890.

The only point which seems to be made for a reversal of the judgment is that time was not of the essence of the contract, and therefore that the offer of performance on the 29th of November, 1889, was in a reasonable time after the date fixed for performance by the contract, or after suit brought by the plaintiffs to rescind. There is no doubt, however, that time was of the essence of this contract, as is seen by a reference to the opinions delivered in *Grey v. Tubbs*, 43 Cal. 364, and *Cleary v. Folger*, 84 Cal. 321, 24 Pac. Rep. 280, where a similar contract was construed with reference to this point. Time being of the essence of the contract, the defendant, having failed to comply with it after a tender of performance by the vendee, was in default. The plaintiffs tendered a deed to the premises, giving all their title thereto, and also the water-stock, and surrendered possession of the premises on the 21st of November, 1889, and demanded a repayment back of their money, and the giving up and canceling of their unpaid note. This was all

that the plaintiffs were required to do to effect a rescission of the contract, and, having done this, no subsequent offer of performance on the part of the defendant would relieve it from the effect of its default. Therefore we advise that the judgment be affirmed.

We concur: GIBSON, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 296)

CONKLING v. PACIFIC IMP. CO. (No. 13,872.)
(*Supreme Court of California*. Dec. 30, 1890.)

RIPARIAN RIGHTS—DIVERSION OF WATER—IN-
JUNCTION.

1. Under Code Civil Proc. Cal. § 1925, which
makes a certificate of purchase of lands, issued

under the laws of the United States, primary evidence of title in the holder, a receipt for the purchase money, issued by the receiver of a United States land-office to an occupant of public lands bordering on a stream, is sufficient *prima facie* evidence of title in the latter to enable him to maintain an action to enjoin an upper riparian proprietor from unlawfully diverting the waters of the stream; and his complaint, which alleges the issuance to him of the receiver's receipt, is not demurrable for its failure to allege that the land is subject to pre-emption, or that plaintiff is a qualified pre-emptor.

2. A grant of the right to divert the waters of a stream, made by a pre-emptor of public lands bordering thereon, is rendered worthless by the latter's abandonment of his claim before procuring a receiver's receipt for the land.

3. The fact that the grantor of the water-right was induced to abandon his claim by the payment of money from plaintiff, and that the latter thereupon entered on the land, does not make his entry fraudulent or illegal as against the grantees of the water-right.

4. The fact that the amended complaint prayed only for an injunction against defendant's threatened diversion of the water, and that at the time of its filing defendant had already begun to do so, will not prevent the issuance of an injunction against the continued wrongful diversion.

5. Where the diversion of the water is wrongful, it is not necessary for plaintiff to prove damages to entitle him to an injunction.

6. Where defendant has a right to divert the water to the full capacity of a 1½-inch pipe, he is not injured by an injunction restraining him from using a 6-inch pipe if the 1½-inch pipe takes all the water of the stream.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

A. B. Hotchkiss, for appellant. W. C. Stratton, for respondent.

WORKS, J. This action was brought by the respondent against the appellant to enjoin the latter from diverting water from a certain natural stream in the county of Santa Barbara. The defendant owned two tracts of land on the stream. Between these two tracts the plaintiff was in possession of a tract of land, claiming the same as a pre-emptor from the government, and for which he held a receiver's receipt. The court below found for the plaintiff, and enjoined the defendant from diverting and using the water as prayed for in the complaint. No motion for a new trial was made, but the bill of exceptions was filed within 60 days, and specifications are made and errors of law assigned therein. Counsel for appellant makes numerous points in his brief, which we will attempt to notice in their order.

The first point made is that the court below erred in overruling the defendant's demurrer to the amended complaint. The objection made to the complaint is that it does not show that the plaintiff was, at the time the action was brought, or at the time the water was diverted from the stream, the owner of the land, or that the land was subject to pre-emption, or that he was a qualified pre-emptor. The allegations of the complaint, so far as it affects this question, are as follows: "That the plaintiff is and was on the 1st day of October, 1888, the owner of that certain tract of land situate in the county of Santa Barbara, state of California, to-wit:

• • • And he now is, and has been since the month of May, 1887, in the actual possession and occupancy of said land; that, in the month of May, said land was public land of the United States open to settlement, and plaintiff, who was twenty-one years old, and a citizen of the United States, did, in said month, settle upon said land, with the intention of pre-empting the same, and acquiring title thereto, and on the 19th day of May, 1887, he filed his declaratory statement in the United States land-office of the district in which said land is situated, claiming said land under the pre-emption laws, and, on the 14th day of September, 1888, he paid for said land, and received from the receiver of the said land-office his receipt for said payment." These averments are not sufficient to show a compliance with the law relating to pre-emption settlements upon and purchase of government lands. Rev. St. §§ 2259, 2264; Quinn v. Kenyon, 33 Cal. 501; Page v. Hobbs, 27 Cal. 486. But it is contended by the respondent that no allegation of facts necessary to show that the lands were subject to pre-emption, or that the respondent was a qualified pre-emptor, and took the steps necessary to acquire the title from the government, is necessary in a case of this kind; that it was enough to allege that he was the holder of the receiver's receipt, and in possession thereunder. In this contention we must hold with the respondent. This is not a case involving title to the land in which each of the parties is claiming through the government. The appellant makes no claim of title to the land, nor is it shown to be in privity with the paramount source of title, or in the position, for any reason, to question the legality of the respondent's holding, except by an affirmative showing against the *prima facie* case made by the receipt. In such a case, it is sufficient for the occupant of the land to allege and prove the receiver's receipt, which is *prima facie* evidence, in a case of this kind, that he is rightfully in possession. Code Civil Proc. § 1925; ¹ Figg v. Handley, 52 Cal. 244; Conlan v. Quinby, 51 Cal. 413. And being so in possession as a pre-emptor, and having complied with the requirements of the statute, which is shown, as we have said, by the receiver's receipt, he had become a riparian owner upon the stream, and, as such, entitled to protect himself against any unlawful diversion of the waters therefrom. Pom. Rip. Rights, §§ 35, 36. There are other objections urged to the complaint, but none of them are well taken. The demurrer to the amended complaint was properly overruled.

A demurrer was sustained to the second defense set up in the defendant's answer, and this is claimed to have been an error. It is alleged in this defense that one Bush entered upon the lands claimed by the plaintiff in this action as a pre-emptor, and filed his declaratory statement in the land-office, and that, while so in posses-

¹ Code Civil Proc. Cal. § 1925, provides that a certificate of purchase of lands, issued in pursuance of any law of the United States, is primary evidence that the holder of such certificate is the owner of the land described therein.

sion of the lands, said Bush granted to one Underhill the right to construct and maintain a pipe-line over said lands, together with the right to use and divert the waters flowing in said creek; that Underhill conveyed this right to the defendant; that defendant had entered into the occupation of said lands for its said business of water supply, had laid its pipes, at great cost and expense, in such manner as that plaintiff must have had notice of the fact; that plaintiff made his so-called "settlement" with full notice of defendant's claims, rights, appropriations, and expenditures; that Bush relinquished to the United States his claim as a pre-emptor by filing the declaration to that effect, and the lands thereby reverted to the United States, subject to the defendant's occupation for the purposes aforesaid, and were not thereafter subject to any further rights of pre-emption. It is further alleged that the plaintiff entered upon the lands not in good faith as a pre-emptor, but for the purpose of obtaining a technical advantage of defendant, and thereby compelling it to buy his claim, and secretly, and without notice to the defendant, procured the officers of the land department to issue to him a receipt for payment for said lands; that no patent had issued to the plaintiff, and the defendant had protested against the issuance of any such patent; and that the expenditures made by the plaintiff in improving the land were made in bad faith. We are unable to see anything in this pleading which can amount to a defense to the plaintiff's cause of action. It is earnestly contended by the counsel for appellant that the plaintiff obtained no rights in the water flowing through the land by entering upon the land, making payment therefor, and procuring the receiver's receipt, and yet, in support of this answer, he contends that Bush obtained such a right by merely entering upon the land and filing his declaratory statement, without making payment, or receiving a receipt; that by his deed his right passed to Underhill, and from Underhill to the defendant; and that the abandonment of his right of pre-emption by Bush not only did not defeat the defendant's right to divert the water obtained through him, but actually confirmed it, and shut off all other persons from entering upon and acquiring title to the land. The statement of such a proposition is sufficient to refute it. Bush had no right in the water to convey; but, if he had, it was lost by his subsequent abandonment of his claim, and the right, in the hands of the defendant, was no better than if it had remained in Bush. The allegations tending to show that the entry of the plaintiff was made to defraud and take advantage of the defendant add nothing to the pleading. The defendant had no rights in the land, or the water, as appurtenant to the land, and could not, therefore, be defrauded by the plaintiff's entry. There was no error in sustaining the demurrer to this defense. There was no error in refusing to strike out the amended complaint on the defendant's motion.

The appellant contends that the court
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below erred in certain rulings upon the evidence. The ground of this contention seems to be that the entry of the respondent upon the land as a pre-emptor was fraudulent and invalid, because it appeared that he had bought the claim of Bush to pre-empt the land, and Bush had abandoned his claim, and the plaintiff had thereupon entered thereon. But the answer to this is that the plaintiff is not claiming under the entry of Bush, but under his own entry, after that of Bush had been abandoned. The fact that Bush had been induced to abandon his claim by the payment of money did not prevent the plaintiff from entering upon and acquiring title to the land. Bush having abandoned his claim in the manner provided by law, the land was open to entry by the plaintiff or any one else, and the entry was not fraudulent or illegal because of Bush's priority and abandonment of his claim. The same contention is made the ground of objection to the introduction of the receiver's receipt, and for the same reasons the objection was properly overruled.

It is insisted by the appellant that the findings of the court do not support the judgment, and are not sustained by the evidence. Both of the parties to this action were riparian owners on the stream, the waters of which are in controversy, and each also claimed to be prior appropriators of such waters, or a part of them. The court below found that the plaintiff was the owner of the land claimed by him; that the same was public land; that he settled upon the same as a pre-emptor, filed his declaratory statement as such, made proof and payment on September 14, 1886, obtained a receiver's duplicate receipt, has ever since occupied and cultivated the lands, and made improvements thereon to the value of \$15,000; that the land lies on both sides of the natural stream known as the "Loma Abaja Creek," and, at the time the plaintiff obtained his receipt, the defendant had appropriated and was diverting a portion of the waters of said creek by means of a 1½-inch pipe, which was not of sufficient capacity to divert all of the waters of the creek, and a part thereof ran down to plaintiff's land; that, when plaintiff settled upon the land, he commenced to use the waters of the creek for domestic and other purposes, and, on the 5th day of August, 1867, he appropriated a portion of the waters of the creek, and diverted the same by means of a 2½-inch pipe, and used the same for irrigation and other purposes, and has so used the same continuously since that time; that the defendant intends to divert all of the waters of said creek from its natural channel by means of a 6-inch pipe at a point thereon above plaintiff's land to a point below the same, and deprive the plaintiff of the use thereof, and that such diversion would render plaintiff's land, and the improvements thereon, of little or no value, and will be of great and irreparable damage to him; and that neither the defendant nor its grantors or predecessors have ever occupied any part of the lands claimed by the plaintiff for any purpose. As to the de-

fendant's right to divert and use the water of the stream, the court found as follows: "That, on the 13th day of August, 1887, A. S. Cooper posted a written notice at a point on said creek above plaintiff's land, claiming the water flowing in said creek to the extent of fifteen inches, measured under a four-inch pressure, which notice was within ten days duly recorded in the office of the recorder of the county of Santa Barbara. That, after the posting and recording of said notice, said Cooper conveyed all of his rights and interests in the waters of said creek to defendant. But said Cooper did not actually divert or use said water for any purpose, and his appropriation was made for the purpose of speculation only, and he did not within sixty days after the posting of his notice commence the excavation or construction of any works in which he intended to divert the water. The defendant, after Cooper's sale to it, which was more than sixty days after he posted his notice, did commence the excavation and construction of works in which he intended to divert the water. That the plaintiff did not post any notice of his intention to appropriate any of the waters of said creek, but he had actually appropriated and diverted the water as set forth in the third finding, and was using it for domestic purposes and irrigation at and before the time when said Cooper posted his appropriation notice. That, on the 13th day of March, 1885, Alexander B. Todd posted a written notice at a point on said creek above plaintiff's land, claiming the water flowing in said creek to the extent of twelve inches, measured under a four-inch pressure, which notice was duly recorded; and he stated in said notice that he intended to divert said water by means of one ten and one-half inch iron pipe, and one one and one-half inch iron pipe, and said Todd did divert water from said creek through a one and one-half inch iron pipe, which pipe is the one mentioned in the second finding. That the defendant is the successor in interest of said Todd. But no actual appropriation or diversion of any water has been made under the said Todd notice, except as to the said one and one-half inch pipe, and no steps have been taken to divert any water under said notice other than as to said pipe, and neither said Todd nor his successors in interest began or prosecuted with diligence the excavation or construction of the works in which it was intended to divert any water from said creek under said notice, except as to said one and one-half inch pipe. And the plaintiff had actually appropriated, diverted, and used the waters of the Loma Abaja creek, as set forth in the third finding, before the defendant, or its grantors, or predecessors in interest, had commenced the excavation or construction of any works in which it was intended to divert any water from said creek, other than through said one and one-half inch pipe. That the defendant is the owner of sections five and six, T. 4 N., R. 27 W., S. B. M., but the said land is below the land of plaintiff's land, and said Loma Abaja creek flows through plaintiff's land before reaching the said land of defendant." As

a conclusion of law from these findings, the court found: "That the plaintiff is entitled to have the said creek flow in its natural channel down to his said land, less the portion thereof diverted by means of a one and one-half inch iron pipe, and that he is entitled to the relief prayed for in his complaint, and it is ordered that judgment be entered accordingly." The court thereupon entered judgment enjoining the defendant from diverting any of the waters of the stream, except that which might be diverted by means of the 1½-inch pipe. These findings were clearly sufficient to sustain the judgment, and after a careful examination of the record we are satisfied that the findings are supported by the evidence.

It is earnestly contended by the counsel for the appellant that the evidence fails to show that at the time the amended complaint was filed the defendant was threatened to divert the waters of the stream; but that, on the contrary, the diversion by the 6-inch pipe was complete, and for that reason injunction could not properly issue. But, conceding that the 6-inch pipe had been put in, and the diversion of the water had taken place at the time that the amended complaint was filed, or at the time the action was commenced, which was the material question, and conceding that the diversion had actually taken place, the act of carrying the water away from its natural channel, if wrongful, was a continuous act against which an injunction might issue. *Moore v. Water-Works*, 68 Cal. 146, 8 Pac. Rep. 816. The continued diversion of the water was the material thing to be enjoined, and not the putting in of the pipe.

It is further insisted that the evidence fails to show that the plaintiff had been or would be damaged by the diversion of the water. We think otherwise; but, if it appeared that the diversion was wrongful, it was not necessary for the plaintiff to prove damages to entitle him to an injunction. *Moore v. Water-Works*, supra, 150.

Again, it is claimed that the plaintiff conceded the defendant's prior right to divert the waters of the stream to the capacity of its 1½-inch pipe, but averred that such pipe was not sufficient to divert all of the waters of the stream; that this averment was denied, and was not supported by the evidence. We think the evidence does show that the 1½-inch pipe would not carry all of the waters of the stream. If it would, it was at least a little remarkable that the defendant should go to the expense of putting in another and much larger pipe to divert water that was not there; and, besides, this claim is hardly consistent with the contention above noticed, that the defendant was, at the time the amended complaint was filed, actually carrying off water with this 6-inch pipe. But this, it seems to us, is not very material. The defendant was not enjoined from diverting the water to the full capacity of the 1½-inch pipe. If this left no other water to divert, the defendant was not injured by the injunction, and has no reason to complain, except it might be as to the costs.

It is contended further that the laches

and acquiescence of the plaintiff, in allowing the defendant to proceed with its improvements, was sufficient to defeat his right to an injunction. But we see nothing in the evidence to support this position.

It is further insisted that the rights of the appellant could not be forfeited by a proceeding of this kind. But this is not an attempt to forfeit any right the appellant had, but to show that it never had any rights. There are other objections to the findings that need not be particularly noticed. There is no error in the record.

Judgment affirmed.

We concur: DEHAVEN, J.; PATERSON, J.

87 Cal. 209

FORD *et al.* v. CUNNINGHAM *et al.* (No. 12,044.)

(Supreme Court of California. Dec. 20, 1890.)

CONTENTS OF LETTER—SECONDARY EVIDENCE—BOOKS OF ACCOUNT.

1. One of the plaintiffs having stated that he had no personal knowledge that certain communications addressed to defendants were mailed except that copies thereof appeared in plaintiffs' copy-book, and that it was a general custom of their firm to place letters in a box in the store from which they were taken to the post-office, there was no foundation laid for the introduction of secondary evidence as to the contents.

2. If secondary evidence were admissible, the press copies would be the best evidence.

3. One of the defendants having identified their ledger showing their account with plaintiffs, and having stated that it showed the true state of the account between them, and that the items had been entered by him at the time of the several transactions, and it being admitted by plaintiffs that the entries were original entries, it was error to exclude it though it did not contain the item sued for by plaintiffs.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

J. M. Lesser, Spalsbury & Burke, and Garber, Boalt & Bishop, for appellants. A. S. Kittridge, for respondents.

PER CURIAM. The only question litigated in the court below was whether the barley was sold by the plaintiffs to the defendant Cunningham, or to the firm of Cunningham & Co., of which he was a member. The appellants contend that the evidence is insufficient to support the findings, but we think there was sufficient evidence on behalf of the defendants to create a substantial conflict, and under the well-established rule we should not interfere with the findings of fact.

The plaintiffs, to establish their case against the copartnership, relied mainly on documentary evidence, some of which they claimed was in possession of the defendants, who were asked at the trial to produce the same. Mr. Morey, one of the plaintiffs, was permitted by the court to state the contents of certain bills and letters which he claimed had been addressed and sent to Cunningham & Co. Objection was made by the defendants to the introduction of oral testimony as to the contents of the bills and letters, and the objection was overruled. We think the court erred in its ruling. The witness stated that he had no personal knowledge

that the communications addressed to Cunningham & Co. were mailed, except that copies thereof appeared in the plaintiffs' copy-book, and that it was a general custom of his firm to place letters in a box in the store, from which they were taken to the post-office. No foundation, therefore, was laid for the introduction of the evidence. Assuming that secondary evidence could under such circumstances be introduced, the press copies were the best evidence next to the originals themselves. The ruling was on a material matter, because the defendants testified that they never received the communications referred to. *Brailsford v. Williams*, 74 Amer. Dec. 562.

Mr. Middleton, one of the defendants, was called as a witness, and identified the ledger of the copartnership, showing the account of Ford & Co. with Cunningham & Co. from September 1, 1884, to the date of trial. It was admitted by the plaintiffs that the entries therein were original entries, but they objected to the introduction of the same as evidence on the ground that it was irrelevant, immaterial, and incompetent. The objection was sustained by the court, to which ruling the defendants excepted. There was no item of barley in the account offered. The ruling, we think, was error. The witness had stated that the ledger showed the true state of account between plaintiffs and defendants, and that the items had been entered by him at the time of the several transactions therein mentioned. *Landis v. Turner*, 14 Cal. 573. Judgment and order reversed, and cause remanded for a new trial.

KAHN v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 11,765.)

(Supreme Court of California. Dec. 22, 1890.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—MANDAMUS.

1. Act Cal. April 1, 1872, (St. 1871-72, p. 911,) passed to establish a street in San Francisco, provided (section 5) that, on petition to the mayor by the owners of a majority in frontage of the property described in such act, "as said owners are or shall be named in the last preceding annual assessment roll for the state, city, and county taxes," for the opening of said street, the board constituted by the act to carry it into effect should proceed. *Held*, that the signatures to the petition of persons other than those to whom the property was assessed on the last preceding assessment roll could not be counted in order to make up the owners of a majority of the frontage.

2. Nor could the signatures of executors, administrators, and agents be counted, in the absence of evidence of their authority to sign the petition.

3. Nor could the signature of a homestead and railroad corporation, made by its president and secretary, be counted, in the absence of evidence that such officers were authorized to affix the signature, or that that duty appertained to their offices.

4. On application, by a holder of bonds issued for improvements made under the act, for *mandamus* to compel the city to levy a tax for the payment of the bonds, the facts that, on presentation of the petition to the mayor, he certified that it was signed by the requisite property owners, and that the county court affirmed the report of the board of the proceedings taken by it under

the petition, do not estop the city to deny the sufficiency of the petition.

Affirming 21 Pac. Rep. 849.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

D. M. Delmas, for appellant. *George Flournoy, Jr.*, City and County Atty., and *Philip A. Galpin*, for respondent.

PER CURIAM. The questions arising herein (which is a motion for a new trial by Kahn) have been fully considered and passed on in this case, the opinion in which will be found in 79 Cal. 392, 21 Pac. Rep. 849. Conceding that the signature of the North San Francisco Homestead & Railroad Association, by its president and secretary, was authorized by the proper corporate authority, the petition would still fail of having the majority required. We see no reason to disturb the rulings formerly made in this case. The motion for a new trial is denied.

(3 Cal. Unrep. 351)

WINDHAUS v. BOOTZ *et al.* (No. 12,991.)¹
(Supreme Court of California. Dec. 30, 1890.)

FRAUDULENT CONVEYANCES—GIFTS—WHO MAY SET ASIDE.

1. The transfer of a debt by a creditor to a third person, to whom the debtor afterwards makes a part payment, and executes a note for the balance, constitutes the transferee the "successor in interest" of the creditor, within the meaning of Civil Code Cal. § 3439, which renders all conveyances by a debtor, made with the intent of defrauding any creditor, void as against all creditors and their "successors in interest."

2. A gift of land by a father to his son is not void as against creditors of the father, unless the latter had not, at the time of the gift, sufficient property subject to execution to satisfy his debts.

3. The return of an execution *nulla bona* five years after the making of the gift is not sufficient to establish the father's insolvency when the gift was made.

Department I. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

F. J. Castlehun, for appellant. *H. H. Lowenthal*, for respondents.

WORKS, J. This was a suit by a judgment creditor to have declared fraudulent and void certain transfers of real property by the defendant Adam Bootz to his wife and children. The trial court gave judgment for the defendants, and the plaintiff appeals.

The court found that there was no fraudulent intent, and that the grantor was solvent and able to pay his debts at the time the deeds were made. Whether this finding was sustained by the evidence or not is the only question necessary to examine.

It was admitted at the trial that the deeds were deeds of gift; and the evidence shows, without conflict, that at the time of their execution the donor was indebted to one Severin in the sum of \$1,000. Subsequently Severin became in need of money, and borrowed \$1,000 from the plaintiff, and it was agreed between the parties that the indebtedness of the donor to Severin should be transferred to the plaintiff, and that due from Severin to the plaintiff

¹Rehearing granted.

should be released. This was done, but, instead of the old note being transferred to the plaintiff, the donor made a payment to her of \$200, and gave a new note for the balance, viz., \$800. The form of the indebtedness was changed, and the amount was reduced, but, in substance, it was a continuation of the old debt; and, in our opinion, the plaintiff was "the successor in interest" of an existing creditor within the meaning of section 3439 of the Civil Code. The question of intent was one of fact, (Civil Code, §§ 1227, 3442,) and the burden of proving the fraudulent intent rested upon the plaintiff. The right of a creditor to go upon property conveyed by his debtor to a third party rests upon two foundations, viz., that the conveyance was fraudulent, and that the grantor had no other property at the time suit is brought, subject to execution, out of which his debt can be made. Proof that the debtor made the conveyance without consideration, that he was then indebted, and that he had not other property at the time of the conveyance, subject to execution, to satisfy such indebtedness, would be sufficient *prima facie* to establish the fact that the conveyance was fraudulent as against creditors. If the debtor had other property at the time of the conveyance, sufficient to satisfy his debts, the fraud would not be made out unless there was other evidence. If the debtor has other property at the time suit is brought, sufficient to satisfy his debts, his creditors are not injured, no matter what the original intention in making the conveyance may have been; and the creditor, not being injured, has no cause of action, and no right to subject property in the hands of a third party to the payment of his debt. It would seem to be unnecessary to cite authorities to sustain so plain a proposition, but we refer to *Albertoli v. Branham*, 80 Cal. 632, 22 Pac. Rep. 404, in which this court said: "Where a creditor attacks a transfer of property made by his debtor on the ground that such transfer was made to defraud, hinder, or delay creditors, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to have that effect. Therefore, it must appear that, at the time the conveyance was made, the debtor had not other property subject to execution out of which his debts could be satisfied. *Evans v. Hamilton*, 56 Ind. 34; *Deutsch v. Korsmeier*, 59 Ind. 373; *Pfeifer v. Snyder*, 72 Ind. 78. This allegation is necessary to show that the conveyance was in fact fraudulent as against the creditors. If the debtor has other property, subject to execution, sufficient to satisfy his indebtedness, the conveyance cannot amount to a fraud on his creditors; and, where the attempt is made to set aside a conveyance on such grounds, it must appear from the complaint that, at the time the action is commenced, the debtor had not other property sufficient to satisfy his debts. *Brucker v. Kelsey*, 72 Ind. 51; *Sherman v. Hoglaud*, 54 Ind. 578. This is for the reason that the conveyance, although made for the purpose of defrauding creditors, is valid as between the parties, and cannot be set aside, un-

less it appears to be necessary for the protection of the creditor, and no such necessity exists if, at the time he commences his action, there is other property of the debtor out of which his debt can be made."

The complaint in the case at bar contained these necessary allegations, and was sufficient. But there was no evidence even tending to show that, at the time the conveyances were made, the grantor was not possessed of other property amply sufficient to satisfy his debts. The declarations of the grantor, relied upon by the appellant as establishing the fact, do not relate to the time of the conveyance. An execution was issued and returned *nulla bona*, but this was several years after the conveyances were made; and, while this was sufficient *prima facie* to prove his insolvency at that time, it could not be held to establish the fact that he had no property nearly five years before. Judgment and order affirmed.

We concur: DEHAVEN, J.; PATERSON, J.

36 Cal. 483; 3 Cal. Unrep. 350

BARKLY v. COPELAND. (No. 13,520.)

(Supreme Court of California. Dec. 23, 1890.)

SLANDER—EVIDENCE OF DEFENDANT'S WEALTH—
DECLARATION OF Co-CONSPIRATOR.

In an action for slander in charging plaintiff with associating with another in a theft of certain cattle, declarations made by such other after the alleged transaction was completed are inadmissible to show that plaintiff was associated with him. Reversing ante, 1.

On rehearing. For former reports, see ante, 1, and 15 Pac. Rep. 307.

Clay W. Taylor, Jackson Hatch, and A. M. McCoy, for appellant. Chipman & Garter, John F. Ellison, and L. V. Hitchcock, for respondent.

PER CURIAM. Respondent's petition for a rehearing is denied. A re-examination of the record has not only confirmed us in the opinion that our decision was correct as to the ground upon which the judgment and order appealed from were reversed, but has satisfied us that we erred in sustaining the ruling of the superior court last noticed in the opinion of Commissioner FOOTE. Mrs. Mandeville's testimony, in regard to statements of Speegle, to the effect that plaintiff was his confederate in the proposed larceny of Polk's cattle, was clearly incompetent as hearsay, and not within the rule of People v. Collins, 64 Cal. 295. The decision in that case was merely that, after competent evidence of a conspiracy to commit a crime, the declaration of one conspirator accompanying an act done in furtherance of the common design, while the conspiracy is rife, is competent evidence against his confederate. This is no doubt correct, but it is not the law that a conspiracy between A. and B. can be proved as to either by the declarations of the other, as was allowed in this case, and our decision sustaining the ruling of the superior court on this point should not become the law of this case, or a precedent for others.

In re BABY'S ESTATE. (No. 13,092.)

(Supreme Court of California. Dec. 20, 1890.)

APPEAL—SATISFACTION OF JUDGMENT.

Where one has taken payment in full satisfaction of a judgment, he cannot thereafter appeal from the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Galpin & Zeigler, for appellants. Pillsbury & Blanding and Page & Eells, for respondents.

PER CURIAM. The respondents have moved to dismiss the appeal herein on two grounds, viz.: (1) The judgment was satisfied by the appellants before the appeal was taken. (2) Notice of appeal was not served on Gibbs, one of the distributees. The decree of distribution was entered March 24, 1890, and the notice of appeal was served May 12, 1890. On the 11th day of April, 1890, there were filed in the court below two receipts, signed by the appellants, in which they respectively acknowledged that they had received from the administrator certain sums of money and personal property in full of the distributive shares of the said estate allotted to them in and by the decree of distribution therein entered March 14, 1890. When a judgment has been satisfied, it has passed beyond review, for the satisfaction thereof is the last act and end of the proceeding. Morton v. Superior Court, 65 Cal. 496, 4 Pac. Rep. 489; People v. Burns, 78 Cal. 645, 21 Pac. Rep. 540. "Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements." Freem. Judgm. § 466; Moore v. Floyd, 4 Or. 260; Cassell v. Fagin, 11 Mo. 208. We are unable to say from the record that the rights of Gibbs would not be affected by a reversal of the decree, and, in view of what has been said upon the first ground of the motion, it is unnecessary for us to pass upon the question whether it was necessary that he should be served with a notice of appeal.

The motion to dismiss is granted.

(87 Cal. 121)

SCOTT v. GLENN. (No. 13,973.)

(Supreme Court of California. Dec. 20, 1890.)

VENDOR AND VENDEE—ACTION TO RECOVER PRICE PAID.

Plaintiff sued to recover \$600, had and received for his benefit. It appeared that the money was paid by himself and others to defendant and another by virtue of the following paper: "Received of * * * \$600, one-third of purchase price of lots, * * * leaving a balance due on said purchase, which by the terms of this sale is to be paid in two equal payments. * * * If paid as above stated," the vendees "will be entitled to a deed of the above-described lots, and otherwise this agreement becomes void, and all payments made hereon shall be forfeited." Defendant signed his name and that of his co-vendor, but the latter afterwards ratified it. The vendors had good title and tendered a deed. Defendant's co-vendor assigned his right to defendant, and the co-vendees, their rights to plaintiff. Held, that there was no right of recovery.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Meux & Edwards, (Thompson & King, of counsel,) for appellant. *T. P. Ryan,* for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment against him for \$600, and from an order denying a new trial. The complaint merely avers that on April 4, 1888, defendant was indebted to plaintiff and certain other named persons in the sum of \$600, for money had and received for the use and benefit of said persons; that the others assigned said indebtedness to plaintiff; and that no part of the same has been paid. The answer specifically denies all the averments of the complaint. There is also a cross-complaint in which defendant avers that on said April 4, 1888, he and one Meux, being the owners of certain described lots of land, contracted in writing with plaintiff and certain other persons to sell them the said lands for \$1,800, \$600 in cash, and the balance in two equal payments, in 6 and 12 months; that the \$600 sued for was the first cash payment on said contract; that plaintiff and said other persons went into possession of the land under said contract; that, when the other payments became due, defendant and said Meux demanded payment, and tendered a good and sufficient deed of conveyance of said land, but that plaintiff and said other persons refused to pay or to accept the deed; and that said Meux assigned all his right to defendant. The prayer of the cross-complaint is that he recover judgment against plaintiff and said other parties for said deferred payments, and for the enforcement of a lien on said land. The answer of the plaintiff, Scott, and others to the cross-complaint first denies, in terms, that there was any such contract in writing, but it admits that there was such a verbal contract, that the \$600 was paid thereon, and that "then and there" the said Glenn and Meux executed, in writing, a receipt and memorandum of said contract in words and figures as follows: "Received of Scott, Cutten, [and others named] six hundred dollars, one-third of purchase price of lots Nos. * * * leaving a balance due on said purchase, which, by the terms of this sale, is to be paid in two equal payments, together with interest, at the rate of ten per cent. per annum, on the whole of said unpaid purchase price, at the maturity of each installment, till paid, in like coin, within six and twelve months from date hereof. If paid as above stated, the above-named Scott, Cutten, * * * will be entitled to a deed of the above-described lots; otherwise, this agreement becomes void, and all payments made hereon shall be forfeited. [Signed] J. T. MEUX & G. R. G. GLENN." The answer denies that they went into possession. It does not contain any sufficient denial of the tender of a deed as averred in the cross-complaint. Neither does it aver that Glenn and Meux had no title, or could not make a valid conveyance of the lots; the only averment on that subject being that "at no time have

the said Meux and Glenn shown to defendants, or either of them, that they, the said Meux and Glenn, had good title to said lots." In an amendment to the answer they aver that Meux did not actually sign the above memorandum, but that Glenn signed his own name and also that of Meux without written authority from the latter to do so. The only findings of fact are (1) "that all the allegations and averments of the plaintiff's complaint are true, and the allegations and denials of the defendant's answer are untrue;" and (2) that the contract mentioned in the cross-complaint "if any such was made," was not reduced to writing and signed by the defendants to said cross-complaint, or by either of them, and that they did not take possession of the land.

Waiving the question as to what right the defendant may have for affirmative relief, we cannot see how the first finding is justified by the evidence, or upon what theory the judgment in favor of plaintiff for the \$600 can be maintained. The evidence shows that the money was paid in accordance with the written instrument set forth in full in the answer to the cross-complaint. Indeed, the only evidence introduced by plaintiff at the trial was that instrument, and proof by a witness that the \$600 was paid "under and by virtue of that paper." He then rested, and defendant made a motion for a nonsuit, which was denied. Meux then testified for defendant that, while he did not sign his name to the instrument, it was signed by his agent, and that he ratified it, and joined afterwards in executing and tendering a deed in compliance with it. Defendant's evidence also showed that Meux and Glenn owned the land and could have given a perfect title; that plaintiff and his assignors made no objection to the title, or to the contract, when the deferred payments became due, but merely asked further time in which to pay, and were granted such time, until finally they concluded to repudiate the entire contract. How can it be said, therefore, that "all the allegations and averment of the plaintiff's complaint are true,"—that is, that "on the 4th day of April, 1888, said defendant was indebted to" plaintiff and his assignors in the sum of \$600, gold coin of the United States, for money had and received by said defendant upon said 4th of April, 1888, for the use and benefit and on account of said plaintiff and his assignors? The plaintiff introduces in evidence a certain written instrument, which he is shown to have received and accepted, and proves that the money sued for was paid "under and by virtue of that paper." But that instrument shows that plaintiff paid the money upon the express understanding and condition that it was not to be returned to him; that it was money "had and received by defendant for the use and benefit of himself," and not for use and benefit of plaintiff or his assignors. There was no necessity for the vendees to sign the written memorandum. *Vassault v. Edwards*, 43 Cal. 458. Moreover, they did sign it by indorsing on it an assignment to plaintiff. The court does not find whether or not Meux signed the contract

or was a party to it; but the evidence clearly shows that he ratified it as soon as his co-vendor informed him of it, and soon afterwards, when he came to Fresno, "again ratified the sale between the parties, and talked with the purchasers about it." Again, when the deferred payments became due, he asked the vendees for the money, and they, making no objection of any kind, simply asked for some delay until they could make arrangements to pay. They proposed at one time to give a mortgage, and then concluded not to do so. And finally Meux united with Glenn in executing and tendering a deed. This was a complete ratification; and he would have been estopped from making a defense for himself, which plaintiff seeks to suggest for him. Moreover, so far as plaintiff's alleged cause of action for the \$600 paid by him is concerned, he is endeavoring to undermine an executed contract; while the principle which he invokes applies to actions for the enforcement of executory contracts. We see no grounds upon which the judgment in his favor can rest. The nonsuit should have been granted. It is not necessary to discuss the defendant's claim for affirmative relief, for the findings on that subject are clearly insufficient. The judgment and order are reversed and the cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

87 Cal. 236

WINTER *et al.* v. McMILLAN. (No. 12,340.)
(*Supreme Court of California*, Dec. 22, 1890.)

NOTICE OF APPEAL—QUIETING TITLE—
CROSS-COMPLAINT.

1. An appeal from a judgment by several parties, and from an order denying a motion for a new trial by one of the parties, may be taken by one notice.

2. In an action to quiet title, there is no error in excluding plaintiff's evidence that his grantor had declared a homestead on the property, though defendant claims title through an execution sale under a judgment against said grantor.

3. Under Code Civil Proc. Cal. § 442, providing that, whenever defendant seeks affirmative relief against any party affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint, there was no error in allowing defendant, in an action to quiet title, to file a cross-complaint alleging that the property was conveyed to plaintiff merely to secure him against liability on a bond, but that no liability was incurred by plaintiff; that the grantor was still in possession, and claimed some interest; and that defendant had title through an execution sale on a judgment against said grantor.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

R. Percy Wright, for appellants. *W. B. Tyler*, (*D. H. Whittemore*, of counsel,) for respondent.

PATERSON, J. This action was brought against the defendant, McMILLAN, to quiet the title of the plaintiffs Winter and Wright to a lot of land in San Francisco. The defendant answered, denying that the plaintiffs were the owners of or had any in-

terest in the land, and at the same time filed a cross-complaint, which alleges, in substance, that plaintiffs never had any interest in the property, except the naked legal title which was conveyed to them by Louis and Louise Helbing, on June 3, 1881, without consideration, and with intent to hinder, delay, and defraud the creditors of said grantors; that G. Henninger and wife recovered judgment against the said Louis Helbing for the sum of \$3,500, and costs, November 11, 1881, in an action for damages, commenced April 30, 1881; that, thereafter, the property in controversy was sold to defendant on execution issued on said judgment, and in due time the sheriff executed and delivered to him a deed therefor; that the deed of the Helbings to plaintiffs was given to secure the latter against any damages they might sustain by reason of their becoming sureties on a penal bond given by said Louis Helbing, but no liability was incurred by plaintiffs on said bond; that the title still stands on the records in the name of the plaintiffs, but the said Helbings have continued to hold, and are now in possession of, the land, claiming some interest therein; that the controversy as to the title to the land cannot be settled without having the said Helbings before the court; that defendant is the owner of the property, and entitled to the possession of the same. The prayer of the cross-complaint is that the Helbings may be brought in by summons, and required to show what right, if any, they have to the property, and for a judgment that neither plaintiffs nor the Helbings have any right, title, or interest in or to the land in controversy. By order of the court, a summons was issued and served on the Helbings, but it seems that they made no appearance. The plaintiffs filed a demurrer, which was overruled. They then filed an answer denying all the allegations of the cross-complaint, and alleging that Louis Helbing had never had any right, title, or interest in the property, except such as he derived from a claim of homestead, which interest was exempt from execution and forced sale. The court found that plaintiffs were not the owners of or entitled to the possession of the property; that the Helbings were the owners of the property on June 3, 1881, when they deeded the same to plaintiffs simply to secure them against any liability as sureties, and that no liability had been incurred on the bond; that defendant purchased the property at execution sale, as alleged by him, and is the owner thereof. Judgment was entered in accordance with the findings. Plaintiffs moved for a new trial, which motion was denied. Thereupon the Helbings united with the plaintiffs in a notice of appeal from the judgment, which notice included also a notice of appeal by the plaintiffs from the order denying their motion for a new trial.

The respondents have moved to dismiss the appeal, on the ground that the appellants could not properly unite in two separate and distinct appeals in one notice, and in one undertaking. An appeal from a judgment, and from an order denying a motion for a new trial, may be taken by

one notice. The notice states who are appellants, and what they respectively appeal from. This is sufficient. The clerk certifies that "sufficient undertakings on appeal in due form were properly filed." There is nothing to contradict the fact stated. The motion to dismiss is denied.

It does not clearly appear what is the basis of plaintiffs' claim of title. They did not trace it back to any paramount source. The burden of showing title in themselves rested upon the plaintiffs, and they failed to make out a case. They showed that on November 10, 1879, Beta Gade gave Louis Helbing a power of attorney authorizing him to sell her real estate, and that on June 15, 1880, A. Hensler and his wife, Mary, made a quitclaim deed of the property to Beta, who was a sister of Mrs. Helbing. What connection, if any, Mary had with the title does not appear, except that she had employed Helbing to put buildings on the land in February, 1878, and the only evidence that Beta ever owned or had possession of the property is that "she walked over it," and "looked at it." Both Beta and Mary were in San Francisco at the time of the trial in the court below, but neither was called as a witness. On June 28, 1880, Louis Helbing, acting as attorney in fact for Beta Gade, for a nominal consideration sold and conveyed the property to himself and wife. On June 3, 1881, Beta and her husband made and delivered to plaintiff a deed of the property, which was absolute in form, and on the same day Helbing and wife executed to plaintiffs a similar instrument. A few days later, plaintiffs and the Helbings exchanged documents, acknowledging that plaintiffs held the property in trust for two purposes, viz., "to secure them against any loss which they might sustain by reason of their having become sureties on the bond above referred to, and to secure to plaintiff Wright payment for professional services which he had rendered, and should thereafter render, in certain proceedings. Plaintiff Wright did not prove what, if any, fees were due to him for services rendered. One of the bonds has been exonerated, and it does not appear that any liability has accrued on the other. The basis of the defendant's claim of title is quite as uncertain as the plaintiffs.' The judgment under which he purchased the property at execution sale, on June 9, 1884, was entered November 11, 1881. Under that purchase, he took whatever right, title, and interest the Helbings had in the property at the date of the judgment. Helbing's deed of July 28, 1880, to himself and wife, is void. The power of attorney did not authorize him to give away the property, or to convey it to himself for a nominal consideration. His act was a fraud on the principal, and the conveyance is a nullity. Section 2306, Civil Code; Dupont v. Wertheman, 10 Cal. 368; Randall v. Duff, 79 Cal. 115, 19 Pac. Rep. 532, and 21 Pac. Rep. 610. It is true the evidence tends to show that Helbing was the real owner of the property, and that the conveyances were made to mislead somebody, probably creditors. He received but a few hundred dollars for two three-story houses. Soon after the

houses were built, the Helbings went into possession of the property, and have ever since occupied the same. The plaintiffs promised to reconvey to the Helbings, not to Beta. The Helbings then filed a homestead declaration on the property. They were heavily in debt. There are many circumstances connected with the transaction, tending to show an attempt on the part of all parties to conceal the identity of the real owner. But the defendant himself offered a lease from Beta Gade to Mary Hensler, dated March 1, 1878, by the terms of which the premises were leased to the latter for a term of five years. He also offered in evidence the power of attorney from Beta Gade to Helbing, and the deed executed by the latter to himself and wife, insisting that the latter was not void. The defendant could not thus affirm title in Beta Gade, in support of his own title, and deny it in answer to plaintiffs' claim of title under the same source. He could not do so consistently at least. If Beta was the owner of the property, the title passed to the plaintiffs herein by her deed of June 3, 1881, several months prior to the entry of the judgment against the Helbings. But, as stated before, it is impossible to tell from the evidence offered by the respective parties what is the basis of the claim of either. The most that plaintiffs can claim, under the evidence introduced by them, is a lien for the value of services rendered by the plaintiff Wright, and for any liability which may have accrued on the bond which has not been exonerated. If Helbing was the beneficial owner at the time defendant purchased at execution sale, the latter took all his right, title, and interest, and is entitled to have the same adjudged to him. To do this it will be necessary for the defendant to amend his cross-complaint, so as to state the facts more fully,—as fully as they are required in a bill in equity. *Kreichbaum v. Melton*, 49 Cal. 50; *Brodrib v. Brodrib*, 56 Cal. 563.

Plaintiffs offered to prove that Mrs. Helbing had declared a homestead on the property June 29, 1880, but the evidence was excluded. We do not think the court erred in its ruling. The fact that the Helbings claimed a homestead could not aid the plaintiffs as against the defendant. The Helbings had, by their failure to answer defendant's cross-complaint, waived, as against the defendant, any claim under the homestead declaration, and their conveyance to the plaintiffs did not give to the latter any homestead right in the property.

Appellants contend that the demurrer to the cross-complaint ought to have been sustained; that a cross-complaint is improper in actions of this kind. In support of this contention, they cite *Wilson v. Madison*, 55 Cal. 8. All that case decides is that where the relief demanded by defendant can be had upon the denials and averments of his answer, a cross-complaint is unnecessary. But there may be cases in which full relief cannot be given the defendant upon answer, and, as in ejectment, a cross-complaint in such cases is recognized as a proper pleading, so that the whole controversy may be settled in

one action; so, here, we see no objection to a cross-complaint upon the allegations of which, supported by proof, the defendant may take from plaintiff that which he would recover in equity, viz., the legal title. Section 442 of the Code of Civil Procedure provides that: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." Here, the affirmative relief which the defendant is seeking certainly affects the property to which the action relates, and we think that the cross-complaint was a proper pleading. The plaintiffs claim the whole title. They could not maintain the action by showing simply a lien without possession, or right of possession. But, if the court denied their prayer because they showed at most only a lien, the validity of the lien could be determined in another action. Why not allow the defendant, upon proper averments in his cross-complaint, to test in this action the validity of the lien claimed by plaintiffs? In other states, it is held that cross-complaints in these actions are proper pleadings. *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. Rep. 769, and cases cited; *Venable v. Dutch*, 37 Kan. 515, 15 Pac. Rep. 520; *Allen v. Tritch*, 5 Colo. 228; *Greenwalt v. Duncan*, 16 Fed. Rep. 612. But it is claimed that, if it be conceded that a cross-complaint is a proper pleading in actions of this nature, new parties cannot be brought in by it. Whether this could be done under the old chancery practice is a question upon which the authorities are not agreed; but our Code system is much broader and more liberal in this regard. The defendant is not, under our practice, confined in his cross-complaint to matters charged in the complaint. Thus in ejectment, as stated before, he may plead matters purely equitable, and secure equitable relief. Besides this, our statute provides that, "when a complete determination of the controversy cannot be had, without the presence of other parties, the court must order them brought in." Code Civil Proc. § 389. A complete determination of this controversy, if the allegations of the defendant and the findings of the court are correct, could not be had without making the Helbings parties. The plaintiffs appeared to be, and claimed to be, the owners in fee. The Helbings were in possession. The defendant was entitled to the possession if the Helbings owned the property when the judgment was entered. A trial between the plaintiffs and defendant would have settled only half of the controversy, and it would have become the duty of the court, we think, when the facts appeared in evidence, to order the Helbings brought in as parties to the action. *O'Connor v. Irvine*, 74 Cal. 443, 16 Pac. Rep. 236. In other states it is held that in a proper case

third parties may be brought in to answer the defendant's cross-complaint. *Allen v. Tritch*, supra; *Bunce v. Bunce*, 59 Iowa, 534, 13 N. W. Rep. 705. Appellants rely upon the case of *Harrison v. McCormick*, 69 Cal. 618, 11 Pac. Rep. 456. In that case there was no necessity for a cross-complaint. The claim was for damages, purely a counter-claim, in which case, of course, the demand "must be one existing in favor of defendant, and against a plaintiff, between whom a several judgment might be had in the action." Code Civil Proc. § 438. In this case a cross-complaint is proper to determine the question as to the validity of plaintiffs' lien. If the obligations of the bond have ceased, and no money is due Wright for professional services, the defendant is entitled to have those facts determined, and to receive whatever affirmative relief he may prove himself, in equity, entitled to. If the Helbings claim a homestead upon the property, it is proper that they should be given an opportunity to present the same, so that the rights of all parties interested, or claiming an interest, may be settled in one suit. The record shows that the summons issued on the cross-complaint was duly served on the Helbings, but is silent as to whether any appearance was made by them. We presume, of course, that no answer was filed; but, if they failed to appear and demur or answer within the time allowed by law, their default therefore ought to have been entered, and a memorandum of such default indorsed on the cross-complaint. Id. § 670. The judgment is reversed, and the cause is remanded for a new trial, with directions to the court below to permit the parties to amend their pleadings in any respect consistent with the nature of the action.

We concur: FOX, J.; SHARPSTEIN, J.; MCFARLAND, J.

BEATTY, C. J. I concur in the judgment.

87 Cal. 306

BOWMAN v. MOORE. (No. 13,251.)

(*Supreme Court of California*. Dec. 30, 1890.)

MUTUAL BENEFIT INSURANCE — CHANGE OF BENEFICIARY.

1. A provision in a certificate of membership in a mutual benefit association, empowering the member to change the beneficiary by "writing filed with the association," is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate, and an indorsement by the secretary on the certificate making the change.

2. The fact that the executors were not named in the request does not render the substitution invalid, as they can be identified by the will to which the member referred in his request for the change.

3. The fact that the substitution indorsed on the certificate was made by the secretary of the association, in compliance with the written request of the member, does not render the substitution invalid, as the member had the right to employ an agent to make the change if he so desired.

Department 2. Appeal from 'superior court, Santa Clara county; JOHN REYNOLDS, Judge.

D. W. Herrington, for appellant. *J. H. Campbell*, for respondent.

THORNTON, J. Joseph Bowman became on the 13th day of June, 1885, a member of the California Life & Accident Association, a corporation and mutual benefit association, and there was issued to him a certificate of membership therein, numbered 893. This certificate purported to be an insurance on his life for \$5,000, payable after his death to the plaintiff, Jennie Bowman, his wife, "unless," as provided in the certificate, "said member shall, in writing filed with this association, substitute some other beneficiary, in which case said amount shall be paid to said substituted beneficiary." On June 4, 1886, Joseph Bowman executed his last will, naming therein the defendants as executors thereof. In this will he inserted the following provision: "Thirdly. I direct that my executors hereinafter named shall, as soon after my death as possible, collect the amount due on a certain policy, issued by the California Life and Accident Association, said policy numbered 893, made payable to Jennie Bowman, bearing date June 13, (thirteenth,) 1885, said policy to be transferred for the purposes hereinafter expressed, viz., in full payment of all my debts owing at the time of my death, or in part payment of the same if my debts exceed the amount of said policy, to-wit, \$5,000." After the execution of his will, Joseph Bowman filed with the secretary of the association this writing: "Gilroy, June 4, 1886. Secretary Cala. Life and Acc't Ass'n, San Francisco—Dear Sir: Enclosed herewith I hand you my cert. of insurance in your company. Please do favor to change the beneficiary from the name now embraced in the said certificate, to the executors named in my will, which bears even date herewith, viz., June 4, 1886, and for the purposes therein expressed. Thus oblige, JOSEPH BOWMAN. Return policy to Geo. T. Dunlap, Gilroy, Cal." Indorsed on this direction on file in said secretary's office are the following words and figures: "Change made June 9, 1886," and upon the certificate of membership, partly in print and partly in writing, is indorsed the following: "The beneficiary under this certificate of membership, pursuant to the rules of this association, is hereby changed from Jennie Bowman, wife of the person named in the within certificate, to the executors named in his will, which bears date of June 4, 1886, or their legal representatives, said change being made at the written request of Joseph Bowman, dated Gilroy, June 4, 1886. W. H. PETTIS, Secretary. San Francisco, June 9, 1886." Joseph Bowman died at the county of Santa Clara, on the 29th of August, 1886, leaving the plaintiff his widow. After Bowman's death his will was duly admitted to probate, and the defendants, S. T. Moore and Theodore Bowman, were regularly appointed and qualified as executors thereof, and since the 9th of October, 1886, they have administered on the estate of their testator. In due time the money due on the certificate, to the amount of \$2,000, was paid by the association on the joint receipt of the plaintiff

and defendants, the defendants signing the receipt as executors. The joint receipt was demanded by the association before it would pay. This money passed into the hands of defendants, who claimed the same as the substituted beneficiary in virtue of the written direction of a change of beneficiary made by their testator, Joseph Bowman. This payment was indorsed on the certificate No. 893. Subsequently the plaintiff notified in writing the executors of Joseph Bowman that she would not accept the terms of the will of her deceased husband, and demanded of them the payment to her of the \$2,000 above mentioned, claiming to be the beneficiary of the policy on which the money was paid to them. This demand was refused, and plaintiff brought this action against the defendants to recover the money paid them. The court rendered judgment in favor of defendants. Plaintiff prosecutes this appeal.

The above are the facts found by the court below, on which this appeal is to be determined. The contention is here made on behalf of plaintiff that the judgment is not sustained by the findings of fact, and that judgment should be entered in her favor. It is argued that the provision made in certificate No. 893 for "Jennie Bowman, wife," is a trust, subject to be defeated under the power reserved in these words, "unless said member [Joseph Bowman] shall, in writing filed with said association, substitute some other beneficiary, in which case said amount shall be paid to said substituted beneficiary." Let it be conceded that, by the provisions contained in the certificate or policy, a trust was created for the benefit of the wife, still the trust, as is conceded, can be defeated by substituting another beneficiary. Jennie Bowman's right was contingent. If the change was regularly done, the right of the first-named beneficiary is at an end. Was the substitution here made in accordance with the provisions of the certificate? That is the question to be determined. Joseph Bowman was authorized, by the terms of the certificate as above stated, to substitute another beneficiary by writing filed with the association. This, in our judgment, he did do. The writing to that effect was communicated to and filed with the association. The intention to substitute is so clear on the face of the paper that we see no room for construction. That must be considered as done which it was the intention of the assured to do. The form in which the substitution is made is immaterial. It would be a strained construction to hold that the assured did not intend to substitute another beneficiary instead of the one first named. The request to the secretary was to make the substitution desired by the assured appear on the books of the association. Nor was the consent of the wife (plaintiff in this action) necessary to the making of the substitution. It was a part of the contract, as entered into in the beginning, that the assured of his own free unrestrained will might at any time make the substitution he desired. The wife, though named as beneficiary, could not in any way control the will of the as-

sured. Whatever rights she had under the certificate, she could not in any way restrain or control her husband, the assured, in making the subsequent substitution. Nor do we see any reason why the assured could not name his executors as beneficiaries. This is not an attempt to devise by will the proceeds of the policy. This, it may be conceded, he could not do. But designating in the requisite mode his executors, as beneficiaries, was within his power. The beneficiary is but the recipient of the policy or its proceeds, and why the assured could not make his executors, or administrators, or his children, or his daughters, beneficiaries, without naming them, we cannot perceive. No one is injured by it. There is no rule or policy of law forbidding it. It is not contrary to good morals. The association is not called on to pay until after the death of the assured. Then the persons named as executors would become known. At any rate the association could not be called on to pay the amount due on the policy until the executors made themselves known to it.

Further we do not see why the assured could not make the secretary of the association the medium through which the writing might be made changing and substituting the beneficiary. All that was done was done in the life-time of the member. The change was to be made in writing, and filed with the association. It was not requisite that the writing should be actually made by the assured member, in his own proper handwriting. It could be made in the handwriting of another, provided it was done by his authority, and for him. This was done through the agency of the secretary. We see no reason why this is not a compliance with the member's contract made in the beginning with the association. In substance and in fact the change was made in writing, and filed as required. The views above expressed are in accordance with sound legal principles. The contentions on behalf of plaintiff are not so sustained. To uphold them would be to put form above substance, and unsubstantial technicalities above substantial legal rules. We find no error in the record. Judgment affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

3 Cal. Unrep. 343

WRIGHT v. WRIGHT. (No. 13,749.)

(Supreme Court of California. Dec. 20, 1890.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The findings of the court founded on conflicting testimony will not be disturbed on appeal.

Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Albert M. Stephens, for appellant. Wells, Guthrie & Lee, for respondent.

PER CURIAM. There is a clean-cut conflict in the evidence. The plaintiff testified that defendant left him, in 1885, without cause and against his wishes, and had ever since, without reason, refused to re-

turn and live with him. There was sufficient corroboration. Letters introduced in evidence, and the testimony of friends and members of the family, tended to show that plaintiff was happy with his wife, and treated her kindly; and his father testified that defendant told him, in 1885, she would not live with the plaintiff any longer. That she has not in fact lived with him is undisputed. The court heard the conflicting statements of the parties, weighed the evidence, and we are not at liberty to set our judgment against this conclusion, even though our conviction should be that the defendant's evidence preponderates. The court did not err in its ruling as to the admissibility of certain evidence. Judgment and order affirmed.

87 Cal. 241

PERKINS v. COOPER *et al.* (No. 13,179.)

(Supreme Court of California. Dec. 20, 1890.)

FILING OF APPEAL—BOND—WAIVER.

1. Under the direct provisions of Code Civil Proc. Cal. § 940, an appeal is "ineffectual for any purpose" where, within five days after service of notice of appeal, an undertaking is not filed or waived.

2. Filing of an undertaking must be waived within the time for filing, otherwise it will be ineffectual.

Reversing 24 Pac. Rep. 377.

On rehearing. For former report, see 24 Pac. Rep. 377.

PER CURIAM. Attention was called to the fact so briefly, and in such an incidental way, at the original hearing, that it escaped our notice, but, upon rehearing, it is made manifest to us that there is nothing before us in this cause which we have jurisdiction to hear and determine. A money judgment was rendered in the cause October 31, 1888. Notice of appeal was served and filed December 26th of the same year. No undertaking on appeal was ever filed or waived. The appeal was therefore "ineffectual for any purpose." Code Civil Proc. § 940; *Holcomb v. Sawyer*, 51 Cal. 417; *Boyd v. Burrell*, 60 Cal. 281; *Biagi v. Howes*, 63 Cal. 384; *Brown v. Green*, 65 Cal. 222, 3 Pac. Rep. 811; *Stratton v. Graham*, 68 Cal. 168, 8 Pac. Rep. 710; *Little v. Jacks*, 68 Cal. 344, 345, 8 Pac. Rep. 856, 9 Pac. Rep. 264, and 11 Pac. Rep. 128; *Duffy v. Greenebaum*, 72 Cal. 159, 12 Pac. Rep. 74, and 13 Pac. Rep. 323; *In re Skerrett*, 80 Cal. 63, 22 Pac. Rep. 85; *Schurtz v. Romer*, 81 Cal. 245, 22 Pac. Rep. 657. The appeal being ineffectual for any purpose, there has been and is no case here for our determination.

Attached to the transcript which has been filed herein there is a stipulation, entitled in this court, agreeing to the correctness of the transcript, and stating that a good and sufficient undertaking on appeal has been duly executed and filed. It is both proved and conceded that this statement is untrue, and the attorney for respondent says that he signed it without actual knowledge of the fact, and relying upon the statement of the counsel on the other side that such an undertaking had been filed, coupled with the fact that he knew the counsel to be per-

fectly familiar with the requirements of the statute and a careful practitioner, and also that the parties were amply able to file the undertaking. There is possibly some doubt as to just what was said on the subject when that stipulation was signed, but there is no doubt about the fact that the statement contained in it on the subject of undertaking was untrue. From that fact it follows (1) that there was then no case in this court in which counsel could bind a client by such a stipulation; (2) that, if the language of the stipulation could possibly be construed as a waiver of undertaking, (which we very much doubt,) it could only operate as a waiver as of and from the date of the stipulation, March 28, 1889, and there was at that date no appeal pending in which to waive an undertaking, and no cause pending in this court in which to make the stipulation. In *Re Skerrett*, 80 Cal. 63, 22 Pac. Rep. 85, it was held that in order to entitle certain parties to appeal without filing an undertaking, under section 946, Code Civil Proc., the order dispensing with the undertaking must be made within the time prescribed by law for filing the undertaking. So, if the filing of an undertaking is to be waived, it must be done within the time for filing; otherwise the appeal is lost, and the party has acquired a right of which he cannot be deprived by that attempt to appeal. The order heretofore entered in this cause must be set aside, and the attempted appeal dismissed. So ordered.

87 Cal. 236

VORWERK v. NOLTE. (No. 13,470.)

(Supreme Court of California. Dec. 20, 1890.)

VENDOR AND VENDEE—CONTRACT—FAILURE TO CONVEY.

Civil Code Cal. § 1651, provides that, where a contract is partly written and partly printed, the written parts shall control the printed part, and, if the two are absolutely repugnant, the latter must be disregarded. Defendant sold land to plaintiff, and in a contract to convey, partly written and partly printed, it was written that the money paid was to be returned in case he failed to execute and deliver a deed "after one year from date." The printed part declared that time should be of the essence of the contract. Held that, since this stipulation is generally used to prevent the tying up of the vendor's property while awaiting payment, it was here repugnant to the written part, and plaintiff could not recover the money paid when a good deed was tendered nine days after the end of the year. Reversing 24 Pac. Rep. 840.

On rehearing. For former report, see 24 Pac. Rep. 840.

Civil Code Cal. § 1651, provides that "where a contract is partly written and partly printed, or where part of it is written or printed under the special direction of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared, without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form; and, if the two are absolutely repugnant, the latter must be so far disregarded."

J. W. Mitchell, (Chapman & Hendrick, of counsel,) for appellant. *J. D. Bicknell* and *R. H. F. Variel*, for respondent

Fox, J. Upon rehearing and reargument of this case a fact is conceded, which was before sufficiently apparent to be suspected, but not sufficiently so, from the record as printed here, to justify action upon it as a fact proved, viz.: That the original contract between the parties was partly written and partly printed; that in preparing it the parties had used a form printed in blank, in common use in the preparation of contracts for the sale of real property, where deferred payments were to be made; and that the words "time is of the essence of this contract," as found therein, was a portion of the printed, and not of the written, matter. If, therefore, there is any doubt about how the contract is to be construed, the rule prescribed in section 1651, Civil Code, is to be applied in the construction thereof. Applying this rule, and it appearing not only that the contract was partly written and partly printed, but that the printed part was prepared without special reference to these particular parties or this particular contract, the question is whether these words so found in the printed part are repugnant to the general scope and purpose of the contract, as the same appears from the original or written parts thereof. Of this we think there can be no doubt. It is a matter of common understanding that when these words—"time is of the essence of this contract"—are used, it is with reference to future payments; that their purpose is to protect the vendor against delays in payment of the purchase price, and the tying up of his estate beyond the fixed period, without the payment of the agreed compensation therefor; and that they have no place in the contract after the full price is paid, and when nothing remains to be done but to make the conveyance. Even where there are future payments to be made, if the time of payment is not fixed, time is not of the essence of the contract. *Day v. Cohn*, 65 Cal. 508, 4 Pac. Rep. 511. It is evident that, in the blank used in this case, the words were inserted and used solely with reference to the duties of the vendee, the party of the second part, for immediately after them, and in the same connection, we find the following: "In event of a failure to comply with the time hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law and equity to convey said property," etc. Then in another part of the instrument, the written part thereof, it is provided that the vendor, the party of the first part, shall have one year in which to make the conveyance, and it is alleged and found that this was done to enable him first to secure the cancellation of an existing mortgage, which was not then mature. By the subsequent writing, made on the same day, it was provided that, if the vendor failed to execute and deliver a deed "after one year from the date hereof," he should return the purchase price, with 3 per cent. per month interest thereon.

Meantime the vendee went into immediate possession, and received the rents of the premises. The year expired June 24th. On the 29th the purchaser demanded his deed, and three days later, which defendant testifies was as soon as he could have it prepared, he tendered the deed, duly executed. No objection was made to it that it was not properly executed, or did not convey good title. The vendee was still in possession, and had collected the rents up to a time even beyond that of the date of the tender. We think the deed was tendered in time, and that the defendant was not liable to an action for the return of the purchase money, with the 36 per cent. interest money thereon, or any part thereof. The order heretofore made in this court in this cause is vacated and set aside, and the judgment and order appealed from are affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; THORNTON, J.

87 Cal. 292

In re MCMANUS' ESTATE. (No. 13,724.)

(Supreme Court of California. Dec. 30, 1890.)

EXEMPTIONS—INSOLVENCY—JEWELER'S SAFE.

On a question whether a safe used by a jeweler and watch-repairer should be set off to him in insolvency proceedings as exempt under Code Civil Proc. Cal. § 690, subd. 4, exempting from execution "the tools or implements of a mechanic or artisan necessary to carry on his trade," he and another practical watch-maker and jeweler testified that such a safe was necessary to the profitable conduct of his business, and that customers would not leave their watches to be repaired unless one were used. *Held*, that the safe was properly set off to him.

Commissioners' decision. Department 1. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Blackstock & Shepherd and *George A. Rankin*, for appellants. *Barnes & Selby*, for respondent.

BELCHER, C. C. The respondent, L. M. McManus, was engaged in the business of a jeweler and watch-repairer, and while so engaged was adjudged to be an insolvent debtor. He owned and used in his business a "jeweler's safe," which the court, against the objections of certain creditors, set apart to him as property exempt from execution. The objecting creditors and the assignee of the estate appeal from the order, and contend that it was not authorized by law, and should, therefore, be reversed. At the hearing the respondent was called as a witness and "testified in substance that he is a jeweler and watch-repairer, and is engaged in that trade or business as a means of support for himself and family; and that without the use of said safe, said business cannot be prosecuted by him to any profitable end; that it is a necessary and useful article in conducting said business; that without the use of said safe his customers would not leave their jewelry and watches with him to be repaired." Another witness was also called, and testified "that he is a practical watch-maker and jeweler; that a safe similar to the one mentioned is an article without which the business of jeweler and

watch-maker and watch-repairer cannot be prosecuted to any profitable end, and that such a safe is a necessary and useful article in carrying on the business of a jeweler and watch-repairer; that without the use of such a safe very few customers will leave their jewelry or watches with the artisan to be repaired." This was all the testimony offered, and upon it the court made its findings and order as follows: "That the said safe is an article without the aid of which the business of petitioner, as jeweler and watch-maker, cannot be prosecuted to any profitable end, and that said safe is necessary to and in actual use by the petitioner in prosecuting his said business. Wherefore it is hereby ordered that the said safe be set apart, and that the same is hereby set apart, for the use of said insolvent debtor, and that the same shall not be subject to be applied to the payment of his debts." Section 60 of the insolvent act makes it the duty of the court having jurisdiction of insolvency proceedings to exempt and set apart for the use and benefit of the insolvent such real and personal property as is by law exempt from execution; and section 690, subd. 4, of the Code of Civil Procedure, provides that "the tools or implements of a mechanic or artisan necessary to carry on his trade" shall be exempt from execution.

Statutes exempting personal property from forced sale are remedial in character, and are evidently intended to protect the debtor, and enable him to follow his vocation, and thus earn a support for himself and family. The general rule now is that such statutes are to be liberally construed, so as to effectuate the humane purpose designed by the law-makers, and our Code of Civil Procedure declares that all of its provisions are to be so construed, "with a view to effect its objects and to promote justice." It is difficult to define accurately the word "implements," and the courts, so far as we are advised, have never attempted to define it. Webster gives as the meaning of the word, "whatever may supply a want; especially an instrument or utensil as supplying a requisite to an end, as the implements of trade, of husbandry, or of war;" and "utensil" he defines as "that which is used; an instrument; an implement; especially an instrument or vessel used in a kitchen, or in domestic and farming business." By the courts, these words are accorded a broad signification, and under them many things have been exempted which are not tools. Thus, in the state of Kansas, under a statute exempting "the necessary tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business," it has been held that an insurance agent and abstractor of titles could claim as exempt an iron safe and set of abstracts, which were used and kept by him for the purpose of carrying on his business. *Davidson v. Sechrist*, 28 Kan. 324. And the same rule has been applied to a printing-press, type, and other articles used in publishing a newspaper. *Bliss v. Vedder*, 34 Kan. 59. 7 Pac. Rep. 599. In Illinois, it has been held that a piano, used by a music-

teacher, and upon which she relied for support, was, within the law exempting "furniture, tools, or implements necessary to carry on his or her trade or business." *Amend v. Murphy*, 69 Ill. 337. In *Massachusetts*, a clock, stove, screen, pitcher, and table-cover, used and necessary to carry on the business of a milliner, have been held to be included in "tools, implements, and fixtures." *Woods v. Keyes*, 14 Allen, 236. So, also, a sewing-machine. *Rayner v. Whicher*, 6 Allen, 294. In *Vermont*, a barber's chair has been held exempt as a tool. *Allen v. Thompson*, 45 Vt. 472. In this state it has been held that an expensive threshing outfit was not exempt, under the statute exempting "the farming utensils or implements of husbandry of the judgment debtor;" but this was upon the ground that the outfit was principally used in threshing grain raised by other persons for hire. *In re Baldwin*, 71 Cal. 74, 12 Pac. Rep. 44. Other cases bearing upon the question might be cited, but we think it sufficient to refer to *Freeman on Executions*, (2d Ed.) §§ 226, 226a, and to 7 *Amer. & Eng. Enc. Law*, 135, in both of which works the authorities are very fully collated and reviewed. In view of the testimony submitted in this case, and the authorities above cited, we see no error in the ruling of the court below, and we therefore advise that the order appealed from be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

87 Cal. 249

GUERNSEY v. WEST COAST LUMBER CO.
(No. 13,643.)

(*Supreme Court of California*. Dec. 22, 1890.)

BREACH OF CONTRACT—WAIVER.

Defendant contracted to buy all the lumber manufactured by plaintiff during a certain season; the lumber to be of the sizes usually required for market, to be designated by plaintiff, subject to the right of defendant to give orders for any sizes usually cut. *Held*, in an action for breach of the contract that defendant could not set up as a reason for refusing to receive more lumber, any objection to the size of lumber theretofore accepted and paid for by him without reserving the right to object to it subsequently, and which he retained without any offer to return it.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

C. J. Perkins, for appellant. T. J. Fording, for respondent.

HAYNE, C. This was an action for damages for the breach of a contract to buy lumber. The contract provided that the defendant should buy all the lumber "of good merchantable quality" which should be manufactured by the plaintiff during the year 1888, at his mill in San Bernardino county, and contained the following clause: "Said lumber shall be of such sizes as are usually required for the market, and shall be designated by Guernsey, regard being had to a due variety of sizes so as to meet the general requirements of the market, except that the company may

give orders for any required sizes usually cut." Under this contract the plaintiff delivered lumber to the defendant until the middle of August, and, with certain unimportant exceptions, the defendant received and paid for the lumber so delivered. About that time the employees of the defendant informed its general manager that some of the lumber which was being delivered was not thick enough, and he instructed them "to have it remedied." No order for any particular size was given to the plaintiff, but he was informed that the lumber he was sending was too thin. He promised to attend to the matter, and his men continued to deliver lumber to the defendant, and the latter to receive and pay for it, until September 20th, when the plaintiff was notified that no more lumber would be received. The plaintiff thereupon sold the remaining lumber to other parties and brought this action to recover the difference in price. The trial court found that the defendant's refusal to receive further lumber was without excuse, and gave judgment for the plaintiff, and the defendant appeals.

We think that since the defendant accepted and paid for the lumber delivered up to September 20th without reserving the right to object to it subsequently, and does not offer to return it, but still retains it, any ground of objection to it which may have existed could not be a reason for refusing to accept subsequent lumber which was in accordance with the contract. The ultimate question upon which the case must turn, therefore, is whether the subsequent lumber was in accordance with the contract. As we have seen, the contract provided that the lumber was to be of good merchantable quality, and of such sizes as were usually required for the market, which sizes were to be designated by the plaintiff, subject to the right of the defendant to give orders for any sizes usually cut. Most of the evidence taken at the trial related to the question whether the lumber delivered by the plaintiff was "merchantable" within the meaning of the contract. But this seems to have been understood by everybody as having reference not to the quality but to the size of the lumber. Thus the local manager of the company testified as follows: "This Guernsey lumber was different from any other lumber that I have handled as merchantable lumber only as to thickness. I objected on account of its being thin. It wasn't good merchantable lumber by reason of its being thin." All the witnesses use the term in this sense, and there is no pretense that there was any other ground of objection. The question litigated, therefore, related to the size of the lumber usually required in the market. The position of the plaintiff was that lumber seven-eighths of an inch thick was sufficient, and there was evidence in support of this view. The position of the defendant was that it was necessary that the lumber should be what was known as inch lumber. The evidence shows, however, that there was not much exactness in the use of these terms. Owing to the character of the timber of the locality, and to the usual method of manufacturers, there was con-

siderable difference in the size of the boards sawed at the same time from the same log. In this regard one witness testified as follows: "There is never a load that comes into the market that were you to put your rule to it every board would show the same thickness. There never was a log on this mountain yet, all the boards cut from which were of the same thickness." Another witness said: "My experience has been that lumber which is cut as inch lumber very seldom comes an inch thick. It would be probably a sixteenth less, and when it dries out it would be more than a sixteenth less. In fact if you take dry lumber it is sometimes three quarters of an inch or a little more." In most loads there would be a few very thin boards which it was customary to reject when delivered at the yard, and this course was pursued in this case. Understanding the terms in the above sense we think that, even if the standard of the defendant be adopted as the true one, the preponderance of the evidence is to the effect that, after the complaint made in August, the plaintiff complied with his contract. In sawing inch lumber the usual way was to "move the set works an inch and a third." After the complaint mentioned the plaintiff's works were so moved. In relation to this the plaintiff says: "I changed my head blocks, and after that the lumber came out a full inch." The lumberman to whom the plaintiff sold his lumber after the defendant refused to receive it testified as follows in relation to it: "I consider this lumber to have been fully as good as any that I ever handled; in fact better than some I have been handling in the last two years, that is, the average of it,—better timber. I mean by this both the quality of the lumber and its manufactured condition. It was cut well and it was good timber." Another person from the same yard testified as follows: "What we received from Mr. Guernsey compared in thickness with the rest. If anything his lumber was a little thicker than the other lumber that we received. I have applied the rule to measure the lumber. I can't say exactly just what it measured, but it was about as near an inch as any lumber we have received." Another lumberman who had seen the lumber testified that the plaintiff's lumber compared favorably with that manufactured in the locality, and said: "I call it good inch lumber." One of the plaintiff's employees, who handled the lumber at the mill, testified as follows: "The lumber that was cut in September was full inch. I saw nothing below an inch but what was thrown across the track. No thin lumber that I know of came down at all." And the teamster who hauled the lumber to the defendant's yard testified that the last load, delivered before September 20th, "was good average thickness. It was inch lumber." It was also in evidence that the price of lumber had fallen below the contract price at the time of the refusal to go on with the contract, and that the defendant had engaged in a kind of work for which "they had to have extra thick lumber." We think that the evidence is amply sufficient to sustain the decision, and we

therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

(3 Cal. Unrep. 344)

ALEXANDER v. JACKSON et al. (No. 13,489.)
(Supreme Court of California. Dec. 23, 1890.)

EJECTMENT—HOMESTEAD—LAND BOUGHT ON CONTRACT—SATISFACTION OF JUDGMENT—APPEAL.

1. A married man bought certain lots, terms part cash, balance on time, deed to be given on payment of balance, lots to be forfeited on failure to meet payments. He then built a house on the lots, and moved into it with his family. The payments on the lots and the house were made with the community property. The wife executed and filed a declaration of homestead on the lots. Before final payments on the lots had been made, the husband assigned the contract and sold the house to plaintiff, who had knowledge of the homestead declaration, and who paid the balance of the purchase money and received a deed of the lots. Prior to the assignment to plaintiff, the wife offered to pay the vendor the amount due on the lots on condition that he would convey them to her or to her and her husband jointly. *Held* that, as at the time the declaration of homestead was filed the title was in the vendor, the wife acquired no rights in the property.

2. Where in ejectment there is coupled with a judgment for defendant an order that a certain sum be paid plaintiff, the leaving of this sum by defendant with plaintiff's attorney, which he refuses to accept, is not a satisfaction of the judgment so as to prevent an appeal by plaintiff.

BEATTY, C. J., and FOX and McFARLAND, JJ., dissenting.

In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Wright & Hazen, for appellant. *L. J. Maddux*, for respondents.

THORNTON, J. This is an action of ejectment for lots 27 and 28 in block 86 in the town of Modesto, in which judgment passed for defendant Mary Jackson. Plaintiff appeals from the judgment on the judgment roll. There is a motion to dismiss the appeal, which will be hereafter considered. The complaint is in the form usual in the action of ejectment. The allegations of the complaint are denied by defendant Mary Jackson, except as to possession when suit was brought. In her answer she sets up a defense that in April, 1869, she and W. A. Jackson intermarried in this state, and have since been husband and wife; that some time in 1881 her husband entered into a contract in writing with Charles Crocker for the purchase of the lots of land above mentioned; that about September, 1884, her husband, W. A. Jackson, erected on these lots a residence of about the value of \$1,500; that the money paid for the lots in suit and the house was the joint earnings of herself and husband, since their marriage; that defendant and her husband and children have, since it was built, made this house their home; that on the 12th day of August, 1885, defendant duly executed and filed in the proper office a declaration of homestead on these lots; that by virtue

¹ Rehearing granted.

of the contract entered into between Crocker and her husband, the latter was to pay Crocker the sum of \$75 for each lot in installments, with interest, etc.; that on the 26th of October, 1885, there was not to exceed \$35 due Crocker on the purchase price of these lots, on the payment of which her husband was entitled to a deed from Crocker; that he (her husband) had abundant means to pay the purchase price; that he fraudulently refused to do so to prevent the conveyance of these lots to him, and that he might fraudulently prevent her from acquiring a homestead in the property; that in October, 1887, her husband made a pretended assignment of the contract of purchase to the plaintiff, and on the same day pretended to enter into a contract by which he was to sell and transfer to the plaintiff the house above mentioned; that this contract and assignment were entered into by the plaintiff and her husband for the purpose of cheating and defrauding her of her homestead; that at the time plaintiff accepted the assignment and contract he well knew that the purpose of the same was to cheat and defraud her of her homestead right; that in October, 1887, plaintiff presented the assignment to Crocker, and obtained a deed for the property; that this deed is the only title by which plaintiff claims the ownership of the property in controversy, and that it is void. It appears from the decision that the court found that W. A. Jackson, in 1884, purchased from Crocker, who then owned them, the lots in suit. The contract for the purchase of lot 28 was executed on the 28th of April, 1884, and that for lot 27 on the 7th of August, 1884. Other lots, including lot 29, were embraced in the contract of April, 1884. The contracts are similar in their terms. The purchase price of each lot was \$75. Twenty-five dollars on each lot was paid when the contract was executed. The remaining \$100 (\$50 for each lot, 27 and 28) was to be afterwards paid in two equal installments. The installments were to bear interest at the rate of 10 per cent. per annum. In each contract it is stipulated that if the purchase price is paid as set forth in it, with cost of conveyances, then W. A. Jackson will be entitled to a deed for the lots, otherwise the contract is null and void, and the amounts paid forfeited. If forfeited Jackson thereafter to be the tenant of Crocker, liable to be dispossessed upon three days' notice, and to be liable to pay a rent of \$15 per month for any term he may remain in possession after forfeiture. A payment was made on the 26th of October, 1885, for which a receipt was given by Crocker, in which the same provisions were inserted as to forfeiture on failure to pay, tenancy, liability to dispossession and the payment of rent, but at \$5 per month for possession after forfeiture. After the purchase, W. A. Jackson and Mary Jackson entered into possession of the lots, and have ever since been in possession. In September, 1884, W. A. Jackson erected a dwelling-house and other improvements on lots 27, 28, and 29, at a cost of about \$1,300. The marriage of defendants is found as set forth in the an-

swer, and stated above. Upon the completion of these buildings, defendants and their children entered into the dwelling-house and have ever since made it their home. The execution of the declaration of homestead is found as above stated from the answer. On or about the 6th of October, 1887, plaintiff and W. A. Jackson entered into an agreement for the purchase and sale of the dwelling-house and improvements, by which plaintiff was to pay W. A. Jackson therefor the sum of \$1,500 less such sum as plaintiff should be compelled to pay Crocker for the lots 27, 28, and 29. W. A. Jackson at the same time made and delivered to plaintiff a writing by which the former surrendered and relinquished to the latter all claims to receive a conveyance for the lots just mentioned, and authorized the plaintiff to take and demand a conveyance there or in his own name. At the same time, plaintiff paid to his vendor the sum of \$100 as part payment for the improvements on the lots. On the 15th of October, 1887, plaintiff paid to Crocker the balance due on these lots, and Crocker then executed to him a conveyance thereof. The balance due on the lots described in complaint (27 and 28) was \$35.35 principal, and \$5.86 interest. Plaintiff on the 3d of November, 1887, paid to Jackson the further sum of \$335.20, and executed to him his promissory notes in writing for \$1,000, and also executed to him a mortgage on the three lots to secure their payment. It is also found that the money, notes, and mortgage were the full purchase money of these lots, and that Jackson thereafter sold, assigned, and delivered the notes to one T. W. Drullard as security for money borrowed of him, of which notes and the mortgage Drullard is now the holder as security for this money. On the 6th of October, 1887, and long prior thereto, plaintiff had full actual knowledge of the declaration of homestead above stated, and that Mary Jackson claimed and occupied the premises as a homestead. The plaintiff, immediately after the 3d of November, 1887, demanded possession of the lots sued for of Mary Jackson, which she refused to deliver, and threatened him with violence if he attempted to take or have possession of them. All the charges of fraud on the part of W. A. Jackson and of the plaintiff are negatived by the findings. It is further found that Mary Jackson offered to pay Crocker the balance due him on the lots sued for in December, 1886, upon the condition that Crocker would convey them to her, or to her and her husband jointly; that she had full notice and knowledge of the right and title of the plaintiff to the premises ever since the 3d of November, 1887; that Mary Jackson and her husband have each had, since the date last mentioned, (she of her separate property,) sufficient means to pay the balance of the purchase money due on the lots in litigation, and that Mary Jackson is entitled to the judgment of the court. Judgment was accordingly entered in her favor, and it was by the judgment further ordered that "defendant Mary Jackson pay to the plaintiff the sum of forty-seven and twenty-one one-hundredths dollars,

balance of the purchase price paid on the lots mentioned, with the interest on the same at seven per cent. per annum from date hereof."

We cannot see that Mary Jackson derived any right by her execution and filing of the declaration of homestead. Conceding that her husband had some equitable interest in the premises, still whatever he had he was competent to sell and transfer it. This is so, though the payments made by her husband were the earnings of the joint labors of herself and husband. Whatever interest was thus acquired was community property, of which the law invests the husband with the like absolute power of disposition (other than testamentary) as he has of his separate property. Civil Code, § 172. The husband sold and transferred his interest in the land involved herein to the plaintiff, as he had a right to do. The vendor (Jackson) did not have the legal title to the property, but only the right to get it from his vendor, Crocker, on payment of the purchase money. The sale and assignment to the plaintiff transferred to him the right to have the legal title conveyed to him on payment of the unpaid balance of the purchase money. The purchase was fair in all respects. The court below expressly found that there was no fraud in any of these transactions between W. A. Jackson and plaintiff in regard to the rights of Mary Jackson. The question of fraud may then be laid out of the case. As the case is presented in the record, the law imposed no obligation on the husband to the wife to complete the purchase and procure a deed so as to make possible the acquisition of a homestead by her. Granting that *in foro conscientie* there was an obligation binding the husband to pay the balance, and procure from Crocker a conveyance, such obligation was of the class styled "imperfect," for the breach of which no redress can be had in a court of justice. The husband had lawful right to refuse to complete his purchase, (*Hicks v. Lovell*, 64 Cal. 14; *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. Rep. 429,) and the wife cannot be heard to complain of it. When the declaration of homestead was executed and filed by Mary Jackson, the legal title was in Crocker, and he could not have been compelled to convey the land at the time of the transfer of the contract by Jackson to the plaintiff. The whole purchase money had not then been paid, and Crocker was entitled to hold out the legal title, until he was paid the sum agreed on. Surely Mary Jackson could not, by executing and filing a declaration of homestead, affect Crocker's right to the land or the right of the plaintiff to whom Crocker might, under the facts of this case, have lawfully conveyed and did lawfully convey it. A right cannot be acquired by filing a declaration of homestead on the land of another. This point, if ever open to contention, is no longer debatable in this state. See *Snodgrass v. Parks*, supra. Crocker conveyed the legal title to the plaintiff. The filing of the homestead declaration invested Mary Jackson with no title to the land in suit, and did not detract from or affect in any way the potency of this

title acquired by plaintiff by Crocker's conveyance to him.

The motion to dismiss the appeal is made on the ground that the judgment had been satisfied. The court gave judgment in favor of Mary Jackson, thus holding that she was entitled to the possession of the lots in controversy, and that plaintiff was not, and then ordered and adjudged that she pay to plaintiff a sum of money "because of the purchase money paid on the lots involved." This was done without any appropriate pleadings. She did not offer to pay any money, nor did she set forth in her answer any state of facts calling for any such judgment. The matter set up in the answer was pleaded merely as a defense to the action, which turned on the issue of right to the possession of the land sued for. There was no pleading on her part in which a demand was made for relief on payment of any sum of money. The portion of the judgment referred to (quoted above) was entirely outside of any issue joined in the cause before the court. It was entirely foreign to anything set forth in either complaint or answer. There was nothing in the case on which to base it. It is suspended as it were in mid air, without support of any kind or description, and is entirely irregular and erroneous. The record shows this state of facts in regard to this alleged satisfaction: that Mary Jackson's counsel on the 31st of August, 1888, after the appeal was taken, left on the desk of one of the attorneys for plaintiff the sum of \$45.86, thus tendering it to plaintiff as payment of the sum adjudged by the court to be paid to plaintiff by defendant; that the counsel for plaintiff refused to accept it, and still holds it for defendant. There is no ground for holding such a tender or payment a satisfaction of the judgment. The motion to dismiss the appeal is denied, and the judgment is reversed with directions to the court below to enter judgment on the findings for the plaintiff, with a judgment for rents and profits at the rate of \$15 per month from the 31st of October, 1887, to the date of the judgment. So ordered.

We concur: PATERSON, J.; SHARPSTEIN, J.

Fox, J. I concur in the order reversing the judgment of the court below on the ground that said judgment as entered is not supported, either by the pleadings or the findings. But I am not prepared to say that the defendant Mary Jackson has not a homestead interest in the premises which she is entitled to have protected, under proper pleadings.

I dissent: McFARLAND, J.

I dissent: BEATTY, C. J.

87 Cal. 281

PEOPLE v. DOUGLASS. (No. 20,695.)

(Supreme Court of California. Dec. 23, 1890.)

ASSAULT WITH DEADLY WEAPON—RECORD—INFORMATION—PRIOR CONVICTION—JUDGMENT.

1. Defendant, accused by information of assault with a deadly weapon, and of a prior con-

viction for manslaughter, pleaded not guilty of the former, and guilty of the latter. The minutes of the trial stated that after the jury were sworn "the information is read, and the plea of not guilty stated to the jury by the clerk." *Held*, that this means that only the charge to which defendant pleaded not guilty was read.

2. Where the record shows that an information charged an assault upon Daniel Aneson, and that the evidence proved an assault on Daniel Aueson, but it also appears that the court told the jury that he was accused of assaulting Daniel Aueson, it will be presumed that the court read the information aright, and that in copying for printing the clerk had mistaken the letter "u" for the letter "n."

3. A person who, when a train is about to start, passes from a railroad depot across the steps of a sleeper, and goes forward on the opposite side, and gets upon the platform of a mail-car situated several cars from the passenger coaches, and two cars from the nearest sleeper, will not be presumed to be a passenger, but, on the contrary, a brakeman is justified in taking him to be a trespasser.

4. Pen. Code Cal. § 666, provides that if the subsequent offense of which a person, who was formerly convicted of a felony, is convicted, is such that upon a first conviction he could be punishable by imprisonment in the state-prison for less than 5 years, then, on such subsequent conviction, he can be punished by imprisonment not exceeding 10 years. *Held* that, since one first convicted of an assault with a deadly weapon may be imprisoned 2 years, he may, when it appears that he was formerly convicted of a felony, be imprisoned not exceeding 10 years.

5. A judgment which states the crime of which defendant was convicted, and the sentence of the court, is sufficiently definite and certain.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

John Aherns and P. Reddy, for appellant. W. Ed. Tupper and S. J. Hinds, for the People.

THORNTON, J. The defendant was convicted of the crime of assault with a deadly weapon. This appeal is by him from the judgment, and an order denying his motion for a new trial. Several points are presented and argued on behalf of appellant, which we will proceed to consider. The defendant was accused by the information of assault with a deadly weapon, and of a prior conviction of a felony, viz., manslaughter. On his arraignment he pleaded guilty to the prior conviction of manslaughter, and not guilty as to the charge of assault with a deadly weapon. When the jury had been impaneled and sworn, it is stated in the minutes of the trial that "the information is read, and the plea of not guilty stated to the jury by the clerk." It is urged on behalf of defendant that it was error to read the information to the jury. The counsel for defendant construes the statement above quoted as a statement that the whole information was read, including both charges made in it, to one of which, as above stated, defendant had pleaded guilty. We do not so construe the statement taken from the minutes of the trial. We understand it as a statement that the charge in the information as to the assault only was read. It would be entirely unnecessary to read that portion of it in which the prior conviction, to which he had pleaded guilty, was set forth. At any

rate it does not clearly appear that the whole information was read. If it was read, it was done in the presence of defendant and his counsel, and no objection was made to it. Further, the record shows distinctly that the charge as to the assault only was submitted to and passed on by the jury.

The verdict is in accordance with law. (Pen. Code, § 1151,) and is free from uncertainty. See *People v. McCarty*, 48 Cal. 557. The same is true of the judgment. See *In re Ring*, 28 Cal. 248. The judgment as entered states the crime of which the defendant had been convicted, and the sentence of the court. This is all that is required by law. There is no uncertainty in these statements.

It is argued that there is a fatal variance between the information and the proof, inasmuch as the information sets forth that the assault was made on Daniel Aneson, and the proof is that it was made on Daniel Aueson. The court in its charge told the jury that the defendant is accused of the crime of an assault on Daniel Aueson. The only accusation in this case is that set forth in the information. The direction of the court to the jury is as to what is contained in the information. Whether the question as to what is contained in the information is one of law or fact, it is to be determined by the court below; and when the court below has determined it, unless it clearly appears to be error, this court will not disturb it. Many persons in writing the letter "u" sometimes form it very like the letter "n," and *e converso*, so that one letter is frequently mistaken for the other. We have no doubt such is the case here,—that in giving shape to "u" it was formed in such a manner as to resemble the letter "n." The only evidence that we have that "n" was the letter instead of "u," is that of the clerk who copies it to be printed as "n." But the court below differed from the clerk as to this, and between the two it is the duty of this court to follow the judgment of the court below. The foregoing considerations induce us to conclude that it is not clear that the court below fell into an error in this matter, but, on the contrary, that the court below read the information aright, and that in this regard there is no error in the record. We have considered the points in regard to the directions given by the court below, and the refusal by the court of the requests to direct the jury made by defendant, and find no error in them.

There is no presumption of law or fact that a person found anywhere on the passenger train of a railway is a passenger. Such a presumption is opposed to all principle. If a person is found in or on a passenger-car, on a train for carrying passengers, such a fact will justify the conclusion *prima facie* that he is a passenger; but if seen to go on the platform of a mail-car, or of some other car not run for the accommodation or use of passengers, no such conclusion as that he was a passenger could be legitimately drawn. The rule seems to be laid down with a significant limitation in *Railway Co. v. Thompson*, 9 N. E. Rep. 357, cited and relied on

by defendant. The rule as there stated is that "a person on a train used for carrying passengers is, in the absence of countervailing circumstances, presumed to be a passenger, and rightfully there." By the language here used, the presumption is allowable "in the absence of countervailing circumstances," which is equivalent to saying that the "presumption," admitting it to exist, "belongs to the class of disputable presumptions, and may be rebutted." The rebutting evidence is spoken of in the opinion as countervailing circumstances, which are nothing more than rebutting circumstances. The circumstances which rebut the presumption that defendant was a passenger are abundant. Evidence was introduced which tended to show that the defendant was not a passenger on the train. A witness testified that he was a brakeman on the night passenger train No. 18, on the morning of the 20th of April, 1889, when the shooting occurred of which defendant is accused. On the morning of that day, before daylight, when it was dark, the train being stopped at Madera, in Fresno county, the witness saw two men (one of whom was defendant) coming up from the rear end of the depot to where he stood. These men crossed the platform of a sleeper, and went up on the opposite side of the train from the depot. They went up towards the engine. He saw them attempt to get on the train behind the mail-car, between the mail-car and the express-car, and he hallooed to them not to get on, to keep off, but they paid no attention to his hallooing. Witness went to where they were, the defendant standing on the platform of the mail-car, and the other on the platform of the express-car. He drove one off the train; the other (defendant) refused to go, and, in the effort to get him off, the witness was shot by the defendant. The platforms of the cars on which the two men got were several cars distant from the regular passenger-car, and two cars from the nearest sleeper. These men did not go to the passenger-car at all, nor did they speak to any one connected with the management of the train to procure a passage, or pay fare, and, when the witness (brakeman) ordered them off the train, they did not say, or pretend in any way or manner, that they were passengers on the train. Evidence of these circumstances was before the jury. The court in its instructions left it to the jury to find whether they were passengers or intruders or trespassers on the train. The objection on behalf of the defendant is that there was no evidence on which this question could be left to the jury. In this the learned counsel for defendant is mistaken. The evidence is detailed above, and, in our view, was sufficient, and the court committed no error in submitting the point to the jury whether the defendant was a trespasser or a passenger on the train.

Another point made is that the court erred in telling the jury that the defendant, a trespasser on the train, was not justified in using his pistol and shooting, if the train was running at a rate of speed when he (the defendant) could with safety get off of it or descend from it. We cannot con-

cur in this view. If wrongly on the train, no law would justify him in shooting, when he could with safety get off it, and avoid the shooting. It was his duty to get off when told to do so. If he did not, he could not urge it as a defense rendering the shooting justifiable, if he could have gotten away from the train with safety to himself. This is too plain to require argument to establish it. The statement of the proposition is a refutation of it. We are of opinion that the court fairly put the case to the jury in its directions, and refused no request which it was not proper in law to refuse.

The point as to the term of punishment is not well taken. By the provisions of subdivision 2, § 666, Pen. Code, if the subsequent offense of which a person is convicted is such that upon a first conviction he could be punishable by imprisonment in the state-prison for any term less than 5 years, then, on such subsequent conviction, he can be punished by imprisonment in the state-prison not exceeding 10 years. Here defendant, if he had been first convicted for the offense for which he was subsequently convicted, could have been punished by imprisonment in the state-prison for 2 years, *i. e.* a term less than 5 years. For the subsequent conviction, then, he could have been sentenced to the state-prison for a term not exceeding 10 years. The sentence was for 8 years, 2 years short of the time for which he could have been sentenced. After an examination of all the points made and discussed, we are of opinion that there is no error disclosed by the record, and that the judgment and order should be and are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(87 Cal. 290)

CAMPE v. MEIERDIERCKS. (No. 12,951.)

(*Supreme Court of California.* Dec. 24, 1890.)

REVIEW—FINDINGS—CONFLICTING EVIDENCE.

A finding of fact by the court upon conflicting evidence will not be reviewed upon appeal.

Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

W. B. Tyler, for appellant. Henry H. Reid, for respondent.

THORNTON, J. In this case, the whole question is as to an issue of fact which was determined by the court below in favor of plaintiff. Whether the money sued for was a gift or not, part of it to the defendant and a part of it to his daughter, depends on evidence in the cause. The evidence was on all material points conflicting. The court below decided that the money was not a gift, and rendered judgment for plaintiff. It is no use to review the evidence, but as it was conflicting on the issue above mentioned, according to the long-established rule of this court, the decision of the court below will not be disturbed. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(3 Cal. Unrep. 343)

VITORENO v. COREA. (No. 14,055.)

(Supreme Court of California. Dec. 20, 1890.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Where no transcript on appeal is filed within 40 days as required by the rule of the court, and no showing made to take the case out of that rule, the appeal will be dismissed on motion of respondent.

In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Thomas Scott, for appellant. Chase, Chase & Miller, for respondent.

PER CURIAM. Appeal was perfected in this case March 5, 1890. No transcript has been filed, and no showing is made taking the case out of the operation of the rule requiring transcripts to be filed within 40 days after the perfection of appeal. On motion of respondent, it is ordered that the appeal be dismissed.

(87 Cal. 253)

DRINKHOUSE v. SPRING VALLEY WATER-WORKS. (No. 12,823.)

(Supreme Court of California. Dec. 22, 1890.)

RES ADJUDICATA.

Under Code Civil Proc. Cal. § 1246, providing that in actions to condemn land any person claiming any interest in the land, though not named in the proceedings, may appear, plead, and defend his interest "in like manner as if named in the complaint," where one takes a written lease of land with notice of the pendency of an action to condemn it, and then fails to appear and defend his interest, he is estopped by the judgment in that proceeding from claiming anything under his lease.

In bank. Appeal from superior court, city and county of San Francisco; E. F. HEAD, Judge.

Ben Morgan, for appellant. Wm. F. Herrin and C. N. Fox, for respondent.

PATERSON, J. This action was commenced on July 29, 1887, to enjoin the defendant from building a dam across San Mateo creek. Plaintiff alleged that on January 1, 1887, Mary Drinkhouse, the owner of the premises, leased them to him for the period of one year, with the privilege of five years from the expiration thereof; that he went into possession, and on the 19th day of April, 1887, a written lease was entered into, by the terms of which he was to have the possession and use of the property for the term of five years from said 19th day of April; that defendant was constructing a dam below said premises, which, when completed, would throw water back upon them and permanently deprive him of the use thereof. The court found that the verbal lease, made as alleged by plaintiff, was by mutual consent canceled on April 19, 1887, and the written lease entered into as alleged, but that no change was made in the possession or use of the property; that said Mary Drinkhouse is the mother of plaintiff, and continued to occupy and use the premises, and he continued to live with her as he had theretofore done from his birth; that on February 28, 1887, and while said Mary Drinkhouse was the owner of a tract of land including the premises described in

the complaint, defendant herein commenced an action against her and J. A. Drinkhouse, her husband, for the condemnation of said tract of land to public use, and duly filed in the recorder's office a notice of the pendency thereof, and that a decree in its favor was entered July 27, 1888; that during the trial of said action plaintiff herein was present as a witness, and acting on behalf of the defendants therein, but never until after the entry of the decree therein made any claim to any interest in the property.

We think that the evidence supports these findings, and that the conclusions of law drawn by the court below are warranted by the facts found. The plaintiff lived in San Francisco with his parents, and testified that he lived "six days of the week in San Francisco, and one day in San Mateo;" that he never fitted up the place as a lodging-house, but put in a few tables, chairs, and blankets; that he had no servants or employees there, and that the foreman who had been in the employ of his mother continued to live in the building. He admits that when he entered into the written lease he knew that a suit was pending in which the water company was seeking to condemn the land. His verbal lease for one year was canceled six weeks before the condemnation suit was commenced. He knew that such a suit was pending,—was in fact an active participant on behalf of his parents against the claim of the company. Under section 1246, Code Civil Proc., the plaintiff herein was authorized, though not named as a party to the condemnation proceedings, to appear, plead, and defend his interest as a lessee, if any such he held, "in like manner as if named in the complaint," and, having failed to do so, although he had notice of the proceeding,—assuming that he was a lessee in good faith, which the court evidently did not believe,—he is now estopped by the judgment in that proceeding from claiming anything by virtue of his written lease entered into subsequent to the filing of the *lis pendens*. Roach v. Water Co., 74 Cal. 263, 15 Pac. Rep. 776; Civil Code, § 3529; Miller v. White, 80 Ill. 580; Wells, Res. Adj. § 32. The court did not err in its ruling against the objections of plaintiff to the admission of the judgment roll and *lis pendens*. The court found on all the material issues. Some of the material allegations of the complaint were not denied. It was not necessary, therefore, to find in relation to them. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

(87 Cal. 245)

WHITE v. ALLATT *et ux.* (No. 13,772.)

(Supreme Court of California. Dec. 20, 1890.)

MORTGAGE FORECLOSURE—PLEADING—REPUGNANCE—AMBIGUITY—UNCERTAINTY.

1. In an action to foreclose a mortgage, where the notes and mortgage set out in the complaint show that they were made to plaintiff as "trustee of the estate of W., deceased," an averment in the complaint that plaintiff sues as "trustee for the heirs at law of W." is immaterial and redundant, and must be disregarded.

2. In such action, therefore, a judgment in favor of plaintiff as "trustee of the estate of W., deceased," is supported by the pleadings.

3. An averment in the complaint as to attorney's fees is not ambiguous and uncertain on the ground that it cannot be determined whether fees are demanded for foreclosure of the mortgage as to two of the notes only, or as to all three, where it appears that, when the action was commenced, but two of them were due, and hence that the recovery must be confined to those two.

4. A demurrer to a complaint on the ground of ambiguity and uncertainty cannot be sustained if the complaint be either ambiguous or uncertain, but is not both.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge. *W. J. McIntyre and H. Goodcell, Jr.*, for appellant. *E. B. Stanton*, for respondent.

GIBSON, C. This action was brought to foreclose a mortgage. The demurrer to the complaint was overruled, and, upon defendants' failure to answer, judgment was rendered against them. From that judgment they bring this appeal, and claim—*First*, that the demurrer should have been sustained upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and, that it is ambiguous and uncertain; and, *second*, that the judgment is not sustained by the pleadings.

1. It is urged that the facts are insufficient for the reason that the plaintiff sues as trustee for seven designated persons, described as "heirs at law of B. F. White, deceased," and there is no allegation that he is a trustee for any purpose for any of the beneficiaries, or that the notes in suit were made in his name for their benefit, and therefore the persons named as beneficiaries are the real parties in interest, and not the plaintiff. The complaint alleges that the three notes set out in it were made and delivered to the plaintiff by the defendants, together with the mortgage in suit, to secure their payment, and that the plaintiff is the owner and holder of the notes and mortgage as trustee for the beneficiaries, "all the heirs at law of B. F. White, deceased;" while the notes themselves show that they were made to the plaintiff, "as trustee of the estate of B. F. White, deceased." These two allegations are said to be inconsistent with each other, because the identity of the plaintiff as trustee for seven particular persons, described as heirs at law of B. F. White, deceased, is different from that of trustee of the estate of the same decedent. But this inconsistency is more apparent than real. It is true that in the latter capacity, if he were trustee of the whole estate, he would not only represent the heirs, but the legatees, devisees, and creditors, if any, as well; while, in the first-mentioned capacity, he would simply represent the persons named as beneficiaries. This makes it appear that the first is more extensive in scope than the second, and that it is not repugnant to the latter. The notes sued on are, however, the principal contract, to which the mortgage is but an incident, and, as it clearly appears from the notes themselves that they were made to the plaintiff for the benefit of "the estate of B. F. White,"

deceased, he must be regarded as a trustee for that estate. These facts are material and controlling, in view of which the averment of ownership of the notes and mortgage, as trustee of the heirs of said decedent, becomes immaterial and redundant matter, and as such must be disregarded. By taking the notes and mortgage in his own name for the benefit of the estate of the decedent above named, he became the trustee of an express trust, and as such may maintain this suit, without joining with him the persons for whose benefit the action is prosecuted. Code Civil Proc. § 369; Bliss, Code Pl. § 262; Shouler, Ex'rs, § 292; Pom. Rem. § 175. This is one of the exceptions to the rule declared in section 367 of the Code of Civil Procedure, that every action must be prosecuted in the name of the real party in interest. The complaint is therefore not objectionable upon the first ground of demurrer.

2. On the grounds of ambiguity and uncertainty, the first point made is that the averment respecting the attorney's fee is uncertain because it cannot be determined from the complaint whether the amount demanded is reasonable or not, because it does not appear whether the amount is demanded for the foreclosure of the mortgage as to two or all three of the notes. Of the three notes set up in the complaint, two were due when the action was commenced, and, as these two were the only ones that could be recovered upon, it seems clear enough to us that the amount demanded as an attorney's fee related to the foreclosure of the mortgage as to those two; hence it cannot be said that the complaint is, in that respect, either ambiguous or uncertain. But, even if it were uncertain, such an averment is unnecessary; for, as was said in *Carrierre v. Minturn*, 5 Cal. 435, "the counsel fees stipulated to be paid were not the cause of action, but, like the costs, a mere incident to it, and may be fixed by the chancellor at his discretion, not exceeding the amount stipulated." This rule has not since been departed from. *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514; *Rapp v. Gold Co.*, 74 Cal. 532, 16 Pac. Rep. 325. See, also, *Association v. Clark*, 84 Cal. 201, 23 Pac. Rep. 1081. What has been said regarding the objection urged upon the general ground of demurrer disposes of the remaining objections as to the uncertainty and ambiguity of the complaint, as they are based upon the averment of trusteeship for the heirs of B. F. White, deceased, and the fact that the notes show they were made to the plaintiff as trustee for the estate of B. F. White, deceased. Again, if the complaint were either ambiguous or uncertain, but not both, the demurrer being in the conjunctive as to these two grounds, it could not be sustained. *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. Rep. 1137.

3. It is claimed that the judgment is not sustained by the pleadings because of the averment to the effect that the plaintiff is the trustee of the persons named as heirs of the decedent, and the judgment is in favor of the plaintiff as trustee for the estate of the same decedent. But as the averment mentioned is, as above shown,

immaterial, and as the notes and mortgage were made and delivered to the plaintiff "as trustee of the estate of B. F. White, deceased," the judgment is in accordance with and supported by the complaint. We therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

87 Cal. 211

GRAY v. SABIN. (No. 11,740.)

(Supreme Court of California. Dec. 20, 1890.)

VACATING JUDGMENT—ABSENCE OF COUNSEL.

By consent, a cause was set for trial November 25th, but on that day plaintiff's counsel was at L., and, a continuance being refused, the case was set for November 30th. On that and the following day the court was engaged in another trial. The next day a clerk of plaintiff's counsel stated that he had returned and had gone to M. to try a case, but the court, on defendant's demand, ordered the case to proceed. No evidence was offered by plaintiff, and verdict and judgment were rendered against him. Afterwards the judgment was vacated on an affidavit of merits, and affidavit of counsel that he had engaged to attend the trial at M. several months before, and on his return from L. he was informed that this case could not be reached for several days; that the court was accustomed to continue cases for the convenience of counsel engaged in other courts. There were counter-affidavits denying this custom, and showing that plaintiff's counsel had before agreed to dismiss the case. On a subsequent motion to set aside the order vacating the judgment, it appeared that plaintiff's counsel had attended the trial at M. as a witness, and voluntarily, without a subpoena. *Held*, that there was no sufficient ground for vacating the judgment.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Pillsbury & Blanding, for appellant.
Robert Ash, for respondent.

PER CURIAM. This cause came regularly on for trial, having been set by consent of all parties on November 25, 1885. Counsel for plaintiff was absent. His clerk stated that he was unavoidably detained in Los Angeles, and asked for a continuance. The defendant objected to a continuance, but, as there was another cause on trial, and as the next day was Thanksgiving day, the court put the case over until Monday, November 30th. On the latter day, and the day following, the cause was called for trial, and the defendant answered, "Ready." On December 2d, other business having been disposed of, the court ordered the case to proceed. The clerk again appeared on behalf of the attorney for plaintiff, and stated that said attorney was in Modesto trying a case, although he had returned from Los Angeles to San Francisco since November 25th. Defendant objecting to a continuance, the court ordered the trial to proceed. A jury was impaneled, and, no evidence having been offered on behalf of the plaintiff, a verdict was rendered for the defendant. On De-

cember 10, 1885, the plaintiff served notice of motion to vacate judgment on the ground that it was taken against him through his mistake and excusable neglect. In support of his motion he presented an affidavit of merits, which also alleged that he expected his attorney to be present at the trial; that he was too poor to employ other counsel to take his place; and that he believed his attorney was actually engaged in another court in the trial of a cause. His counsel made affidavit that, although he had returned to San Francisco on November 29th, he had several months prior engaged to be in Modesto to attend the trial of a cause there, set for November 23d, and afterwards continued to November 30th; that he was informed on his return to San Francisco, November 30th, this cause could not be reached for several days on account of other business before the court, and that it was a custom of this court to continue causes for the convenience of counsel engaged in other courts. Counter-affidavits were filed on behalf of the defendant, alleging that there was no custom under which causes were continued for the convenience of counsel engaged in the courts of outside counties; that counsel for plaintiff had long before agreed to dismiss this cause. J. L. Boone, a partner of the attorney for plaintiff, who was absent in Modesto at the time of the trial, corroborated the defendant in his statement as to the promise of a dismissal. A clerk in the office of the attorneys for defendant stated that he had informed the attorney for plaintiff as to the day of the trial, and said attorney stated that he would not be present, that he was going to Los Angeles, and asked for a continuance, which the clerk said he had no authority to grant. The court granted the motion of the plaintiff and set aside the judgment. Thereafter the defendant moved the court to set aside its order vacating the judgment, on the ground that it had been deceived in matters of fact by the affidavits filed on the application to vacate the judgment, which motion was denied, and defendant has appealed. It was made to appear—indeed, the fact was not disputed—that the attorney of the plaintiff attended a trial at Modesto, not in the capacity of an attorney, but as a witness; that he was not subpoenaed, but attended voluntarily; that he left Modesto before the trial of the said cause was completed, having been permitted to give his testimony out of the regular order, so that he might return to San Francisco. We think that, under the showing made on the first application, the motion to set aside the judgment ought to have been denied; and, certainly, on the showing made to vacate the order the defendant was entitled to have it set aside; and to have the judgment stand on the verdict of the jury. If such excuses as were offered in this case were held sufficient to set aside judgments, there would be no end to delays and annoying expedients. The orders appealed from are reversed.

(3 Cal. Unrep. 354)

DIETZ v. MISSION TRANSFER CO. (No. 13,-
915.)¹

(Supreme Court of California. Dec. 31, 1890.)

DEED—RESERVATION—EJECTMENT—RES ADJUDICATA—ADVERSE POSSESSION—ESTOPPEL.

1. The owners of land conveyed a part of it to plaintiff, with a reservation to them and their assigns of "the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances," and the right to do whatever was necessary to obtain and transport such minerals, including the erection of proper machinery, and the laying of pipes. The rest of the original tract was conveyed in parcels to other persons, with the same reservation, and finally the reserved rights and interests in the whole were granted to defendants. *Held*, that defendants have no right to the possession of plaintiff's land further than is necessary to the exercise of the rights reserved in that tract alone.

2. Where, in ejectment, it is shown that defendants have taken possession of a part of plaintiff's land, to enable them to exercise the rights reserved in the rest of the original tract by their grantors, and that they are not seeking the minerals in question on plaintiff's land, and that none exist there, plaintiff is entitled to recover the possession of the land occupied by them.

3. A judgment in a former action determining that a lease to plaintiff, granted before he obtained his deed, of the right to take such minerals in the entire tract had expired, and enjoining him from interference with defendants' right to take such minerals, they having purchased it from his grantors, is no bar to such action of ejectment.

4. Plaintiff's recovery cannot be defeated on the ground of defendants' adverse possession, where the evidence shows that before the statute had run the structures by which defendants held possession were carried away by flood, and rebuilt in a different place on plaintiff's land; for, as defendants were trespassers, their possession was adverse only to the extent of the land actually occupied by them.

5. Plaintiff's deed to defendants of all structures erected by him on the land, for the purpose of exploring for, obtaining, and transporting such mineral, will not estop him to claim title to, and the right of possession of, the land on which such structures stand.

In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Noble Hamilton and Joseph A. Joyce, for appellant. *Charles Fernald and John J. Boyce*, for respondent.

WORKS J. This is an action of ejectment. The common grantors of the plaintiff and defendant were the owners of a large tract of land, including the land in controversy in this action. They subdivided the land, and sold it in several tracts. One of these tracts, being the one now in litigation, was conveyed to the plaintiff. The deed conveying the land contained this reservation or exception: "Excepting and reserving to the parties of the first part, and their servants, agents, and assigns, the exclusive right to all oils, petroleum, asphaltum, and other kindred mineral substances, and the right to erect machinery, sink wells, bore, tunnel, dig for, work on, and remove the same from the said premises, together with the right of way over and through any and all parts of said premises, for the purpose of going to and coming from said works, and transporting machinery, tools, implements, and supplies for said works, and of transporting said substances to a

market, and the right to lay pipes to conduct oil, and the right to dispose of said substances, and of transferring to their grantees thereof the same rights as are herein reserved to the parties of the first part; but not to destroy or injure any crops growing upon, or any improvements on, said premises, such as buildings, trees, vines, roads, inclosures, without making just compensation for such injury or destruction, reserving, also, to the parties of the first part the right of way for a road or roads over and across said premises, for the use of tenants or vendees of adjoining and other lands of said rancho." A like reservation or exception was contained in conveyances of other parts of this larger tract to other parties. Subsequently, said grantors conveyed to the defendant in this action the estate or interest in the whole tract reserved or excepted by these conveyances. The complaint is in the ordinary form. The answer, in one defense, sets up these conveyances; that the defendant was entitled to all of the rights reserved or excepted by said conveyances, and alleged further. "That prior to the commencement of this action, and on or about the 2d day of July, 1883, this defendant entered into the possession of its estate in said lands, as hereinabove particularly described, and then at once began, in good faith, to exercise open and notorious acts of ownership over the same, under claim of right and title thereto, and then, at great expense, began the exploration for, and the development of, said oil interests, and the erection of costly machinery, derricks, rigs, buildings, storage-tanks, and pipe-lines upon said premises, and defendant has thence, hitherto, continued, in good faith, the progress thereof, and the development of said territory for said oils; that the respective estates of the plaintiff and the defendant in the premises described in said amended complaint are of such a kind and character that the possession of the surface of the soil thereof has been held and enjoyed by each separately, to the extent and for the benefit of their said several, respective, separate estates, freeholds, and property therein, and not otherwise, ever since plaintiff and defendant acquired their said several, respective, separate interests and estates in said real property; and that this defendant is now the owner, seised and possessed in fee-simple absolute, and in the actual occupation and possession of the said estate and interest in said real property described in the amended complaint of plaintiff herein, as particularly, and specifically, and at large set forth and described in this answer." The answer also pleaded the statute of limitations, a former adjudication, and an estoppel by deed, which will be further noticed hereafter.

The court below found the interests in the land in the plaintiff and defendant, as above stated, and, among other things, found "that the plaintiff in this action has been, since said 23d day of November, 1882, continuously, to the present time, in the possession and enjoyment of the estate so conveyed to him by the said Carpenter and Steinbach, but has not held, occupied,

¹Rehearing granted.

or enjoyed any part or portion of the excepted estate, reservations, rights, or privileges excepted and reserved by his deed of that date, and the defendant has never ousted or ejected plaintiff from any portion of his said estate, and the defendant does not now withhold the possession thereof from the plaintiff. That thereafter, and in the month of May, 1883, this defendant entered upon said land and premises, as hereinabove, and in said amended complaint, described, and took possession and the actual occupation of all of its separate estate therein, and exercised and enjoyed the entire and exclusive use of, in, and to said excepted estate and reservations, rights, and privileges, and that said defendant has continuously, from said date to the present time, so exclusively occupied, used, enjoyed, and controlled said excepted estate, and said reservations, rights, and privileges. That the entry of the defendant in this action upon said described tract of land was under and by virtue of said instrument in writing, made by the said Steinbach and Carpentier to the said Whaley, by which the said excepted estate and interest in said tract of land, and the reservations, rights, and privileges in, over, and upon the same were sold and conveyed to the said Whaley, and under and by virtue of the transfer, sale, assignment, and conveyance thereof by the said Whaley to the said defendant. And the said defendant never did at any time enter upon the separate estate of the plaintiff in said premises, nor in any manner oust or eject the plaintiff therefrom; but said entry was made, and said occupation and possession taken and acquired, by defendant, and held and enjoyed solely and exclusively for the rightful occupation and enjoyment of said excepted estate, and said reservations, rights, and privileges. That the said several respective estates, interests, rights, and privileges of the plaintiff and the defendant in, over, and upon the particular tract of land hereinabove, and in said amended complaint, described are separate, distinct, entire, and complete in themselves, and that the possession of the plaintiff and the defendant of the surface of the soil of said tract is for the benefit, advantage, use, and enjoyment of the respective and separate estates resting and being in each. And that said respective and separate estates are of such a kind and character that the possession of the surface of the soil of said tract of land can be held and enjoyed by each separately, to the extent and for the benefit of each of said several, respective, separate estates, freeholds, and property, for the respective uses, and purposes, and rights of each resting and being in plaintiff and defendant; and that the possession has been so held and enjoyed by the respective parties hereto ever since the acquisition by each of their respective interests and estates in said real property. That the defendant, in the month of May, 1883, entered upon said land and premises hereinabove, and in the amended complaint of plaintiff, and in the answer thereto of defendant herein described, and took possession and actual occupation of

its estate therein, in the same manner, and to the same extent, as it now occupies and enjoys the same; and that, continuously from said date, its possession has been by an actual, open, and notorious occupation, under claim of right and title to said estate, founded upon said various written agreements and conveyances, made by the said Steinbach and Carpentier, to it and to its predecessor, the said Whaley, and it has held, occupied, and enjoyed said possession as the owner of said excepted estate, reservations, rights, and privileges, as its own absolute property, and in hostility to the plaintiff's title, and to the whole world. That said possession and occupation have been continuous, open, notorious, and uninterrupted from said month of May, 1883, to the present time, and said defendant has paid, during said time, all state, county, and municipal taxes levied and assessed upon the same." The court also found in favor of the defendant on the defenses of former adjudication, the statute of limitations, and estoppel by deed, and, that no question might arise as to the findings covering the issues, there was also a general finding that all of the allegations of the defendant's answer were true. Upon these findings, the court concluded as follows: "(1) That defendant, the Mission Transfer Company, a corporation in this state, was, at the time of the commencement of this action, and now is, the sole owner in fee-simple of the excepted estate, with the reservations, rights, and privileges set forth in the answer of the defendant herein, and in the deed of Steinbach and Carpentier to plaintiff, A. C. Dietz, dated November 23, 1882, excepted and reserved, and subsequently conveyed by Steinbach and Carpentier to the defendant herein, with the right to perpetually use said premises in the manner, and to the extent, in said deed, and hereinabove in these findings set forth; (2) that plaintiff has no right, title, or interest, or any estate whatever in or to, such excepted estate, or the reservations contained in said deed, and that no estate therein passed to plaintiff by said deed of November 23, 1882, or otherwise; (3) that the plaintiff is not entitled to recover against defendant in this action, by reason of defendant's occupation of the tract of land and premises described in the amended complaint and answer herein, and in these findings; (4) that defendant is entitled to his costs and disbursements in this action." It must be evident, at a glance, that some of these findings are entirely inconsistent with each other, and that the findings and conclusions of law have left the case in utter confusion. The court below, as appears from its conclusions of law, seems to have been laboring under the impression that the plaintiff was attempting to recover the interest or rights reserved or excepted by the original grantors, and subsequently conveyed to the defendant. The findings and conclusions seem to be based upon this theory, and, so treating the case, the decision was against the plaintiff. Viewing the case in this light, no doubt the conclusion reached by the court was right. But

such was not the question presented, and the conclusions of law are almost entirely aside from the real question in the case. It was not a question whether the plaintiff or defendant, or either of them, owned the interests claimed by them respectively, but which of them was entitled to the possession of the property, conceding their titles or interests to be as claimed by each.

Counsel on both sides discuss in their briefs, at great length, whether the clause in the deeds above referred to, and set out, was a reservation, or an exception; but we think it is entirely immaterial to this controversy whether it was one or the other. The same may be said of the controversy in the briefs, as to whether the interest of the defendant was a corporeal hereditament, or estate in the land, or a mere incorporeal hereditament or easement. As we construe the deed to the plaintiff, it conveyed to him the fee-simple title to the land, subject to the right of the grantors and the defendants, as their successors in interest, to enter upon the land, and occupy it for the purposes mentioned in the deed. For those purposes, and none other, the defendant was entitled to the possession of the land, or so much thereof as was necessary for such purposes, and for such a length of time as it was necessary for it to occupy it for such purposes, and no longer. It makes no difference, therefore, whether its interest in the land constituted a title to a part of the land itself or not. If it did, it was only entitled to go upon the land for the purpose of severing its part of the land from that of the plaintiff, and removing it therefrom. It had no right to enter upon and hold its part of the land, where situated, to the exclusion of the plaintiff. The plaintiff was entitled, under his deed, to the possession of the surface of the land. The defendant was entitled to take possession of and occupy the plaintiff's land, for the purpose of extracting therefrom the mineral substances contained therein, if any, to explore and excavate the lands, for the purpose of ascertaining whether it contained such substances or not, and, if found, to erect the necessary buildings and machinery, put down pipes, and to make and use such roads as were necessary to remove the oils or other substances from the land. The deed also gives the defendant the right of way for a road, or roads, over and across the premises, for the use of tenants or vendees of adjoining and other lands. This clause in the deed has no connection with the defendant's interest in the land, which is only a right to enter upon this and other tracts of land for a temporary purpose, but applies to tenants and vendees of the other tracts, to whom the original grantors or their grantees might sell or lease the property. Therefore, this last clause in the reservation, or exception, need not be further noticed.

It will be observed that the defendant alleged in its answer, and the court found, that it went into possession of the land, and began, in good faith, to exercise notorious acts of ownership over the same, and at great expense began the explora-

tion for, and development of, said oil interests, and the erection of costly machinery, derricks, rigs, buildings, storage-tanks, and pipe-lines upon said premises, and that it has continued in good faith the progress thereof, and the development of said territory for said oils. This allegation in the answer is defective, in not alleging directly that the entry of the defendant, and other acts done, were for the purpose of developing and extracting oil from this land. It seems, however, to have been treated as such an allegation at the trial, and found upon as such by the court. It is insisted by the appellant that the finding of the court that the defendant was in possession for the purpose of developing or extracting oil from the land in controversy is not sustained by the evidence, and that the evidence shows, beyond any controversy, that the buildings placed upon the plaintiff's lands, and the pipes put down, and roads made and used thereon, were placed thereon and used for the sole purpose of extracting and removing oil from other and different lands, and that the evidence shows that no attempt had ever been made by the defendant to explore the plaintiff's land for oil, or other substances mentioned in the reservation or exception, and that, in fact, the evidence shows that no such substances existed in or upon this land. We have examined the evidence carefully, and find the appellant to be right in this contention. The evidence not only fails to show that the respondent's possession was taken for the purpose of developing and extracting oils or other substances from the appellant's land; but the respondent's own testimony shows affirmatively and conclusively that it took possession, and constructed buildings, and other structures, and put down pipes on the plaintiff's land solely for the purpose of developing, extracting, and removing oils from other and different lands, and that it had made no effort to develop oil on the plaintiff's land. Not only so, but the evidence failed to show that the land contained any oil, or other substances, included in the defendant's right in the land, and tended strongly to show that it did not contain any such substances. It was contended by the respondent that it had the right, under the exceptions and reservations in the several deeds made to the plaintiff and others, to occupy and use all of the land for the purpose of developing and extracting oil from any part of it. But there is nothing in the plaintiff's deed giving any such right. On the contrary, the reservation or exception contained in the deed, so far as it gives the right to enter upon and occupy the land, is confined in plain and unambiguous terms to the development and removal of oil, and other substances, from the land described in the deed. To hold that the defendant could enter upon, occupy, and use the land for its convenience in extracting and removing oils from another and different tract of land, would be to vary the terms of the deed in a material respect, and make for the parties a new and different contract. This the courts have no power to do. What we have said is applicable to the right to put

down pipes to convey the oil. This provision, although not limited in express terms to oil taken from the land, must be construed in connection with the other rights granted, and be limited in the same way. For these reasons, the finding of the court that the defendant was rightfully in possession of the land, occupying its own estate therein, and other findings based upon this theory of the defendant's rights, are not sustained by the evidence, and the conclusions of law founded upon these findings rest upon an erroneous view of the law.

The respondent attempts to justify the decision of the court below on the ground that the plaintiff's cause of action was barred by a former judgment. But we are quite clear that the questions adjudicated and determined in the former action, and the one now before us, are not the same. It appears from the pleadings in the former action that the appellant had, prior to the execution of the deed to him, leased from the owners of the entire tract above mentioned the right to take oil and other substances from the same, and the lease gave him the option to purchase the perpetual right to take such oil, and other substances mentioned, from the whole tract, on certain conditions, and bound him to give up possession at a certain time, in case such perpetual right was sold to other parties; that the appellant had failed to buy said right; that it had been sold to the respondent who had made improvements, and expended large sums of money in making the improvements necessary for developing the oils and other substances taken from said lands; that the appellant had refused to surrender the possession of the property, and was claiming the right to still extract oils from the land, and refused to permit the respondent to enter upon the same for the purpose of exploring for, developing, and extracting the oils and other substances from the land. The judgment of the court in that case was against the appellant, that his lease or license had expired; that the respondent was entitled to the possession of the land for the purposes before mentioned, and enjoined the appellant from asserting or exercising any rights under said lease or license, and also enjoined him from preventing the respondent from entering upon the land for the purposes mentioned. It will be observed that the case relied upon as a bar to this action presented an entirely different question from the one now before us. There the question was as to the right of the appellant to hold possession of the whole tract of land, and extract oil from it under a lease. Here there is no question as to the right of the appellant to hold the land under a lease, or to extract oil from it, nor is such a right on the part of the respondent involved in this case. Here, the appellant asserts the right to the possession as owner of the soil of a part of the tract, and not the right to extract oil from it. He does not dispute the right of the respondent to enter upon and occupy the land for the purpose of exploring for, developing, and extracting from his land,

oils or other substances mentioned in his deed. His claim is that the respondent is in possession of the land for other and different purposes, and is therefore a mere trespasser. This claim is fully substantiated by the evidence, and it is not covered by the former judgment.

Again, it is contended by the respondent that the appellant's cause of action was barred by its adverse possession. But this position is effectually answered by the findings of the court below. It is directly found by the court that the plaintiff was never ousted of his possession, but that he and the defendant were both in possession, and were both entitled to the possession. It is true that the court found generally that the answer of the defendant, which included the defense of the statute of limitations, was true, but the other finding referred to is inconsistent with and contradictory of this. Besides, both the evidence and the findings show that the defendant made no claim of title to the land as against the plaintiff, and that it never paid any taxes upon it. It merely asserted the right to occupy a part of the land, temporarily, in conjunction with the plaintiff, and not adverse to his claim of ownership, and paid taxes for a part of the time, not on the land, but upon the structures it had placed upon it. A holding without disputing the plaintiff's rights, and without asserting any claim opposed to his rights, could not be adverse to him. *Unger v. Mooney*, 63 Cal. 595; *Oneto v. Restano*, 78 Cal. 377, 20 Pac. Rep. 743. Besides, the evidence fails to show that the possession of the defendant was continuous. Its occupation was of a part of the land by certain structures erected upon it. The evidence shows that before the statute had run its full time these structures were washed away by high water. It is not shown when they were replaced. But it is shown that, when the structures were rebuilt, they were put up on a different part of the plaintiff's land. As the defendant was a mere trespasser, it could only obtain title to the land actually occupied by it, and as its possession was changed, and neither part of the land was in actual possession by it for the requisite time, there was no bar as to either tract.

As to the claim that the plaintiff is estopped by deed to deny the defendant's right to possession, we find that there is nothing in the deed inconsistent with the plaintiff's claim in the action. The deed was by the appellant and one Hill, and granted, bargained, sold, assigned, and transferred to the respondent all of their right, title, and interest in and to "all the buildings, tanks, derricks, pipes, pipe-lines, fixtures, and all other personal property whatsoever that now is, or are, or ever hereafter has or have been, on or upon any portion of the rancho, known as the 'Ex-Mission of San Buena-ventura,' in the county of Ventura, state of California." This was nothing more than a transfer of an interest in personal property. But counsel for respondent seem to think that, because, at the time the transfer was made, a part of the property was on the lands of the appellant,

now in controversy, the appellant is in some way estopped to claim title and possession to his land. But, as we have said, we see nothing in the deed which should estop the appellant from asserting and maintaining his present claim. Judgment and order reversed, and cause remanded.

We concur: SHARPSTEIN, J.; McFARLAND, J.; DE HAVEN, J.; PATERSON, J.

SCHULTZ *et al.* v. McLEAN *et al.* (No. 13, 991.)¹

(Supreme Court of California. Dec. 20, 1890.)

EQUITY—PLEADING—RESULTING TRUSTS—FRAUD—RESCISSIION.

1. In a suit to declare a resulting trust in plaintiffs' favor arising out of fraud in the procurement of a conveyance of land, the complaint alleged that the title was vested in defendant by a conveyance from one who held the legal title as trustee and agent for plaintiffs, in which conveyance plaintiffs joined; that the consideration for the deed, which was absolute on its face, was \$26,000, but that defendant agreed to pay \$5,000 more thereafter, and to hold the land in trust, and at a future time sell it for a price satisfactory to both parties, under plaintiffs' supervision and control, and to divide the profits with them. It was alleged, however, the plaintiffs' agent and trustee told them that such was defendant's agreement, and it was not alleged that defendant ever made such agreement with plaintiffs, or that he authorized their said agent to do so. *Held*, that the complaint does not show facts sufficient to establish a trust on the ground of fraud.

2. Even had such trust been established by the allegations of the complaint, it could not be enforced in this suit where the complaint fails to allege that an opportunity had ever occurred to sell for a satisfactory price, or that plaintiffs had ever exercised their supervision and control with a view to effect a sale.

3. Such complaint shows no cause of action entitling plaintiffs to a decree that they are owners of the land, and that defendant's interest therein is that of a mortgagee, subject to their right to redeem, as it fails to show any obligation assumed by plaintiffs which the mortgage was given to secure.

4. Nor is it sufficient as a complaint for the rescission of the sale on the ground of fraud, as the only fraud alleged is not shown to be that of defendant, but of plaintiffs' agent.

5. Though the complaint alleges the intention and understanding of plaintiffs in the transaction, and the findings of the court are that such was in fact their intention and understanding, this does not entitle them to any relief, where it was not communicated to defendant, and his intention and understanding was different.

In bank. Appeal from superior court, San Luis Obispo county; JAMES F. BREEN, Judge.

D. M. Delmas, (T. M. Osment, W. F. Herpin, and H. L. Gear, of counsel,) for appellant. E. W. McKinstry, John J. Roche, Jas. J. Waymire, and Graves, Turner & Graves, (Haggin & Van Ness, of counsel,) for respondents.

Fox, J. 1. The complaint does not state facts sufficient to constitute a cause of action against the appellant for the relief demanded, or for the relief granted, or for any relief permissible under the allegations or within the prayer of the complaint. So far as the allegations of the complaint tend to show a cause of action against the appellant, it is in the form and nature of a bill in equity to declare and

enforce a resulting trust, one claimed to have resulted by reason of fraud in the securing of a conveyance of real estate, but in the nature of an express trust, the object and purpose of which is definite and fixed, and one under which the rights of all the parties are alleged to have been made fixed and absolute by contract. The prayer is not either to declare or enforce the alleged trust, but to disregard it, and for a decree adjudging, in legal effect, that the appellant's title to the land is in the nature of a mortgage, and granting plaintiffs the right to redeem, and for such further conjunctive, not for such alternative, relief, as may be agreeable to equity. The relief granted disregards the allegations of the complaint, and follows the prayer.

(a) The complaint fails to show a case of resulting trust. It shows that the conveyance or instrument under which the title became vested in appellant is a deed absolute upon its face, for which appellant paid at the time a money consideration, amounting to nearly \$26,000; that it was made, executed, and delivered by the holder of the legal title, who held it as trustee and agent of plaintiffs, and who, in executing it, was acting in pursuance of his trust, and within the scope of both his apparent and his actual authority as agent, and also by the plaintiffs themselves, the owners of the equitable title, and sole beneficiaries under the trust. They thereby attested, certified, and affirmed to the appellant the authority and power of their agent and trustee, and by the joint act of themselves and their trustee united and vested both the legal and the equitable title in the appellant. That trust was extinguished, and the entire estate in the lands became vested in the appellant. *Welton v. Palmer*, 39 Cal. 458. Was a new trust created? That is a question to be determined from the allegations of this complaint. When a deed is absolute in form, the intention appearing on its face ought to prevail, unless a different intention is made to appear so clearly as to leave no doubt upon the subject. *Henley v. Hotelling*, 41 Cal. 26, 27. This deed is attempted to be avoided by an effort to show that it was obtained by fraud, and under an express promise that the grantee would advance a further sum of \$5,000, which he has not done, and would then hold the lands in trust, and at some future time, under the supervision and control of plaintiffs, would sell the same, and after deducting from the proceeds of the sale the sum of \$25,906.77, the sum which he actually did pay, with interest at 7 per cent. per annum, would pay to them one-half the remainder, less the said sum of \$5,000, retaining the balance for his own use and benefit. But the complaint fails to show that the appellant and alleged trustee made any such promise or agreement, or accepted the deed under such or any trust. It shows that their own agent and trustee told the plaintiffs that such was the bargain, and that they acted on the faith of what he said, and trusting upon his honesty and fidelity in the premises; but it does not show that the grantee in the deed made any promise or agreement whatever, either of trust or for future ad-

¹Rehearing granted.

vances, or that he had any knowledge of what their agent told them in the premises. The grantors in such a deed cannot avoid it on the ground that a third person practiced a fraud upon them, of which the grantee was ignorant, and more particularly so if, as in this case, that third person was their own agent. *Deputy v. Stapleford*, 19 Cal. 302; *Insurance Co. v. McCormick*, 45 Cal. 533; *Stewart v. Whitlock*, 53 Cal. 2; *De Arnaz v. Escandon*, 59 Cal. 486. If a fraud was committed upon the plaintiffs, it was committed, as shown by this complaint, by their own agent, and not by this appellant, and they (the plaintiffs) must suffer the consequences. *Salter v. Baker*, 54 Cal. 143. If deceived by their own agent, and loss results, it is theirs. *Overacre v. Blake*, 82 Cal. 77, 22 Pac. Rep. 979. "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civil Code, § 3543. If there was fraud or wrong, it was the fraud or wrong of the agent of plaintiffs, and not of the defendant, (appellant here,) and the latter cannot be held responsible for it in the absence of any knowledge on his part that it was being committed. *Overacre v. Blake*, supra. Even if it be true, as alleged in the complaint, that the law firm of which Robinson, the trustee and agent of plaintiffs, was a member, were attorneys of appellant, it does not follow that he is chargeable with knowledge of the deceit practiced by Robinson upon his principals, if any, for he was not dealing with Robinson as an attorney at law, but as the holder of a title which he was buying, and who had full power to sell; and that he had such power was affirmed by the plaintiffs themselves. It is not claimed or pretended that Robinson was authorized by McLean to make any such representations as it is said he did make to plaintiffs; so that, even if Robinson was acting as attorney at law for McLean, and in that sense his agent, the latter can be chargeable with constructive notice only of such acts as were done within the scope of his apparent authority. There is nothing in the employment of a law firm which would give to one who was not acting as a lawyer in a given transaction of purchase and sale, but as the trustee, personal representative, and agent of another, even apparent authority to represent to his principal that the purchaser in that transaction was doing, or had promised to do, other or different from that which appeared upon the face of the papers as demanded by him to be done; and statements made by him *in pais* which would tend to show a transaction other or different from that shown by the papers would not be binding upon the purchaser. *Wilson v. Railroad Co.*, 53 Cal. 736. The complaint, therefore, fails to show facts constituting a trust.

(b) If there is such a trust as declared upon, the complaint fails to show a present right of action to declare or enforce it, or that there ever can be a right of action to extinguish it in the manner prayed in the complaint, and attempted in the decree. If there is a trust such as declared,

it is one which has vested the whole title, legal and equitable, in the appellant. Civil Code, § 863; *Ward v. Waterman*, 24 Pac. Rep. 930, (No. 12,662, filed September 5, 1890.) In the trust property, the plaintiffs have reserved no right whatever, present or future. No provision is made by which the property, or any part thereof, is ever to be returned to the plaintiffs. The only manner of executing the trust is to convert the property into money. When so converted, the plaintiffs will be interested in the net proceeds only, after first deducting the whole amount invested by appellant therein, with interest, and then only to the extent of one-half, the remaining half being still the property of appellant. The relief prayed, and the relief granted, would be in direct violation of the terms of the trust itself, as it is alleged to have been agreed upon by the parties. This trust, if enforced at all, must be enforced according to its terms. *Hidden v. Jordan*, 21 Cal. 93, 28 Cal. 316; *Cowing v. Rogers*, 34 Cal. 653; *Sandloss v. Jones*, 35 Cal. 489; *Pujol v. McKinlay*, 42 Cal. 559. Equity will furnish alternative relief when, and when only, the terms of the trust cannot be specifically enforced, as in the case of *Adams v. Lombard*, 80 Cal. 426, 22 Pac. Rep. 180. In this case there is no attempt to show that the trust cannot be executed according to its terms. To disregard those terms, and grant the relief prayed, and attempted to be given, would be to deprive the appellant, who is himself a beneficiary under the alleged trust, of all the benefits thereby guaranteed to him, and to work a forfeiture of all his beneficial interest in the estate. This would not be equity but oppression, and a court of equity cannot lend itself to such a proceeding. Nor does the complaint show the plaintiffs entitled to any present relief under the alleged trust. The power and duty of the appellant was to sell, not to reconvey at any time or upon any terms. He was bound to sell only when he could realize a price satisfactory to both parties, and had power to sell only with the consent and under the supervision and control of plaintiffs. There is no averment that an opportunity has ever occurred when a satisfactory price could be realized, or that the plaintiffs have ever consented to sale, or that they have ever made an effort to effect a sale under their supervision or control. As to the \$5,000 further advances, there is no allegation bringing home to appellant a promise to make such advance, or that he has ever been asked to make it, and the fact that it remains unpaid furnishes no ground of action in equity, whatever it might do at law.

(c) The complaint fails to show a cause of action for decree in the nature of declaring plaintiffs to be the owners, and the right of appellant that of a mortgagee with right in plaintiffs to redeem, as prayed and decreed. There is not and never has been a relation of debtor and creditor between these parties. There is no obligation of any character resting upon these plaintiffs, secured or to be secured by mortgage. Without such an obligation, there can be no mortgage. *Henley v. Hotaling*, 41 Cal. 28; *Farmer v.*

Grose, 42 Cal. 169; *Montgomery v. Spect*, 55 Cal. 352. There is no pretense that the plaintiffs have ever promised to pay anything, or assumed any obligation whatever.

(d) It is claimed in argument that the action is for rescission, on the ground of fraud. That is not the relief demanded or granted, and the allegations of the complaint are insufficient to entitle plaintiffs to that relief. Rescission can be had in those cases only which are mentioned in section 1689, Civil Code, and in the manner prescribed in section 1691 of said Code. The fraud must be that of the party against whom the rescission is had, not that of him who seeks rescission, or of his agent or personal representative. As already shown, whatever of fraud or deceit is shown by this complaint was the fraud of the agent of plaintiffs. And, even if it be true that there was a failure to pay a part of the purchase price, that would not entitle the vendor to rescind the contract, and recover back the land. *Lawrence v. Gayetty*, 78 Cal. 134, 20 Pac. Rep. 382.

It follows from these conclusions that the demurrer to the complaint should have been sustained on the ground that it did not state sufficient facts, and it further follows that the complaint does not support the judgment.

2. It is also claimed by appellant that the plaintiffs' cause of action, if any they ever had, is barred by the statute of limitations. As we have held that no cause of action is stated, this point is, perhaps, at the present time unimportant. But, as it is possible that an attempt may be made to state a cause of action, we deem it best, without dwelling upon the point, to say that, in our judgment, the ruling of the court below upon this point was correct. The action was commenced within eight months after the date of the conveyance under which appellant claims. Three complaints have been filed, all based upon the same transaction, all praying for substantially the same relief, differing slightly in stating the terms of the alleged trust, the last one differing from the others mainly in being more specific in charging fraud, and stating the acts constituting the alleged fraud. But we do not think that it presents another and different cause of action, although it presents it in a somewhat different form.

3. The facts as found differ materially from those alleged in the complaint, only in this: The court expressly finds that McLean never did make to Robinson, or authorize Robinson to make to plaintiffs, the representations alleged in the complaint, or the promise to pay other or more than he did, or that he would take or hold the land in trust for any purpose whatever, or that he promised or intended to deal with the land in any other way than as an absolute purchase, but that each and every of such representations was made by Robinson to plaintiffs without the knowledge, consent, approval, or sanction of said McLean; that McLean was willing and anxious to purchase the lands absolutely, and pay the price therefor which he did pay, but was not willing,

and never did intend, to deal with them in any other way, or to pay any greater price therefor, and that he intended, when he made the purchase, to hold and claim the lands absolutely; further, that Robinson has not now, and never has had, any interest in the said lands, by virtue of any contract between himself and McLean. Some of the other findings are not responsive to the issues in the cause, and as to them they must be disregarded. Counsel for respondents discuss with much force the inferences to be drawn from the finding of the court as to the relations existing between McLean and the law firm of Robinson, Olney & Byrne. That argument might with propriety be addressed to the court below, but it is too late to ask this court to draw inferences in direct conflict with the positive finding, the substance of which is given above. The court below had before it the evidence, such as it was, of the relations of those parties, and found on it, and still found positively and affirmatively, as a fact, that McLean never made any representations or promises as charged, and never authorized the making of any such representations or promises, or knew that such were made; and also found that the man who did make them was the agent and trustee of plaintiffs, and acting for them and on their behalf. It does say, in the third finding, that Robinson acted for and on behalf of McLean, as his agent, "as hereinafter stated," but it does not "hereinafter," or anywhere, find or state any particular in which Robinson acted for or on behalf of McLean, or as his agent, and this simple expression in the third finding cannot be held to defeat the positive findings found in 15 and 16, the substance of which is above stated. There is nothing in *Brison v. Brison*, 75 Cal. 525, 17 Pac. Rep. 689, or *Newman v. Smith*, 77 Cal. 26, 18 Pac. Rep. 791, cited by respondents, to conflict with this view. For the reasons which we have given in point 1, if the findings had been in full accord with the allegations of the complaint, they would have been insufficient to support the judgment. With findings 15 and 16 so at variance with the allegations of the complaint, and so directly in favor of the appellant as they are, there seems to be nothing left for the judgment to stand upon. It is urged that the allegations of the complaint are in accordance with the intention and understanding of the plaintiffs at the time that they executed the deed, and that the findings accord with the complaint in that regard. Concede that to be true; it is still found that such was not the intention or understanding of the defendant McLean, against whom this judgment is rendered, and whose deed is here attempted to be set at naught. The mere intention of the plaintiffs, uncommunicated and unknown to the defendant, cannot control the plain letter of his deed, executed with all the formalities required by law. *Stewart v. Whitlock*, 58 Cal. 2. The court found, as alleged in the complaint, that the land was worth at the time of the conveyance the sum of \$45,000, and it is urged that the inadequacy of consideration is itself evidence of fraud, for which the conveyance

should be annulled, and the relief granted. This point is not well taken. Where a sale is made by a trustee, as was done in this case, and the approbation of the *cestui que trust* is manifested by his joining in the execution and acknowledgment of the deed, he cannot thereafter complain that there was no consideration for the conveyance. *Welton v. Palmer*, 39 Cal. 456. If he cannot complain that there was no consideration, much less can he do so for inadequacy of consideration. Want or insufficiency of consideration will not establish fraud *per se*. *Gillan v. Metcalf*, 7 Cal. 138; *Horn v. Water Co.*, 13 Cal. 62; *Thornton v. Hook*, 36 Cal. 229, 230; *Welton v. Palmer*, supra; *Goad v. Moulton*, 67 Cal. 536, 8 Pac. Rep. 63. The plaintiffs have failed to allege, and the court has failed to find, facts constituting a fraud against which equity can relieve. Eliminating the allegations of fraud, plaintiffs have alleged, or attempted to allege, a contract which the court finds was never made. The court cannot make or enforce any other contract than the one declared upon. *Congdon v. Chapman*, 63 Cal. 359.

4. It is claimed that the evidence is insufficient to justify the findings. The conclusion we have reached on points 1 and 3 have rendered it unnecessary to consider this question. But we have looked into the evidence, and find that it fully justifies findings 15 and 16, above referred to, except that we see nothing to justify the sentence to the effect that, for the purpose of avoiding any notice of Robinson's trust and the equities of plaintiffs in the lands, defendant McLean refused to have any meeting or interview with plaintiffs, or either of them. And we find nothing in the evidence or in the findings to justify the conclusion "that the plaintiffs are the owners of the lands described in the complaint, and that the defendant McLean holds the legal title thereto in trust for the plaintiffs." The relief granted is not warranted by anything in the case, except the prayer of the complaint, and the prayer will not warrant any relief except such as is warranted by the allegations of the complaint, supported by the evidence and the findings. Judgment and order reversed, and cause remanded.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

PATERSON, J. I concur in the judgment, on the ground that the relief granted by the decree goes beyond the allegations of the complaint. According to those allegations, the whole title was vested in the appellant. The respondents reserved no right in the real estate, present or future. Appellant was to sell the property, and, after repayment of the moneys expended and advanced by him, the profits arising from the proceeds were to be divided. There is nothing to show that the trust alleged cannot be enforced, the property sold, and the net proceeds divided. The property may have greatly appreciated in value since it was conveyed to appellant. If so, he is entitled to the benefit of a sale, which, under this decree, he would not receive.

SCHULTZ et al. v. McLEAN. (No. 14,039.)¹

(*Supreme Court of California.* Dec. 20, 1890.)

In bank. Appeal from superior court, San Luis Obispo county; JAMES F. BREEN, Judge.

D. M. Dalmas, (T. M. Osment, W. F. Herrin, and H. L. Gear, of counsel,) for appellants. *E. W. McKinstrey*, John J. Roche, Jas. J. Waymire, and Graves, Turner & Graves, (Haggin & Van Ness, of counsel,) for respondent.

PER CURIAM. This is an appeal from so much of the judgment rendered in the above-entitled cause, and considered in No. 13,991, this day decided, (ante, 427,) as requires the plaintiffs, as a condition of redeeming, to pay interest upon the amount determined in and by the said judgment to be due to said McLean. The terms of the contract and trust declared upon in the complaint cannot be complied with, without the payment of such interest, except it be by a sale of the land with the approval and consent of plaintiffs, for an amount which shall be found insufficient to pay both principal and interest. But as the entire judgment is reversed and set aside, by the decision in said case, No. 13,991, filed this day, there is nothing left to be determined upon this appeal, and the same is dismissed.

(87 Cal. 313)

FISKE et al. v. SOULE. (No. 13,314.)

(*Supreme Court of California.* Dec. 31, 1890.)

REAL-ESTATE BROKERS—COMMISSIONS.

1. In an action by real-estate brokers for commissions, it appeared that defendant placed with them for sale certain lands to be sold at \$45 per acre net without the crops, or \$47.50 per acre net with the crops, the brokers to have as commission any sum they could get above these figures. A written contract of sale, without reservation of crops, was made for a gross sum equal to \$48.50 per acre, but the court found that the actual contract was a sale at \$45 per acre without the crops, and it was so reported to defendant. The money was tendered, and a deed presented for execution, which, however, contained no reservation of the crops. Defendant made no objection on this account, and it was apparently taken for granted by all that the crops would not pass; but he absolutely refused to execute the deed, or pay the commission. *Held*, that plaintiffs were entitled to recover \$3.50 per acre as commissions.

2. Whether plaintiff's exceeded their authority in making a contract of sale, instead of merely securing a purchaser, was immaterial in an action to recover their commission.

3. That the contract of sale called for a conveyance "free of all incumbrances" did not require a deed of general warranty against incumbrances, and, if it did, defendant cannot object on that ground, when the deed presented to him was only an ordinary grant deed, and he then made no objection either to the form of the contract or the deed.

4. The fact that the contract bound the purchaser to the payment of the price only by forfeiting a cash payment of \$500 is immaterial, when it appears that a tender of the whole price was made.

5. The fact that cash was tendered obviates any objection on the ground that the contract of sale did not require cash payment.

6. The fact that cash was tendered prevents any defense on the ground that plaintiffs were not entitled to commissions until the price was paid.

7. The fact that the land belonged to defendant's wife is immaterial, since he gave it in for sale as his own, and plaintiffs were ignorant that it was not his.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTE, Judge.

Thomas & Hurst, for appellant. *Baker & Grant*, for respondents.

WORKS, J. Plaintiffs are real estate and

¹Rehearing granted.

insurance agents. They claim that the defendant employed them to sell for him certain real estate, on certain terms and conditions, which they fulfilled; but that, notwithstanding defendant's agreement to pay their commissions for making the sale which he authorized, he has refused to pay them, and, to recover what is due them, they have brought this suit. They recovered a judgment for the sum of \$2,103.50, with interest thereon from the 5th day of May, 1887, and costs, from which, and an order refusing a new trial, this appeal is taken by the defendant. The contract, or agreement, under which the plaintiffs undertook to sell the land for the defendant, is as follows: "This writing, made this 15th day of April, A. D. 1887, witnesseth: That I, W. H. Soule, of the county of Yolo, in the state of California, have this day placed with Geo. D. Fiske & Co., for sale, the following property, of which I am the owner in fee, situate in section —, township —, range —, (see plat,) county of Yolo, and state of California, to-wit: Consisting of about 600 acres of land, being the southerly half of the tract known as the 'Jno. M. Rhodes Rancho' in Capay valley. Price, \$45.00 per acre (net) without crops, or \$47.50 per acre (net) with the crop. Terms of payment as buyer and seller may agree. The said property to remain in the hands of Geo. D. Fiske & Co., for sale or exchange for thirty days from the date hereof, and I hereby agree that if, at the expiration of that time, five days' notice by me in writing of the withdrawal has not been given them, this agreement shall continue in full force until I give such notice, hereby authorizing Geo. D. Fiske & Co. to sell the aforesaid property and article, with purchaser for the same, as my agents, according to price and terms of payment above written, or any price or terms of payment which I may agree to take other than the above, and agreeing with them that, if the same be sold or exchanged during the time it is in their hands, no matter by whom, I will pay them a commission of all I receive over and above the price above mentioned on amount of said sale or exchange. And I further authorize Geo. D. Fiske & Co. to advertise the said property to the amount of \$——. It is further understood by me, before signing this agreement, that Geo. D. Fiske & Co. will pay out of their commission all expenses of advertising done by them. W. H. SOULE. [Seal.] [Endorsed:] We hereby accept and agree to the terms of the within instrument this 15th day of April, A. D. 1887. GEO. D. FISKE & CO." The contract of sale which plaintiffs made with the purchaser is as follows: "\$500.00. Received of John D. Stephens the sum of five hundred dollars, (\$500,) the same being a part of the purchase money for the following described piece or parcel of land situate, lying, and being in Capay valley, Yolo county, Cal., formerly known as part of the 'John M. Rhodes Tract,' being the same land bought by me from John M. Rhodes, said land being bounded on the north and east by H. Hammel and Cache creek; on the south by Winters and Palm-

er; and on the west by the west line of the Rancho Canada De Capay,—containing 500 acres of land. The remaining portion of the purchase money, to-wit, the sum of \$28,600.00, to be paid on or before the 12th day of May, 1887, by John D. Stephens or his assigns. In consideration of which the said land is to be conveyed free of all incumbrances to the said John D. Stephens or his assigns. Dated, Woodland, Cal., April 23, 1887. W. H. SOULE. By GEO. D. FISKE & Co., his agents." The defendant refused to convey the property, after a tender of the money specified in this agreement, and also refused to pay the plaintiffs their commissions.

It is contended by the appellant that the plaintiffs were not entitled to recover because the contract of sale was for \$45 per acre with the crops, when the limit of their authority to sell was for that price without the crops, and \$47.50 per acre with the crops; but the sale was made for a sum in gross which amounted to more than \$47.50 per acre. There was 601 acres of land, and it was sold for \$29,100, which amounted to \$48.41 per acre; so that, conceding that the contract of sale included the crops growing on the land, the sale was for more than the highest amount the plaintiffs were required to sell for, and the sale was not beyond their authority. The sale agreed upon was for \$48.50 per acre, supposing that there were 600 acres of the land, but it turned out that there were 601 acres. And when a tender was made to the defendant, it was for \$48.50 more than the written agreement called for, so as to cover the agreed price for the additional one acre. The court below found, however, that the sale was for \$45 per acre without the crops, and there was evidence to support this finding so far as the verbal agreement between the plaintiffs and the purchaser was concerned, but not as to the written contract between them. The contract bound the defendant to convey the land without any reservation of the crops. This written contract was binding on the defendant, if the plaintiffs had the power to make it, unless corrected on the ground that by mistake it was not in accordance with the agreement actually made. Under its finding that the land was sold for \$45 per acre without the crops, the court allowed the plaintiffs, as commissions, the difference between that sum and the sum of \$29,148.50. The plaintiffs were bound by their agreement to account to the defendant for \$47.50 per acre, if the crops went with the land, and were only entitled to the balance of the purchase price over and above that sum as their commissions, unless the defendant waived the form in which the agreement to sell and the deed tendered to him were made. We have seen that, by the terms of the written agreement, the crops must go with the land. Therefore, the amount found in favor of the plaintiffs was excessive to the amount of \$2.50 per acre upon the 601 acres of the land, if this written agreement was to be looked to alone. It may be that, if the actual agreement was as claimed by the plaintiffs, and a tender and

a demand for a deed containing a reservation of the growing crops had been made, the plaintiffs could recover the full amount claimed in any event, but this does not appear to have been done. But there is another ground upon which we think the plaintiffs were entitled to recover the whole amount of their commissions. The sale was reported to the defendant as a sale at \$45 per acre without the crops. He asked the plaintiffs to sell the crops to the parties for \$2.50 per acre if possible. The plaintiffs consented, and attempted to do so, but the purchasers stated that they did not want the crops, and refused to buy them. The form of deed presented to the defendant, when a conveyance was demanded of him, was an ordinary grant deed without any reservation of the crops. But the defendant did not refuse to consummate the trade on the ground that the deed was not in proper form, or on the ground that the sale was not in accordance with the written authority given by him. The evidence shows clearly that it was the understanding of all the parties, the purchaser included, that the crops were not to pass. If any such objection had been made, there can be no doubt that a deed containing the necessary reservation would have been accepted. It seems not to have been observed by any of the parties at the time that the contract of sale or the deed proffered were not in the form necessary to carry out the agreement of the parties. The defendant refused absolutely to consummate the sale or to negotiate with reference to it. It is perfectly apparent that the fact that the contract and deed were not in proper form had nothing whatever to do with his refusal to execute the deed. This being the case, he should not be allowed to offer that as an excuse for not complying with his contract by way of defense to this action.

It is contended by the appellant that the contract given by the defendant to the plaintiffs did not authorize the plaintiffs to sell the land or to bind the defendant by their agreement to sell it, but only to secure a purchaser. This might be material if the action were by the purchaser to enforce a specific performance of the agreement to convey, but it is wholly immaterial in this case whether the power of the plaintiffs was to sell or merely to procure a purchaser. They complied with their part of the contract. If the defendant did not see proper to convey to the purchaser they had procured, this was no reason why he should not pay their commissions. It is immaterial that the plaintiffs in their complaint construed and treated this as a power to sell, even conceding that it was not. The contract was set out and made a part of the complaint, and entitled them to whatever was authorized by its terms and the facts proved. The allegations were sufficient to entitle them to recover as mere brokers. *Dolan v. Scanlan*, 57 Cal. 261. It is claimed by the appellant that the authority given by the contract was revoked before the sale was made; but the court found to the

contrary, and there was evidence to support the finding.

It is further contended that the contract of sale was not within the power of the plaintiffs because it required the defendant to convey by general warranty against all incumbrances. But the evidence shows that, when the tender was made, no such deed was demanded, nor do we think the contract required any such deed. The deed demanded was, as we have said, an ordinary grant deed, and its form was not objected to, nor was there any claim that the property was incumbered, or that there was any reason why the plaintiff could not or should not execute such a deed. It is also insisted that the contract was unfair and not mutual, because the purchaser was not bound, in any way, to pay the purchase money, except by a forfeiture of the \$500 cash payment. But this, if so, is immaterial. The whole purchase money was tendered to the defendant when a deed was demanded of him, and before this commission was demanded. It is further claimed that the sale was not made within the time limited by the contract. This is based upon the assumption that payment of the purchase money was necessary to constitute a sale, which is not necessarily so. The purchaser could not be expected to pay the purchase money before receiving a conveyance. Counsel say that the contract required a sale for cash. This we think is not so. By the terms of the contract the terms of payment were to be "as buyer and seller may agree." If this is to be construed as reserving to the defendant the right to agree in person upon the terms of payment, it is still clear that it did not impose upon the plaintiffs the duty of selling for cash. Besides, there could be no reasonable objection to the terms of payment when cash was tendered, and no such objection was made to the consummation of the sale.

Again, it is contended that the plaintiffs were not entitled to recover until the purchase money was paid. It may be conceded that this would be so if the purchaser had failed to pay the purchase money, but the defendant could hardly defend on this ground when the purchase money was not paid, solely because he refused to accept it. It appears from the evidence that the title to the property was not in the defendant, but in his wife. This was not material. He gave it to the plaintiffs to sell as his property, so stated in his contract, and the evidence is to the effect and the court found that the plaintiffs had no knowledge, until after they had made the sale, that the title was not in him. Under such circumstances his want of title could not affect the plaintiffs' right to recover their commissions. The court found on all the material issues. All of the findings necessary to a recovery are sustained by the evidence, and they support the judgment. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

87 Cal. 267

HAVEMEYER *et al.* v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 13,709.)

(*Supreme Court of California.* Dec. 22, 1890.)

CONTEMPT—WRIT OF PROHIBITION—RECEIVERS.

1. Under a writ of prohibition to a judge enjoining him from interfering with petitioners' possession of certain property, either through a certain receiver appointed by him or otherwise, the judge is guilty of contempt if the receiver acts in violation of the writ, and the judge, with knowledge of the receiver's proceedings, refrains from exercising his power to control them.

2. Where the appointment of a receiver is void as being in excess of the jurisdiction of the court, and the receiver is advised by a preliminary writ of prohibition that the validity of the proceedings in the matter of the receivership are challenged on jurisdictional grounds, the receiver, having at the time of the service of such writ at most only a mixed or scrambling possession of the property, will be guilty of contempt in thereafter interfering with the possession of petitioners contrary to the terms of the writ.

THORNTON, J., dissenting.

In bank. Proceedings to punish for contempt. For decision on application for writ of prohibition, see 24 Pac. Rep. 121.

BEATTY, C. J. The application for a peremptory writ of prohibition herein, and the charge that the judge of the superior court and his receiver had violated the injunction contained in the preliminary or alternative writ, and had thereby committed a contempt, were heard and submitted together. In our opinion filed at the time of deciding the cause, (see 84 Cal. 327, 24 Pac. Rep. 121,) we stated very fully all the facts necessary to be considered in deciding upon the charge of contempt, excepting only those relating to the character and extent of Mr. Reddy's possession of the refinery, etc., at the time he was served with the alternative writ. Avoiding, as far as possible, any repetition of that statement, we proceed to consider whether the charge of contempt has been made out. That Mr. Reddy did interfere with the possession and control by petitioners of the refinery and other property claimed by them in their own right, and described in our writ; that he did interfere with the conduct and business of the same; and that he did continue to exercise with respect thereto all the powers granted in the order appointing him receiver, after service of our writ,—is conceded; and it is also conceded that the judge of the superior court, after like notice, entirely and purposely abstained from any interference with his proceedings. But it is contended in behalf of the receiver that before he had any notice of our order he was in complete and absolute possession of all the property claimed by the respondents, and that his subsequent dealings with it were only such as were necessarily incumbent upon him by reason of such possession. In behalf of the judge it is claimed that the effect of our writ was to deprive him of all control and direction of the receiver, and, consequently, to absolve him from any responsibility for his acts. This claim of exemption from responsibility on the part of

the judge cannot be allowed. The object and purpose of our order and writ, expressed in the plainest terms, (84 Cal. 351, 24 Pac. Rep. 121,) was to restrain the action of the court. It was addressed directly to the judge, and only indirectly, through him, to the receiver. Both were bound by it, but it was nevertheless the duty of the principal to see that the agent obeyed it, and, whatever the receiver did in violation of its terms, the judge must answer for, if, with knowledge of his agent's proceedings, he refrained from exercising his undoubted power to control them. And such, as we have seen, is the case. The whole matter to be determined, therefore, is the correctness of the receiver's position; *i. e.*, that he was in full possession before he had any notice of the injunction, and that he did nothing thereafter except to preserve things *in statu quo*. He contends that from the afternoon of February 17th he was in full, complete, and absolute possession of the refinery, shops, and offices, and was only impeded and interrupted in his control of some of the personal property therein. The assumption, however, upon which he builds his entire argument is that he was acting under a valid appointment, and had a lawful right to do everything that he attempted to do; and, since its basis is swept away, there is little left of the argument. We have decided—and we have no doubt of the correctness of that decision—that the appointment of Mr. Reddy, and all the proceedings in the matter of the receivership, were void. Therefore, when he entered into the refinery, shops, and offices, he did so as a mere trespasser, without any lawful warrant whatsoever, and all his acts in attempting to obtain possession must be viewed in that light.

We do not wish to be understood as conceding that Mr. Reddy's acts, even if his appointment had been valid, would have been entirely justifiable. We are not called upon to decide how summarily a receiver lawfully appointed may proceed in wresting the possession of property, specifically described in the order appointing him, out of the hands of strangers to the action claiming it in their own right. We had supposed that in such case it would be his duty to abstain from the exercise of anything like force; that, if he found the claim of ownership and possession by a third party to be made in good faith, he would report the matter to the court, and, if he proceeded further, do so only by an action for the recovery of the property, if he was satisfied that such claim was a sham, and the possession by such stranger held by collusion with (or as a mere agent or servant of) a party bound by the order, that he would still report the facts to the court, and have the persons resisting his authority cited to answer for contempt; and that after a hearing upon the citation the court would not, unless in a plain case, order a writ of assistance to dispossess such parties, but would direct an action to be brought so that their rights might be fully and fairly litigated. But, as we have said, these are matters which we are not called upon to decide here, and we have

given this very general expression of our views only in order not to seem to acquiesce in the proposition so strenuously urged by counsel to the effect that in the case supposed it is the right and duty of the receiver to take the property regardless of the claims and possession of third parties; that it is their duty to yield unquestioning obedience to his commands, surrender possession of the property, and petition the court for leave to sue for its recovery. The question here is much simpler. It is whether Mr. Reddy and his men, regarded as mere naked trespassers, entering without any sort of lawful warrant, had, prior to the hour of 3 o'clock P. M., on February 18th, succeeded in ousting the petitioners from their lawful possession of the refinery, shops, etc., and in gaining so full and complete a possession themselves as to justify their subsequent proceedings. The testimony bearing upon this point is quite voluminous, and to some extent conflicting, though not more so than might naturally have been expected, considering the opposite points of view from which the occurrences at the refinery were viewed by those who participated in and have testified regarding them. It appears that Mr. Reddy, armed with the commission from the superior court, and attended by a number of men, acting in obedience to his orders, entered the refinery on the afternoon of February 17th, stated the authority under which he assumed to act, declared himself in possession, ordered the superintendent of the works to shut them down, disposed his men about the building, and stopped the delivery of sugar then in progress. The superintendent, however, refused to take any orders from Mr. Reddy, referred him to Mr. Mott, the general agent of the petitioners, and asserted their claims to the property. There is no doubt that the superintendent and his foreman were, to some extent, intimidated by the sudden irruption of Mr. Reddy and his men, and the threat of arrest and punishment if they refused to submit, and, no doubt, they did make use of various temporizing expedients in order to maintain their ground without resorting to open and violent resistance, but they neither left the building nor acknowledged Mr. Reddy's authority. The dispute ended at last in a sort of truce for the night, both parties remaining on the ground, the superintendent being allowed until next day to take legal advice and determine whether he would yield the possession or not. Acting upon the advice he received, the superintendent notified Mr. Reddy the next day that he would continue to resist him by all means short of force, whereupon Mr. Reddy applied to the court for the assistance of the sheriff. In the affidavit which he presented to the court for that purpose, and which was, as is evident, framed upon his theory as to the validity of his appointment, and the entire regularity of his proceedings, he states that he has entered into possession of the refinery, but that H. C. Mott and R. H. Sprague (the general agent and superintendent of petitioners) are impeding, hindering, and delaying him in the discharge of his duties as receiver, and are refusing

to allow him to take into his possession and control certain property situate on the premises. This affidavit, as an assertion of possession, is almost *felo de se* in itself, and would have been quite so if it had disclosed the further and undisputed fact that Mott and Sprague were really impeding and hindering the receiver by their assertion of and their attempt to uphold the possession and right of the petitioners. Evidently, too, the superior judge attached less importance to the legal conclusion stated in the affidavit than to the facts by which it was qualified; for, by the terms of his order to the sheriff, that officer was commanded to do what was necessary to place Mr. Reddy in exclusive, full, and complete possession. The sheriff, in the return which he subsequently made of this order, seems to have fallen back on the theory of the affidavit, that Mr. Reddy was in possession of the refinery, though impeded and interfered with by certain persons whom he found on the premises, and who at his request retired therefrom, leaving Mr. Reddy in peaceful, undisturbed, and undisputed possession. He does not disclose who these persons were, but the testimony shows that the superintendent and foreman of the refinery were meant. When Mr. Reddy and the sheriff came back on the 18th, armed with a new order, Mr. Sprague and his foreman did retire from the building in obedience to their demand, but almost immediately returned. There is a conflict of testimony as to the terms upon which they re-entered. Mr. Reddy's testimony, in which he is corroborated by others, is that they came back at his request to take care of the large amount of sugar then in solution, under a promise to obey his orders, and shut down the works as speedily as that could be done without too serious loss. They, on the other hand, claimed that they only promised not to oppose Mr. Reddy's orders, and declared their purpose to remain on the premises in the interest of the petitioners, and in their pay. It is not necessary, in our opinion, to reconcile this conflict in the testimony, which in all probability is mainly due to the different construction given by the two parties to what was actually said. We will assume that the arrangement was such as Mr. Reddy states it to have been, for even then he did not get complete possession. The only two persons removed from the premises, or who acknowledged Mr. Reddy's authority, were Mr. Sprague and his foreman. Mr. Mott, the general agent, was in a position of authority over them, and over more than a hundred other employes then on the premises, none of whom were removed, and none of whom ever received or obeyed any order from Mr. Reddy before he was enjoined, and all of whom continued thereafter in the pay and service of the petitioners. Mr. Mott, it is true, was not at the refinery while the sheriff was there, but he had been there before, resisting Mr. Reddy, and he returned afterwards, and renewed his resistance, so that Mr. Reddy was compelled to remove him by force,—a very gentle force, it is true, but it would no doubt have been greater if there had been great-

er resistance. In the mean time Mr. Reddy had been served with our writ, and Mr. Sprague had disclaimed his authority, and contrary to his orders had put a large additional amount of sugar in solution. This being the facts, it is clear that there was, in the best view for the respondents, a mixed and scrambling possession of the refinery, in which case the legal seisin, as it always does, attached itself to the right of possession. The result was that Mr. Reddy found himself in the position of being obliged to decide, at his peril, whether his authority was valid or not, and, as soon as service was made upon the superior judge, at a later hour on the same day, he was placed in the same position. A copy of the petition for the writ of prohibition, our order for the writ, and the writ itself, were all served together, and by them the respondents were fully advised that the validity of their proceedings was challenged upon jurisdictional grounds, and that until our further order they must suspend their proceedings against the property described in the writ. Their claim to be in possession of the refinery, and especially their right to discharge the superintendent of the petitioners, and put another in his place, stop the delivery of sugar, and close down the works, depended upon the jurisdiction to appoint a receiver. If that proceeding was void, they were bound to withdraw from the refinery, shops, office, etc., and leave the petitioners unmolested. If, on the other hand, the appointment of the receiver was valid, they might maintain the *status quo*, and perhaps were justified in doing the other things above mentioned. Being in this situation, they did right in taking legal advice, but the fact that they did so, and acted upon it in good faith, does not wholly relieve them from the consequences of the actual disobedience of which they were guilty. They were advised that the possession of the receiver was lawful and complete, and that he must do all that he subsequently did. They were also advised that the superior judge could not interfere with or control the acts of the receiver pending the hearing of the cause. This advice was erroneous, but we have no doubt that it was given, accepted, and acted upon in good faith, and, therefore, that the respondents, though technically guilty of contempt, did not intend any disrespect to the court, or any infraction of its orders, and that they should not be punished otherwise than by a nominal fine. The finding of the court is that William T. Wallace, judge of the superior court, and Patrick Reddy, Esq., did on the 18th day of February, 1890, and on various days thereafter, violate our injunction herein issued and served on said 18th day of February, 1890, by continuing in and about the refinery and other property in said writ described, and by interfering with the petitioners in the conduct of their business therein, and did thereby disobey our lawful order and writ, and were therein guilty of a contempt of this court. Wherefore it is ordered that said William T. Wallace and Patrick Reddy be, and each of them is, hereby fined in the sum of \$10.

We concur: Fox, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

THORNTON, J. I dissent. There is no evidence of contempt committed by either party in this case.

87 Cal. 226

BISHOP v. MCKINLEY, Judge. (No. 13,845.)
(Supreme Court of California. Dec. 20, 1890.)

EMINENT DOMAIN—JURISDICTION—PROHIBITION—SEWERS.

1. Code Civil Proc. Cal. pt. 3, tit. 7, regulating proceedings had in the exercise of eminent domain, provides, in section 1243, that "all proceedings under this title must be brought in the superior court of the county in which the property is situated;" and section 1238 provides that the power may be exercised for the sewerage of any incorporated city, among other purposes. The municipal corporation act of March 13, 1883, c. 7, § 870, provides that when it is necessary that the city shall take private property for a sewer, "and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be had," etc. *Held*, that the authority of the superior court to entertain such proceedings is derived from the Code and not from the municipal corporation act, and hence the absence of the circumstances under which that act authorizes such proceedings to be had goes to the right of the trustees to maintain them, and not to the jurisdiction of the court.

2. In such proceedings to condemn the right of way for a sewer, the fact that inability to agree with the owner of the land as to the price, and an order from the trustees to begin the proceedings, are not alleged, or are not proved, is no ground for application for the writ of prohibition, but its effect is for the determination of the trial court on demurrer or plea.

In bank.

Garber, Boalt & Bishop, (Stephen M. White, of counsel,) for appellant. *John Haynes and Thomas Mitchell*, for respondent.

Fox, J. This is a petition for a writ of prohibition to restrain the superior court of the county of Los Angeles, McKinley, Judge, from further proceedings against the petitioner, in a certain action pending in that court, wherein the city of Pasadena, is plaintiff, and the petitioner herein, and several other persons, including the county of Los Angeles, are defendants, brought for the purpose of acquiring by condemnation a right of way for a sewer along and in certain of the county roads of said county of Los Angeles. The city of Pasadena is a municipal corporation of the sixth class, organized and existing under the provisions of chapter 7 of the act of the legislature, entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883. For the purpose of providing drainage for the city, and protecting the health of the inhabitants thereof, she has devised and adopted a system of sewerage, and secured a considerable tract of land situate outside of, and a considerable distance from, the corporation, as a place for the discharge of the sewage of the city, called the "Sewer Farm," and has commenced the construction of a main sewer through certain streets of the city, and contemplates continuing the same through

certain of the public highways of the county, from the city to said sewer farm. The right of way has been granted by the board of supervisors of the county for said sewer, through the necessary highways, for a portion of the distance, but there is one highway through which the city authorities declare that it is necessary to construct the same, the fee of which is not vested in the county, but the county has a grant of the same "for the purposes of a highway, but for no other purpose;" or in other words, a mere easement, and to secure the right of way for this sewer in that highway, which constitutes a part of the route of the sewer, the action was brought, the further prosecution of which it is now sought to prohibit. It is claimed on the part of the petitioner here, who is the owner of a tract of land situate on the east side of the road or highway along which the right of way is sought to be secured by condemnation, and who owns the fee to the center of the road, and covering that part of the road-way in front of her lot under which the sewer is to be laid, that the court has no jurisdiction to entertain the case, or to render or enforce any judgment therein, because it is not alleged or shown that the city authorities were unable to agree with her for the right of way, and because it does not appear from the record of the proceedings of the city council that it ever authorized the commencement of the action.

The question then is whether the absence of the existence, or the want of averment or proof, of these two facts, or either of them, deprives the court below, respondent here, of all jurisdiction to entertain, hear, or determine the action, or whether they simply go to the question of the right of the plaintiff in the action to institute and maintain the same, and to recover therein. If they deprive the court of jurisdiction to entertain the action, and to hear and determine the rights of the parties therein, so that it is acting upon the complaint filed therein wholly without jurisdiction, then it would seem that the petitioner here might be entitled to relief by prohibition; but if, on the other hand, it has jurisdiction to entertain the action for condemnation so commenced before it, and these are merely questions, upon which, among others, it may be called upon to adjudicate in the course of the proceeding before it, then the mere fact that it reaches an erroneous conclusion upon these questions, or either of them, will not entitle plaintiff to the writ of prohibition, but the error, if it be one, will be subject to review upon appeal. Chapter 7 of the municipal incorporation act referred to is the one which provides for the organization, powers, and government of municipalities of the sixth class. Section 862 of that act, found in that chapter, (St. 1883, p. 269,) gives to the board of trustees power * * * to construct, establish, and maintain drains and sewers. Section 870, (page 273,) so far as it relates to the subject-matter of this question, reads as follows: "Whenever it shall become necessary for the city or town to take or damage private property for the purpose of * * * rights of

way for drains, sewers, and aqueducts, * * * and the board of trustees cannot agree with the owner thereof as to the price to be paid, the trustees may direct proceedings to be taken, under section one thousand two hundred and thirty-seven and following sections, to and including section one thousand two hundred and sixty-three of the Code of Civil Procedure, to procure the same." Petitioner insists most strenuously that it is from this section that the court derives its jurisdiction to entertain a proceeding for condemnation, for such a purpose, at the suit of such a corporation, and that if the complaint fails to show, or, showing it, upon the trial, the plaintiff fails to prove an attempt and inability to agree, and an order of the trustees to prosecute the action, the court is entirely without jurisdiction in the premises. We cannot accede to this proposition. The superior court is a court of general jurisdiction. By section 5 of article 6 of the constitution, it is specially provided that it shall have jurisdiction "of all such special cases and proceedings as are not otherwise provided for." Part 3 of the Code of Civil Procedure provides for "special proceedings of a civil nature." Title 7 of that part is devoted specially to the making of provision for proceedings had in the exercise "of eminent domain." It constitutes the general law of the state upon that subject, and expressly provides that the right of the people or government to take private property for public use may be exercised in the manner provided in that title. Section 1243, found in that title, provides that "all proceedings under this title must be brought in the superior court of the county in which the property is situate." They must be commenced by the filing of a complaint, and issuing a summons thereon. Section 1238 defines the purposes for which the power may be exercised, and among these is "sewerage of any incorporated city." It is from the constitution, the provisions of which are repeated in section 76, Code Civil Proc., and from title 7, pt. 3, of said Code, and not from any section or provision of the municipal government act, that the superior court derives its jurisdiction in and over proceedings had in the exercise of the power of eminent domain. The provisions of the last-named act may affect the question of the right of the municipality to maintain its action, and secure in the court the relief demanded; but they do not affect the jurisdiction of the court to hear and determine all questions that may arise between the parties in such proceeding.

Counsel have cited very many cases in support of the proposition that the fact of inability to agree, and express authorization to institute the proceeding, are jurisdictional, and go to the power of the court itself to hear and determine the case. But most of them are cases where the proceeding was not only special, and not according to the usual course of civil procedure, as it is here, but also before tribunals which were themselves special, and of limited jurisdiction. Not one of them, so far as we have been able to find, challenges the power of a court of general

jurisdiction to hear and determine, in such a proceeding, the question of the right of parties to maintain the action, and secure the relief, under statutory provisions like that above quoted from the municipal government act. The rulings made in the cases cited were made, not upon application for prohibition, but upon appeal, or, when the proceeding was before a tribunal of special and limited jurisdiction, upon *certiorari*. The complaint in the condemnation proceeding here sought to be prohibited is in strict conformity with the provisions of section 1244, Code Civil Proc., and contains everything that is there required. If it be true, that the absence of either averment or proof of attempt and inability to agree, or of express direction by the local board to institute and prosecute the proceeding, bars the right of the plaintiff to maintain the action, or to recover the relief sought, that would seem to be a matter of defense, either by demurrer or by plea, and in such case the court before which the proceeding is prosecuted would be the one to pass upon the question so raised, in the first instance. Error in such determination would be subject to review upon appeal, but it would be merely error in the exercise of jurisdiction, and would not entitle the party aggrieved to prohibition. We are not called upon, or authorized, in this proceeding, to determine whether a ruling either way upon such a question would be error; that must be determined when the case comes here in proper form. All that we need now determine is that, if error, it does not furnish ground for prohibition. Upon this proposition, the case of *State v. Valliant*, 13 S. W. Rep. 398, seems to be much in point. We quote the statement as to what the case was, and as to what the court said on the subject, from petitioner's reply brief: "A certain railroad company sought to condemn part of the track of another by proceedings taken in the circuit court of St. Louis. The defendant company applied for a writ of prohibition, on the ground that the statutes and ordinances of St. Louis did not authorize the exercise of jurisdiction in eminent domain there invoked in favor of the company invoking it." Upon the application for prohibition the court held: "That the circuit court of St. Louis had jurisdiction of proceedings to appropriate property to public use, in the exercise of the right of eminent domain, in a proper case, is unquestioned and unquestionable; but the substance of the petitioner's contention here, as well as the ground on which they, as defendants, resisted the proceedings in the circuit court, is that the statutes and ordinances do not authorize the exercise of such jurisdiction in behalf of the Southern Railroad Company. We are of opinion that the question thus raised is not a proper one for our decision upon this application. Where the action or course which the court is about to adopt, is such as it has lawful power to take, it should not ordinarily be prohibited from taking it. Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction is a ques-

tion of law, the solution of which, either way, cannot impair the court's right to apply its judicial power in the premises according to its view of the law, and of the facts before it." This quotation, taken from the petitioner's own brief, would seem to be conclusive against her in this proceeding. Nor is there anything in any of the cases cited from this court in conflict with this view. We have examined them all, and in every case but one, where the court has discussed the point here contended for by petitioner, it was upon appeal, and the question was whether the court below had erred in its determination of this question of law, not in exercising jurisdiction to determine upon it. In the one case of *Mahoney v. Supervisors*, 53 Cal. 384, the proceeding was for a writ of mandate to compel the board of supervisors to act upon the appointment of commissioners made by the mayor and others to condemn certain water-rights. The petitioner, who claimed to be the owner of the property which was to be condemned, failed to show that he had ever offered to sell at any price. The statute and the tribunal were both special and local, and the act provided for the appointment of commissioners only in case the municipal authorities, who had not only the authority to purchase, but to select the commissioners in case the property could not be acquired by negotiation. The court refused to grant the writ. We do not see that the case is at all in point. Petitioner relies upon the decision of this court recently made in the case of *Havemeyer v. Superior Court*, 24 Pac. Rep. 121, as decisive of the question of her right to the writ of prohibition in this case. The cases are not at all parallel. In the *Havemeyer Case*, the proceeding in the court below was one taken on behalf of the state to secure a decree declaring the corporate franchise of a private corporation forfeited, and for a statutory penalty for violation of its charter. Upon the application for prohibition in this court, no question was made as to the jurisdiction of the court below to hear and determine the action which was brought before it, and in it to determine every question that was raised affecting the rights of the parties to the action, in the subject-matter thereof. And this court, in passing upon the application, expressly declared, in substance, that it did not pass upon the jurisdiction, or the regularity of the proceedings of the court below, in hearing and determining the case before it, or in enforcing the judgment which it had rendered. The proceeding to which the judgment of, and the writ granted by, this court was directed was one had after judgment in the matter of appointing a receiver with express direction to seize and take into his possession certain property not involved in the action in which the court had pronounced its judgment, and which was at the time in the possession of, and claimed to be owned by, persons who were not parties to that action, and who consequently had no day in court, and no right of appeal. In this case the petitioner is a party defendant in the action pending in the court below, and is actively

prosecuting her defense, with a right to have any ruling which may be made in that court reviewed here on appeal. In the view we take of the case, she is not entitled to the relief here demanded. The writ must be denied, and the order heretofore made herein, staying proceedings in the court below, vacated. So ordered.

We concur: THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

87 Cal. 425

SCRAMM *et al.* v. SOUTHERN PAC. R. CO.
(No. 14,026.)

(Supreme Court of California. Jan. 5, 1891.)

APPEAL—REVIEW—NEW TRIAL.

Where the motion for a new trial sets out, among other grounds, irregularities in the proceedings, and the insufficiency of the evidence, the order of the trial court granting it will not be disturbed on appeal, though no errors of law were committed at the trial.

Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

John D. Bicknell, for appellant. *Pepper & Lindenfeld* and *E. C. Bower*, for respondent.

McFARLAND, J. This is an action brought by the widow and children of John Scramm, deceased, to recover damages for his death, which is alleged to have occurred on the railroad track of defendant, and to have been caused by the negligence of defendant and its employes. The jury returned a verdict for defendant, and the court below granted a new trial. From the order granting plaintiff's motion for a new trial defendant appeals. Orders of trial courts granting new trials are not often disturbed, and yet when it appears that such an order was granted through misapprehension of the law, it should be reversed as readily as an order refusing a new trial. But, in the case at bar, it is impossible to know the reasons upon which the order was based. The grounds of the motion were numerous, including alleged errors in ruling upon the admissibility of evidence, and upon instructions to the jury; insufficiency of the evidence to justify the verdict, and that it is against law; and misconduct and irregularity in the proceedings of the court and jury. The order of the court merely grants the motion in general terms. If it could be said that the motion rested entirely on supposed errors in giving or refusing instructions to the jury, it might be well urged that the order should be reversed; for there were certainly no errors committed in that regard against the plaintiffs. They were as favorable (if not more so) to plaintiffs as they could have been reasonably expected under the law as established in this state upon the subjects embraced in the instructions; and, if there was any error committed on this point, there was none of which plaintiffs should complain, and we see no other errors of law sufficient to warrant a new trial. But, if the court granted the motion on the ground of insufficiency of evidence to justify the verdict, (as it may have done,) we are not prepared to say that in so doing it grossly abused its discretion. Moreover, the point as to the irregularity of the proceedings may have had weight with the court. A number of written instructions which had been asked and refused, and had been indorsed by the judge "Not given," went to the jury with

those that were given. This, of course, was irregular, and wrong; but such an irregularity would not always warrant a court in setting aside a verdict, for it might appear that it probably did no harm. In the case at bar, however, the court might have thought that harm was done. For instance, there was a contested issue of fact, whether or not there was a "crossing" at the place where the accident occurred; and on an instruction referring to that matter, the judge had indorsed "Not given, not shown to be a crossing." And the judge may have thought that this, and also the refusal of other instructions, might have been taken by the jury as the expression of his opinion on questions of fact. He is presumed to have been better acquainted with the whole case than this court, and to have known better what might have influenced the jury. While, therefore, upon the case as we see it, we may not be very strongly impressed with the conviction that it was the duty of the court below to set aside the verdict, still, we do not feel it to be our duty to set aside the order of the court. That course is rarely taken here, except when the questions raised involve issues of law alone. Order appealed from affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

PEOPLE v. POWELL. (No. 20,698.)

(Supreme Court of California. Jan. 4, 1891.)

CONSTITUTIONAL LAW—JURY OF THE VICINAGE—MURDER—EVIDENCE.

1. Pen. Code Cal. § 1033, as amended by Act March 9, 1887, (Sess. Laws Cal. 1887, p. 61,) providing that the state may have a change of venue in a criminal action, "on the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of defendant in the county where the action is pending," is void, being in conflict with Bill of Rights Cal. § 7, providing that "the right of trial by jury shall be secured to all and remain inviolate," the right secured being the right to trial by a jury of the vicinage as it existed at common law.

2. On trial for murder, where there is evidence that defendant believed deceased to be armed at the time he shot him, the prosecution may prove that as a matter of fact deceased was not armed, but it cannot show that he was not in the habit of carrying arms, and had refused to go armed that day.

3. Evidence of conversations not had in defendant's presence, nor in any way brought home to him, is inadmissible.

4. Defendant may show that before the shooting he was told that deceased was a dangerous man, as the evidence tends to substantiate the plea of self-defense, but he cannot show that he was told to "look out" for deceased.

5. Private counsel may, with the consent of the trial court, assist the district attorney in the prosecution, and may make the entire argument if the district attorney so desires, and the court assents.

6. After the homicide has been established by the state, it does not then devolve on defendant to prove by a preponderance of evidence that the killing was justifiable or only manslaughter. THORNTON, J., dissenting.

Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

George C. Ross and *George A. Knight*,

for appellant. *George A. Johnson, Atty. Gen., E. N. Deuprey, S. M. Shortridge, and E. F. Fitzpatrick, for the People.*

WORKS, J. The appellant was charged by information, in the county of San Mateo, with the crime of murder, alleged to have been committed in that county. He was twice tried in said county, and the jury failed to agree upon a verdict at each trial. Without any effort made to procure a third jury, the district attorney moved the court under section 1033 of the Penal Code for a change of venue to another county. The material part of the application was as follows: "Said district attorney, on behalf of the people of the state of California, hereby makes application to said court for a change of venue from said county of San Mateo, to some convenient county, of the above case of the People of the State of California v. Llewellyn A. Powell, on the grounds and for the reasons that a fair and impartial jury cannot be obtained for the trial of said case in said county of San Mateo, the same being the county where said action is now pending; and hereby states the following facts and causes for making said application, viz.: That the above-named defendant is charged, by information, filed in said superior court of said county of San Mateo, with the crime of murder, alleged to have been committed in the month of November, 1887, in killing, in said county, at said time, one Ralph S. Smith; that said defendant has had two trials in said superior court, on said charge; that the first trial was had in April, 1888, and the second trial in August, 1888; that at said first trial, there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, 72 citizens, and, of said number, 67 were examined before a jury could be obtained in said case; that at said second trial, there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, 184 citizens, and of said number 173 were examined before a jury could be obtained to try said case; that said county is small in size and population, and a large number of its citizens, whose names appear upon its assessment roll, are Italians and Portuguese, and are disqualified from serving as jurors, in consequence of not understanding the English language; that also a large number of those citizens, whose names appear upon the assessment roll of said county, live in the city and county of San Francisco, and are therefore not liable to jury duty in said county of San Mateo; that said case was so horrible in its nature that it attracted the attention of the people of, and has been fully discussed in all parts of, said county of San Mateo; that said case has also been discussed, more or less, by the citizens summoned to appear to serve as jurors, as aforesaid; that there are two local weekly newspapers in said county, having a general circulation therein, and the newspapers of the city and county of San Francisco also have a wide-spread circulation throughout said county of San Mateo, and, by and through the columns

of the newspapers aforesaid, the facts of said case, and the trials thereof, have been fully discussed before the citizens of said county of San Mateo. For the reasons herein set forth said district attorney says that a fair and impartial jury cannot be obtained to try said case in said county of San Mateo, and said district attorney therefore prays that said court make an order transferring said action of the People of the State of California vs. Llewellyn A. Powell, now pending in said court, as aforesaid, to some convenient county free from like objections." This application was supported by the following affidavit of the district attorney: "George H. Buck, being duly sworn, says that he is the district attorney of said county of San Mateo, and is the same person who made and signed the foregoing application; that as such district attorney he makes said application; that he has read said application, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true."

In addition to this affidavit there were others by citizens of said county, in which each of the affiants, after alleging his residence in the county, and acquaintance with the people thereof, alleged that he knew the contents of the affidavit of the district attorney, and that "said affidavit is well founded and true." The assessor of the county also made affidavit that he had examined the last assessment of the county, and that there were about 600 persons among those whose names appeared on the assessment roll who had the necessary qualifications and were competent to serve as jurors of said county. The sheriff of the county also made the following affidavit in support of the application: "W. H. Kinne, being duly sworn, says that he is now, and has been for more than two years past, the sheriff of said county, and that at the two trials of the above case in said county he summoned most of the jury in both of said trials of said case; that in doing so he was obliged to and did go to and visit all parts of said county; that he was a candidate for re-election at the last election, in the fall of 1888, for the office of sheriff of said county, and during the campaign he visited all portions of said county many times; that he also saw many people of and from all parts of said county, at the county-seat, to-wit, at Redwood City, during the past year; that he has had an opportunity to and has discussed the merits of the case of the People of the State of California vs. Llewellyn A. Powell, now pending in said superior court, and that he understands the feeling of the people in regard to said case, and has often heard them express their opinion about said case; that from such expression of the people so interviewed, he says that a fair and impartial jury cannot be obtained to try said case in said county."

The defendant objected to the granting of the change of venue, and in opposition to the application therefor filed the affidavit of one of his attorneys, and 17 other

citizens of the county, to the effect that they were residents of the county, and knew many of the other residents thereof, and that in their opinion a fair and impartial jury could be obtained in said county to try the defendant. The application was granted, and the venue changed to the city and county of San Francisco. When the case reached that county, the defendant objected to being tried therein, on the grounds, in substance, that the offense was charged to have been committed in the county of San Mateo; that the superior court of that county alone had jurisdiction to try the defendant; and that the court of the city and county of San Francisco had no jurisdiction in the matter; and moved that the case be remanded to the county of San Mateo for trial. The objection and motion were overruled, the defendant put upon his trial, convicted of manslaughter, and sentenced to the state-prison for the term of 10 years. He moved for a new trial, which was denied, and now appeals to this court. The change of venue was granted under section 1033 of the Penal Code, as amended, which provides: "A criminal action may be removed from the court in which it is pending. * * * *Second.* On the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of the defendant, in the county where the action is pending."

The appellant contends, first, that this section of the Code, so far as it authorizes a change of venue on the application of the district attorney without the consent of the defendant, is in conflict with section 7 of the bill of rights contained in the constitution of this state, which provides: "The right of trial by jury shall be secured to all, and remain inviolate." The precise point urged upon us is that the effect of this clause in the bill of rights is to preserve and continue in force the right of trial by jury as it existed at common law, and that the common-law right was to a trial by a jury selected from the vicinage or county. This calls upon us to determine—*First*, what the common-law right of trial by jury was; and, *second*, whether or not the right is the same under our constitution. We think the common-law right of trial by jury is clearly and definitely stated by Mr. Blackstone in his Commentaries (book 4, p. 350) as follows: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is, freeholders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed." And Mr. Cooley, in his work on Constitutional Limitation, (5th Ed., p. 392,) says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed." Again, in Story on the Constitution: "By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its

jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to have been committed." Story, Const. §§ 1769, 1779, 1781, 1791. See, also, Swart v. Kimball, 43 Mich. 448, 5 N. W. Rep. 635. There can be no doubt that such was the common-law right of trial by jury. We are led to inquire, therefore, whether the same right is given or preserved by our constitution, and, if so, whether the section of the Penal Code under consideration is in conflict with this constitutional right. Our constitution does not define the right of trial by jury. It was a right then existing, the extent, scope, and limitations of which were well understood, and the constitution simply provides that such right shall be secured and remain inviolate. If the right at common law was as above stated, there can be no question but that an act of legislature, authorizing the trial of a defendant out of the county where the offense is charged to have been committed, is an abridgment of the right, and for that reason void. Such statutes have been almost uniformly condemned as unconstitutional in other states. Kirk v. State, 1 Cold. 344; Wheeler v. State, 24 Wis. 52; Osborn v. State, 24 Ark. 629; State v. Howard, 31 Vt. 414; Ex parte Rivers, 40 Ala. 712; State v. Knapp, 40 Kan. 148, 19 Pac. Rep. 728.

It is contended by the respondent that, in the states in which these cases were decided, the constitution provided in express terms that one charged with crime should be entitled to a trial by a jury selected from the county or district where the offense is charged to have been committed, and therefore the statutes referred to were in direct conflict with the express requirements of the constitution, while in this state the constitution contains no such requirement. As to most of the states, the fact contended for is true, but not as to all of them. But can this make any difference? Does not our constitution confer upon a defendant charged with crime precisely the same right, although not expressed in terms? We have seen that this was the well-understood common-law right. This court has said that it is this same right that is held inviolate by our constitution. In Koppikus v. Commissioners, 16 Cal. 254, in discussing the effect of this constitutional provision, this court said: "The provision of the constitution that 'the right of trial by jury shall be secured to all and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. It is true that the civil law was in force in this state at the time of the adoption of the constitution, but its framers were, with few exceptions, from states where common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common-law sense that the lan-

guage has always been regarded by the courts of this state. It is a right 'secured to all,' and 'inviolable forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several states of the Union." See, also, *Cassidy v. Sullivan*, 64 Cal. 266. It is true, the question before the court, in the cases cited, was as to the class of cases triable by jury; but the language used would have been just as appropriate and applicable if the question now before us had been under consideration. Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says: "Accusations of criminal conduct are tried at the common law, by jury; and wherever the right to this trial is guaranteed by the constitution, without qualification and restriction, it must be understood as retained in all those cases which were triable by jury at common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused."

* * * Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." *Cooley, Const. Lim.* (5th Ed.) 390-393. This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and judge in the case of *Swart v. Kimball*, 43 Mich. 448, 5 N. W. Rep. 635, in which it is said: "The constitution of the state provides that 'the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law.' Article 6, § 27. The right is to remain. What right? Plainly the right as it existed before,—the right to a trial by jury as it had become known to the previous jurisprudence of the state. *Underwood v. People*, 32 Mich. 1. The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the legislature cannot take them away. The next section of the constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the legislature cannot take away a single one of its substantial and beneficial incidents; (*Opinions of Justices*, 41 N. H. 550;

Ward v. People, 30 Mich. 116;) and even the accused cannot waive any one of the essentials. *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Hill v. People*, 16 Mich. 351; *Allen v. State*, 54 Ind. 461. Now that in jury trial it is implied that the trial shall be by a jury of the vicinage is familiar law. Blackstone says that the jurors must be 'of the *visne* or neighborhood, which is interpreted to be of the county where the act is committed.' 4 Comm. 350. This is an old rule of the common law, (2 Hawk. P. C. c. 40; 2 Hale, P. C. 264;) and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all, (2 Hawk. P. C. c. 25; 1 Chit. Crim. Law, 177.) This overnicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that parliament, as the supreme power of the realm, made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law, (volume 1, p. 179,) the chief of these being cases of supposed treason or misprision of treason examined before the privy council, and which under the statute of Hen. VIII. might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written constitutions of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some states whether it was competent even to permit a change of venue on the application of the state, to escape local passion, prejudice, and interest, (*Kirk v. State*, 1 Cold. 344; *Osborn v. State*, 24 Ark. 629; *Wheeler v. State*, 24 Wis. 52;) but this may be pressing the principle too far, (*State v. Robinson*, 14 Minn. 447, [Gil. 333;] *Gut v. State*, 9 Wall. 35;) but no one doubts that the right to a trial by a jury of the vicinage is as complete and certain as it ever was, and that in America it is indefeasible, (1 Bish. Crim. Law, 2d Ed., § 552; *Whart. Crim. Law*, § 277; *Paul v. Detroit*, 32 Mich. 108; *Ward v. People*, 30 Mich. 116.)" This case was decided under a constitutional provision the same, in effect, as our own, and is directly in point.

It may be added that the effect of holding this statute to be unconstitutional will be to render it necessary, in a case where no jury can be obtained in the county, that a defendant be discharged or held in confinement for an indefinite time until such changes take place in the county that a jury can be had; but we cannot take away from the defendant a right conferred upon him by the constitution, on the mere ground that such a result may follow in rare cases. The right is one which has always been regarded as of

great importance, and has been preserved and continued in force by the constitution of the United States, and perhaps by the constitutions of every state in the Union. If it be allowed that the legislature can break in upon this right and take it away or abridge it on the ground and for the reason stated in the statute under consideration, it must be admitted that it may do so for other reasons, and thus the right guarantied by the constitution will be subject to modification at the will of the legislature, and this cannot be conceded. We are convinced that the section of the Penal Code, so far as it authorizes a change of venue on the application of the district attorney, without the consent of the defendant, is unconstitutional and void; that the change of venue in this case was improperly granted; and that the court below had no jurisdiction to try the cause. But if it were conceded that the statute is valid, the result of this appeal must be the same. The application for the change of venue, and the affidavit in support of it, were entirely insufficient to bring this case within the statute, or to authorize a change of the place of trial. The application was not made on the ground that no jury could be obtained in the county, but because a fair and impartial jury could not be obtained. As to what will constitute a fair and impartial jury, there may be many different opinions. The statement that such a jury could not be obtained was the statement of a mere conclusion, and the facts did not show that no jury could be obtained. There are two modes provided by which a defendant, or the people, may avoid a trial by partial or unfair jurors, viz., challenges for cause, which exclude all persons from the jury who are legally incompetent to serve as such, and peremptory challenges, by which a party may relieve himself of jurors whom he believes will not be fair and impartial jurors. This last kind of challenge is limited, and it may happen when a party's right of peremptory challenge is exhausted there may remain on the jury persons who are not, in his estimation, or in fact, fair and impartial, but who are competent jurors. The application and the proof to support it do not show that a jury of such persons as these might not have been obtained. It is perfectly clear that the intention of the legislature was to make a distinction between the grounds upon which the people and the defendant should be entitled to a change of venue. The defendant has only to show that a fair and impartial trial cannot be had in the county. Pen. Code, § 1033. The application before us would have been sufficient under this clause, but it is not sufficient under the clause relating to the right of the district attorney to a change of venue, which provides that the change may be had where no jury can be obtained, which is quite a different thing, as we have attempted to show. A juror is not necessarily incompetent because he is not impartial. He may favor one party or the other, and yet, if he has not formed or expressed an opinion as to the merits of the cause, he cannot be challenged for cause. For this

reason, proof that a fair and impartial jury cannot be obtained is not equivalent to proof that no jury can be obtained. A statute of this kind, if valid, should be strictly construed, and, if it could be enforced at all, in our judgment, the change should not be granted until all legal means to procure a jury had been exhausted, and no jury could be obtained. It should not be allowed to rest upon the mere opinion of persons, however numerous, that a jury could not be procured. The conclusion we have reached on this point is decisive of this appeal, but there are other questions presented which may arise on another trial, and we feel it our duty to decide.

The prosecution was allowed, over the objection of the defendant, to prove in rebuttal that the deceased was not in the habit of carrying arms; that on various occasions he had so stated; and that, on the morning of the shooting, he had refused to go armed when it was suggested that he had better do so. We have looked in the transcript in vain for any evidence on the part of the defendant which could justify or call for any such evidence in rebuttal. There was evidence tending to show that the defendant believed the deceased to have been armed at the time he shot him. This rendered it competent for the prosecution to prove that as a matter of fact he was not armed at that time, but it did not justify the proof as to his general habit with respect to the carrying of weapons, or his declarations with reference to the matter, not made in the presence of the defendant, and not shown to have been communicated to him prior to the shooting. There was no evidence on the part of the defendant going to show that the character of the deceased for peace and quietness was bad; therefore, the evidence cannot be justified on the ground that it tended to show his good character in these respects. Evidence to sustain his character could not be heard unless it was attacked, (*People v. Anderson*, 39 Cal. 704,) and, if it could, it would not have been competent to prove it by evidence that he was not in the habit of carrying arms or that he had refused to do so. On cross examination of one or more of the witnesses for the prosecution, the defendant asked whether the deceased had not had quarrels with several persons named; and it was admitted that the deceased had so stated. There was no objection to this evidence by the prosecution. It was clearly incompetent, and, if it had been objected to, would no doubt have been excluded. It is claimed that this evidence on the part of the defense rendered the above mentioned proof competent. We do not think so. In the first place, the evidence on the part of the defense was incompetent, as we have said; but, if it were not we do not see how the evidence offered in rebuttal that the deceased was not in the habit of going armed tended to rebut the proof that he had stated to some one that he had quarreled with certain persons. There was also evidence admitted in behalf of the prosecution of conversations between the witness Mrs. Willis and third parties, not in the presence of the defend-

ant, and with which he was in no way connected. This evidence should have been excluded. It was admitted by the court below, upon the assurance of counsel for the prosecution that it would be brought home to the defendant, which was not done. The same may be said of the testimony of the witness Glennon, of a conversation between Mrs. Willis and himself. The prosecution having failed to connect the defendant with the subject-matter of the conversation, the defendant moved to strike out the evidence. The motion was denied. This was error. The evidence should have been stricken out. The same witness, Glennon, was also allowed to testify to a conversation with the defendant. The ill-feeling which resulted in the death of Mr. Smith, at the hands of the defendant, grew out of an article published in a newspaper, of which the deceased was proprietor. The conversation testified to by Glennon was with reference to this article, and tended to show that the defendant believed the witness was the author of the article, and abused him, and threatened to get even with him; that in the same connection he made abusive remarks about one Mrs. Willis; and that subsequently, during the same day, he returned and stated to Glennon that he had learned that he was not the author of the article, and apologized for the language he had used. This evidence was well calculated to prejudice the jury against the defendant, and was immaterial and incompetent. If it had been shown to have been communicated to the deceased, it might have tended in some small degree to excuse his conduct towards the defendant, at the time of the shooting, but it was not shown that it was communicated to him. It could hardly be claimed that the threat of the defendant to "get even" with Glennon was evidence tending to prove that he killed the deceased, or the motive of the killing. And if this was not so that part of the conversation relating to Mrs. Willis, and which the defendant moved specially to strike out, was clearly incompetent.

It is contended by the appellant that the court below excluded evidence offered by him to the effect that he was told before the shooting that the deceased was a dangerous character, and that he had better beware of him, and that this was error. The defendant claimed, and introduced evidence tending to show that, in firing the shot which caused the death of the deceased, he acted in self-defense. In connection with the evidence as to what occurred at the time of the shooting, it would no doubt have been competent for the defendant to show that before the shooting he was informed that the deceased was a dangerous man. *State v. Lull*, 48 Vt. 536. Where a defendant claims to act in self-defense, any evidence tending to show that he acted as a reasonably prudent man would have acted under the circumstances is competent. *People v. Iams*, 57 Cal. 119, 130; *People v. Westlake*, 62 Cal. 307. In this case the evidence tended to show that the defendant was attacked by the deceased, and, in the encounter that followed, wounded him. In

judging whether the defendant acted with reasonable prudence and caution, and in the honest belief that he was in imminent danger of death, or great bodily injury, it was proper that the jury should know, if such were the fact, that he had been informed beforehand that the man who attacked him was a dangerous character, and so believed at the time, as such information and belief might reasonably influence the conduct of a prudent man under such circumstances. Such evidence does not rest upon the necessity of showing that the communication was brought home to the deceased, as counsel for respondent contend. The sole object of it is to show the state of mind of the defendant at the time of the shooting, and for this purpose it was proper and should have been admitted.

There may be some doubt whether the questions put to the witness were such in form as to raise the point, but the question has been presented on its merits here. The form of the questions is not objected to in the court below, nor is it here. In the effort to prove a certain state of facts, either the question put to the witness should disclose clearly what it is supposed to prove, or a proposition to prove certain facts should be submitted to the court below, and refused, in order to present the question in this court. Neither was done here, and we are led to believe, by certain questions put to the defendant, on the same subject, that the communication made to the defendant was not of the kind claimed by the appellant. It certainly was not competent to show that the defendant was warned to "look out" for the deceased, or the like. This would be quite a different thing from proving that the deceased was a dangerous man, and one who might be expected to go to extreme measures if he should attack the defendant. For these reasons, if no other error appeared in the record, the cause would not be reversed on this ground.

The rulings of the court in excluding certain questions asked the witness Mrs. Smith, widow of the deceased, on cross-examination, with reference to certain articles appearing in the paper formerly owned by her husband, after the first trial of this case, and excluding said articles when offered in evidence, were not erroneous. There was no error in allowing private counsel, employed to assist the district attorney in the prosecution of the case, to open and close the argument in the case. The court below must be left to determine upon the propriety of allowing such a course to be taken, and, so long as private counsel conduct the prosecution properly, we see no reason for holding that the entire argument may not be made by them with the consent and acquiescence of the district attorney and the trial court. The court below gave the following instruction, which is complained of by the appellant: "In this case the homicide, having been established by the state, unless the testimony of the state proves that the offense was excusable or justifiable, the burden of the proof is upon the defendant to show by a preponderance of evidence that the crime was only man-

slaughter, or was justifiable." This instruction was erroneous, because, the homicide being established by the state, it cast upon the defendant the burden of proving by a preponderance of the evidence that the killing was justifiable, or only manslaughter. *People v. Bushton*, 80 Cal. 160, 22 Pac. Rep. 127, 549; *People v. Elliott*, 80 Cal. 296, 22 Pac. Rep. 207; *People v. Langan*, 81 Cal. 142, 22 Pac. Rep. 482. Judgment and order reversed, and cause remanded with instruction to the court below to remand the cause to the superior court of the county of San Mateo for further proceedings.

We concur **SHARPSTEIN, J.; McFARLAND, J.**

DE HAVEN, J. I concur in the judgment. The second subdivision of section 1033 of the Penal Code is clearly unconstitutional. There was also error in the giving of the instruction referred to in the opinion of Mr. Justice WORKS. Upon the other points therein discussed, I express no opinion.

THORNTON, J. I concur in the above, except as to the instruction described in it. I am of opinion that the instruction is sound law, and that there was no error in giving it.

(86 Cal. 605)

GRIFFITH v. HAPERSBERGER. (No. 12,644.)
(*Supreme Court of California.* Jan. 4, 1891.)

In bank. On rehearing. For former report, see ante, 137.

PER CURIAM. In this case the petition for a rehearing is denied, but the judgment is modified to this extent: The superior court will compute interest on the amount awarded to respondent from January 1, 1885, as prayed for in the complaint, instead of September 15, 1883, the date of the architect's certificate.

(87 Cal. 410)

MILLER v. WADE et al. (No. 12,510.)
(*Supreme Court of California.* Jan. 4, 1891.)

APPEAL—PRACTICE—ASSIGNMENTS OF ERROR—NONSUIT.

Where a nonsuit is granted, it is not necessary that the record show on what ground the motion was made, as the ruling of the court will be upheld, if it can be justified on any ground. *DE HAVEN* and *THORNTON, J.J.*, dissent.

In bank. Appeal from superior court, Alameda county; **NOBLE HAMILTON**, Judge.

Action by Miller against Wade. From a judgment of nonsuit, plaintiff appeals. Affirmed.

W. W. Allen and *D. S. Smart*, for appellant. *George F. Hoefler* and *Moore & Reed*, for respondent.

WORKS, J. This is an appeal, by the plaintiff, from a judgment of nonsuit. There is a bill of exceptions which contains the evidence, and from which it appears that a nonsuit was granted, but the ruling of the court is not assigned or specified as error. Such an assignment has been held to be necessary to present the question to this court. *Schroeder v.*

Schmidt, 74 Cal. 459, 16 Pac. Rep. 243; see, also, *Polack v. Gurnee*, 66 Cal. 267, 5 Pac. Rep. 229, 610; *Malone v. County of Del Norte*, 77 Cal. 217, 19 Pac. Rep. 422.

The assignment of error is the pleading which points out the particular question raised and passed upon in the court below, and presented to this court for review. The bill of exceptions is intended to present the facts and the exception which sustains the point made and thus reserved for our determination. *Pico v. Cohn*, 78 Cal. 385, 20 Pac. Rep. 706. If this were not so, this court would be compelled, instead of looking to the assignment of errors for the questions presented, to search the whole transcript to find them; opposing counsel would have no means of knowing what points would be relied upon until the briefs were filed in this court, and questions could be urged here that had never been called to the attention of the court below on the motion for a new trial. A different rule was declared in one case, in department, in which a distinction is made between a statement and a bill of exceptions in this respect. *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. Rep. 403. It is true, as said in that case, that the statute applies, in terms, to statements only; but this court has held, in a number of cases, that a statement and a bill of exceptions are the same, and where a bill of exceptions is used on a motion for a new trial, and is thereby made to take the place of the statement, it must contain everything necessary to present the question by a statement. Undoubtedly a bill of exceptions might be used where a statement might not be proper, and in many cases no specification of error would be necessary. But where a bill of exceptions is used as the basis of a motion for a new trial, it is a statement. The court below has a right, under the Code, to have specifically pointed out all errors relied upon in making the motion, and this court can only be called upon to pass upon such questions as have thus been specified, and relied upon in the trial court. That such was the intention of the Code we have no doubt, and it is absolutely necessary that it should be so, in order that cases may be fairly presented and properly decided. The same rule must prevail in any case where the error to be reviewed depends upon the evidence given at the trial, whether it is necessary to present the error complained of by a motion for a new trial or not. The policy of the law is that a question should be presented to the court below, and an opportunity be given to that court to correct the error, if one has been committed, before appealing to this court.

It is further contended by the respondent that, as the determination of the question whether or not the nonsuit was properly granted depends entirely upon the sufficiency of the evidence to make out the plaintiff's case, the appeal must have been taken within 60 days, and, as this appeal was not taken within that time, it was too late. Section 939 of the Code of Civil Procedure provides: "But an exception to the decision or verdict, on the ground that it is not supported by the evidence,

cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." We think the ruling on the motion for a nonsuit was a "decision" within the meaning of this section, and although the ruling, if erroneous, has been held to be an error of law, the whole question depends, in this court, upon the sufficiency of the evidence to sustain the decision of the trial court. The appeal must be taken within 60 days to be available.

The appellant contends that the judgment of nonsuit cannot be upheld in this case because the record does not show the grounds upon which the motion was made, or that any grounds were assigned. This would be so, if the nonsuit had been denied, and the defendant had appealed. But it is not so where the nonsuit was granted. The decision of the trial court will be upheld where the nonsuit is granted, if the ruling can be justified on any ground, whether made a ground of the motion or not. The reason for this is that the moving party must show error on appeal, and, in order to sustain an appeal in this class of cases, he must show that he pointed out to the court below the grounds of his motion. If he did not, the objection is waived. But this rule cannot apply where the motion is granted, as the doctrine of waiver can have no application where the decision is in favor of the moving party. But, notwithstanding our conclusion that the question is not properly presented, we have examined the evidence carefully, and are satisfied that the evidence of the plaintiff was entirely insufficient to make out his case, or to put the defendant upon her proof. Judgment affirmed.

We concur: SHARPSTEIN, J.; FOX, J.

PATERSON and MCFARLAND, JJ. We concur in the judgment on the ground last stated. The decision of the department in *Shadburne v. Daly* is correct, in our opinion, and should be adhered to.

I dissent: DE HAVEN, J.

I dissent: THORNTON, J.

(37 Cal. 394)

KIRKWOOD v. SOTO. (No. 13,894.)

(Supreme Court of California. Jan. 4, 1891.)

COMPENSATION OF OFFICER—INCREASE DURING TERM.

Under Const. Cal. art. 11, § 9, providing that "the compensation of any county, city, town, or municipal officer shall not be increased after his election, or during his term of office," it is the compensation for services to be rendered, and not traveling and other incidental expenses of the office, that is forbidden to be raised.

Commissioners' decision. In bank. Appeal from superior court, Contra Costa county: JOSEPH P. JONES, Judge.

Action by Kirkwood, county superintendent of schools of Contra Costa county, against Soto, auditor of the same county, to compel defendant to draw his warrant on the county treasurer for \$76.75, traveling expenses incurred by plaintiff in the performance of his official duties, which never

had been allowed by the county board. From a judgment in plaintiff's favor defendant appeals. Affirmed.

W. S. Tinning, for appellant. Chase, Chase & Mellis, for respondent.

BELCHER, C. C. The respondent was elected superintendent of schools of Contra Costa county at the general election held in 1886. His term was four years, commencing on the first Monday of January following. In due time, he qualified, and entered upon the discharge of his duties, and has ever since continued to hold the office. At the time of his election, Contra Costa was a county of the seventeenth class, and the county government act contained the following provision in regard to his salary: "Sec. 189. In counties of the seventeenth class, the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to-wit: * * * (11) The superintendent of schools, eighteen hundred dollars per annum." St. 1885, p. 176. In March, 1889, section 1552 of the Political Code was amended so as to read as follows: "Sec. 1552. Each county superintendent shall receive his actual and necessary traveling expenses, said expenses to be allowed by the board of supervisors, and to be paid out of the general fund: provided, that this amount shall not exceed ten dollars per district per annum. He shall also be allowed postage and expressage, payable out of the county school fund, two dollars for each school-district: provided, that in incorporated cities each school containing three hundred pupils shall be considered equal to one school-district." After this amended section took effect, the respondent incurred, in the performance of his official duties as school superintendent in visiting schools in his county, actual and necessary traveling expenses, to the amount of \$76.75. For this amount, he presented a claim to the board of supervisors, properly itemized and verified for allowance. The claim was examined and allowed by the board, and a warrant was ordered drawn on the county treasurer therefor. The appellant was county auditor at the time, and, as such, refused to draw the warrant ordered, and thereupon this proceeding was commenced to compel him to do so. After a hearing, the court below granted the prayer of the petition, and ordered a peremptory writ of mandate to issue, commanding the appellant to forthwith draw his warrant in favor of the petitioner upon the county treasurer for the amount allowed and ordered paid by the board of supervisors. From that order or judgment this appeal is prosecuted. The only contention of appellant is that section 1552, supra, is inapplicable and unconstitutional, so far as the respondent is concerned, it having been passed after he was elected to office, because, in authorizing the payment of his necessary traveling expenses, it, in effect, increases the compensation or salary allowed him at the time of his election. The clause of the constitution relied upon reads as follows: "The compensation of any county, city, town, or municipal officer shall not be in-

creased after his election, or during his term of office." Article 11, § 9. The words "compensation" and "salary" were evidently used synonymously in the constitution, and in the county government act. Thus, in article 5, § 19, of the constitution, it is provided: "The governor, lieutenant governor, secretary of state, controller, treasurer, attorney general, and surveyor general shall, at stated times during their continuance in office, receive for their services a compensation for their services which shall not be increased or diminished during the term for which they shall have been elected," etc. In article 9, § 2, it is provided: "A superintendent of public instruction shall, at each gubernatorial election after the adoption of this constitution, be elected by the qualified electors of the state. He shall receive a salary equal to that of the secretary of state," etc. And, in article 6, § 17, this language is used: "The justices of the supreme court and judges of the superior court shall severally, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished after their election, nor during the term for which they shall have been elected. The salaries of the justices of the supreme court shall be paid by the state. One-half the salary of each superior court judge shall be paid by the state, the other half thereof shall be paid by the county for which he is elected. During the term of the first judges elected under this constitution, the annual salaries of the justices of the supreme court shall be six thousand dollars each." In the county government act the same language is used at the commencement of each section which fixes the compensation of county officers. It is: "The county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries." Since the adoption of the present constitution many acts have been passed by the legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices. Among them, the following may be noted: The justices of the supreme court and the judges of the superior court, who were first elected under the constitution, entered upon the discharge of their duties, as such, on the first Monday of January, 1880. In April following, an act was passed to amend part 1 of the Code of Civil Procedure, and substituting a new part 1 to take the place thereof. See Amend. Codes 1880, p. 21. By section 47 of this act, it was provided that the supreme court shall hold regular sessions at the capital of the state, at the city and county of San Francisco, and at the city of Los Angeles; and that "the justices and officers of the supreme court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its sessions." By section 71, it is provided that a judge of any superior court may hold the superior court in any county, at the request of the judge of that county, "and, upon the request of the governor, it shall be his duty to do so." And, by sec-

tion 160, it is provided that "a judge so holding a court, at the request of the governor, shall be allowed his actual expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof." The constitutionality of these provisions has never been questioned, so far as we are advised, in any court, or elsewhere, and yet, if the theory of the appellant be true, they would seem to have been subject to the same objections raised here, during the terms of the justices and judges who were in office at the time the act was passed.

The question now presented for decision does not appear to have been ever passed upon by the supreme court of this state, but a similar question was before the supreme court of Illinois, in *Briscoe v. Clark Co.*, 95 Ill. 309. The constitution of that state provided that the county board should fix the compensation of all county officers, with the amount of their necessary expenses, "provided, that the compensation of no officer shall be increased or diminished during his term of office." The supreme court held that it was the salary of the county officer—the compensation for the personal discharge of official duty—which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the necessity, which the business of the office should develop, and being so, the allowance for expenses could be increased. In our opinion, it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden, by section 9 of article 11 of the constitution, to raise. We therefore advise that the judgment appealed from be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(87 Cal. 329)

BAKER v. BRICKELL *et al.* (Nos. 12,992, 13,574.)¹

(*Supreme Court of California.* Jan. 3, 1891.)

HUSBAND AND WIFE — OCCUPATION OF GOVERNMENT LAND — BONA FIDE POSSESSOR — TRUST — ESTOPPEL.

1. In 1860 a married man went into possession of part of the government land known as the "outside lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of Act Cong. March 8, 1866, (14 U. S. St. at Large, p. 4,) relinquishing and granting the right and title of the United States in said lands to the city of San Francisco, in trust to be "disposed of and conveyed by said city, to parties in the *bona fide* actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. While the husband and wife were in possession, they executed a declaration of homestead on the land under the California homestead act of 1862, by which the homestead estate, on the death of either, vested absolutely in the survivor. Thereafter the city deeded the land to the widow, she having con-

¹For dissenting opinion, see post, 1067.

plied with the various ordinances and legislative acts relative thereto. *Held*, that as she had *bona fide* actual possession at the passage of the act, no trust arose under the conveyance to her in favor of said children.

2. The fact that she, as administratrix of her husband, returned said land as assets of his estate is immaterial, and does not estop her to claim it as her own.

BEATTY, C. J., dissenting.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

E. J. & J. H. Moore, for appellant. *Kellogg, Fox & King*, for respondent.

THORNTON, J. In this case there are two appeals prosecuted by defendant Brickell, —the first (12,992) from the judgment on the judgment roll; and the second (13,574) from an order denying Brickell's motion for a new trial. They will be considered together. The action is brought to establish a trust against defendant Brickell. The lands in controversy are portions of what are known as the "outside lands" of the city and county of San Francisco, and not within that portion affected by the Van Ness ordinance. John H. Baker went into possession of the lands in suit, called the "Baker Tract" or "Golden Gate Ranch," on July 9, 1860. He purchased this and other lands within his possession from one James C. Garner. He was then a married man, and at the time above stated went into possession with his wife, Maria Baker, (who is the defendant, Maria Baker Batchelder,) and their children. John H. Baker died in March, 1863, leaving his wife surviving with six children, of whom the plaintiff was one, then an infant of tender years. The surviving wife, with her children, remained in possession of the land in controversy, and was in possession when the act of congress of March 8, 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," was passed, and before and some time after the passage of this act. See this act on page 4 of 14 U. S. St. at Large. At the time of the passage of this act, the legal title to these lands was in the United States. The land granted by the act was within the corporate limits of the city of San Francisco, and the right and title of the United States was by it relinquished and granted to the city of San Francisco and its successors, subject to certain reservations and exceptions designated therein, "upon the following trusts, namely: That all the said land not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof by themselves or tenants on the passage of this act, in such quantities, and upon such terms and conditions, as the legislature of the state of California may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public use." A proviso follows the above which has no bearing on the case, and need not be further adverted to.

It may be remarked here that no part of the land in suit was ever reserved or set apart by ordinance, or otherwise, for public uses. Some observations are here ap-

propriate as to the nature of the title of the city, successor to the former pueblo of San Francisco. The character of this title has been the subject of discussion in similar cases, both in the supreme court of the United States and in this court, and it may be regarded as settled law that the title of the pueblo, as well as that of the city, was not an indefeasible estate; ownership of such lands could not be strictly affirmed of either the pueblo or the city. The title amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for buildings, or cultivation, or both, and to use the remainder for commons, for pasture lands, or as a source of revenue, or for other public purposes. The right of this possession and use was in all particulars subject to the control of the government of the country. They were to be held by the pueblo or city in trust for the benefit of the inhabitants, and its right of disposition was subject to be modified, and even taken away by the government. On this point see *Townsend v. Greeley*, 5 Wall. 326; *Grisar v. McDowell*, 6 Wall. 364; *Palmer v. Low*, 98 U. S. 16; *Trenouth v. San Francisco*, 100 U. S. 253; *Leroy v. Cunningham*, 44 Cal. 599; *Dupond v. Barstow*, 45 Cal. 450; *Low v. Lewis*, 46 Cal. 549; *McManus v. O'Sullivan*, 48 Cal. 7, 17, 18; *Randall v. Austin*, 46 Cal. 54; *McCreery v. Sawyer*, 52 Cal. 257; *People v. Holladay*, 68 Cal. 442, 9 Pac. Rep. 655. The legal title to these lands passed to the United States from Mexico on its acquisition of California, and passed to the city by the act of March 8, 1866, upon the trusts above set forth, for the benefit of such of its inhabitants as were in the *bona fide* actual possession of the same at the date of the passage of the act just above referred to, viz., on the 8th day of March, 1866.

Now, who was in the *bona fide* actual possession of the land on the 8th of March, 1866? For whose benefit and behalf was the grant by congress made? Obviously, Maria Baker. She was then and before that date an inhabitant of the city of San Francisco, residing on the lands with her children. That the grant was made to the head of the family there can be no question, and Maria Baker was then the head of her family. We consider this determined in *Labish v. Hardy*, 77 Cal. 327, 19 Pac. Rep. 531, where a similar question was determined in similar language in a grant made by act of congress to the corporate authorities of the town of Santa Cruz. The only difference between that case and this is that in the case cited the surviving husband was held to be the grantee, and in this case the surviving wife is the grantee. The possession in both cases was that of the head of the family, the husband in one case, and the wife or widow in the other. Here the husband and father was not in being when the act of congress was passed in 1866. He had then been dead nearly three years. It goes without saying that then, being dead, he could not take title under the grant, and, therefore, on his decease the land did not become a part of his estate. It may be added here that the tenant spoken of in the act of congress may be held to signify the conventional ten-

ant. *Brooks v. Hyde*, 37 Cal. 374. Here there was no contract either express or implied from which the tenancy could be inferred, nor is there any reason to hold that Mrs. Baker became the tenant, in any sense, of her husband on his decease.

To carry the act of the 8th of March, 1866, into execution, the board of supervisors passed an ordinance, known as "Order 800," which was ratified and affirmed by an act of the legislature passed March 27, 1868. Order 800 was passed by the board of supervisors on the 14th of January, 1868. See St. 1867-68, p. 379, etc. Subsequently, in 1870, another act of the legislature was passed to expedite the settlement of the land-titles in the city and county of San Francisco, etc., affirming order 800 of the board of supervisors of the city. See St. 1869-70, p. 353, etc. This enactment was made to enable the parties entitled to procure conveyances of the title to these lands from the city and county of San Francisco. Of the act of congress, and of the ordinances of the city and county of San Francisco, and of the acts of the legislature, it may be remarked that nowhere in them is the title of any other person recognized or allowed, save those who were in actual *bona fide* possession on the 8th of March, 1866, by themselves or their tenants, except where a possessor had been ousted from his possession, which possession he might recover by suit. As there was no evidence of ouster here by Maria Baker of any one, no question arises here as to ouster and recovery of possession by a suit at law.

By the order 800, ratified as above, it was provided that a map or plan of these outside lands should be made and adopted by the board of supervisors above mentioned; that upon the completion of the map it should be deposited for public inspection in the office of the clerk of the board of supervisors, there to remain for a period of thirty days, notice whereof should be given by publication in three of the daily papers of the city during the time that the map should so remain in the clerk's office. The occupant of any tract of land was required, by order 800, ratified as above, to present a diagram of his land, and have it delineated on the map made by the supervisors. This delineation of a tract, however, could not be made on the map unless all the taxes on it should have been paid for five fiscal years preceding the year beginning July 1, 1866. The claimant was also, before the title could be procured, required to surrender all claim to any streets and highways. By the act of 1870 (St. 1869-70, *supra*), passed March 14th of that year, the claimant was empowered to file a petition for a grant from the city of the tract of land of which he was in possession, as above mentioned. By the provisions of this act the petitioner was to set forth in such petition, verified as required by the act, a claim that he or his tenants, or the persons through whom he claims or derives possession, had been, from and including the 8th day of March, 1866, and still was, in possession of a portion of such outside land, and that he, or the person through whom he claims or derives possession, has

paid to the tax collector of the city and county of San Francisco the amount assessed by the Outside Land Commission upon the land described in the petition, to pay for the land reserved for public uses, provided for in section 10 of order 800, and has also paid the five years' taxes mentioned in section 4 of order 800, and all taxes levied on said lands for state and municipal purposes, then remaining unpaid. The board of supervisors was, these before-mentioned acts having been done, required to proceed to act on his petition. The claimant was required to make proof of the facts stated in his petition before a committee of the board of supervisors, styled the "Outside Land Committee." After the proofs were closed, the Outside Land Committee was required to consider the same, and to make such report and recommendation thereon as shall seem to them just and proper in the premises. The committee was required to file with the clerk of the board the testimony taken by it, and its report, which report was to be submitted to the board of supervisors for their approval, and if, in their judgment, the claim of the petitioner is well founded, the board was, by an order entered in their minutes, to adjudge and award a grant of his lands to the petitioner, less the amount reserved for public use. The board was thereupon required to give public notice of their award by notice published at least once a week for three successive weeks in a daily newspaper published in the city and county of San Francisco, which notice should specify the name of the applicant, the date and filing of his petition, and the tract of land awarded, by a good and sufficient description thereof, proof of publication of which notice was to be made in the manner then or thereafter required by law for the proof of publication in civil process. Section 2, p. 354, Act 1870. The third section of the act provides for the execution of a deed of conveyance signed by the mayor of the said city and county, and acknowledged and delivered by him to the applicant of the tract of land awarded to him, to which shall be attached the corporate seal of the city and county above named, provided the petitioner, before receiving the deed aforesaid, is required to quitclaim and personally deliver the possession of all lands claimed by him reserved for public purposes, and for the use and benefit of the city and county, provided there is no suit pending between the petitioner and some third person. A reference will be further made to this last-mentioned proviso hereafter in this opinion. By the third section it is provided that the conveyance executed under the provisions of this act shall operate as an acknowledgment on the part of the city and county aforesaid that the title to the land described in it has passed under and by virtue of order 800 and ordinance 822, and of the several acts of congress and of the legislature ratifying said order and ordinance, under the authority of which the same have been passed. The said conveyance shall likewise operate to grant, convey, remise, and release to the party, his heirs and assigns, named therein, the

lands in such conveyance described, and all the estate and interest present and future of the city and county of San Francisco in and to such lands. On the 10th day of January, 1873, Maria Baker, after due and regular proceedings had under order 800, and the acts of the legislature of 1868 and 1870, was granted a conveyance in the usual form of all the lands described in the complaint as being part of the Baker ranch, which conveyance was executed to her by the authorities of the city and county, as required by the act of 1870, above referred to, and in the mode therein set forth, conveying to her the title of the city and county of San Francisco, as declared in the fifth section of the act of 1870, the provisions of which have been fully stated above. When the conveyance was made to her afterwards, it does not appear that any suit in regard to the land was pending against her. Not appearing, this court must regard it as not existing. Maria Baker intermarried with one David F. Batchelder, and subsequently she and her husband, Batchelder, executed to the defendant Brickell divers mortgages on the land conveyed to her by the deed of the city and county aforementioned, and on other lands, to secure the payment of divers sums of money, amounting in the aggregate to the sum of \$42,500. These mortgages were subsequently regularly foreclosed, and the land sold under a decree of foreclosure, regularly given, made, and entered, and by such decree and the sale thereunder, and the deed of the sheriff of the city and county of San Francisco executed to defendant Brickell, the title of said Maria Batchelder became vested in Brickell. It further appears from the findings herein that on the 23d of September, 1862, Maria Baker and her then husband, John H. Baker, executed a declaration of homestead in due form of law, embracing the land involved in this litigation. This homestead estate, under the provisions of the act of 1862, under which the declaration was made and recorded, on the death of either spouse, vested absolutely in the survivor. Such is the effect of the fourth section of the act of 1862. See *Herrold v. Reen*, 58 Cal. 445-447, where the point is considered and decided. See, also, cases cited in the opinion in that case. It was not necessary that this homestead estate should be set apart by the probate court to the surviving spouse. It vested in the survivor by descent. *Herrold v. Reen*, supra. So on the death of John H. Baker, in March, 1863, the homestead estate vested in his surviving wife, Maria Baker. Under such circumstances the contention cannot be upheld that the possession of Maria Baker was not, on the 8th of March, 1866, *bona fide*. She was not only in actual possession, but she was there having title to the whole land as against any heir of John H. Baker, by the legal devolution to her of the whole land as a homestead. In such a state and condition the *bona fides* of her possession could not be impeached. Its *bona fides* were beyond a doubt.

This conclusion disposes of this case, for in no event would any trust arise here in favor of any of the children, issue of the

marriage of Maria Baker and her husband John H. Baker. The plaintiff could have no claim to any portion of the land. There is nothing on which to build a trust. A trust arises from contract or from circumstances which affect the conscience of a party, and charge him with the rights of another. Here there was no contract between Maria and John H. Baker, constituting a trust, and no circumstances affecting the conscience of Maria Baker, charging her with any duty to her children in regard to the lands in suit. John H. Baker had no title to this land. His settlement and possession on it was merely permissive. He acquired no right to it by such possession. The title was then in the United States, to give it to whom it thought best; and when it did make a donation, in March, 1866, he could not be the recipient of a grant. He had then departed this life, and could take nothing by the act of congress passed on the day above mentioned. The possession on that day was that of his wife, the then head of the family, Maria Baker. She owed no duty to her children save support, maintenance, and education,—none in regard to this land. Independent of the homestead which had arisen under the act of 1862, which, as we have seen, passed to her on the death of her husband, we think she was on the 8th day of March, 1866, in the actual *bona fide* possession of the land, but when the homestead right is taken into account, there can in our judgment be no question or doubt as to the *bona fides* of her actual possession. She was, therefore, the grantee under the act of congress of the land in question. The grant to Maria Baker was a pure donation, and how any trust in favor of any other person could arise out of it, we cannot surmise. Nor are we without authority to sustain this conclusion. In *Labish v. Hardy*, 77 Cal. 327, 19 Pac. Rep. 531, a like question came before this court for discussion, and its determination was in accordance with what is stated herein. In that case the decision was in relation to the provisions of an act of congress of July 23, 1866, relinquishing and granting the lands within the limits of the town of Santa Cruz to the corporate authorities thereof, in trust, and with authority to convey them to the parties in the actual *bona fide* occupancy thereof at the date of the passage of the act. On May 13, 1871, the corporate authorities of the town conveyed the premises to William H. Hardy, father of appellant, and husband and grantor of respondent. The appellant claimed that the rights and equities acquired by her parents through occupancy and possession of the premises constituted community property, one-half of which belonged to her mother, and at her death, by the law then existing, descended to and vested in her children. The mother of appellant died in 1856, ten years prior to the passage of the act of congress in July, 1866. The court, per SHARPSTEIN, J., said: "The beneficiaries under the act of congress were clearly those in the *bona fide* occupancy of the land in the town of Santa Cruz at the date of the passage of said act, which was ten years after the death

of appellant's mother. An occupancy which terminated ten years before the passage of the act would not be a *bona fide* occupancy at the time of its passage. We are unaware of any law under which a bare occupancy of any public land of the United States vests in the occupant any right or equities in or to the land so occupied. We think no property was acquired in the premises in controversy by either of the parents of appellant prior to the passage of the act of July 23, 1866." This judgment was concurred in by five of the justices of this court, and there was no dissent. It is clearly correct and meets our approval.

The other circumstances, viz., the facts that Maria Baker qualified and was appointed as administratrix of John H. Baker, and put the land in suit on the inventory returned by her to the probate court as assets of her intestate's estate in the administration of the estate, are entirely immaterial. We are aware of no law by which a person appointed administrator loses his land by so acting. There is no estoppel on Maria Baker to claim her own property under such circumstances. She no doubt acted in this matter through ignorance of her rights, or, if advised at all, from having been improperly counseled. It is useless to dwell on the points adverted to in relation to the administration, which are totally immaterial, and cannot in any proper view of them affect the decision of this case. The judgment and order are reversed and the cause remanded for a new trial, in accordance with the views expressed in this opinion. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(87 Cal. 422)

CHESTER v. FIELD *et al.* (No. 13,816.)

(Supreme Court of California. Jan. 4, 1891.)

EJECTMENT—QUIETING TITLE—JUDGMENT ON PLEADINGS.

1. Upon a complaint containing the usual allegations in ejectment, and all that are necessary to quiet title, and a prayer that defendants be required to set forth their claims; that said claims be adjudged to be invalid, and plaintiff's title declared to be good; that plaintiff be restored to possession, and defendants be barred forever from asserting any claim to the land, and "for such other and further relief as shall be meet in the premises," judgment would not be given without evidence, even if there was no answer.

2. A specific denial of plaintiff's right of possession, which would be bad on special demurrer for uncertainty, is sufficient to raise an issue as to some portion of the property, and to defeat a motion for judgment on the pleadings, even if such motion were ever good in ejectment.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

A. Everett Ball, for appellant. Edward Field, *in pro. per.*, and Henry C. Dibble, for respondents.

PATERSON, J. The complaint contains the usual allegations in ejectment, and all that are necessary to quiet title. At the trial, and before any evidence was introduced, the plaintiff moved for judgment on the pleadings, claiming that the an-

swer raised no material issue. There was no demurrer to the answer. The motion was properly denied. If the action be considered as an action of ejectment, there is a specific denial of plaintiff's alleged right of possession. The denial, it is true, covers all the parcels described in the complaint, and would not stand the test on demurrer for uncertainty, but it is sufficient to raise an issue as to some portion of the property, and to defeat a motion for judgment on the pleadings, assuming that such a motion would be good under any circumstances in an action of ejectment.

The prayer of the complaint is that the defendants be required to set forth their claims; that said claims be adjudged to be invalid, and plaintiff's title declared to be good; that plaintiff be restored to possession, and defendants be debarred forever from asserting any claim to the land, and "for such other and further relief as shall be meet in the premises, and costs of suit." Upon the allegations of the complaint and this prayer the court would not have given judgment without evidence, if there had been no answer at all filed. The judgment is affirmed. All concur.

(87 Cal. 413)

CLAVEY *et al.* v. LORD. (No. 13,578.)

(Supreme Court of California. Jan. 4, 1891.)

ACCOUNTING—FINDINGS OF FACT—ADMISSION OF EVIDENCE AFTER VERDICT—OBJECTIONS TO EVIDENCE—HARMLESS ERROR.

1. In an action for an accounting by defendant of cattle delivered to him by plaintiff's intestate, the issue as to the number of cattle delivered to defendant is immaterial where it appears that defendant has made a complete settlement with deceased and with plaintiffs.

2. Each party moved for judgment on a special verdict, but the court did nothing until three months thereafter, when it permitted defendant to introduce further evidence, without showing cause therefor by affidavit. Plaintiffs also introduced such evidence as they wished. *Held*, that there was no abuse of discretion.

3. Where one of plaintiffs' counsel objected to evidence of statements made by plaintiffs' witness inconsistent with his testimony, on the ground that there was no foundation laid to impeach his testimony, and plaintiffs' leading counsel then said, "if it was not after he testified, he cannot be impeached in that way," the objection does not go to the proving of what witness said after he testified.

4. The findings as to settlements being controlling, any error in the admission of evidence tending to show the number of cattle delivered to defendant was harmless.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

James H. Budd and F. D. & G. W. Nicol, for appellants. F. W. Street, E. A. Rodgers, and J. C. Campbell, for respondent.

VANCLIEF, C. The first count of the complaint in this action alleges that the decedent in his life-time verbally contracted with the defendant to deliver to the latter a large number of stock cattle, which the defendant was to herd, pasture, feed, and care for, in consideration of which the defendant was to have one-half of the increase of said cattle, but was to return, or account to the decedent for, all the cattle

originally delivered and one-half of the increase at the expiration of the contract. The contract did not fix or state the time during which the defendant was to keep the cattle, but it is alleged that he kept them until William Clavey died, June 25, 1885. Nor is the date of the contract alleged, but it appears that it was made in 1875. It is further alleged, on information and belief, that the deceased delivered to the defendant, under the contract, "about one hundred and forty head of stock cattle," which defendant kept according to the contract, and "that the increase of said cattle, while in possession of the defendant under said contract, amounted to many hundreds." It is further alleged, on information and belief, that during the life-time of William Clavey there was no accounting between him and defendant in regard to the cattle; and that no accounting or settlement has been made between plaintiffs and defendant in regard to the cattle since the death of William Clavey. In the second count it is alleged, on information and belief, that during the life-time of the deceased he and defendant entered into a verbal contract, "by the terms of which they were to purchase large tracts of land in Tuolumne county, the same to be held by them in common." That under said contract "Clavey furnished to defendant large sums of money with which to purchase and pay for his (Clavey's) interest in the aforesaid land;" and that defendant, "with said money, and money of his own, and under said agreement, did purchase large tracts of land, the deeds and conveyances of which were taken in the name of defendant, and in trust, however, for the joint benefit of himself and said Clavey, each of whom owned an undivided half thereof." That the defendant still holds the title to said lands, and "refuses to account to plaintiffs therefor, or for the rents and profits of the land, or for the money invested therein by Clavey, and refuses to make any statement of his trust under said contract, all of which has been demanded by plaintiffs. The prayer of the complaint is—*First*, that defendant account for the cattle under the contract first alleged; and, *second*, that he account for all money received by him for the purchase of land under the contract, alleged in the second count, and for all lands purchased therewith, and for the rents and profits thereof. The answer of the defendant admits a contract in regard to the cattle, but with the additional terms that the defendant was authorized to deal with, sell, and dispose of the cattle and the increase as his own, during the time he should keep them, and account to Clavey for the proceeds of such sales; and that defendant was not to be liable for loss of cattle by death or otherwise; and, also, that defendant was to hold said cattle as security for all debts due the defendant from Clavey. And denies that Clavey delivered to defendant more than 77 head of cattle under the contract. Denies that there had been no accounting and settlement with Clavey and the defendant; but alleges that at divers times he had accounted to and settled with Clavey, during his life-time, all mat-

ters pertaining to the cattle contract, and that in March, 1887, he had accounted and settled with the plaintiffs for all the cattle and increase thereof that remained in his possession after the death of Clavey. The answer also denies all the material allegations of the second count. Twenty-five special issues framed by counsel for the respective parties were submitted by the court to a jury, and on April 7, 1888, the jury returned a verdict in favor of the plaintiffs upon all the issues except one, as to which the jury failed to agree. Thereupon each party asked for judgment on the special verdict; but no further action appears to have been taken by court or counsel until July 14, 1888, when defendant's counsel asked permission to introduce further evidence, which was allowed by the court against the objection of plaintiffs' counsel. After hearing the additional evidence the court set aside the special verdict, and upon all the evidence made written findings in favor of the defendant, and rendered judgment accordingly. The plaintiffs appeal from the judgment, and from an order denying their motion for a new trial. The court found the cattle contract to have been as stated in defendant's answer, and that defendant received only 77 head of cattle under the contract; and further found, in regard to the cattle transaction, as follows: "(6) That during the life-time of Clavey, defendant and said Clavey had frequent settlements and accountings in regard to the cattle so received, and the increase thereof, and that at each of said settlements defendant fully settled with said Clavey for all of the cattle sold and the increase of said cattle; (7) that on or about the 10th day of March, 1887, defendant delivered to plaintiffs herein, the administratrix and administrator of the estate of said William Clavey, deceased all of the cattle that remained in defendant's possession, whether the same were original stock cattle, or the increase of said stock cattle, and the plaintiffs herein received the same; (8) that at the time of the commencement of this action, defendant did not have in his possession any of the original stock cattle received from William Clavey, nor any of the increase of the original stock cattle so received, nor any of the proceeds of the sale of said cattle or the increase thereof, but had fully accounted to said Clavey during his life-time for the increase of said cattle, and the proceeds from the sale of the same, and had turned over to said plaintiffs all of the cattle that they were entitled to receive under the terms of said contract." Upon all the issues in the second count, the court found in favor of defendant.

1. Many of the findings are attacked on the ground that they are not justified by the evidence. But I think all the findings, except that as to the number of cattle delivered to defendant under the contract, are sustained by a preponderance of evidence; and the finding as to the number of cattle delivered is supported by the positive testimony of the defendant, and of the witness Richards, opposed to the positive testimony of John Loney and the rather indefinite testimony of McFarland,

for the plaintiffs. There was an attempt by each party to discredit the witnesses of the other as to the number of cattle; but there is nothing in the record from which it can be seen or determined here that the court did not justly estimate the credibility of the witnesses. Besides, if the sixth, seventh, and eight findings as to settlements with the deceased and plaintiffs are justified by the evidence, as I think they are, they are controlling, and render the issue as to the number of cattle immaterial.

2. It is insisted by appellants that the court erred in hearing additional evidence three months after the verdict of the jury was rendered, and in disregarding the verdict of the jury. When the verdict was rendered, each party moved for judgment upon it, and it does not appear why the court did not further act in the case until three months thereafter; yet it does not appear that the delay was objected to by the appellants. If the court disagreed with the verdict of the jury, there should be no question that it had the power to disregard and set it aside of its own motion, since, until adopted by the court, it was only advisory. *Johnson v. Powers*, 65 Cal. 179, 3 Pac. Rep. 625; *Sweetser v. Dobbins*, 65 Cal. 529, 4 Pac. Rep. 540, and other cases. The only remaining question under this head is whether the court erred in permitting the defendant to introduce further evidence without showing cause therefor by affidavit. It was undoubtedly within the discretionary power of the court to permit further evidence, under the circumstances disclosed by the record. *Foote v. Richmond*, 42 Cal. 441; *Barry v. Bennett*, 45 Cal. 80; *Keys v. Warner*, Id. 60; *Association v. Willard*, 48 Cal. 615; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. Rep. 745; *Bank v. Wolff*, 79 Cal. 70, 21 Pac. Rep. 551, 748. And no abuse of that power appears. Both parties were permitted to introduce additional evidence without any apparent restriction; and both parties did introduce additional evidence. There is no complaint that the plaintiffs were surprised, or were not allowed ample opportunity to procure and introduce evidence in rebuttal or in chief; nor does it appear that plaintiffs failed to procure any additional evidence desired, which would have been available under other circumstances. Conceding that the court might have denied the motion to admit further evidence without any apparent abuse of discretion, as in the case of *Kohler v. Wells*, 26 Cal. 613, cited by respondent, it does not necessarily follow that it was an abuse of discretion to grant the motion; for, in cases where the decision is governed entirely by the discretion of the court, it may often happen that a decision in favor of either party would not appear to be an abuse of discretion. To say that the law allows no latitude for the exercise of discretionary power is to deny that the power is discretionary. The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and

motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice.

3. On the trial before the jury, McFarland testified for the plaintiff as to the number of cattle delivered to the defendant. On the trial before the court, three months later, the defendant offered to prove by his witness, Preston, that, after McFarland had testified, he made a statement, in regard to the number of cattle, inconsistent with his testimony before the jury. Thereupon the following objection by counsel, and ruling by the court, were made: "Mr. Nicol. I object upon the ground that no proper foundation has been laid to impeach his testimony. Mr. Budd. If it was not after he had testified, he cannot be impeached in that way. Mr. Campbell. It was after. The Court. Answer the question. Mr Budd. Plaintiff expects." The witness then testified to a statement by McFarland made after he had testified before the jury, inconsistent with his testimony before the jury. Counsel for appellants contend that the admission of Preston's testimony was error. I think, however, that the objection, as modified by Mr. Budd, who appears to have been the leading counsel for plaintiffs, was no objection to proving what McFarland said after he testified before the jury; and that the objection must have been so understood by the court and counsel for defendant.

4. The deposition of J. W. Tullock, assessor of Stanislaus county, was offered in evidence by defendant to show how many cattle were assessed to Clavey in 1874. The plaintiffs objected to questions numbered 7, 8, 9, 10, and 11. Their objection was sustained as to 9 and 10, but was overruled as to 7, 8, and 11. Those questions were as follows: "No. 7. State whether or not the assessment list of that year contains certain cattle belonging to the said Clavey? No. 8. State just what the assessment book shows with reference to these cattle, with regard to number, value, and quality? No. 11. State whether or not the 124 head of cattle above referred to include all the cattle which were assessed to William Clavey in 1874." The answers to these questions appear to have been read by the witness from page 22 of the assessment roll of 1874, showing that 124 head of cattle and no more had been assessed to Clavey that year, and that "124 head of stock cattle had been removed to Tuolumne county." The grounds of the objections were that No. 7 was incompetent, irrelevant, and not the best evidence; the same as to No. 8, and also that it does not appear who made the assessment, or that Clavey signed or had anything to do with it; and that No. 11 did not ask for the best evidence. It is claimed by appellants' counsel that the court erred in overruling their objections to the questions numbered 7, 8, and 11. If there was error in any of these rulings, it was harmless. The evidence objected to tended to prove only that Clavey owned no more than 124 head of cattle at the time of the assessment in 1874; and, therefore, could not have been applied to any other issue than

that as to the number of cattle delivered to defendant. It had no bearing whatever upon the issues as to settlements, and could not have influenced or contributed to the findings upon these issues. These findings are controlling, and dispose of the case in favor of the respondent without regard to the number of cattle delivered.

5. Several other exceptions to rulings of the court were taken, but they appear to be either grounded upon misapprehension of the facts or unimportant in view of the settlements found. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(3 Cal. Unrep. 372)

PEOPLE *ex rel.* BOARD OF STATE HARBOR COMMISSIONERS V. ROBERTS. (No. 12,989.)

(Supreme Court of California. Jan. 4, 1891.)

WHARFAGE TAXES—CONSTITUTIONAL LAW.

1. Wharfage charges imposed by the board of harbor commissioners on the owner of a barge and lighter, which were kept within a slip constructed, repaired, and dredged by the board, are valid, and not in violation of Const. U. S. art. 1, § 10, which prohibits a state from levying duty on tonnage without the consent of congress.

2. Where a lighter actually received the support of a wharf in discharging into and loading from a vessel tied to the wharf, the fact that the vessel lay between the wharf and the lighter, and that the owner of the vessel had paid regular wharfage rates, does not affect the right of the board of harbor commissioners to collect wharfage rates from the owner of the lighter.

3. While Act Cal. March 17, 1880, which amends Act March 15, 1878, so as to exempt vessels engaged solely in domestic commerce from the wharfage tax, to which vessels engaged in interstate commerce still continue subject, may be invalid, in so far as it discriminates against vessels engaged in interstate commerce, yet the board of harbor commissioners, which is the agent of the state, with only such powers as are conferred on it by the legislature, cannot disregard the amendment, and collect wharfage taxes from vessels engaged solely in domestic commerce.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Rosenbaum & Scheeline, for appellant. T. C. Coogan, for respondent.

PATERSON, J. This action was brought on behalf of the people on relation of the harbor commissioners to recover a certain sum, claimed to be due to plaintiff for wharfage. The defendant's barge and lighter part of the time were attached to the wharves by hawsers and lines fastened to mooring piles, which had been placed there for that purpose by the respondents, and part of the time they were not attached to the wharves, but were fastened by lines to the sides of other vessels, which were moored up against and fastened to the wharves. Appellant contends—*First*, that his vessels did not use the wharves, and, therefore, the charge is one upon tonnage and in conflict with section 10, art. 1, of the constitution of the United States; *second*, that appellant is exempt from the charge made, because his vessels are en-

gaged in transferring merchandise between different points within the state.

There is no merit we think in the first contention. The court found that the appellant did use the wharves, and that finding is not challenged, but it also found that appellant's vessels were not in all cases attached directly to the wharves. The barge and lighter were, however, within the slips which were constructed, kept in repair, and dredged by the respondents; and appellant could not have made use of them unless they had been so repaired and dredged. Under these circumstances, wharfage charges are valid, and the constitutional provision relied upon by appellant is not violated. *People v. Gas-light Co.*, 54 Cal. 248; *People v. Williams*, 64 Cal. 502;¹ *State Tonnage Tax Cases*, 12 Wall. 219; *Cannon v. City of New Orleans*, 20 Wall. 577; *Benedict v. Vanderbilt*, 1 Rob. (N. Y.) 194. Furthermore, the barge and lighter were, when within the slips, actually receiving the support of the wharves in discharging into and loading from vessels which were tied thereto. They were practically tied to the wharves, although there was a vessel between them and the wharf itself, and the fact that the owners of the vessels lying next to the wharf had paid regular wharfage rates does not affect the right of the harbor commissioners to collect from the defendant. *Vicksburg v. Tobin*, 100 U. S. 430.

We are of the opinion that appellant's second contention is sustained by the act of the legislature, approved March 17, 1880, amending section 6 of an act entitled "An act concerning the water front of the city and county of San Francisco," approved March 15, 1878. This amendatory act provides that "no wharfage shall be collected on any merchandise or other article loaded on any vessel or railroad car, in the city and county of San Francisco, for the purpose of being transported to any port or place in the state of California, nor on any merchandise or other article loaded on any vessel or railroad car, at any port or place in the state of California, and arriving in the city and county of San Francisco." It is claimed by respondents that this act is unconstitutional, and they rely upon the decision of the supreme court of the United States, in the case of *Guy v. Baltimore*, 106 U. S. 434, in support of this proposition. We do not think that case is in point. It was held in that case that a state could not employ its property for public use so as to hinder, obstruct, or burden, interstate commerce in the interest of commerce wholly internal to that state; could not build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states. In that case an ordinance of the city of Baltimore required vessels laden with the products of other states to pay, for the use of the public wharves of that city, fees which were not exacted from vessels landing thereat with the products of Maryland. It does not follow that because vessels plying between San Francisco and ports outside of this state are exempt from wharfage, under the de-

¹2 Pac. Rep. 393.

cision in *Guy v. Baltimore*, the defendant's vessels should not be exempt therefrom. Application of the rule contended for by respondent, would be a discrimination against domestic vessels. The power to collect wharfrage is derived from the legislature, and the board of harbor commissioners is the agent of the state, with such powers, and no others, as are conferred upon it by the legislature. The court found that "both said lighter and said barge were engaged in transporting freight between different points in the state of California." Judgment reversed, with directions to the court below to enter judgment on the findings in favor of the defendant.

We concur: WORKS, J.; McFARLAND, J.; SHARPSTEIN, J.

87 Cal. 399

SUKEFORTH v. LORD. (No. 13,363.)

(Supreme Court of California. Jan. 5, 1891.)

PLEADING—AVERMENT OF FRAUD—INSUFFICIENCY—WAIVER—FRAUDULENT CONVEYANCES.

1. Failure to demur to a general allegation of fraud, or to object to evidence offered at the trial, is a waiver of the insufficiency of the pleading. *Distinguishing Albertoli v. Branham*, 80 Cal. 633, 23 Pac. Rep. 404, and overruling *Sukeforth v. Lord*, 23 Pac. Rep. 296.

2. The fact that the verdict is against the party alleging the fraud does not deprive him of the benefit, on appeal, of the waiver by his adversary of the insufficiency of the plea.

3. The fact that no such objection appears in the statement, on motion for new trial, which contains all the evidence, is a sufficient showing that no such objection was made.

4. In an action for wrongful attachment, the answer denied generally plaintiff's ownership, and then alleged that, by a conspiracy between a debtor of defendant and plaintiff, such debtor conveyed the property in question to plaintiff, with intent to defraud his creditors. *Held*, that the allegation of fraud so qualifies the denial of ownership that a demurrer on the ground that fraud is not sufficiently alleged goes to the whole answer.

5. Where the record shows that counsel stated to the court, just as the jury were retiring, that he wished an exception to all the instructions given for the other party, and refused for himself, and that the court told him to have them entered, the exception is sufficient as to the written charges, though neither the minutes of the court nor the reporter's notes show that any exception to instructions was reserved or entered. Overruling *Sukeforth v. Lord*, 23 Pac. Rep. 296.

6. Where a creditor attaches property transferred by his debtor to another, on the ground that the transfer is fraudulent, and is sued by the transferee for its value, which is admitted to be a certain sum, it is error to instruct that the jury may find for plaintiff for a sum less than the admitted value.

7. It is error to refuse to instruct that a transfer by an insolvent may be vitiated by constructive as well as actual fraud.

8. It is likewise error to refuse to instruct that the acceptance by a creditor of an insolvent debtor of an amount of property largely in excess of his demand is a circumstance from which fraud may be inferred.

9. An agreement between the creditor accepting the property and the debtor that the surplus proceeds shall be refunded to the debtor is a circumstance tending to show that the transfer was made with intent to hinder and defraud creditors, and it is error to refuse an instruction to that effect.

In bank. On rehearing. For former report, see 23 Pac. Rep. 296.

George A. Rankin, (T. C. Coogan, of counsel,) for appellant. Cross & Simonds, for respondent.

BEATTY, C. J. This is an action to recover damages on account of the seizure by defendant, under a writ of attachment, of certain goods claimed by the plaintiff. The case was under the following circumstances: On the 15th of August, 1888, L. M. Sukeforth, who, for a number of years theretofore, had carried on a certain carpet business at Nevada City, being largely indebted and insolvent, sold, transferred, and delivered to the plaintiff, who is his brother, for a nominal consideration of \$1,500, his entire stock in trade, all his outstanding bills and accounts, and all other property exempt from execution which he then possessed. Among his creditors, at the time of this transfer, were Sloan & Co., wholesale carpet dealers, who caused a suit to be instituted upon their claim, and, in said suit, caused an attachment to issue, which was levied by the defendant, as sheriff of Nevada county, on the stock of carpets, etc., then in the possession of the plaintiff, and claimed by him as vendee of his brother. Thereupon, this action was commenced against the sheriff, who defends upon the ground that the sale from L. M. Sukeforth to the plaintiff was fraudulent and void as to creditors. The case was tried by a jury, who found for the plaintiff, and the defendant appeals from the judgment, and from an order denying his motion for a new trial. At the trial in the superior court all questions of fact were eliminated from the case by the mutual admissions of counsel, except the single one of fraud in the sale, and all the assignments of error, which we are asked to consider, relate exclusively to that matter.

A preliminary objection is made by the respondent to any consideration of the errors assigned, upon the ground that the answer of the defendant was insufficient to raise the issue of fraud. The allegations of the answer upon this point are as follows: "That the defendant is informed and believes, and, upon such information and belief, so avers the fact to be, that, on or about the said 15th day of August, 1888, while said L. M. Sukeforth was so as aforesaid engaged in business, and while he was so aforesaid indebted, he, said L. M. Sukeforth, and the plaintiff, who is his brother, conspired together for the purpose and with the intent to hinder, delay, and defraud the creditors of said L. M. Sukeforth out of their just debts and demands against him, said L. M. Sukeforth; and with such purpose and intent, the said L. M. Sukeforth made a pretended, false, and fraudulent sale of the property mentioned in plaintiff's complaint, and of all other property, save such as is by law exempt from execution, owned by said L. M. Sukeforth, to the plaintiff, and, with such purpose and intent, the said plaintiff received said pretended, false, and fraudulent conveyance; and thereupon said plaintiff took possession of said property, and so held the same, and not otherwise."

If there had been a demurrer to the answer, it would probably be held, on the authority of *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. Rep. 950, and other cases cited by respondent, that these allegations were insufficient as a plea of fraud. Or, if evidence tending to prove the supposed fraud had been objected to at the trial, upon the ground of immateriality, the objection would probably have been sustained, unless the answer had been amended. But there was no demurrer to the answer, and at the trial evidence was offered and admitted without any objection whatever, which tended in the strongest manner to establish every fact necessary to invalidate the sale on the ground of fraud. The question therefore is whether a party, who has treated an answer containing a general allegation of fraud as sufficient to raise the issue by going into a trial of all the questions involved without any objection, can make the point here for the first time, that there is no such issue in the case. We think there can be no manner of doubt that, if the verdict and judgment in this case had been in favor of the defendant, and the plaintiff had been appealing, he would not have been heard to allege the defect in the answer, which he relies on here to prevent a consideration of the errors assigned by the defendant. In *King v. Davis*, 34 Cal. 106, the plaintiffs were appealing, and in this court objected to the answer on precisely the ground taken by the respondent here. But the court said: "The point made by the appellant, that the answer does not make an issue of fraud, cannot be considered by us further than to say that it comes too late. The answer contains a general allegation of fraud, and the appellant went to trial upon the issue thus joined, without making any exception to the answer on the score of insufficiency. Nor was any objection made by the appellant to the testimony introduced by the respondent in support of the issue of fraud; on the contrary, that issue was assumed to have been properly made, and was tried upon its merits. Under these circumstances, an objection to the answer that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, cannot be entertained by us." This proposition, that the failure to allege the particular facts constituting fraud, or estoppel, or other special defenses pleaded in general terms, may be waived by failure to demur, or to object to the evidence offered at the trial, has been affirmed over and over again in a long series of cases running through our reports from the first volume down to the case of *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. Rep. 386. We refer to the following, among many others: *Lee v. Figg*, 37 Cal. 335; *Hutchings v. Castle*, 48 Cal. 155; *Bull v. Ford*, 66 Cal. 176, 4 Pac. Rep. 1175. Against this long list of cases is cited the recent decision of department 1 of this court in *Albertoli v. Branham*, 80 Cal. 633, 22 Pac. Rep. 404, which is supposed to establish a different doctrine. If that case could not be distinguished from this, it would be sufficient to say that it is not law. A decision of one department of this court cannot be held to have over-

ruled a long line of cases decided by the whole court, especially when they are not even named, or otherwise referred to, in the department decision, and were evidently not considered. But the truth is that case differed from this, and from the cases above cited, in the important particular that the evidence of fraud was objected to at the trial, though the report does not show it. By reason of this fact, probably counsel for defendant did not make the point that there had been any waiver of defects in his plea of fraud, and did not cite any of the cases holding the doctrine above quoted from *King v. Davis*. His whole contention was that his plea was sufficient, and that was the only question which the department decided. Therefore, the rule of *King v. Davis* is still unquestionably the law of this state, as it unquestionably ought to be. But the respondent contends that it does not apply to this case, because—*First*. The answer was in such form that he could not have demurred to it on any ground allowed by the statute, and, therefore, he waived nothing by failure to demur. *Second*. The record does not show that he failed to object to evidence of fraud. *Third*. The defect in the plea was not cured by verdict, as in *King v. Davis*, and other cases in which the verdict was in favor of, and not against, the plea, as it is in this case.

With respect to the first point, respondent says the plea of fraud was not separately stated, but was coupled with a denial of plaintiff's ownership, which made the answer good against the general demurrer to the whole answer, and a demurrer to the plea of fraud impracticable. We think, however, that the plea of fraud is separately stated in the answer, and might have been separately demurred to. But, if it was not separately stated, it must be regarded as qualifying the denial, in general terms, of plaintiff's ownership, and showing that such denial meant nothing more than that the plaintiff was not owner of the goods, because the transfer from L. M. Sukeforth was void as to creditors, by reason of fraud. In which case, assuming that the fraud was insufficiently pleaded, the whole answer was demurrable, on the ground that it did not state facts sufficient to constitute a defense, or that it was ambiguous, uncertain, and unintelligible. Code Civil Proc. § 444.

As to the second point. It is true, as contended by respondent, that there is no express statement in the record to the effect that he failed to object to the evidence of fraud, but we do not deem such an express statement necessary, if the fact can be clearly inferred from the statement, as we think it can. The defendant, in moving for a new trial, specified in his statement the particular grounds upon which he relied, and every specification of fact or law showed that he relied upon having proved every fact necessary to establish a fraudulent sale. He also set out the evidence to sustain his specifications, all appearing to have been received, without any objection, upon the ground that fraud had not been pleaded. If any such objection had been made, it was the right of the respondent to amend the proposed

statement so as to show it, and undoubtedly he would have done so. The fact, therefore, that no objection appears to have been made is proof that there was none. To hold otherwise would destroy all the advantage of the doctrine of waiver; for, in all cases where the party had not been warned of the defects of his plea by demurrer or objection to evidence, he would be wholly unaware of the necessity of making it appear by his statement or bill of exceptions that he had not been warned, and the court would merely have saved him from one snare in order to involve him in another.

As to the third ground for denying the defendant the benefit of the doctrine of waiver, we think that the fact that he is appealing is rather in his favor than otherwise. In *King v. Davis*, as in all the cases in which the plaintiff was appealing, the only consequence of a reversal of the judgment on account of the insufficiency of the plea would have been a retrial of the cause upon amended pleadings; but to affirm the judgment on that ground, when the defendant is appealing, would leave him without remedy, or hope of redress. Therefore, when he is appealing in a meritorious case, in which he might prevail on a new trial under correct rulings, it would be even more unjust to allow plaintiff to object to his plea in this court for the first time than it would have been to allow the objection in the cases cited. For these reasons we conclude that the defendant is entitled to have his appeal considered on its merits.

His first proposition is that the evidence showed, without substantial conflict, that the transfer of the property in controversy by L. M. Sukeforth to plaintiff was fraudulent and void as to creditors, and that the superior court erred in not granting a new trial on that ground. It is certain that many facts were established, without any conflict in the evidence, from which the jury would have been justified in inferring a fraudulent intent upon the part of plaintiff and his brother in making and accepting the transfer; but we are not willing to say that such inference was absolutely necessary. It is, however, certain that the case was such as entitled the defendant to have the issue of fraud submitted to the jury upon instructions fully and fairly stating the law applicable thereto. This we think was not done, the court having given instructions that should have been refused or qualified, and refused instructions that should have been given. But here, again, we are met with the technical objection that the errors of the court in giving and refusing instructions cannot be reviewed, because they were not excepted to in time, or at all. The objection is based upon the following statement in the record: "After the officer had been sworn to take charge of the jury, and as the jurors were retiring, but before they were out of the court-room, counsel for the defendant stepped up to the side of the bench, and said to the court: 'I would like an exception entered to all the instructions given by the court, at the request of the plaintiff, to all the instructions asked by the defendant, and refused by the court,

and to all instructions given by the court on its own motion.' The court said: 'Have any exceptions entered you desire,' Counsel said: 'Shall I have the clerk enter them?' The court replied: 'If you choose to do so.' Neither the minutes of the court, kept by the clerk, nor the reporter's notes of the trial, show that any exception to instructions was reserved or entered." This shows very clearly that a sufficient exception was taken to the written requests to charge given and refused, (*McCreery v. Everding*, 44 Cal. 249; *Shea v. Railroad Co.*, Id. 429,) though it was probably insufficient as an exception to the oral charge of the court, (*Rider v. Edgar*, 54 Cal. 130, and cases there cited.) We will, therefore, consider only the exceptions to the written charges.

It was error to give plaintiff's instruction No. 15, which was as follows: "If you find a verdict for the plaintiff in this case, your verdict will be for the value of the property converted by the defendant at the time of the conversion, not exceeding the sum of \$4,000, together with interest thereon from August 25, 1888, to this date, at the rate of seven per cent. per annum." The property taken by defendant was alleged in the complaint, and admitted by the answer, to be worth \$4,000, and a verdict for the plaintiff could not properly have been rendered for less than \$4,000, and interest. Under this instruction, the jury were allowed to find, and they did find, a verdict for less than \$4,000. This does not look like an injury to the defendant, but he complains that he was injured by the instruction in this way. If the jury had been compelled to find for the plaintiff, for \$4,000, or not at all, they would have found for defendant, but, being allowed to find a smaller verdict for plaintiff, they eased their consciences by a sort of compromise between what they wished and what the law demanded. We scarcely think that this would have been a ground for reversal, but as the case is to be remanded for a new trial on other grounds, and as the defendant deems himself injured by this instruction, we feel constrained to pronounce it erroneous.

It cannot perhaps be said that the first, eleventh, and thirteenth instructions are positively erroneous. They are all to the effect that a transfer of property by a debtor to one creditor in preference to others is not necessarily fraudulent. It would have been better, however, in view of the facts of this case, to have added the qualification that such transfer must be made in good faith.

The instructions asked by defendant, and numbered 4, 6, 11, and 16, were all correct and pertinent, and the refusal to give them was error, and error clearly prejudicial to the defendant. By the first, (No. 4,) the defendant sought to impress upon the jury the view that a man is guilty of fraud in doing what the law deems fraudulent, although he may not be conscious that he is committing any wrong. By the second, (No. 6,) the court was asked to instruct the jury that the acceptance by a creditor from an insolvent debtor of an amount of property largely in excess of his demand is a circumstance tending to

prove a fraudulent intent. By the third, (No. 11,) the court was asked to charge as follows: "If a debtor, who is insolvent, transfer to one of his creditors all his property, except such as is exempt from execution, with an understanding or agreement between himself and his creditor that the latter will dispose of the property so transferred, and, after paying himself, refund whatever remains to the debtor, such an understanding or agreement would be a circumstance tending to show that the transfer was made with intent to delay and defraud creditors. And, where the value of the property so transferred is grossly in excess of the creditor's claim, that is a circumstance tending to show that such an understanding exists." The fourth (No. 16) contains a correct statement as to the necessity in most cases of relying upon circumstantial or presumptive evidence to prove fraud, and of the amount of proof required to establish it satisfactorily. From the character of the evidence in this case, it was important that the jury should be correctly informed on all these points, and, for their error in refusing these instructions, the judgment and order appealed from must be reversed. We see no error in the other rulings complained of. Judgment and order reversed, and cause remanded.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

87 Cal. 390

VANCE v. SUPERIOR COURT OF SACRAMENTO COUNTY *et al.* (No. 13,936.)

(*Supreme Court of California.* Jan. 4, 1891.)

BILL OF EXCEPTIONS—SETTLEMENT—POWER OF SUPREME COURT.

Code Civil Proc. Cal. § 652, providing, "if the judge in any case refuses to allow an exception in accordance with the fact, the party desiring the bill settled may apply by petition to the supreme court to prove the same," does not apply to a case where the trial court in settling the bill of exceptions makes amendments in the statement of the proceedings and evidence.

In bank.

Amos H. Carpenter, for petitioner.
Wilson & Wilson and A. L. Rhodes, for respondent.

MCFARLAND, J. This proceeding is in the form of an original petition to this court in which it is stated (substantially) that the petitioner, Vance, was a defendant in a certain action in the court of respondent; that judgment having been rendered against him in said action, he presented to the respondent, judge of said court, a draft of a bill of exceptions, which, it is averred, contained a true statement of the proceedings and evidence in said action; that the said judge changed the said draft by striking out certain things from its statement of said proceedings and evidence, and inserting certain other things therein, and settled said bill as so amended by him; and that the amendments made by said judge were incorrect and untrue. The prayer of the petition is that this court "will allow and settle said bill of exceptions * * * as set forth in the printed pages of this pe-

tition." The printed pages of the petition contain the entire draft of the bill of exceptions, which purports to state all the proceedings and evidence in the action referred to; and the written part shows the amendments made by the judge before the settlement. The amendments do not appear to us to be material, and yet they may have some importance which does not appear here.

If this proceeding can be maintained at all, it must be by virtue of section 652, Code Civil Proc. The language of that section is as follows: "If the judge in any case refuse to allow an exception in accordance with the fact, the party desiring the bill settled, may apply by petition to the supreme court to prove the same." Now, it seems quite apparent upon the face of this language that the petition must be based upon the refusal of the judge to allow an exception which is "an objection upon a matter of law to a decision made * * * by a court, tribunal, judge, or other judicial officer," (Code Civil Proc. § 646;) but, in the petition now before us, there is no averment or showing or pretense that the respondent refused to allow any exception whatever, or that the proceedings or evidence about which the dispute occurs had any reference whatever to any exception which he refused to allow. The petitioner, therefore, clearly fails to bring himself within the language of the section. It is argued, however, by petitioner, as it has been argued by counsel in other recent cases, that there should be no "narrow" construction given to section 652, but that this court should construe it to extend to every imaginable case where, in a statement on motion for a new trial, or (which is practically the same thing) in a long bill of exceptions covering the whole trial, there is a dispute between the attorney and the presiding judge as to what evidence had been introduced, or what in other respects had occurred at the trial. This is an attempt, without warrant in the canons of construction, to assume that the legislature meant more than it said. No interpretation can justly be called "narrow" which follows statutory language which is itself *ex industria* narrow. When section 652 was enacted, the general statutory law, in accordance with the inherent distinction between trial and appellate courts, was that the judge of the trial court alone should make that record which otherwise would not be record, by settling statements and bills of exceptions; and that the appellate court should act upon records as they came to it. If the legislature had intended to entirely overturn that ancient rule, and to send the appellate down into the trial court to construct for the latter an entire history of a trial there, it certainly would not have confined itself to the "narrow" language which it employs. But it evidently approached the subject with the greatest caution. It said nothing about statements on motion for new trial, or about what evidence, or what history of proceedings generally, should go into statements or general bills of exceptions, nor did it

undertake to give this court general power to reconstruct such statements or bills, or determine what evidence should go into or be stricken out of them. It refers solely to a case where the judge is charged with having refused to allow an exception, that is, where a party claims that he made an "objection upon a matter of law to a decision made" by the court, and took an exception to the decision, and the court refuses to certify in a bill or statement that such an exception was taken, or that such an occurrence took place. In such a case the party may prove, if he is able, in this court, that he did take such exception, and may prove, no doubt, in that connection, sufficient surrounding facts to show what the point of exception is. If he succeeded in making his proof, his exception will be here put into a bill, certified by this court through its chief justice, and filed with the clerk below, where it will take its place among the other things which constitute the record. But when the Code speaks of an exception which the judge has refused to allow, it necessarily refers to an exception which the judge had the power to allow, and section 652 has no application except where a judge has refused to allow such an exception. If it be an evil that a statement of what evidence was introduced, made by a judge who presided over the trial, and who acts in his judicial character, and under his judicial oath, cannot be overcome by the contradictory statement of somebody else, why it must be put into that large class of evils (real or imaginary) which this court has no jurisdiction to remedy. These views are in accordance with *Landers v. Landers*, 82 Cal. 480, 23 Pac. Rep. 126. They are also expressly held in the recent case of *Hyde v. Boyle*, 24 Pac. Rep. 1059, (decided November 7, 1890,) although in the latter case it does not appear that the opinion was concurred in by a majority of the court. And, for the reasons above stated, the application in the case at bar must be dismissed.

It may be noticed that counsel for respondent raises here, for the first time, the point that section 652 is unconstitutional, for the reason that by it the legislature undertook to confer upon this court powers, and to impose upon it duties, not embraced in any of the categories of jurisdiction enumerated in that part of the constitution by which the court is created. But, as the case is already disposed of, we do not care to consider the constitutional question at this time. The prayer of the petition is denied, and the proceeding dismissed.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.

thereon the sum of \$300. Judgment was rendered against appellant for the balance of \$343.30, and his motion for a new trial denied. Appellant's acceptance of the order drawn against him by the firm of Joyce & Duncan was only verbal, and upon the trial he objected to the admission of the evidence showing such verbal acceptance, and also to the introduction of the order itself, upon the ground that such acceptance, not being in writing, was not binding, and that the order itself was incompetent without a written acceptance, and these objections being overruled are assigned as error. The court did not err in overruling appellant's objection to this evidence. *Wheatley v. Strobe*, 12 Cal. 92. The evidence is sufficient to support the findings, and we find no error in the record. Judgment and order affirmed.

We concur: GAROUTTE, J.; PATERSON, J.

(87 Cal. 428)

CAMPBELL v. THOMAS. (No. 13,891.)

(*Supreme Court of California*. Jan. 5, 1891.)

REAL-ESTATE AGENTS—COMMISSION.

Defendant, having only possessory title to a reservoir dam site, appointed plaintiff his agent to sell it, informing him that he would get the legal title, and agreeing that plaintiff should have a certain amount if he effected a sale to be approved by defendant, or if defendant made a sale without consulting plaintiff. Thereafter defendant obtained the legal title, and sold the property. *Held*, that plaintiff was entitled to the amount provided by his contract.

Department 2. Appeal from superior court, Los Angeles county; JOHN R. AITKEN, Judge.

Waters & Gird, for appellant. *E. E. Rowell and Paris & Fox*, for respondent.

McFARLAND, J. This is an action to recover two-fifths of the amount for which certain property was sold by defendant. The court gave judgment for plaintiff for \$1,850.80, and defendant appeals. The defendant and other persons entered into a written contract with plaintiff by which plaintiff was appointed their agent to negotiate a sale of a certain reservoir dam site, situated on the San Jacinto river in San Diego county, and which they agreed that if plaintiff effected a sale to be approved by them, they would give him two-fifths of the purchase price, and that if they, themselves, made a sale without consulting plaintiff, he was to have the same percentage as though he had effected the sale. While this contract was still in force, and plaintiff was still their agent, they effected a sale without consulting him, and, on that sale, defendant received property of the value of \$4,627, for two-fifths of which the judgment was rendered. At the trial, a great many exceptions were taken which are not referred to in appellant's brief, and which do not seem to present any material error. The real point insisted on by appellant is that the property sold was not the property mentioned in the contract. The facts on which this point rests are these: At the time of the contract defendant did not have the legal title to the reservoir dam site, but only a possessory title. He had

[87 Cal. 424]

JOYCE v. WING YET LUNG. (No. 13,687.)

(*Supreme Court of California*. Jan. 5, 1891.)

EQUITABLE ASSIGNMENT—VERBAL ACCEPTANCE.

An order drawn by a creditor on his debtor for the whole amount of the indebtedness operates as an equitable assignment of the debt to the payee, and a verbal acceptance of the order by the debtor is valid.

Department 1. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

L. F. Fisher and C. C. Stephen, for appellant. *R. Dunnigan*, for respondent.

DE HAVEN, J. The findings show that Wing Yet Lung was on March 27, 1888, indebted to the firm of Joyce & Duncan in the sum of \$643.30, and that firm being also indebted to the respondent in the same amount, they upon that day gave an order requesting the appellant to pay respondent the sum of \$643.30. Said order was accepted by appellant and he paid

posted notices claiming the site, and also certain water-rights, and claimed to be in possession. This site was on section 7, and was consequently railroad land. He told plaintiff that he had made arrangements with the railroad land agent, and that as soon as the land was graded and in the market, he would get title from the railroad company. Afterwards such title was procured, and although in the sale the property was described as so much land, it was the same land that constituted the reservoir dam site described in the contract, and was bought by the purchasers, Judson, Potts, and Mayberry, for the express purpose of a reservoir dam site, for which purpose it was mainly valuable. The facts, therefore, that a better title was procured after the making of the contract, and that the property was described in the sale as land, do not defeat the contract. It is clear that the property mentioned in the contract, and the property sold, was the same. Judgment and order denying a new trial affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(87 Cal. 345)

RYAN v. FITZGERALD. (No. 12,962.)

(*Supreme Court of California.* Jan. 3, 1891.)

CLAIM AND DELIVERY—VERDICT—JUDGMENT—UNCERTAINTY—DAMAGES.

1. In an action of claim and delivery, a verdict for plaintiff for the possession of the property, or its value, is good, under Code Civil Proc. Cal. § 627, prescribing what the verdict shall contain, but not requiring that there shall be any findings as to delivery.

2. In an action of claim and delivery against a constable for property taken on execution, where damages are claimed for both the taking and the detention, a verdict for damages in a certain sum is good, though it does not specify whether the damages are for the taking, or the detention, or for both.

3. An objection to the form of the verdict, in that it omits to state whether the damages given are for the taking, or the detention, or for both, cannot be urged for the first time on appeal.

4. Where the verdict and judgment for plaintiff for part of the property are silent as to the balance, and defendant in his answer asks for the return of the property, which from the record appears to be in plaintiff's possession, the judgment will be so modified as to require plaintiff to return to defendant that part as to which the verdict and judgment are silent.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county.

G. W. Langan, for appellant. D. M. Connor, for respondent.

FOOTE, C. This action of claim and delivery was for the recovery of the possession of certain horses and colts and two mowers, or their value, and damages for their taking and detention. The defendant admits the taking of the property, as a constable, under a writ of execution on a judgment against Jeremiah Ryan, the assignee of the plaintiff. The cause was tried by a jury, who returned this verdict: "We, the jury in the above-entitled cause, find for the plaintiff the possession of the following property: The horses and colts described in the complaint, or their value, the sum of \$1,225, with damages in the sum of \$48.55." Upon that ver-

dict a judgment was rendered for the plaintiff that he have and receive possession of the property mentioned in the verdict, specifying it, "or for the sum of \$1,225, the value thereof, in case a delivery thereof cannot be had, and in case a delivery of any portion thereof cannot be had, then for the value of such portion of said property, together with \$48.55 damages, and for costs taxed at \$39.50." From this judgment, an appeal is taken on the judgment roll, and the appellant claims a reversal thereof, because: "The verdict is uncertain in this: It does not provide for a delivery of the property to the plaintiff, if delivery can be had, and does not, nor does the judgment, state for what the damages are given. The complaint claims damages for taking as well as for detention. Damages for detention only are permitted, and, so far as appears, the damages may have been awarded for the taking only." It was unnecessary that the verdict should have provided for any delivery of the property, if such could be had. When the jury found the right of possession to be in the plaintiff, then the conclusion of law followed, as provided in section 667 of the Code of Civil Procedure, that he was entitled to delivery, if it could be had, and, if not, to the value of the property as found by the jury in the alternative. This the judgment must contain, but not the verdict; for, as to the judgment, the form of it must be as provided in the section of the Code of Civil Procedure supra, but section 627 of the same Code, which prescribes what the verdict of the jury shall contain, requires no finding as to delivery at all.

As to the second matter of objection, that in reference to the uncertainty of the verdict for damages, whether it is given for taking or detention, it may be said: That in an action of the kind in hand, damages may be claimed and recovered for both taking and detention. *Arzaga v. Villalba*, 24 Pac. Rep. 656. And the verdict being for a sum certain for damages, not specifying which kind, will be presumed to cover both grounds alleged for damage. Again, the objection going to the form of the verdict should have been taken in the court below, and it is too late to urge it here. *Campbell v. Jones*, 41 Cal. 515.

It is urged further that, because the jury found for the plaintiff for the possession of a part of the property only, and as to the balance their verdict was silent, that a judgment based thereon is void, as not responsive to the issue raised by the pleadings,—that is, the right of possession of the whole of the property sued for. Conceding that, if such a verdict had been rendered for the defendant, it would have been insufficient to support the judgment, under the rule laid down in *Muller v. Jewell*, 66 Cal. 216,¹ yet the defendant here does not allege in his answer that the plaintiff has the possession of any of the property, but that an officer of the law has it under a writ in this case. The plaintiff has only obtained judgment for a part of the property, and has no right

to possession of the balance. There is nothing to show but that the defendant is entitled thereto, and that it cannot be withheld from him. The verdict and judgment here being silent as to the balance of the property, it must be held that the plaintiff was denied any further relief than he has obtained, and he is precluded from any further litigation with the defendant as to this balance. *Gray v. Dougherty*, 25 Cal. 277. But in this case the defendant has asked for a return of the property, and it does not appear that he has given bond and sureties, who have justified, and in that case it would have been the sheriff's duty, under section 515, Code Civil Proc., to have delivered the property to the plaintiff, and it must be presumed that he has done so. Therefore, since the plaintiff has not been determined by the verdict and judgment to be entitled to this balance of the property, the judgment here should be so modified as to require his return of it to the defendant, and in other respects the judgment should be affirmed, and we so advise.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. Ordered the judgment be modified in accordance with the views above expressed, and, as so modified, the judgment is affirmed.

(87 Cal. 367)

COFFEY v. GRAND COUNCIL. (No. 14,010.)

(Supreme Court of California. Jan. 4, 1891.)

MANDAMUS—SETTLEMENT OF BILL OF EXCEPTIONS.

A *mandamus* will not be granted to compel a judge to settle a bill of exceptions, where it appears that counsel for petitioner served a statement to which amendments were proposed, which he rejected, and that then he set a day and hour at which the statement and amendments would be presented to the judge for settlement, but, by reason of other engagements, failed to appear at the appointed hour, though he did appear later in the day, but did not then ask for a settlement of the statement, nor ask the opposing counsel to consent to a statement until two days after.

In bank.

W. F. Stafford, for petitioner. H. H. Reid, for respondent.

PATERSON, J. This is an application for a writ of mandate to compel Hon. J. P. Hoge, a judge of the superior court, to settle a bill of exceptions in the case of Coffey vs. The Grand Council of the Young Men's Institute, and should be entitled "Grand Council vs. Hoge, Judge." On the petitioner's own showing, we think it is not entitled to the writ prayed for. After judgment in the court below in favor of the plaintiff, the defendant in due time served its notice of intention to move for a new trial, and proposed statement. Proposed amendments were served January 30, 1890, and on February 3d, defendant served notice that they were not accepted, and that the proposed statement and amendments would be presented to the judge on February 10, 1890, at 10 A. M. Counsel for the plaintiff appeared before the judge at the hour named, but no one appeared on behalf of the defendant, nor was the proper statement presented until

2 o'clock of the day named, when its counsel went to the chambers of the judge, and asked permission to withdraw the proposed statement and amendments for the purpose of seeing if the attorneys for the respective parties could not agree upon a settlement. Two days later, he called at the office of the plaintiff's attorney for a voluntary settlement, but the latter refused to consider the proposal, claiming that defendant had lost the right to a settlement by reason of its laches. Thereupon defendant's counsel incorporated all of the proposed amendments in the statement, and presented an engrossed copy of the same to the judge for his certificate on March 11, 1890, but the latter refused and still refuses to sign the same, claiming that he had lost jurisdiction to act upon it. The petitioner alleges that its counsel was engaged in causes pending in other departments of the superior court, and for that reason overlooked the hour for which the settlement of the statement had been fixed. If there is any power to relieve a party from the effect of such an inadvertence, it is in the court below, not here. The matter was presented to the judge, and the petition shows that the petitioner was given repeated hearings on its application, all parties being present. As stated before, if there was any power anywhere to relieve the petitioner from its default, and if good cause could be shown in that behalf, the court below was the proper tribunal to determine the matter, and we must assume that it did not abuse its discretion on the showing made by the parties. Furthermore, it appears that counsel for the petitioner did not ask the judge to settle the statement when he appeared before the latter, at 2 o'clock, and that he did not leave the papers with the judge, but withdrew them. Instead of going immediately to the attorney for the adverse party, to see if a voluntary settlement could be had, he held the papers for two days, and after being informed that no settlement could be made, the reasons for which were given, he held them for about a month before any attempt was made to secure the certificate of the judge. No excuse is offered for these delays. Counsel for petitioner asked at the hearing to be allowed to amend the petition, so as to set out the conversation between himself and the judge, which occurred at 2 o'clock, February 10th, as fully as it is set out in his affidavit in opposition to the motion made in department 1 of this court, to dismiss the appeal. If the petition can be amended in any case after an alternate writ has been issued, and the respondent has appeared and answered the same, it would be useless to allow it in this case. We have looked into the affidavit referred to, and there is nothing there alleged which would have any material bearing on the question before us. No copy of the petition or of the writ was served on the plaintiff, and respondent has moved to dismiss on that ground. Rule 28 requires the petitioner to serve copies on the party in interest. This would of itself be sufficient ground for dismissing the petition, no offer having been made to comply with the rule. The demurrer is sustained without

leave to amend, and the alternate writ is discharged.

We concur: WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

(87 Cal. 370)

COFFEY v. GRAND COUNCIL. (No. 14,010.)
(Supreme Court of California. Jan. 4, 1891.)

APPEAL—FAILURE TO FILE TRANSCRIPT.

Where no transcript is filed on appeal, and it appears that the judge below has refused to settle a statement, because presented too late, and that a writ of *mandamus* to compel him to do so has been denied, the appeal will be dismissed on motion.

Department 1. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

W. F. Stafford, for appellant. Henry H. Reid and O. T. Shuck, for respondent.

PATERSON, J. This is a motion to dismiss the appeal for failure to file the transcript. The certificate of the clerk makes a *prima facie* case in favor of the moving party, but appellant claims that there is a statement on motion for a new trial, which remains unsettled by the judge of the court below, and which he intends to use on appeal. The judge of the court below, after repeated hearings on appellant's application to settle the statement, has refused to certify to it on the ground that it has lost its right to a statement by its failure to present the same to him for settlement. An application was made to this court in bank for a writ requiring the judge to settle the statement, and the petition has been denied. The facts shown there (*Coffey v. Grand Council*, ante, 547, this day filed) are the same as the facts here. If we assumed that the judge had the power in his discretion to settle the statement after February 10th, it still appears that after repeated applications he has refused to settle the statement, and we must assume that he will continue to do so, and that there can, therefore, be no statement on appeal. The appeal is dismissed.

We concur: WORKS, J.; DE HAVEN, J.

(87 Cal. 441)

LYNCH v. WELBY et al. (No. 13,743.)
(Supreme Court of California. Jan. 5, 1891.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In an action for breach of a contract to purchase all of plaintiff's merchantable beef steers, the question whether the steers were of the kind and quality defendants agreed to take is for the jury, and its verdict, on conflicting evidence, will not be disturbed.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Haggin & Van Ness, (J. M. Wilcoxson, of counsel,) for respondent.

SHARPSTEIN, J. This action is for the recovery of \$3,623 damages, alleged to be sustained by reason of an alleged breach of a contract of the parties by the defendants. The contract was, in effect, that defendants would purchase of the

plaintiff all the steers belonging to him on the 11th day of May, 1888, that were three years old and upwards, and that were then or that would be merchantable beef by the 1st day of July, 1888, the number of which was estimated by the parties to be about 300 head. And the parties further agreed that, if there should arise any question between them as to what steers would make merchantable beef, the question should be decided by arbitration, each party to select one arbitrator, and, if the two could not agree, they should select a third to settle the question. Pursuant to this agreement, plaintiff gathered his said band of cattle, and the defendants selected therefrom 90 head of the largest and most choice steers of said band, and paid the plaintiff therefor at the rate of \$40 per head, and requested plaintiff to have another and complete gathering of the cattle on the 1st day of July, 1888, at which time defendants would take the remainder of the steers as per agreement, and plaintiff had gathered and ready for delivery the residue of his band, consisting of 176 head of steers, which he insisted then, and still insists, were good merchantable steers. Defendants refused to accept all of said steers, but offered to select from said band only so many as in their opinion were then merchantable beef,—48 or possibly 50 head in all. Thereupon plaintiff insisted upon choosing arbitrators, as stipulated in said agreement, to decide how many of said steers were merchantable beef. Plaintiff chose one William Epperson, and the defendants one A. J. Harris, with the understanding if they could not agree they should select a third person to act with them. It does not appear that the arbitrators so selected ever decided that any of said steers were merchantable beef, or that they ever differed or failed to agree upon how many were or were not merchantable beef, or that they ever selected a third person to act with them. The only reason appearing in the record for not proceeding with the arbitration is that the defendant Judge announced that he could not abide by the decision of the arbitrators. He said, according to the testimony of one of the witnesses, that Lynch was not willing to do anything towards settling the matter, and, as far as he (Judge) was concerned, he would not have another thing to do with the cattle, and turned and rode out of the field. That was evidently treated by all of the parties as a revocation by defendants of their agreement to arbitrate. About two weeks after the failure to arbitrate, plaintiff sold 176 head of cattle to Lux & Miller for \$29.68 per head, and this action is prosecuted to recover the difference between the price which defendants agreed to pay for cattle of the kind and quality specified in their agreement with plaintiff, and the price paid for the 176 head sold to Lux & Miller. Whether the cattle which defendants refused to accept were of the kind and quality that they agreed to take is a question upon which there is a plain conflict of evidence, and we cannot disturb the verdict of the jury upon that question. We think the instructions of the court placed the mat-

ters in issue fairly before the jury. Judgment and order affirmed.

We concur: THORNTON, J.; MCFARLAND, J.

87 Cal. 434

CARPENTER v. HATHAWAY. (No. 13,765.)

(Supreme Court of California. Jan. 5, 1891.)

PARTNERSHIP—LOCATION AND PURCHASE OF PUBLIC LAND—DIVISION OF PROFITS.

1. A verbal agreement that plaintiff should locate and purchase government land for defendant, and that on its resale, to be made for cash as opportunity offered, the proceeds of each sale, after deducting the government price, should be divided equally between them, is consistent with and not superseded by a written acknowledgment given by defendant to plaintiff after nearly all the land had been located and purchased, reciting the fact of its acquisition, and that plaintiff was to share equally in the net profits; and hence the division of the profits is not postponed by the written acknowledgment until all the land has been resold, but the division is to take place on the resale of any portion thereof, as provided by the verbal agreement.

2. The fact that defendant borrowed the money with which to purchase the land from the government does not entitle him to deduct the interest, before dividing the proceeds on a resale, as the agreement does not so stipulate.

3. A decree that plaintiff is entitled to an undivided one-half interest in the land remaining unsold, subject to a lien in favor of defendant for the amount of the purchase price, is not erroneous for its failure to provide for the payment of taxes to be subsequently levied on the land, as the interest awarded to plaintiff is taxable to himself alone, and not to defendant.

4. Defendant cannot complain of the erroneous action of the court in allowing him interest on the purchase price of a portion of the land acquired after the execution of the written acknowledgment.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

William Shipsey, for appellant. *W. B. Dillard*, for respondent.

GIBSON, C. Plaintiff brought this action to dissolve a partnership, for an accounting, and to establish his interest in certain lands acquired as partners, and obtained a judgment in his favor. Defendant appeals from the judgment, also from an order denying him a new trial. The main facts, as shown by the findings, may be briefly stated as follows: About November 15, 1885, the plaintiff, who was then county surveyor of San Luis Obispo county, had special knowledge of the location and quality of certain large tracts of vacant government land on the Carisa plains in that county, then offered at private sale for \$1.25 per acre, but he was without means to purchase any of the land. On or about that date, he and the defendant, who was possessed of both means and credit, entered into a verbal agreement, whereby the plaintiff, upon his part, agreed to assist in pointing out, locating and entering in the name of the defendant, such portions of the lands as the latter might deem it advisable to purchase for their joint benefit, and the defendant, upon his part, agreed, in consideration thereof, to furnish a team and wagon for the inspection of the lands, to purchase

the lands of the government, and furnish the necessary money therefor, and, when so purchased, to take charge of and sell the same for cash at a reasonable profit as opportunities might occur, and, after each sale, to deduct from the proceeds of each sale the price paid to the government for the land sold, and pay over promptly to the plaintiff one-half of the remainder. Between the date of the agreement and the 5th day of June, 1886, the plaintiff and the defendant had, pursuant to the agreement, acquired 3,169 acres of land, the title to which stood in the name of the defendant. Upon the latter date, defendant gave plaintiff a written acknowledgment to the effect that the defendant had acquired title from the United States government to 3,169 acres of land, and that it was understood and agreed that the plaintiff was to share equally with the defendant in the net profits of the land. Thereafter, about August 15, 1886, and pursuant to the same agreement, the defendant acquired title to 640 acres of land. On April 11, 1887, while all the lands were still held under the agreement, the defendant sold and conveyed to one A. R. Taylor, a near relative of the defendant, 1,937 acres of land for the sum of two dollars per acre. Of this price, he received but one dollar per acre, and voluntarily, but without the plaintiff's consent, and contrary to their agreement, gave credit to the grantee for the remainder of the purchase price, which still remains unpaid, the defendant not having taken steps to collect it. Had this latter amount been collected, the net proceeds of the sale, after deducting the sum of \$1.25 per acre paid to the government, would have been the sum of \$1,445, one-half of which the plaintiff would have been entitled to. Defendant, however, paid him but \$125 on account, which the plaintiff admitted in his complaint. On June 1, 1889, and at various times subsequently, the plaintiff demanded of the defendant an account of the lands sold, and the money received therefor, and also the payment to him of his share of the net proceeds of the sale; but the defendant failed and refused to render him any account, or to pay him any portion of the net profits of the sale, except the sum of \$125, admitted as before stated. Prior to the first demand for an account of the lands sold having been made, that is, on November 1, 1888, the defendant received an offer of \$3 per acre for all the lands acquired under the agreement, and was urged by the plaintiff to accept it; but, having sold a portion to Taylor, he could not do so, and has ever since been unable to sell the remainder of the lands. The land sold to Taylor was the only portion of the lands that the defendant sold, and the only amount of money, in which the plaintiff had any interest, that the defendant misappropriated, was the amount he gave his relative, Taylor, credit for indefinitely. On these facts, the court awarded the plaintiff \$597.50, with legal interest thereon from the date of the sale of the portion of the land to Taylor, and an undivided one-half interest in the lands remaining unsold, subject, however, to a lien in favor of the defendant for the sum of \$1.25 per acre to

cover the purchase price he paid therefor to the government.

The defendant contends that the writing superseded the oral agreement, and that, according to the former, the profits were not to be divided until all the lands were sold. The verbal agreement, alleged in the complaint as the foundation of the action, was entered into in November, 1885, and all the land in question, except the 640-acre tract, was acquired pursuant to it, nearly seven months before the writing was made, which defendant claims superseded the verbal agreement. The writing itself does not contain anything inconsistent with the verbal agreement. It merely states the substance of it. The only witnesses examined in the cause were the parties to it, and nowhere in their testimony does it appear that the writing was given or received as a contract which was intended to supersede all their previous negotiations and stipulations concerning the same subject-matter. The defendant testified that "there was no written agreement from January till June, and the reason I made that little writing was I was afraid that Carpenter was afraid of my verbal agreement, and I told him at the time my word was as good as my bond." The plaintiff testified: "My contract with defendant became complete when the writing of June 5, 1886, was executed. That writing contains the substance of the agreement." The foregoing is all the testimony that was given concerning the writing, and we think the court was justified in finding therefrom, in view of the contents of the writing itself, that it was given and received as a mere acknowledgment or memorandum of the verbal agreement. The statement of the plaintiff that the contract became complete, etc., must, when read in connection with the defendant's statement of the distrust with which he thought plaintiff regarded him, mean that he (the plaintiff) felt safe in having a tangible and complete acknowledgment of the existence of their verbal agreement and of his interest in the land, the title to which stood wholly in the name of the defendant. The agreement itself was not completely performed at the time the written acknowledgment of it was given to the plaintiff. It was still executory, and remained so until the judgment herein was entered. Now, as the verbal agreement was that the lands were to be sold for cash at a reasonable profit, as opportunities to make sales should occur, and the profits were to be divided promptly after each sale, it is clear that the plaintiff was not compelled to wait until all the lands were sold for his share of the profits.

Defendant further contends that, as he borrowed money with which to purchase the lands, and paid interest thereon, the profits should have been ascertained, in the court below, by deducting from the price for which he sold a portion of the lands to Taylor, not only the \$1.25 per acre paid to the government therefor, but the interest he had paid thereon, and the taxes and other expenses necessarily incurred in acquiring, keeping, and disposing of the property. As to the interest, it

is sufficient to say that it was not stipulated for in the agreement, and, as to taxes and other necessary expenses, even if they were properly chargeable, there was no evidence of them offered, nor claim made therefor at the trial.

It is further urged that no provision was made for the payment of future taxes upon the unsold portion of the lands in which plaintiff was awarded an interest. It was not necessary to make any further provision therefor, because, as that portion of the lands was divided equally between them, and the plaintiff's interest made subject to a lien for \$1.25 per acre in favor of the defendant to secure the purchase price, the plaintiff's interest is taxable to himself alone, and not to the defendant.

As to the 640 acres purchased under the agreement after the written acknowledgment of June 5, 1886, was given, the court, in awarding the plaintiff his half interest therein, in addition to the lien imposed thereon in favor of the defendant for the price per acre paid by him to the government, extended such lien to cover interest at the legal rate from the date of the purchase of the tract. The finding upon which this allowance of interest is based is claimed to be unsupported by the evidence. We are inclined to think so, too; but, as it is in favor of the defendant, he is not injured by it.

It is also claimed by the defendant that the 640-acre tract was erroneously brought within the agreement. The evidence that it was acquired under the agreement is quite strong. Both parties testified that it was so acquired; but the defendant, in order to defeat the plaintiff's claim respecting it, testified as follows: "The written declaration I gave Carpenter embraces all the land described in the complaint, except the 640 acres in sections 5 and 6, township 31 south, 19 east, that I acquired in August afterwards. If he kept his agreement, that was to be included in it." To which we may add: The court found that he fully performed the agreement upon his part, and this finding is supported by the evidence. We advise that the judgment and order be affirmed.

WE CONCUR: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

87 Cal. 430

MILLER V. HIGHLAND DITCH CO. *et al.*
(No. 14,017.)

(Supreme Court of California. Jan. 5, 1891.)

SEVERAL TORT-FEASORS—JOINT LIABILITY.

The several owners of different irrigating ditches, who act independently of each other in the operation of their ditches, are not liable in a joint action for damages sustained by a landowner from an overflow occasioned by the combined waters of all the ditches.

Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

Waters & Gird, Curtis & Otis, and George L. Otis, for appellant. Willis,

Cole & Craig and *Harris & Gregg*, for respondents.

McFARLAND, J. Plaintiff was the owner of a tract of land situated about one mile southerly from the San Bernardino range of mountains. Part of the tract was in a high state of cultivation. Coming out of said mountains, and trending towards plaintiff's land, but not reaching it, is a canon called "Baldrige Canon." The natural waters of said canon would not flow upon plaintiff's land, but, as found by the court, "would spread out on the lower lands without cutting any particular channel, the tendency of the flow being to spread out over the said lower lands north of plaintiff's premises, and become absorbed in the soil." But the defendants, by means of three different ditches, turned foreign water into said canon, and the commingling water from said ditches passed through said canon, and by cutting new channels, etc., flowed out and over plaintiff's land, covering part of it with sand and *débris*, and thus doing him damage. All of the ditches, however, were not owned jointly by all of the defendants. Each ditch was owned and operated by part only of the defendants who had no interest in the other ditches; and there was no concert of action—that is, no common design—between the owners of one ditch and the owners of the other ditches. The action was brought to enjoin all the defendants from continuing the wrong, and also to recover damages jointly against all the defendants for the injury already done. The court gave judgment decreeing an injunction, and also adjudging damages against all the defendants, jointly, for \$972.33. Defendants appeal from the judgment and from an order denying a new trial; and the only point they make is that the joint judgment for damages is erroneous, because there was no concurrent or joint act or negligence on the part of defendants which caused the damage.

It is clear that the rule, as established by the general authorities, is that an action at law for damages cannot be maintained against several defendants jointly when each acted independently of the others, and there was no concert, or unity of design, between them. It is held that, in such a case, the tort of each defendant was several when committed; and that it does not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants; and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors. *Chipman v. Palmer*, 77 N. Y. 51; *Navigation Co. v. Richards*, 57 Pa. St. 142; *Sellick v. Hall*, 47 Conn. 260; *Gould, Waters*, § 222; *Pom. Rem.* §§ 307, 308. The case of *Blaisdell v. Stephens*, 14 Nev. 17, is very similar to the case at bar, and involved the very point under discussion. In that case,

several defendants were sued "for wrongfully flowing waste water from their lands to the injury of plaintiff's ditch, and for an injunction to restrain such wrongful flowing of waste water." It appeared, however, that the defendants "own, occupy, and irrigate separate and distinct tracts or parcels of land each in his own right;" and they moved for a nonsuit upon the ground that it did not appear that the injury complained of "was the result of the joint or concurrent act of defendants." The trial court overruled the motion, and, on appeal the supreme court of Nevada held that the nonsuit should have been granted, and said in its opinion: "The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they cannot be held jointly liable for the acts of each other." On rehearing, however, it was held that the injunction against defendants was proper; but the judgment, so far as it awarded damages, was reversed. The principle has not been changed in this state, either by statute or judicial decision. The latest authority on the point here is *People v. Mining Co.*, 66 Cal. 138, 4 Pac. Rep. 1152. That was a case where it was sought, by the equitable remedy of injunction, to restrain the commission of acts similar to those complained of in the case at bar; and the appellant sought to invoke, as against the injunction, the principle above stated as applicable to actions at law for damages. This court held, however, that the rule did not apply to the equitable remedy; but it expressly stated that it would apply to an action for damages. Counsel for appellant, in support of their position, had cited a number of cases; and, in alluding to them, this court said as follows: "Each of those cases was decided upon the principle that where several persons, acting independently of each other, engage in the commission of wrongful acts, the torts are distinct and not joint; and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert. There can be no doubt of the correctness of that principle, and of its applicability to an action at law for the recovery of damages for the violation of a private right." It may be contended that the earlier case of *Hillman v. Newington*, 57 Cal. 56, established a different doctrine; but it must be remembered that the main purpose of that action was to procure and maintain an injunction. The judgment awarded only nominal damages,—\$1. Before that time, there had been some doubt whether several wrong-doers, acting independently, could be joined in an equitable proceeding to procure an injunction against all; and, indeed, it had been once held in this state (*Keyes v. Water Co.*, 53 Cal. 724) that it could not be done. The language of the court in *Hillman v. Newington* must, therefore, be considered as referring especially to the right of equitable remedy. There was practically no question of damages before the court, and no question was raised as to the distinction between the equitable

and the legal remedy. The case is referred to in the opinion of the court in the later case of *People v. Mining Co.*, above mentioned, where *Hillman v. Newington* is evidently considered as settling only the equitable remedy. And, of course, the distinction is very plain between holding one defendant liable for the past wrongs of all the others, and simply enjoining all from committing wrong in the future. We think, therefore, that under the law as clearly settled, the joint judgment against the defendants for damages is erroneous.

We have considered this case somewhat at length, because it is contended that the rule as above stated will in some instances work a hardship to owners of property injured by the joint consequences of acts of several persons not acting in concert. No doubt there may be cases where it would be difficult to make sufficient proof against one of such persons, if sued separately. But it cannot be made clear that the opposite rule would work less wrong. At all events, we must declare the law as we find it. If the law were changed so that in a case like the one at bar a several judgment could be given against each defendant for the proportionate part of the joint damage which his individual acts had caused, it may be that such change would be in furtherance of justice. But the suggestion of such change could be properly made only to the law-making power. The judgment appealed from, so far as it awards damages against defendants, is reversed, and in all other respects the judgment is affirmed. Let appellant recover the costs of this appeal. Order overruling motion for new trial affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

87 Cal. 423

Ex parte AH SING. (No. 20,705.)

(*Supreme Court of California.* Jan. 4, 1891.)

INFORMATION—SUFFICIENCY—ALLEGATIONS AS TO TIME.

In *habeas corpus* for discharge from a commitment under a prosecution for visiting a gambling-house, the failure of the complaint to set forth the time does not affect the jurisdiction of the court to try the case.

In bank.

Joseph F. Coffey, for petitioner. *Joseph D. Page*, Dist. Atty., for respondent.

THORNTON, J. Application to be discharged on *habeas corpus*. The petitioner, as appears by the return, is in custody of the sheriff of the city and county of San Francisco, by virtue of a commitment upon a conviction by the police court of the city and county aforesaid of a misdemeanor, viz., visiting a gambling place. It is urged that the court below was without jurisdiction, because the time was not set forth in the complaint upon which the conviction was had. This point might have been considered and passed on by the court which rendered the judgment, and might also have been considered and passed on by the superior court, to which the case was carried by appeal of the defendant, and the judgment there affirmed.

We cannot see that the court below was without jurisdiction for the defect claimed which is brought to our attention. The writ is discharged, and the petitioner remanded to the custody of the sheriff of the city and county above mentioned. So ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; PATERSON J.

3 Cal. Unrep. 365

MONTGOMERY v. SAYRE. (No. 13,911.)¹

(*Supreme Court of California.* Jan. 4, 1891.)

WAIVER OF JURY TRIAL—SPECIAL FINDINGS.

1. Where the record shows that two special questions were submitted to the jury which they answered, but gave no general verdict, and that these questions did not cover all the issues in the case; that the trial proceeded, and both parties introduced evidence; and that the case was submitted to the "court for decision and judgment," which was rendered against defendant,—the right to trial by jury was waived by defendant under Code Civil Proc. Cal. § 631, providing that jury trial may be waived by oral consent in open court entered in the minutes or by failure to appear at the trial.

2. Answers to special questions not disposing of all the issues in a case do not constitute a special verdict within Code Civil Proc. Cal. § 624, defining a special verdict to be that by which the jury find the facts; and such special findings, unaccompanied by a general verdict, are of no effect, since by section 625 the special findings only control when they are inconsistent with the general verdict.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Code Civil Proc. Cal. § 631, provides that the right to trial by jury is waived (1) by failing to appear at the trial; (2) by written consent in person or by attorney, filed with the clerk; (3) by oral consent in open court entered in the minutes.

Geo. A. Nourse, for appellant. *W. F. Goad* and *Arthur Rogers*, for respondent.

THORNTON, J. This action was on a promissory note executed by defendant's testator to the plaintiff. It was given to secure the payment of the note of the Pioneer Gold Mining Company to the plaintiff for \$110,000. This last note was indorsed by William S. Chapman. It was further secured by the pledge of all the shares of the capital stock of the Pioneer Gold Mining Company, except 30 shares thereof, and also by a mortgage on the Pioneer mine, then owned by the company above named, executed by said company. The above facts appear and are not disputed. It further appears that there was a prior mortgage executed by the company on the Pioneer mine, on which a suit for foreclosure was brought, and in this suit the plaintiff, who was one of the defendants therein, filed a cross-complaint, asking that his mortgage be foreclosed. This was done, and an order of sale issued directing the proceeds of the sale of the mine under the decree to be applied first to the payment of the prior mortgage, and the remainder upon the plaintiff's mortgage. At the sale under this decree, the plaintiff became the purchaser of the mortgaged premises for \$50,000, of which \$10,415 was paid to the owners of the prior

¹ Reversed in banc. See 27 Pac. 648, 91 Cal. 206.

mortgage, and the remainder, less costs of sale, was applied on the second debt of plaintiff, adjudged then to amount to \$69,426.60. The sheriff's return of sale showed a deficiency due on the second debt to plaintiff, amounting to \$61,534.13. The complaint shows payments on the mortgage debt to plaintiff, including the payment made of a portion of the funds of the sale above mentioned, amounting to \$98,380.82. Judgment for this deficiency was docketed against the mortgagor company and W. S. Chapman. On this judgment payments were made before the commencement of this action, leaving still due, as averred in this complaint, the sum of \$34,551.20. Plaintiff asks judgment on the note sued for, principal and interest thereon, amounting to \$17,120.80. The claim of plaintiff on the note sued on was regularly presented to the defendant's executor, who rejected it. This action was brought on the note to recover the amount above mentioned, to be paid by defendant in due course of administration. It is set up in the answer that the \$110,000 note had been fully paid, and denies that any sum remains due and unpaid on it. Other allegations of the complaint were denied. These need not be fully stated. As an affirmative defense, the defendant set up by his answer the following: "That a transcript of the docket of the deficiency judgment docketed against the Pioneer Mining Company and W. S. Chapman (the maker and indorser of the mortgage note) was filed with the recorder of Fresno county in November, 1887, and thus the judgment became a lien upon all the real property of said W. S. Chapman in said Fresno county; (2) that at and before the filing of said transcript, Chapman owned certain real property described, situated in said county, which was held in the name of W. F. Goad, trustee for plaintiff, Montgomery, for further security for debts due Montgomery from Chapman; (3) that the said lien of said judgment was never enforced against said property of said Chapman, but that said Montgomery, Chapman & Goad, after the death of said A. L. Sayre, sold and conveyed by deed to Thomas E. Hughes all said real property for \$35,000, paid by Hughes to Montgomery, which was received by Montgomery as payment in full of every debt and obligation due from Chapman to him, except the judgment aforesaid, which then amounted to less than \$36,000, and that Montgomery thereupon released said land from the lien of said judgment; (4) that said real estate was then worth \$140,000, and if sold at its real value would have realized enough to pay all debts due Montgomery from Chapman, including said deficiency judgment; (5) that said Montgomery released said land from the lien of said judgment, and released said Chapman from the obligation of said judgment without the consent of defendant." The case was tried by a jury on the 28th of April, 1889, who rendered the following verdict:

Question 1. What was the value, May 15, 1888, of the following lands, viz.: The south half of section 24, section 25, the south-east quarter of section 26 and section 35, all in township 11 south, of range

17 east, from the Mount Diablo base and meridian; also section 1, and the west half of section 15, in township 12 south, of range 17 east, from said base and meridian? Answer. \$136,800. C. C. HARRIS, Foreman."

"Question 2. Did the plaintiff, A. Montgomery, on or about May 15, 1888, release W. S. Chapman from all liability under the judgment in the complaint herein mentioned? Answer. Yes. C. C. HARRIS, Foreman."

This verdict, it appears, was in answer to special questions embracing special issues submitted to the jury by the questions above given. There was no other verdict, and no general verdict; nor does it appear that any general verdict was demanded by either party. It appears from the record that the trial proceeded after the return of the verdict, both parties introduced evidence, and on the 24th and 25th of April, 1889, it is stated "said trial was completed and submitted to the court for decision and judgment, with the privilege to the parties to file briefs herein, which was done." The court subsequently rendered its decision, finding on all the issues in the case, disregarding the verdict, treating it as non-existent, and, in fact, finding contrary to the answers of the jury on the questions submitted to them, and rendered judgment for plaintiff for a sum of money. The defendant appealed.

The above facts are taken from the record, and on them must the solution of the points in this case be made. Was there any verdict rendered on which judgment could be entered? This is an action at law, and the defenses set up on behalf of defendant were all legal defenses. Payment is certainly a legal defense, and so is the discharge of a surety by releasing his principal, or by surrendering a lien on property sufficient, if sold, to pay the debt for which the surety had obligated himself. We have no doubt of the correctness of these rules. Such is the common law, and it is so prescribed in the Civil Code, §§ 2819, 2840. The verdict cannot then be regarded as advisory to the court. The case is not one in equity. It has no such features. All the questions arising on the defenses set up relate to legal defenses. If the facts above mentioned exist, the surety is discharged by operation of law, without the necessity of appealing to a court of equity to obtain such discharge. The fact that the statute requires that the judgment must be entered, payable in due course of administration, does not make this an equity case. This doctrine applies particularly to actions for the recovery of money, which are almost always actions at law. Certainly such must be the form of the judgment in a recovery on a promissory note. By the statute, (Code Civil Proc. § 625,) in an action for the recovery of money, a jury may, in their discretion, render either a general or a special verdict. In such a case as the one before us, the court cannot direct the jury to find a special verdict, but it may, in such a case, and in fact in all cases, instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a writ-

ten finding thereon. This finding on the written question must be returned and filed with the clerk, and entered on the minutes of the court. When the special finding of facts on the questions submitted is inconsistent with the general verdict, the special finding controls the general verdict, and the court is bound to give judgment accordingly; that is, in accordance with the special finding. It must be held, nothing appearing to the contrary, that the court instructed the jury in accordance with law; that is, if they found a general verdict, to find on the questions submitted to them. We cannot assume or presume that the court violated the law in failing to direct the jury to find a general verdict in connection with their answers to the questions, unless the record shows it. The record must put the court in the wrong. If it does not, it must be held that the court acted in accord with the rules of law. We must presume then that the jury did not obey the instructions of the judge, in failing to find a general verdict, as they were told to find. Either party had the right to have the court direct the jury, when they returned their verdict on the questions submitted, to return a general verdict. This was not done, and it must be held that this right was waived by each party to the action.

What, then, is the effect of the verdict which was rendered? Neither party asked for judgment on the verdict as rendered. If this had been asked by either party, the other party might have objected. The objection, if made, should have been sustained, and the result would have been a mistrial. The court could not, of its own motion, have ordered judgment on the verdict. It was not such a verdict as judgment could have been rendered on, unless by consent of both parties. If judgment had been entered on it by consent, the maxim would apply *consensus tolet errorem*, and the judgment would be valid. This was not a special verdict. A special verdict is defined by the Code as that by which the jury find the facts only, leaving the judgment to the court. Code Civil Proc. § 624. The facts found by the jury are all the facts in issue. On these facts so found the court renders judgment. See *Breeze v. Doyle*, 19 Cal. 101. When the jury find a special verdict they are not bound to find a general verdict. In this case they might have returned either a special or a general verdict. Either was within their power; and in this they were beyond the control of the court. Code Civil Proc. § 625. The special finding in this case did not dispose of all the issues. It did not dispose of the defense of payment and other issues. In any point of view it was not a special verdict. It was a special finding, regularly to be accompanied by a general verdict. Not being so accompanied, it was of no legal effect, and no judgment, except by consent of the litigants, could have been entered on it. It was a nullity to which no validity could have been imputed, unless the parties had agreed that it should be regarded, so far as it disposed of the issues in the case, as a controlling finding or verdict. On this point see *Eisemann v. Swan*, 6 Bosw. 668. But the record shows

no such agreement. For all that appears the jury was discharged without finding anything which in law can be held as a verdict, and the record informs us that the parties submitted further evidence: that the trial was completed on the 25th of April, 1869, (one day after the so-called verdict was returned into court;) and that the cause was, on the 25th of April, "submitted to the court for decision and judgment." The verdict seems to have been treated by counsel and court as of no effect. It appears in the transcript that the cause came on regularly for trial; was tried on the 24th and 25th of April, 1889, when the trial was completed. We cannot construe this otherwise than as a statement, which we must hold to be absolutely true, that the trial was not completed until the 25th day of April, 1889, the day after the special findings were filed. Certainly the verdict on an incomplete trial is a nullity, and should be so treated, unless it is shown that the parties gave it effect by a stipulation that it should be regarded as of some validity, and how far it should be so regarded. The defendant had a right to have his cause tried by a jury. This was accorded to him. The jury was called and sworn in the case, and then was discharged without objection, without rendering a verdict. Both parties afterwards went on to try the case, introduced further evidence, and submitted the case for decision and judgment. We cannot hold otherwise than that there was a waiver of a trial by jury, just as effectual as if his consent had been given in open court, and entered on the minutes. The minutes show a consent by action in open court, by proceeding with the trial, introducing further evidence after the jury was discharged, and submitting the case for decision and judgment. Such action was inconsistent with any demand or desire for a jury trial, and should be held a waiver, within the provisions of Section 631, Code Civil Proc.

It is argued that the verdict was not waived. But in our view there was no verdict, and the counsel seems to have so regarded it, or he would have asked for judgment on the verdict. We can put no other construction on the statements in the record of the course that the trial took than that the finding was regarded as no verdict, and that the trial should proceed as if no verdict had been found. No question of waiver arises on the finding, for there was no verdict. It gave the defendant no right, for it conferred none. It cannot be said that the defendant did not waive his right to have judgment entered on the verdict, as the special finding gave no such right to either party. If it had conferred a right to judgment, and the parties had afterwards to complete an incomplete trial, the question might arise, although it would be manifestly unjust to hold either party bound by a verdict on an unfinished and incomplete trial. This disposes of all the questions arising in the cause. There was no motion for a new trial. There is no statement or bill of exceptions in the case, nor any motion made in the court below to set aside the judgment on any ground. We find no error in

the record, and the judgment must be and is affirmed.

We concur: MCFARLAND, J.; SHARP-STEIN, J.

87 Cal. 514
LATHAM v. CITY OF LOS ANGELES *et al.*
(No. 13,612.)

(*Supreme Court of California.* Jan. 23, 1891.)

DEDICATION—EVIDENCE—EXCHANGE OF LANDS.

1. Land within the limits of the pueblo of Los Angeles, was granted by the *ayuntamiento* to a private person, who was put in possession by the *alcalde*. Before the grant, the land was vacant, and was used by adjoining lot-owners in passing to and fro, and sometimes for public celebrations and amusements. *Held*, that this was not sufficient evidence of a dedication to the public to overcome the presumption that the authorities acted within their powers, and conveyed a good title by the grant.

2. That a subsequent owner petitioned the city council for an "exchange or indemnification

for certain lands belonging to her, and now occupied by the public," (being the lot in question,) and that the council passed a resolution directing a concession of other land to be made to her, in pursuance of which a deed was drawn up and signed by the mayor, is not sufficient evidence that the exchange was actually consummated, when there was no proof that the deed was delivered, and it appeared that the city subsequently granted the lot to another.

Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Readon & Daly and *C. McFarland*, for appellant. *Chapman & Hendrick* and *Johnston & Borden*, for respondent.

DE HAVEN, J. This is an action by the plaintiff, Latham, against the defendants the city of Los Angeles and one L. M. Bigelow, to quiet title to certain tracts of land in the city of Los Angeles, but by stipulation between the plaintiff and the said city, filed in the court below, the only portion of the property described in the complaint, now in litigation, is the lot known as the "Engine-House Lot." There was also a stipulation entered into between the plaintiff and the defendant Bigelow by which it was agreed, in addition to other matters, that the plaintiff and said Bigelow were "equally interested and held in equal and undivided parts the lot known as the 'Engine-House Lot.'" The judgment of the court below was to the effect that the plaintiff and said defendant Bigelow are the owners, in equal shares, of said engine-house lot, and that the city of Los Angeles has no right in or title to the same. The defendant city moved for a new trial, which was denied, and from the judgment and the order denying its motion for a new trial, appeals. The appeal is from the whole judgment, and the defendant Bigelow has not been served with notice of appeal. The findings support the judgment. The plaintiff derails title through a grant, or order, made by the *ayuntamiento* of the pueblo of Los Angeles to one Leandry, and the possession given him by the *alcalde*, in pursuance of such order.

That the pueblo had authority to make the grant of the land in question to said Leandry, if it was a house lot, is not questioned; but it is claimed—as we understand the contention of appellant—that the grant is void for uncertainty, and for the further reason that prior to the alleged grant, which was in 1836, the land in question had become a public plaza or street, and for that reason could not be granted for private purposes. We think, however, that the petition and the orders made by the authorities of the pueblo thereon, and the report of the *alcalde* describing the land, of which he had given Leandry possession by order of the *ayuntamiento*, when read together, as they must be, are sufficiently definite, and that the calls therein embrace the land in controversy was shown upon the trial by uncontradicted extrinsic evidence. Nor is the evidence sufficient to show that at the date of this grant the lot in controversy was a public plaza, and therefore beyond the authority of the pueblo to grant. It does appear that it was vacant, and that

it was used by owners of adjacent lots in going to and from such lots, but it is not shown that such lots were granted, with reference to this lot, as a plaza, or that it ever had been in any manner set apart or recognized by the authorities as a plaza. It is also shown that upon certain days the public would use it as a place for celebrating, and for other public amusements. But all of this only shows that, being vacant and unoccupied, it was used as any other vacant land might have been, and it is not sufficient to overthrow the presumption that the authorities of the pueblo of Los Angeles acted within the limits of official authority in making to Leandry the grant or concession in question. That such presumption attaches to the grant we are considering is the effect of the decisions of this court in *Cohas v. Raisin*, 3 Cal. 453; *Payne v. Treadwell*, 16 Cal. 220.

We cannot say that the evidence in this case is such that the trial court must necessarily have found that since said grant Leandry, or any of those who have succeeded to his title, dedicated the lot in question to the public as a plaza, and such being the state of the proof we do not feel authorized to set aside its finding upon this point. When it is sought to show that an owner has, without a conveyance, divested himself of title to land in favor of the public, by way of gift or abandonment, the proof ought to be such as to clearly show that such was the owner's intent. In *Grube v. Nichols*, 36 Ill. 92, it is said: "The intention to dedicate is a vital controlling element in such a grant. A dedication is not an act of omission to assert a right, but it is the affirmative act of the mind of the donor. It arises upon the action and not upon the passive condition of the mind of the owner. The mere non-assertion of a right does not establish a dedication, unless the circumstances establish the purpose or intention to donate the use to the public." There is no evidence in the record of any express declaration or admission by Leandry, or any successor in interest, showing that such dedication was made.

The petition of Mrs. O'Campo praying for "an exchange or indemnification for certain lands belonging to her and now occupied by the public, being the lot at the entrance of Negro alley, into the public square," supposing it to refer to the land in controversy, is not an admission that the same had been dedicated to the public. It is rather an assertion of her right to it, and willingness to either accept pay for it or an exchange of other lands; and the action of the city council directing a concession to be made to her of other land, in accordance with her petition, is not consistent with the claim now made that the lot in controversy was then the property of the city. It would appear from the evidence that in accordance with this resolution of the city council, a deed was drawn up and signed by the mayor, conveying to Mrs. O'Campo a certain lot in the city of Los Angeles. But whether this was actually delivered to her does not so clearly appear. It was, however, delivered to one Olvera, supposed by the mayor to

be her agent. But the deed itself was not produced, nor any witness who had ever seen it in the possession of Mrs. O'Campo, and it was admitted that subsequent thereto the city had conveyed the same lot to another. We cannot say from this evidence that the exchange contemplated by the petition of Mrs. O'Campo and the city council was ever consummated. And in this connection it may be added that the testimony shows that the first public act by which the city attempted to assert dominion over the lot in controversy was by building the engine-house, which was in 1884. The conclusion which we have thus reached upon the merits makes it unnecessary to determine whether the failure to make the defendant Bigelow a party to this appeal entitles the respondent to a judgment dismissing the appeal, and upon this point we express no opinion. Judgment and order affirmed.

We concur: HARRISON, J.; PATERSON, J.

87 Cal. 453

WILHOIT *et al.* v. CUNNINGHAM *et al.* (No. 13,495.)

(*Supreme Court of California.* Jan. 6, 1891.)

INJUNCTION—PLEADING—COMPLAINT—DEMURRER.

1. The complaint alleged that defendant A. levied attachments on B.'s land; that B. was adjudged an insolvent, and A. proved her claims against him; that thereafter, by consent, the insolvency proceedings were dismissed, and B. executed to plaintiffs an assignment for the benefit of his creditors of all his property, including said land; that plaintiffs accepted the trust; that said levies were dissolved; that A. obtained judgments in said attachment suits, and executions were issued, and the sheriff had levied on the land, and, unless restrained by injunction, would sell it, and prevent plaintiffs executing their trust. *Held*, that the complaint was not demurrable as not stating a cause of action, as, even if the debtor had an attachable interest by reason of his right to any residue, the complaint alleged a threatened sale not of such interest, but of the land; and, under Civil Code Cal. § 3457, where an assignment for benefit of creditors is made, the creditors must avail themselves of the assets without preference, or not at all.

2. Ambiguity and uncertainty being made separate grounds of demurrer by Code Civil Proc. Cal. § 430, subd. 7, a demurrer on the ground that the complaint is ambiguous "and" uncertain cannot be sustained, where the complaint is defective in only one of said respects.

3. Though the assignment to plaintiffs would be void if the affidavit required by Civil Code Cal. § 3462, was not attached to and filed with the inventory, and plaintiffs would be without legal capacity to sue, still the complaint is not demurrable by reason of its failure to allege such attachment and filing, as, under Code Civil Proc. Cal. § 433, the omission of the complaint to show plaintiffs' legal capacity to sue must be taken advantage of by answer.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county.

J. C. Campbell, for appellants. *Carter & Smith*, for respondents.

GIBSON, C. This is an appeal by the plaintiffs from a final judgment entered against them upon defendants' demurrer to their complaint, praying that defendants be enjoined from selling the realty in controversy under certain writs of execution. It appears by the complaint that Ella Averill, on the 6th day of October,

1885, commenced two separate actions, in the superior court of San Joaquin county, against M. E. Bryant to recover of him the amounts due upon two promissory notes, and, on the same day, caused a writ of attachment to issue in each action, and be levied upon certain real estate then belonging to Bryant; that thereafter, on the 31st day of the same month, Bryant was by and in the same court adjudged an insolvent debtor, against whom the said creditor Averill, on the 27th day of the same month, proved her several claims, including the two promissory notes above mentioned; that on or about the 30th day of January, 1886, by the consent of defendant Averill, as such creditor, and all the other creditors, the insolvency proceedings were by an order of the court duly dismissed; that, on the 16th day of February, 1886, Bryant, being still insolvent, at the request of defendant Averill and his other creditors, executed and delivered to plaintiffs a deed of assignment of all his property not exempt from execution, for the benefit of his creditors, pursuant to division 4, pt. 2, tit. 3, of the Civil Code, which deed embraced the real estate levied upon by the writs of attachment above mentioned; that the plaintiffs, as such assignees, accepted the trust, and in due time qualified, as required by law, and entered upon, and still continue in, the discharge of the duties of the said trust; that the said deed and a proper inventory were duly filed for record; that defendant Averill assented to the execution and delivery of the deed of assignment to the plaintiffs, and also to the acceptance by plaintiffs of the trust thus created; that, since the said trust was created, the plaintiffs have been the owners, and in the possession of the real estate in controversy, in trust for the benefit of all of the creditors of Bryant, including the defendant Averill; that, prior to the execution of said deed, the levies under the writs of attachment above mentioned were dissolved; that on the 21st day of September, 1887, in the superior court aforesaid, the defendant Averill obtained a judgment in her favor in each of the suits upon the promissory notes, and caused a writ of execution, regular in form, to issue in each case, and to be placed in the hands of her co-defendant Cunningham, as sheriff of San Joaquin county, for service; that the said sheriff has, by virtue of said writs of execution, levied upon and threatens to, and, unless restrained by injunction, will, sell the real estate in question, and thereby cast a cloud upon the plaintiffs' title thereto, which will prevent them from executing their trust expeditiously, and with advantage to the creditors of Bryant; that the said execution levies were made for the express purpose of hindering the plaintiffs from executing their trust. The grounds of the demurrer are—*First*, insufficiency of the facts stated to constitute a cause of action; *second*, ambiguity and uncertainty of the facts in certain specified particulars; *third*, incapacity of the plaintiffs to sue, because it does not appear that the inventory was verified, as required by section 3462 of the Civil Code.

1. In support of the first ground of demurrer, the respondents contend that the

assignor still retains an equitable interest in the land in controversy, which was included in the deed of assignment, and that it is subject to sale upon execution. But this argument does not apply to the facts. The allegation is, that the defendant Cunningham, as sheriff, has levied upon and threatens to sell, not only the assignor's equitable interest in the residuum of the property assigned, but the whole of the property itself, thereby including the assignees' legal title thereto, as well as the equitable interest of the assignor in the residuum, if there should be any. The deed of assignment is controlled by the provisions of the Civil Code relative to trusts. Civil Code, § 3449. Those provisions, so far as applicable here, are as follows: "Sec. 863. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. Sec. 864. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust." The trust created by the deed of assignment here relates to real property, and was expressly created for the benefit of the creditors of the assignor. There was no reservation in it of any estate or interest to the assignor, except that authorized by section 864, supra, wherein the assignor provides that the residuum left after his creditors are satisfied shall be returned to him, his executors, administrators, or assigns. No other estate or interest could be reserved in a trust of this character. Subdivision 4, § 3457, of the Civil Code. The effect of the deed, then, was to divest the assignor of his entire interest and estate in the property assigned, subject to the right to a reconveyance of any residue remaining undisposed of after the creditors are satisfied, or payment of the overplus of the proceeds of the sales of the property. This is in accordance with the weight of authority in other jurisdictions, as shown in *Burrill on Assignments*, (5th Ed.) § 298. Under our law as declared in the Civil Code, an insolvent may, in good faith, make an assignment for the benefit of his creditors, with or without the consent of the latter, and, when such an assignment is made, the creditors must either avail themselves of the assets without preference, (section 3457,) or not at all. The object of the law is to enable a debtor, through his assignee, to dispose of his property for the benefit of his creditors. This object would be defeated, if one of the creditors could ignore the assignment, and sell the property to satisfy his particular claim. Such a sale would, if it could be made, deprive the assignees of the property, or, if it would not, still the sale would cloud the title of the assignees, because, in any action they might have to prosecute for the removal of the cloud so cast, the evidence of the pur-

chaser's title would show that such latter title was derived from the assignor, to overcome which, the assignees would have to prove that the judgments were obtained in actions commenced before the deed of assignment was made upon debts covered and provided for by the deed of assignment. *Pixley v. Huggins*, 15 Cal. 127; *Porter v. Pico*, 55 Cal. 165; *Roth v. Insley*, (Cal.) 24 Pac. Rep. 853. Such a cloud, it is evident, would prevent them from disposing of the property to the advantage of the creditors in the performance of their trust. The respondents further contend that the threatened sales, if made, would not cast a cloud upon the assignees' title to the property, inasmuch as the judgments, upon which the executions were issued, were obtained subsequent to the assignment, and therefore all that could pass under the sales would be the equitable interest of the assignor in the residuum of the property assigned. But the facts here show that the actions, in which she obtained her several judgments, were begun upon subsisting credits before the assignment was made, and that, as such a creditor, she assented to the assignment. Therefore she is one of the creditors for whose benefit the assignment was made, and as such must take her proportionate share with the other creditors. Besides, as already shown, the execution levies were not restricted to the equitable interest of the assignor in the residuum, but were made upon the whole property. It is further claimed by the respondents that as the complaint shows that defendant Averill acquired a lien by attachment in each of the actions in which she obtained her judgments, above mentioned, before the assignment was made, and as it does not appear that those attachments were dissolved, the liens so acquired became merged in the judgments, and, in consequence, she is entitled to sell the realty in question to satisfy such judgments. But it is distinctly alleged that those attachments were dissolved, but the date is not stated. If, however, the absence of the date renders it insufficient, it appears from the allegations respecting the insolvency proceedings which preceded the assignment, and which are pleaded as matters of inducement, that the attachments were levied within one month prior to Bryant's filing his petition in insolvency. Since this is so, the attachments became dissolved by operation of law, (insolvent act of 1880, § 17,) and that which is implied by law need not be pleaded, (*Kraner v. Halsey*, 82 Cal. 209, 22 Pac. Rep. 1137.)

2. The second ground of demurrer is in the conjunctive; that is, that the complaint is ambiguous and uncertain. These are made separate grounds of demurrer by subdivision 7 of section 430 of the Code of Civil Procedure. And, in the case of *Kraner v. Halsey*, supra, it was held that, where such separate grounds of demurrer are conjoined, the complaint must be defective on each, or the demurrer must be overruled. There the complaint was held to be neither ambiguous nor unintelligible, but uncertain in several particulars, and the demurrer upon the ground of ambiguity, unintelligibility, and uncertainty,

not sustainable. In this case, we do not think the complaint is ambiguous. There is but one respect in which it may be said to be so, and that is wherein it is stated that the defendant Averill, as a creditor, proved her claim in the insolvency proceedings several days before Bryant was adjudged an insolvent. But, as those proceedings were dismissed, this allegation is immaterial. The complaint is uncertain with regard to dates, as in *Kraner v. Halsey*, as well as in several other respects, but, as it is not both ambiguous and uncertain, it comes within the rule of that case.

3. As to the capacity of the plaintiffs to maintain this action as assignees, it is urged that, as it does not appear from the complaint, that the affidavit required by section 3462 of the Civil Code was attached to and filed with the inventory, the assignment in consequence was void, and the plaintiffs are therefore without legal capacity to sue. In the case of *District No. 110 v. Feek*, 60 Cal. 405, this court said: "The defendants demurred to the complaint. The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are, in substance, that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. *Bank v. Donnell*, 40 N. Y. 410. A demurrer on the ground that plaintiff has not the legal capacity to sue would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. *Code Civil Proc.* § 433; *Bank v. Donnell*, supra." See, also, *Miller v. Luco*, 80 Cal. 257, 22 Pac. Rep. 195. In the present case it appears by sufficient allegations, the defect not having been specially pointed out under the first ground of demurrer, that Bryant made a valid assignment for the benefit of his creditors, and that the plaintiffs, as assignees thereunder, accepted the trust, and duly qualified as such assignees. It therefore appears affirmatively that the plaintiffs have the legal capacity to sue. And if it be a fact that the affidavit, which seems to be essential to the validity of the assignment, (*Civil Code*, §§ 3461-3463, 3465; *Beardsley v. Frame*, (Cal.) 24 Pac. Rep. 721,) was omitted, then, under the rule applied in *District No. 110 v. Feek*, supra, such omission must be set up in the answer, because it does not affirmatively appear upon the face of the complaint that such affidavit was omitted. We therefore advise that the judgment be reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant defendants leave to answer within the usual time.

We concur: VANCLIEF, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant defendants leave to answer within the usual time.

(87 Cal. xxi)

SARGENT *et al.* v. CUNNINGHAM *et al.* (No. 18,496.)

(*Supreme Court of California.* Jan. 6, 1891.)

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county.

J. C. Campbell, for appellants. Carter & Smith, for respondents.

GIBSON, C. This case is in all material respects like that of *Wilhoit v. Cunningham*, ante, 675, (No. 18,495, this day decided,) and, for the reasons given in that case, we advise that the judgment herein be reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant the defendants leave to answer within the usual time.

We concur: VANCLIEF, C.; BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the trial court to overrule the demurrer to the complaint, and grant the defendants leave to answer within the usual time.

(87 Cal. 192)

KELLOGG v. COCHRAN *et al.* (No. 13,731.)

(*Supreme Court of California.* Dec. 19, 1890.)

INSANE PERSONS—COMMITMENT TO ASYLUM—APPEAL—REHEARING.

1. Pol. Code Cal. § 2217, provides that, where it appears to a judge that a person against whom complaint has been made is insane, he must order his confinement in the insane asylum. *Code Civil Proc.* § 1764, provides that if, on petition of a friend, it shall appear that a person is mentally incompetent to manage his property, the court shall appoint a guardian of his person and estate, and section 1766 provides that, on restoration of his mental capacity, it shall be so adjudged by the court, and the guardianship shall cease. *Pol. Code*, § 2197, provides that insane persons received in the asylum must, upon recovery, be discharged therefrom. By *Act Cal.* March 9, 1885, (*Pol. Code*, p. 350), the resident physician must discharge persons who have been improperly committed. *Held*, that the discharge of an inmate of an insane asylum, over whom no guardian had been appointed, restored him to legal capacity to sue without any further adjudication of his restoration to sanity.

2. The order of commitment of a person to an insane asylum is not conclusive that such person was insane at the time of the commitment.

ON REHEARING.

A rehearing will not be granted in order to consider points not made in the argument upon which the case was originally submitted.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

J. M. Damron and Chapman Bros., for appellant. Wells, Guthrie & Lee and Gottschalk & Luckel, for respondents.

VANCLIEF, C. The purpose of this action is to recover from the defendants damages for a malicious prosecution of the plaintiff as an insane person, and causing him to be unlawfully arrested and committed to the insane asylum at Stockton. A demurrer to the complaint was sustained by the court. The plaintiff declined to amend his complaint, and final judgment was thereupon rendered against him, dismissing his complaint, and for

costs, from which he appeals on the judgment roll. The grounds of demurrer are that the complaint does not state facts sufficient to constitute a cause of action, and "that it appears upon the face of the complaint that the plaintiff has not the legal capacity to sue herein." The substance of those parts of the complaint relevant to these grounds of demurrer is as follows: That on January 28, 1889, the defendants willfully, maliciously, unlawfully, and without probable cause, "caused and procured the plaintiff to be arrested and committed to the state insane asylum at Stockton, state of California, on the charge of insanity; that under and by virtue of said commitment plaintiff was unlawfully and against his will detained and imprisoned in said state insane asylum at Stockton, on said charge of insanity, for and during the period from said 28th day of January, 1889, up to and including the 20th day of February, 1889, whereupon said plaintiff was then and there given leave of absence, and afterwards, to-wit, April 13, 1889, was discharged; that plaintiff was not on said 28th of January, 1889, or ever at any other time, before or since said day, dangerously insane, or insane at all, nor was he at any of said times so far disordered in his mind as to injure health, person, or property, all of which was known by said defendants before and at the time of said arrest and commitment."

The learned counsel for respondents contend that the demurrer was properly sustained, on the ground that the plaintiff had not legal capacity to sue, for the reasons: (1) That it appears on the face of the complaint that the plaintiff had been adjudged to be insane on January 28, 1889, by the judge of a court of record, pursuant to section 2217 of the Political Code, relating to commitments to the state insane asylums; and (2) that such adjudication is conclusive upon the plaintiff not only that he was insane at the time he was so adjudged, but that he continued to be insane at the time this action was commenced, unless before that time he had been found to be of sound mind, and capable of taking care of himself and property, as authorized by section 1766 of the Code of Civil Procedure. It is true that where guardians have been appointed for persons who, by reason of their insanity, imbecility, or habitual drunkenness, are mentally incompetent to manage their property, under statutes in other states similar to article 2, tit. 11, pt. 3, of our Code of Civil Procedure, (sections 1763-1766,) it has been held that an adjudication of such incompetency is conclusive against all persons dealing with the ward until he is restored to capacity to manage his own affairs, by an order of court similar to that authorized by section 1766 of the Code of Civil Procedure. The cases of *Wadsworth v. Sharpsteen*, 8 N. Y. 388, and *Imhoff v. Witmer's Adm'r*, 31 Pa. St. 243, are fair samples of the strongest cases to this effect. In the latter case the court said: "The object of the statute was protection and guardianship over persons and estates of parties wanting capacity to take proper care of either, and to pre-

serve the property of such from being squandered or improvidently used to their own injury and that of their families, if they have any. It is not necessary to adduce reasons to prove the self-evident proposition that, to admit the capacity of control to exist in the lunatic or habitual drunkard over his estate, after inquisition settling his condition in this respect, or submit it to be controverted by evidence of lucid intervals or sobriety at the moment of contracting, would leave the estates of these unfortunate classes about as much exposed as before proceedings had in regard to them. The inquisition and decree, standing of record, was intended for notice to all the world of the incapacity of the particular party to contract. It is the judgment of the law to this effect, and, as a consequence, his acts in regard to his property are absolutely void while the condition exists." In the case cited from 8 N. Y. the court said: "The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals, and therefore, during such intervals, the drunkard has no more authority to deal with, or dispose of, the property, than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication, and the committee could not execute his trust with safety to himself, or benefit to the drunkard or his family." These quotations are made merely to show that the reasons assigned in those cases for holding an adjudication of incompetency conclusive until set aside cannot be applied to the order of a judge in this state committing a person to the state insane asylum, under the provisions of the Political Code, although they may be applicable to adjudications of our courts in proceedings had under section 1766 of the Code of Civil Procedure. But, whether the reasons assigned in those cases are to be considered sufficient for holding an adjudication of incompetency, under section 1766 of the Code of Civil Procedure, conclusive against the person adjudged incompetent until set aside, as therein provided, need not be decided in this case, since it seems clear that the proceeding against insane and other mentally incompetent persons, authorized by the Code of Civil Procedure, is entirely distinct from the proceedings authorized by the Political Code for the commitment of insane persons to the state insane asylum. The provision in section 1766 of the Code of Civil Procedure authorizing the court to restore the person adjudged insane or incompetent to capacity is only applicable to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same Code. The application of it to persons committed to the asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. After a person has been

committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon writ of *habeas corpus*. The power to discharge him otherwise than upon *habeas corpus* is vested exclusively in the officers of the asylum. Section 2197 of the Political Code provides: "Insane persons received in the asylums must, upon recovery, be discharged therefrom." This implies the power to determine whether or not the patient has recovered. By an act of March 9, 1885, the resident physician is authorized, and it is made his duty, to discharge persons who have been improperly committed. (Deer. Pol. Code, p. 350.) By another act of March 9, 1885, (Deer. Pol. Code, p. 342,) it is provided that the kindred or friends of an inmate of the asylum may apply to the judge who committed him for an order to be directed to the trustees of the asylum for his removal to their custody, and, upon their proving that they are capable and suited to take care of him, and to give protection against his insane acts, the judge may issue the order. But the act further provides that "the trustees shall reject all other orders or applications for the release or removal of any insane person, except the order of a court or judge on proceedings in *habeas corpus*." See, also, a like provision in section 19 of "An act to provide for the future management of the Napa State Asylum," approved March 6, 1876, (St. 1875-76, p. 133.) It would seem, therefore, not only that the power to discharge an inmate of the asylum is vested solely in the officers of the asylum, but that such power is to be exercised upon one of two grounds only: (1) That the insane inmate has recovered; and (2) that he had been improperly committed. I think the effect of a discharge on either ground, if no guardian had been appointed under the act of March 9, 1885, (Deer. Pol. Code, p. 342,) would be to restore the person discharged to legal capacity to sue. A discharge on the first ground is an adjudication, by competent authority, that the person had recovered from insanity; and a discharge on the second ground, by like authority, overrules or nullifies the order of commitment, and leaves the person committed in the same *status*, as to capacity to sue, that he was in before he was committed. Civil Code, § 40. Besides, I think the order of commitment is not conclusive evidence against the plaintiff in this action of his insanity at any time, or of probable cause for the prosecution of which he complains; for, if it is so, it is difficult to conceive how he is to prove a cause of action which depends upon the truth of his averments that he was not insane to the degree required by section 2217 of the Political Code, or at all, at the time the order was made, and that the prosecution was without probable cause. If he is estopped, by the order of commitment, from proving these averments, it would seem to follow that no action for a malicious prosecution on a charge of insanity, resulting in an order

of commitment, can be maintained; yet the authorities sanction such actions. Cooley, Torts, § 176 et seq. That the order of commitment would not thus estop or conclude the plaintiff in a proceeding by writ of *habeas corpus* is obvious, and we have seen that it is not final, or conclusive as to the resident physician of the asylum, whose duty it is to disregard it, if, in his opinion, it was not properly made. Indeed, the final determination, as to whether the person committed is insane or not, is to be made and announced by the resident physician of the asylum. The proceeding before the judge is only preliminary, and is analogous to the preliminary examination of a criminal charge by a magistrate. As the only ground of demurrer argued here is that the plaintiff has not the legal capacity to sue, and no particular in which the complaint fails to state a cause of action has been suggested by counsel, or discovered, I think the judgment should be reversed, and the court below directed to overrule the demurrer.

WE CONCUR: BELCHER, C. C., and HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to overrule the demurrer.

ON REHEARING.

(Jan. 17, 1891.)

PER CURIAM. In submitting this case for decision, respondents argued but a single point raised by their demurrer to the appellant's complaint. We considered that objection, and decided it correctly. In their petition for a rehearing, other objections to the complaint are called to our attention; but we have decided—and with manifest propriety—that we will not grant a rehearing in order to consider points not made in the argument upon which the case was originally submitted. A respondent whose demurrer has been sustained by the superior court ought to fairly present in this court every objection upon which he relies. We cannot be expected to scrutinize the record for the purpose of discovering points which counsel have not taken the trouble to specify.

Rehearing denied.

(37 Cal. 505)

BALL v. KEHL. (No. 13,808.)

(Supreme Court of California. Jan. 10, 1891.)

INJUNCTION—DIVERSION OF WATER—FINDINGS—SUFFICIENCY.

Plaintiff alleged that by adverse user he had acquired the right to the water in defendant's mill-race for irrigation and domestic purposes, when the mill was not running; that defendant had deprived him of the use of the water at such times, and threatened to continue the deprivation; and he prayed that defendant be restrained therefrom. The court found that on a certain day defendant did so deprive plaintiff of the use of the water. *Held* sufficient to sustain an injunction, in the absence of any finding as to how long such deprivation lasted, or as to whether defendant threatened to continue it.

Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Curtis & Otis and Henry M. Willis, for appellant. H. C. Rolfe, for respondent.

DE HAVEN, J. The complaint alleges, in substance, that the defendant had, by means of a canal, appropriated the waters of a certain creek for the purpose of operating a mill owned by him, and that, subject to the use and right to use said water by the defendant, the plaintiff has for 12 years last past appropriated and used adversely to defendant for irrigation, agricultural, and domestic purposes the water so flowing in said canal, whenever the said mill was not being run; that upon August 10, 1888, while the said mill was not running, the defendant, without right, deprived plaintiff of the use of said water, and has ever since continued to deprive plaintiff of its use; and that "defendant threatens so to deprive plaintiff of the use of any of said water at all times, even when said mill is not being run or operated, nor said water needed for running or operating the same." The answer of the defendant contained a denial of these allegations. The court below rendered judgment in favor of the plaintiff, and enjoining the defendant from depriving plaintiff of the use or flow of the water of said canal, except at such times as said water may be needed and actually used for running and operating said mill. From this judgment, and an order denying his motion for a new trial, the defendant appeals.

The findings do not support the judgment. The court finds that the defendant did, on the 10th of August, 1888, and while he was not using the water for the operation of his mill, deprive the plaintiff of the use of said water by closing a certain waste-gate, but there is an entire omission to find how long such deprivation continued, or whether defendant ever threatened or threatens to continue so to deprive plaintiff of the use of said water at times when said mill is not being run, or the water is needed for running the same. The allegation that defendant's act was continuing, and that he threatened to continue to deprive plaintiff of all use of the water in controversy, was a material one. Without it, the complaint would not state facts sufficient to entitle plaintiff to the injunction asked for and obtained, and the failure of the court to find upon this issue tendered by the complaint is necessarily fatal to the judgment. This conclusion is sustained by the case of *Coker v. Simpson*, 7 Cal. 340, in which it was said: "The complaint seems insufficient to sustain that part of the judgment granting the injunction. It is simply alleged, in substance, that defendant, between certain specified dates, diverted the waters of the stream, to the plaintiff's damage, in a sum stated. There is no allegation that the injury was continuing, or threatened to be continued, or likely to be continued. The circumstances stated are sufficient for a recovery of damages, but no equitable facts are alleged to sustain the injunction. The writ of injunction, though remedial, must be based upon equitable circumstances. From all that appears in the complaint, the injury was only temporary, and not likely to continue." And so in this case it may be said, from all that appears in the findings of the court, plaintiff's injury was

only temporary and past, and not likely to continue at any time in the future. See, also, *Water Co. v. Chapman*, 8 Cal. 392. This view renders it unnecessary to pass upon the sufficiency of the evidence to sustain the findings of the court, as the reversal of the judgment compels a reversal of the order denying defendant's motion for a new trial. Judgment and order reversed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

87 Cal. 461

PETTINGER v. FAST. (No. 13,735.)

(*Supreme Court of California*. Jan. 12, 1891.)

VENDOR AND VENDEE—ACTION FOR PRICE—EVIDENCE.

Plaintiff sold his farm to defendant for \$4,000, and one-half of the excess above that sum for which the farm might be sold within two years. In an action for the balance of purchase money the complaint alleged that defendant had sold the farm for \$8,000, and the court so found. The evidence showed that he sold the farm for \$6,000, reserving the timber thereon. *Held*, that this would not support the finding, though it was shown that the timber reserved was worth \$2,000.

Department 1. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Putnam & Nichols, for appellant. *B. F. Thomas* and *W. P. Butcher*, for respondent.

DE HAVEN, J. Action to recover the sum of \$1,950, alleged to be due plaintiff for the balance of the purchase price of land conveyed by plaintiff to defendant. The court below gave plaintiff judgment for that sum, and also denied defendant's motion for a new trial, and the defendant appeals from such judgment and order. The facts as found show that on November 17, 1886, plaintiff executed to appellant a deed of his farm, the appellant agreeing, in writing, to pay therefor the sum of \$4,000, and to give one-half of all in excess of that sum which "the farm can be sold for within two years," such additional sum "to be also a part of the purchase price, when so sold for a larger sum." It is also found that on September 1, 1887, "appellant entered into an agreement in writing with one Ed. Culbert, whereby he sold to said Culbert the said parcels of land for the sum of \$8,000."

The principal question to be determined on this appeal is whether the finding of the court in relation to the sale of the land is justified by the evidence. It was shown upon the trial that on September 1, 1887, the appellant and one Culbert entered into an agreement in writing by which the appellant "promises and agrees to sell and convey unto the party of the second part, [Culbert,] and to make and execute and deliver to him a deed" of the land purchased by appellant from the plaintiff in this action, the said Culbert "to have and to hold all and singular said premises, together with all the tenements, hereditaments, and appurtenances thereunto belonging, * * * except that portion of the timber thereon hereinafter mentioned and reserved unto the party of the first part." The agreement further recited that the appellant was to have all the timber

on said land, "except that on the southern line of the *mesa*, adjoining the Rincon rancho, and on the east end of said *mesa*." It is clear that under appellant's agreement with respondent, an actual sale of the farm within the time limited was not indispensably necessary in order to establish as a fact the price for which it could have been sold, and thus fix the liability of appellant thereunder. The appellant would not have been at liberty to reject any *bona fide* offer of purchase for a sum exceeding \$5,000 without the consent of the respondent. But the complaint alleges an actual sale to Culbert for the sum of \$8,000, and the court so finds, and it is therefore necessary to consider whether such fact was established upon the trial. The appellant insists that there was no sale to Culbert at all, but only an agreement to sell; but we are of opinion that such contention cannot be sustained. In the case of *Eaton v. Richeri*, 83 Cal. 185, 23 Pac. Rep. 286, the plaintiff therein was to wait for any balance that might be due him until certain mining property was sold and an executory contract for the sale of the mine was made, and the court held that the plaintiff could recover, saying: "The word 'sold' does not necessarily, and in all connections, mean that a conveyance must be made, or that the title must pass." The fact that no money was received by appellant on the contract is immaterial. The transaction was none the less a sale, and by it the equitable title of the property sold passed to Culbert. But in one respect the evidence does not sustain the finding of the court as to this sale. The written agreement of sale contained a reservation of standing timber, and, we think, notwithstanding some confusion in the evidence, that the real transaction between appellant and Culbert was a sale of the farm for the sum of \$6,000, the appellant reserving the growing timber thereon as specified in the contract of sale. The fact that this timber may have been estimated by both appellant and Culbert as of the value of \$2,000, or that appellant's price for the land with timber standing was \$8,000, and with a reservation of such timber \$6,000, cannot change the terms of the actual sale, as made to appear by the written contract of sale. By that contract, as we have said, the farm was sold for the sum of \$6,000, the appellant reserving as an interest therein the standing timber referred to, and proof of such a contract is at variance with the contract alleged in the complaint and found by the court, and the finding that the farm was sold for the sum of \$8,000 is not sustained by the evidence. Undoubtedly the respondent's right to recover on his contract is not limited to the sum agreed to be paid by Culbert, but if he seeks to recover more it must be upon a complaint which shows the facts as they really exist. It is clear that upon the execution of the contract of sale appellant disabled himself from thereafter accepting any *bona fide* offer for the farm, and the respondent became entitled to recover, not only upon the basis of the price agreed to be paid by Culbert, but in addition thereto one-half of the market

value of the standing timber reserved, or, at his option, one-half of the net sum for which such timber may have been sold by appellant. Judgment and order reversed.

We concur: PATERSON, J.; GAROUTTE, J.

BENSON v. SHOTWELL. (No. 12,661.)

87 Cal. 49

(Supreme Court of California. Jan. 12, 1891.)

In bank. On rehearing. For former report, see ante, 249.

PER CURIAM. After a careful reconsideration of this case we are satisfied that, although the facts have been stated too strongly against the respondent with respect to the first point discussed in the leading opinion, heretofore filed, the decision is nevertheless correct and fully sustained upon the ground stated and relied upon in the concurring opinion of Mr. Justice WORKS. For this reason respondent's petition for a rehearing is denied.

McFADDEN *et ux.* v. SANTA ANA, O. & T. ST. RY. CO. (No. 13,919.)

87 Cal. 464

(Supreme Court of California. Jan. 12, 1891.)

IMPUTED NEGLIGENCE—HUSBAND AND WIFE—CROSS-EXAMINATION.

1. By Civil Code Cal. §§ 162-164, 169, damages recovered for personal injuries to the wife are community property, and by section 172 the husband has the management and power of disposition of such property. *Held*, that the husband is a necessary party to an action for injuries to the wife, and his contributory negligence is imputable to her.

2. In an action for personal injuries, it is competent for defendant to ask plaintiff, on cross-examination, whether she called a doctor on the night of the accident; she having testified in her own behalf as to her injuries, and the pain she suffered.

3. In such action defendant should be allowed to ask plaintiff's physician, on cross-examination, what he considered the serious ailment at the time he was called to see her, and what treatment was advised.

Commissioners' decision. Department

2. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Victor Montgomery and *O. Caswell*, for appellant. *Charles S. McKelvey*, for respondent.

VANCLIEF, C. Action for damages alleged to have been sustained by a personal injury to the wife alone, through the negligence of defendant. On May 26, 1888, the defendant was a corporation owning and operating a street railroad running east and west through the center of Fourth street, in the city of Santa Ana, in Los Angeles county. On that day it caused an excavation to be made in that street about 6 feet wide, 50 feet long, and 10 inches in depth, on the north side of the railway, parallel with it, and about 6 feet from it, for the purpose of constructing a switch or turn-out, to be connected with the main railway, and for the construction of which it had permission from the city authorities. It is alleged in the complaint that the excavation was dangerous to travelers on the street during the nighttime, unless properly guarded and lighted; and that it was the duty of the defendant

to guard and light it, so as to warn travelers of the danger, etc., which the defendant neglected to do on the night of May 26, 1888. The complaint then proceeds as follows: "That on, to-wit, the 26th day of May, 1888, the plaintiffs herein were lawfully driving along the same, and they, the plaintiffs, had no warning of, or notice of, the existence of the aforesaid excavation and obstructions, and they, the plaintiffs, saw no lights or barriers about the said excavation and obstructions, and, without any fault of either of the plaintiffs, they, the plaintiffs, came in collision with the said obstructions, and where drawn over the same into the excavation aforesaid, whereby Flora McFadden sustained great injuries in her person, and internal injuries by which her womb was displaced, and by reason of said injuries to her person and said internal injuries, she was confined to her bed for many months, and endured great physical and mental suffering. Her health is injured and impaired thereby, and the plaintiffs are informed and believe that the injuries sustained by Flora McFadden, in her person and to her health, are permanent and for life, and that the same were caused by the gross negligence, default, and carelessness of the defendant herein, by reason of all which the plaintiffs are damaged in the sum of \$12,000." The answer of the defendant denies the alleged injuries to the plaintiff Flora; denies the alleged negligence on its part; and alleges contributory negligence on the part of the plaintiffs. The case was tried by a jury. Verdict and judgment for the plaintiffs for \$1,000. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The principal question for decision arises upon instructions to the jury as to the effect of contributory negligence, if any there was, on the part of the husband alone. At the request of the plaintiff, the court instructed the jury that if they found that the plaintiff Flora was injured by the negligence of the defendant, without any negligence on her part, and that the negligence of her husband, if any, only contributed to the injuries, the jury could not attribute the husband's negligence to her, and should assess such damages as will compensate her for injuries proximately caused by the negligence of the defendant. And again: "If you find from the evidence that the negligence of Robert McFadden, if any, only contributed to the injury complained of, if any was sustained, his negligence cannot be imputed to Flora McFadden, and must not be regarded as her negligence." Defendant's counsel excepted to these instructions, and requested the court to instruct the jury that contributory negligence of the husband, if any, was imputable to the wife, and, under the circumstances of this case, would prevent a recovery; which the court refused to give. I think the court erred in giving these instructions, and in refusing to instruct, substantially, as requested by the defendant's counsel. *Peck v. Railroad Co.*, 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440; *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. Rep. 257; *Huntoon v. Trumbull*, 2 McCrary, 314, 12 Fed. Rep. 844; *Beach, Contrib. Neg.* pp. 113, 114, 284.

The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action, (*Railroad Co. v. Dunn*, 52 Ill. 260; *And. Law Dict.*;) and, if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife, (*Civil Code*, §§ 162-164, 169,) of which the husband has the management, control, and absolute power of disposition other than testamentary, (*Id.* § 172.) Consequently the wife cannot sue alone for damages on account of an injury to her person, as she is permitted to do "when the action concerns her separate property." *Code Civil Proc.* § 370; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. Rep. 223. In these respects our Codes differ from the laws of those states in which the cases cited by appellants were decided, wherein the right to recover for a personal injury to the wife, and the money recovered, are deemed her separate property. In the case of *Flori v. City of St. Louis*, 3 Mo. App. 231, the husband and wife sued for a personal injury to the wife alone, and the trial court instructed the jury, in effect, that if the husband was guilty of negligence, directly contributory to the injury, there could be no recovery in the action. Of this instruction the appellate court said: "We do not so understand the law. The contributory negligence of the plaintiff will bar a recovery where the plaintiff is the injured party, and the recovery is for his benefit. But here the husband is merely a formal party, the cause of action belonging to the wife. Under our law, (*Acts 1875*, p. 61,) 'any personal property, including rights in action, * * * which has grown out of any violation of the personal rights' of a *feme covert*, is her separate property, and under her sole control, and is not liable for the debts of her husband." In *Platz v. Cohoes*, 24 Hun, 101, the decision that the negligence of the husband could not be imputed to the wife, in a case like this, was put solely upon the grounds that the wife was a mere passenger in her husband's wagon, and that her husband had no joint interest with her, and was in no way identified with her. On appeal from this decision of the supreme court, the court of appeals held that the question, as to contributory negligence of the husband, did not arise, and declined to decide it. 89 N. Y. 219. In the case of *Railroad Co. v. Dunn*, 52 Ill. 260, it was held that the right of the wife to sue for an injury to her person was her separate property, under a statute of that state providing that all property shall be separate property of the wife "which any married woman, during coverture, acquires in good faith, from any person other than her husband, by descent, devise, or otherwise." In *Shearman and Redfield on Negligence* (4th Ed. § 67) it is said: "But in New York, Missouri, and other states where the change has been radical, and married women have a right to recover, in such cases, damages for their own separate use, it is held that the negligence of the husband, while in company with his wife, is not chargeable

to her, unless she encouraged him in it, or otherwise concurs in it." No other authority is cited for this than the cases above considered.

2. The appellant's counsel complain that the scope of their cross-examination of plaintiffs' witnesses was too much restricted by the court. Of the numerous exceptions taken on this ground, I think the following should be sustained: *First.* After the plaintiff Flora had testified on behalf of plaintiffs as to the injury, and the pain suffered by her immediately thereafter, defendant's attorney, on cross-examination, asked the following questions: "Question. Well, you was conscious, wasn't you? Answer. I was conscious of a very severe pain. Q. Well, you went home that night, and didn't call a doctor? Mr. McKelvey. We object. I don't think it responsive to the direct examination." The court sustained this objection, and the defendant's counsel excepted. *Second.* Dr. Ball, as an expert, testified in chief, on the part of the plaintiffs, that he visited the plaintiff Flora, about two weeks after the injury, in consultation with Mrs. Dr. Howe, the attending physician, and further testified that he examined the patient as to her condition at that time, and as to the probable causes of her ailments. On cross-examination defendant's counsel asked the following questions: "Question. You had a consultation, then, did you? Answer. Yes, sir. Q. What was the determination by you and the attending physician, as to what was the serious thing to attend to? Mr. Brusseau. I object to the evidence, for the reason that the same is immaterial and incompetent." The court sustained this objection, and defendant's counsel excepted. *Third.* Counsel then asked Dr. Ball what was the treatment advised then, (at the consultation.) The objection to this question, on the grounds that it was immaterial, incompetent, and irrelevant, was sustained by the court, and counsel excepted. That all these questions were in the proper line of cross-examination, and that each of them might have elicited testimony which would have been competent, relevant, and material, seems too plain for argument. One of the witnesses, being a party testifying on her own behalf, as to the pain she suffered,—a matter as to which it would have been difficult to contradict her,—and the other testifying as an expert medical witness, their cross-examination should have been allowed a liberal range touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness. Whether or not these errors, in excluding proper cross-examination, may have been prejudicial to the defendant, need not be determined, since the judgment should be reversed on the ground of error in the instructions to the jury. Other points are made by counsel for appellant, but, in my opinion, the record shows no other errors than those above considered. I think that the judgment and order should be reversed, and the case remanded for a new trial.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the case remanded for a new trial.

87 Cal. 471

BRUMLEY *et al.* v. FLINT. (No. 13,665.)

(Supreme Court of California. Jan. 14, 1891.)

APPEAL—OBJECTIONS TO EVIDENCE—EXCESSIVE DAMAGES.

1. Where a witness is asked what, in his estimation, was the damage done by cattle trespassing on pasture land, and the question is objected to on the ground that it is "incompetent, irrelevant, and immaterial as asking for a conclusion, * * * and as not the proper way to prove damages," the point that the witness had not been shown to possess the requisite knowledge to express an opinion cannot be raised for the first time on appeal. Distinguishing *Reed v. Drais*, 67 Cal. 491, 8 Pac. Rep. 20.

2. Where, in an action for damage done by trespassing cattle, the evidence as to the number of the cattle, and the amount of damage, is conflicting, it cannot be said that a judgment for \$325 is excessive, though the cattle were on the land only at times during two months, and plaintiff paid only a \$1,000 rent for the land for the whole year, and, after the trespass, subleased it for \$1,500.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

W. H. Spencer, for appellant. W. B. Dilard, for respondents.

BELCHER, C. In December, 1887, one Chester R. Brumley leased from the owner 16,320 acres of grazing land for the year 1888. Between January 1 and February 7, 1888, the defendant's cattle wrongfully entered upon a portion of this land, and ate up, trod down, and destroyed the grass and feed growing thereon. In May, 1888, the said Brumley died, and thereafter the plaintiffs were duly appointed and qualified as executors of his will. The plaintiffs, as such executors, brought this action to recover damages for the alleged trespasses of defendant's cattle in the sum of \$1,000. The case was tried before the court, without a jury, and by the judgment the plaintiffs were awarded the sum of \$325, and costs of suit. From this judgment, and an order denying a new trial, the defendant appeals.

1. At the trial, C. J. Brumley was called as a witness for plaintiffs, and, after stating that he was the son of Chester R. Brumley, and one of the plaintiffs, proceeded to testify as follows: "I know the land described in the complaint, and have known it for the past fifteen years. It is grazing land. I know defendant's cattle. They are branded with a star. I saw defendant's cattle on the land described in the complaint many times during January and February, 1888,—eight, nine, eleven, or twelve hundred of them,—and they were trespassing on the land. There were many fresh rain-water pools on the land, and the cattle ranged there. The ground was wet during these months, there having been a heavy snow-storm and much rain, and the cattle injured and damaged the pasture greatly by treading it down and eating it. For the last five years I have been in the cattle business near this land." The witness was then asked by

plaintiffs' counsel to state what amount of damage, in his estimation, was done by the cattle during the time they were trespassing upon the land. The defendant objected to the question, "upon the ground that the same was incompetent, irrelevant, and immaterial, as asking for a conclusion which the court was to arrive at from the facts given in testimony; and further as not the proper way to prove damages." The court overruled the objection, and the defendant reserved an exception. The witness then answered: "The damage from eating up, treading down, and destroying the grass on the land by defendant's cattle during the time you mention would, in my estimation, amount to \$700 or \$800." It is now urged for appellant that the ruling above mentioned was erroneous, because the witness had not been "shown to possess the requisite knowledge of the value of the property claimed to have been injured by defendant's cattle," and, in support of this position, *Reed v. Drais*, 67 Cal. 491, 8 Pac. Rep. 20, is cited. It is not claimed that the answer to the question, if given by a competent witness, would have been incompetent, irrelevant, or immaterial, and upon that question we are not called upon to express an opinion. It will be observed here that the objection was not that the witness was incompetent, for want of sufficient knowledge, to testify as to the damages, but only that it was not the proper way to prove damages. The general rule is that "a party objecting to the admission of evidence must specify the ground of his objection when the evidence is offered, and will be considered as having waived all objections not so specified." *People v. Manning*, 48 Cal. 338. It is true that a general objection is sufficient, if the evidence objected to is absolutely inadmissible for any purpose. *Nightingale v. Seannell*, 18 Cal. 315. But otherwise, to entitle the objection to notice, "the party should have laid his finger on the point at the time." *Martin v. Traversers*, 12 Cal. 243; *Cochran v. O'Keefe*, 34 Cal. 558. Conceding therefore, without deciding, that the witness was not shown to possess the requisite knowledge to enable him to testify as to the damages, still we do not think the point made can be considered here, for the reason that that objection to the question was not taken. In *Reed v. Drais*, supra, there is nothing in conflict with what has been said. In that case, as shown by the record, a witness was asked to give the value of certain land, and the testimony was objected to, and excluded by the court, "on the ground that the witness had not shown himself competent to testify on that point." In affirming the judgment, the court, among other things, said: "There is no doubt that a witness acquainted with the value of property may give an opinion as to such value, but he must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit, or branch of business, or department of science, he may yet be heard. Where, however, the knowledge is wanting, the opinion should be rejected. We

think, therefore, the court did not err in refusing to admit the testimony."

2. It is claimed that the evidence was insufficient to justify the decision of the court that plaintiffs were damaged in the sum of \$325 by reason of the trespass. But the evidence was conflicting as to the number of cattle that committed the trespasses, and as to the damage done by them. On the part of the plaintiffs, the evidence tended to show that they were entitled to a larger sum than was awarded to them. The fact that the deceased, *Brumley*, paid, as rent for all the leased premises, only \$1,000, and, some time after the trespass, subleased them for \$1,500, is not controlling. We cannot say, therefore, that the judgment should be reversed or modified, because the damages allowed were excessive. We think the judgment and order should be affirmed, and so advise.

We concur: VANCE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

87 Cal. 475

PEOPLE *ex rel.* LAINE *v.* TYRRELL. (No. 14,076.)

(*Supreme Court of California.* Jan. 17, 1891.)

APPOINTMENT TO OFFICE—VACANCY—HOLDING OVER.

1. Under Pol. Code Cal. § 879, providing that "every officer shall continue to discharge the duties of his office, although his term has expired, until his successor has qualified," an appointee by the governor during a recess of the legislature, to fill a vacancy in the state board of health, holds until the qualification of his successor, notwithstanding section 1000 provides that such appointee shall only hold office until the adjournment of the next session of the legislature.

2. Although the governor issues a commission to such appointee for the entire balance of the unexpired term, its legal effect is to fill the vacancy only until the adjournment of the next session of the legislature.

3. Where the legislature fails to appoint a successor to the appointee, the governor cannot then appoint another, as there is no vacancy.

4. Where such appointee has duly qualified under the commission issued by the governor, and at the next session of the legislature his appointment is confirmed for the unexpired term, but no other commission is issued, the appointee holds under his first commission, and is not required to qualify again.

In bank. Appeal from superior court, Sacramento county; *W. C. VAN FLEET*, Judge.

Clinton L. White, for appellant. *Geo. A. Johnson*, Atty. Gen., and *A. L. Hart*, for respondent.

DE HAVEN, J. On November 17, 1884, during a recess of the legislature, a vacancy existed in the membership of the state board of health, and on that day the appellant, *Tyrrell*, was appointed a member of said board, and in the commission issued to him by the governor it was recited that he was thereby appointed a member of the state board of health, vice *F. W. Hatch*, deceased, for the term expiring January 11, 1888. Appellant duly qualified as such officer November 19, 1884, and

since that date has continued to discharge the duties of said office. Upon January 20, 1885, the legislature being in session, the governor transmitted to the senate a message informing that body of appellant's said appointment, on November 17, 1884, "for the term of four years, vice F. W. Hatch, deceased," and the senate was requested to consent thereto. The senate took action upon said message, and the question, "Will the senate advise and consent to the appointment of G. G. Tyrrell of Sacramento as a member of the state board of health for the term of four years, vice F. W. Hatch, deceased?" was decided in the affirmative. The governor did not thereafter issue to appellant any commission for said office, nor has he since such action of the senate taken any oath of office as a member of said board. On March 18, 1889, during a recess of the legislature, the governor appointed the relator, Laine, to the said office of member of the state board of health, and upon that day he duly qualified as such. The judgment of the court below was in favor of the relator, and ousting the appellant from said office. From this judgment, and an order denying his motion for a new trial, the defendant, Tyrrell, appeals.

We think the commission issued by the governor to appellant on November 17, 1884, must be held to have legal effect, simply as an appointment to fill the vacancy then existing, until the adjournment of the next session of the legislature, as the governor was not authorized to make an appointment for any longer time than during the recess of the legislature. Pol. Code, § 1000. Upon the issuance of this commission the appointment to fill such vacancy temporarily was complete, and needed no action of the senate to confirm it. *People v. Cazneau*, 20 Cal. 504. And we think that under this commission the appellant was vested with the right to hold said office until the appointment and qualification of a successor in the mode provided by law. Section 879 of the Political Code declares: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified;" and section 1000 of the Political Code does not create an exception to this rule, in the case of officers temporarily appointed by the governor. The language of that section, "but the person so appointed can only hold the office until the adjournment of the next session of the legislature," simply means, when construed with section 879, as it must be, that the term of such appointed officer shall expire upon the adjournment of the next session of the legislature, and his successor may take his place; but, if no successor has been appointed, then the very condition of affairs intended to be provided for by section 879 has arisen, and that section applies. It is the settled law of this state that the mere expiration of the term of the incumbent of an office does not create a vacancy therein such as the governor alone is authorized to fill by the appointment of a successor. *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407. It would follow from this that the appointment of the relator during a recess

of the legislature was invalid, unless, under section 996 of the Political Code, a vacancy was created by the failure of the appellant to take and file his official oath after the confirmation of the senate. The obligation to take and file such oath did not arise unless the message of the governor announcing the appointment of appellant during the recess, and the action of the senate advising and consenting to the same, constituted an appointment of appellant as his own successor. But, even construing these acts of the governor and senate as a nomination and confirmation of appellant as his own successor, (and whether they can be so construed we do not determine,) such appointment was not completed, no commission having been subsequently issued to the appellant. In the matter of an executive appointment, with the consent of the senate, the issuance of a commission is not a mere ministerial act, but is a part of the act of appointment. It is this act which completes the appointment, as well as perpetuates the evidence of it. *People v. Murray*, 70 N. Y. 526. And this is also the doctrine of the case of *Conger v. Gilmer*, 32 Cal. 76. It follows that the court below erred in rendering judgment for the relator upon the findings. Judgment and order reversed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.

REAY v. BUTLER. (No. 14,051.)

(*Supreme Court of California*. Jan. 17, 1891.)

APPEAL—DISMISSAL.

Where no undertaking on appeal is filed within five days after service of the notice of appeal, as required by Code Civil Proc. Cal. § 940, there is no appeal before the court to be considered or dismissed. Following *Bellegrade v. Bridge Co.*, 80 Cal. 61, 22 Pac. Rep. 57, and overruling *Reay v. Butler*, ante, 350.

In bank. On rehearing.

PER CURIAM. The motion to dismiss the appeal in this case upon the showing made at the time the motion was submitted should have been overruled on the authority of *Bellegrade v. Bridge Co.*, 80 Cal. 61, 22 Pac. Rep. 57, and cases therein cited. Since then the record has been filed here, which, it is claimed, shows that the undertaking on appeal was filed in time. The order heretofore made dismissing the appeal is set aside, and the motion overruled, without prejudice to further consideration, at the proper time, whether the appellant is entitled to be heard.

87 Cal. 480

In re COUTS' ESTATE. (No. 13,995.)

(*Supreme Court of California*. Jan. 19, 1891.)

CLAIMS AGAINST EXECUTORS—ALLOWANCE—SALE OF LAND.

1. Under Code Civil Proc. Cal. § 1536, providing that, when a sale of property is necessary to pay the debts of a decedent, or the charges of the administration, the executor may sell real estate for that purpose upon the order of the court, and section 1545, providing that, if the executor neglect to apply for an order of sale, any person may make application, one whose claim against the

executor for services to the estate has been allowed by the court may make application for the sale of land to pay it, and the court has jurisdiction to settle and allow such claim, without waiting for the executor to pay it, and charge it as an expense of the administration.

2. Under Code Civil Proc. Cal. § 1637, providing that the settlement and allowance of an executor's account is conclusive as to all interested, except those under disability, an order settling an executor's account, and allowing a claim included therein of a third person for services rendered the estate, is conclusive on the devisees who do not appeal.

Department 1. Appeal from superior court, San Diego county; C. W. C. ROWELL, Judge.

Leovy & Humes and Conklin & Hughes, for appellant. *Trippett & Neale and Hunsaker, Britt & Goodrich*, for respondents.

PATERSON, J. On May 29, 1889, the executrix filed an account of her administration of the estate from January 29, 1887, to February 1, 1889, which set forth, among other items of the same nature, a claim of \$1,240.57 against the executrix by Cave J. Coutts, for services, money paid out, etc., "the validity of which charges against said estate" she asked the court to determine on the settlement of the account. After due notice, a hearing was had, and the account was settled. With respect to the item referred to, the court found that it was a legal charge against the estate, and authorized the executrix to pay Coutts out of any moneys that might thereafter come into her hands as executrix. On March 5, 1890, Coutts filed a petition asking for an order requiring the executrix to sell so much of the real estate as should be necessary to pay his claim. An order to show cause was issued, and at the trial the petitioner introduced evidence tending to support every material allegation of his petition, but, on motion of the devisees, a nonsuit was granted, and the proceeding dismissed. From this order, petitioner has appealed. It is admitted that the court in its decree settling the account made the order referred to, and that the executrix has not paid, and has not funds in her hands sufficient to pay, petitioner the amount allowed, but it is claimed that the nonsuit and dismissal were proper because the order of the court allowing Coutts \$1,240.57 is void; that his claim, if any he had, was against the executrix, and, until she pays it, and presents it in her account as an expense of administration, the court cannot act upon it; that the claim is barred by the statute of limitations, but, if the appellant has any remedy at all, it is by execution against the executrix, under section 1647, Code Civil Proc. We think that the petition states facts sufficient, and that upon the evidence offered by petitioner the motion for nonsuit should have been denied. Section 1536, Code Civil Proc., provides that, "when a sale of property of the estate is necessary to pay * * * the debts outstanding against the decedent, or the debts, expenses, or charges of administration, the executor may also sell any real as well as personal property of the estate for that purpose, upon the order of the court;" and section 1545 provides

that, "if the executor or administrator neglect to apply for an order of sale when it is necessary, any person may make application therefor in the same manner as the executor or administrator, * * * and the decree of sale must fix the period of time within which the executor or administrator must make the sale." These provisions were intended to afford creditors of the executors, as well as creditors of the decedent, the means of securing payment of their claims against the estate, and necessarily contemplate expenses of administration, which the executor neglects or refuses to pay. There is nothing in the statutes which requires payment of claims against the executor for services rendered, or materials furnished, the estate during administration, before they can be allowed in the settlement of his account. It would be a misfortune if there were. Where the representative of the estate has a doubt as to the legality of the claim, or the amount that should be paid for services rendered, or materials furnished, in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and, if so, in what amount. *Dwinelle v. Henriquez*, 1 Cal. 392; *Gurnee v. Maloney*, 38 Cal. 88. The order settling the account was appealable, and the allowance of the claim is conclusive against every one interested, except those laboring under disability. Sections 1637, 1638, Code Civil Proc.; *Deck's Estate*, 6 Cal. 669; *Stott's Estate*, 52 Cal. 406. The order appealed from is reversed, and the proceeding is remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

87 Cal. 508

HARLAN *et al.* v. STUFFLEBEEM *et al.*
(No. 14,063.)

(*Supreme Court of California. Jan. 21, 1891.*)

MECHANICS' LIENS—FORECLOSURE—FINDINGS.

1. In a suit to foreclose a mechanic's lien for painting and graining a house under a contract with defendant, findings that plaintiff substantially performed the contract, and also that some small places were left unfinished which would cost about five dollars to finish properly, are not contradictory.

2. Such findings are sufficient to support a judgment for plaintiff for the contract price, less five dollars.

3. Code Civil Proc. Cal. § 1192, provides that the owner's interest in land shall be subject to mechanics' liens for the erection of a building thereon under contract with the lessee, where the owner knows of the erection of such building and fails to give notice that he will not be responsible for it. *Held*, that the owner's interest may be sold on foreclosure of such mechanic's lien where he knew of the erection of the building, and, after its completion, made a payment to plaintiff on account of his work.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *Brown & Daggett*, for appellants. *Lamberson & Taylor*, for respondents.

HARRISON, J. Action for the foreclosure of a mechanic's lien. The plaintiffs contracted with the defendant Stufflebeem,

who was the lessee of certain lands owned by the defendants Bashore, to do the work of painting, varnishing and graining upon some buildings which Stufflebeem was constructing for himself upon said lands, upon the completion of which they were to receive \$145. The main issue presented in the case was whether the plaintiffs had completed the work according to their contract. The court found that the plaintiffs had substantially complied with all the terms of said contract, and completed said work on or about the 10th day of April, 1890, but that some small places in the house were not properly grained and finished, and that the cost of properly finishing such places would be not more than five dollars; and thereupon gave judgment for the plaintiffs for the amount of the contract price, after deducting said sum of five dollars.

1. It is contended by the appellants that the findings are contradictory, and do not support the judgment. Neither of these propositions can be maintained. The finding that the plaintiffs substantially complied with all the terms of their contract, and completed the work, is entirely consistent with the finding that some places in the houses were not properly grained and finished; and the finding that the cost of properly finishing such places would not be more than five dollars supports, rather than contradicts, the finding of substantial performance. The performance of a contract need not in all cases be literal and exact, in order to entitle a party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done, or the manner of its performance, is the sole matter in dispute, and is to be decided upon conflicting testimony. In contracts for the construction or repair of buildings, a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract. If there has been no willful departure from its provisions, and no omission of any of its essential parts, and the contractor has, in good faith, performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action. *Whart. Cont.* § 607; *Liggett v. Smith*, 3 *Watts*, 331; *Philip v. Gallant*, 62 *N. Y.* 264; *Hayward v. Leonard*, 7 *Pick* 185; *Sinclair v. Tallmadge*, 35 *Barb.* 604. This rule is peculiarly applicable in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work. Section 1187 of the Code of Civil Procedure provides that "any trivial imperfection in the said work * * * shall not be deemed such a lack of completion as to prevent the filing of any lien." If the lien can be "filed" notwithstanding such imperfection, it must follow that the claimant can foreclose his lien, and that

the "trivial imperfection in the work" is no defense to the action. Whether the contract has been substantially performed is a question of fact which must be determined by the trial court in each instance from the facts and circumstances in the case, and the finding of the trial court upon that point is as conclusive as is its finding of any other fact. The present case is before us upon the judgment roll alone. In the absence of the testimony upon this point, we are bound to assume that it was sufficient to support the finding that the plaintiffs substantially completed their contract, as also the finding that the defendants would be fully compensated for any imperfection in the work by deducting five dollars from the contract price. If they can be thus compensated in damages, full justice is done to all parties by deducting that amount from the contract price, and allowing the contractor to recover for the work that has been done by him.

2. Appellants urge that it was error to order a sale of the interest of the defendants Bashore in the lands described in the judgment, and cite section 1185 of the Code of Civil Procedure, as declaring that only the interest of the person causing the building to be repaired is subject to the lien. But it is found by the court that the defendants Bashore knew, at the time, of the construction of the said buildings, and of all the terms and conditions of the contract between the defendant Stufflebeem and the plaintiffs at the time it was made; and also that, on the completion of the work, the defendant Rachel Bashore made a payment to the plaintiffs on account thereof. Section 1192 of the Code of Civil Procedure provides that when, with such knowledge, the owner fails to give notice that he will not be responsible for the same, his interest in the land shall be subject to the lien. In *Lumber Co. v. Newkirk*, 80 *Cal.* 275, 22 *Pac. Rep.* 231, these sections were construed by this court on a similar state of facts, and it was held that the interest of the owner in the lands was subject to a lien for materials used in the construction of a building thereon, which was erected under a contract made by the owner of the leasehold estate. It was also held in that case that it was not necessary to aver that the owner of the realty did not give any notice that he would not be responsible for the construction of the building. The judgment of the court below must be affirmed, and that court is directed upon the filing therein of the *remittitur* to allow plaintiffs, as a part of their costs on this appeal, a reasonable fee for the services of their attorney in this court. Code Civil Proc. § 1195.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.; DE HAVEN, J.; MCFARLAND, J.; GAROUTTE, J.

3 Cal. Unrep. 383

In re TILDEN. (No. 20,776.)

(*Supreme Court of California.* Jan. 19, 1891.)

ATTORNEYS—DISBARMENT—POWER OF SUPREME COURT—ACCUSATION OF LARCENY.

Under Code Civil Proc. Cal. § 287, providing that an attorney may be disbarred for the

reason, among others, that he has been convicted of a crime involving moral turpitude, the supreme court has no authority to proceed against a member of the bar upon a mere verified accusation of larceny, preferred by another attorney.

In bank. Application to disbar an attorney.

Crittenden Thornton, for petitioner. *T. C. Coogan*, for respondent.

BEATTY, C. J. This is a proceeding against an attorney and counselor of this court, for the purpose of causing his name to be stricken from the roll. It is founded upon a verified accusation, of which the following is a copy: "Now comes Charles F. Hanlon, an attorney and counselor of this court, and brings this accusation against Charles L. Tilden, and for causes of accusation states 'that said Charles L. Tilden was at all the dates and times hereinafter mentioned, and now is, an attorney and counselor of this court; that heretofore, to-wit, the 5th day of December, 1890, at the city and county of San Francisco, state of California, the said Charles L. Tilden did steal, take, and carry away from the office and possession of this accuser, and by force and arms, and without the consent of this accuser, a certain valuable paper and undertaking for the payment of money, that is to say, a certain undertaking of the firm of Tilden & Tilden, of which the said Charles L. Tilden is a member, for the payment unto said Charles F. Hanlon, as attorney for the plaintiffs in the action hereinafter mentioned, for the sum of \$150 to be paid as penalty costs upon the consent of said Charles F. Hanlon, as attorney for plaintiffs, to a continuance of the argument of a certain demurrer in an action then pending in the superior court of the city and county of San Francisco, state of California, in which William H. Carpenter, Harry S. Carpenter, and Thomas Carpenter were plaintiffs, and O. M. Schaff, M. L. Wilbert, William S. Arnold, and M. M. Donovan were defendants; 'that said Charles L. Tilden did so with the felonious intent to steal, take, and carry away from the office and possession of said plaintiffs' attorney the said paper and undertaking. CHARLES F. HANLON.'" Upon the filing of this accusation, Mr. Tilden was cited to answer it, and in response to the citation he files an answer denying the truth of the charge, and at the same time objects to its legal sufficiency. His objection is well taken. The accusation is somewhat ambiguous, charging a larceny in terms, but describing the act in such manner as to leave it doubtful if anything more than a trespass is alleged. Assuming, however, that a larceny is charged, this court has no jurisdiction to try an accusation of that character, and it is not until after an attorney has been tried and convicted of a crime involving moral turpitude, and the record of his conviction produced here, that we are expressly empowered to remove or suspend him for that cause. Code Civil Proc. § 287. But it is contended that in such matters this court must necessarily have an authority more extensive than the mere letter of the statute, and to enforce this view the case is supposed

of an attorney notoriously guilty of an infamous crime, but acquitted of the charge through some scandalous miscarriage of justice. It is sufficient on this point to say that no such case is before us, and that it will be time enough to decide it when it arises. Even conceding that in the case supposed it might be our duty to proceed against an attorney in spite of his acquittal, we are very certain that it is no part of our duty to anticipate the action of the proper trial court where the attorney has not even been accused. Mr. Tilden's demurrer is sustained, and the proceeding dismissed.

We concur: PATERSON, J.; GAROUTTE, J.; DE HAVEN, J.; HARRISON, J.; SHARPESTEIN, J.; MCFARLAND, J.

(3 Cal. Unrep. 375)

MILLER v. WADDINGHAM *et al.* (No. 13,- 899.)¹

(*Supreme Court of California. Jan. 19, 1891.*)

FIXTURES—VENDOR AND VENDEE—RIGHT TO REMOVE HOUSES.

1. Houses built on mud-sills resting upon the soil, which is not disturbed, are affixed to the land within the terms of Civil Code Cal. § 660, declaring that "a thing is deemed to be affixed to the land when it is * * * permanently resting upon it, as in the case of buildings."

2. Such houses built by a contractor for a vendee in possession, who has paid part of the price for the land, and who, being unable to pay for the houses, turns them over to the contractor, cannot be removed from the freehold by the latter. *Distinguishing Hendy v. Dinkerhoff*, 57 Cal. 8.

3. A vendee who has not paid the entire purchase price cannot claim the right to remove houses built by him on the land on the principle that, since equity regards that as done which ought to be done, he should be deemed the trustee of the purchase money for the vendor, and the equitable owner of the land, with the right to deal with it as he pleases.

4. A vendee who, while in possession under an executory contract of purchase, has built houses on the land before paying the entire purchase price, may be enjoined by the vendor from removing them.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; JOHN L. CAMPBELL, Judge.

Waters & Gird, for appellant. *Harris & Gregg*, for respondents.

HAYNE, C. This was a suit for an injunction to restrain the defendants from removing six buildings from the plaintiff's land, and for damages for injuries sustained in that regard. The trial court gave judgment for the defendants, and the plaintiff appeals upon the findings. The findings show the following case: The plaintiff, who was the owner of two blocks of land in "Ontario Colony," and of half of the streets in front thereof, made a contract to sell the land to the defendant's assignor, who entered into possession, and paid the sum of \$9,000 "on said contract." While in possession he caused the houses in question to be erected, but, being unable to pay the contractor, he made over the houses to him, and the latter sold them to the defendants, who proceeded to move them. It does not clearly appear whether the houses were erected upon the plaintiff's

¹ Reversed in banc. See 27 Pac. 750, 91 Cal. 377.

blocks of land, or upon the streets in front thereof. But the counsel have assumed (what in all probability was the fact) that the houses were upon the blocks mentioned; and, following the lead of counsel, we have so assumed for the purposes of this opinion. "Said houses were built on red-wood mud-sills of two-inch by six-inch timber; said mud-sills resting upon the soil. The soil was not disturbed in building or removing said houses. Nothing was ever said about the houses being built so they could be removed." It does not appear what was the price to be paid to the plaintiff for the land. The inference is that only a part of the price was paid. Assuming that such was the case, it does not appear whether the unpaid portion was due at the time of the removal of the houses, or at the commencement of the suit. The vendee is still in possession, and the contract "is subsisting, and not disaffirmed."

The first question to be considered is whether the houses were affixed to the land in such a manner as to become a part of the realty. The term "fixture" is used in different senses. Sometimes it is used in its general sense, of a thing which is affixed to land. *Merritt v. Judd*, 14 Cal. 63, 64. Sometimes it is used to designate a thing which can be severed from land after having been affixed to it. In this sense it is a term "denoting the very reverse of the name." 1 Chit. Gen. Pr. p. 161. Less frequently it is used to designate a thing which cannot be removed after having been affixed to the land. *Ewell, Fixt.* p. 4, and note. But, whatever may be the true signification of the term, it is manifest that (with certain exceptions, such as heirlooms and the like) the thing must first be affixed to the land, in a legal sense, before any question as to its removal can arise. If not affixed to the land in any sense, its owner may move it about at pleasure. The rule of the common law was that a thing was not to be deemed affixed to land unless fastened to it in some manner. And in *Pennybecker v. McDougal*, 48 Cal. 160, it was held that a cabin set on wooden blocks not attached to the soil was personal property. But the value of the cabin was only \$25, and it must have been more or less of a temporary structure. In New York and other states the common-law rule was relaxed so as to include things permanently resting upon the soil, though not fastened thereto. Thus, in *Snedeker v. Warring*, 12 N. Y. 175, it was held that a statue resting upon a pedestal in front of a building was a part of the realty; the court saying: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement." And see *Strickland v. Parker*, 54 Me. 266; *Cavis v. Beckford*, 62 N. H. 229. And this principle is embodied in section 660 of the Civil Code, which provides that "a thing is deemed to be affixed to land when it is * * * imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings." In this case the houses seem to have been of a permanent character, (they cost \$4,100;) and we think that, under the Code, they must be considered as having been "affixed" to the land.

This being so, the question arises whether the successors in interest of the vendee had any right to sever the houses from the land. Upon this question many modern authorities lay great stress upon the intention with which the thing was affixed, (*Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138; *Walker v. Flouring-Mill Co.*, 70 Wis. 96, 35 N. W. Rep. 332; *Schaper v. Bibb*, 71 Md. 149, 17 Atl. Rep. 935; *Docking v. Frazell*, 38 Kan. 423, 17 Pac. Rep. 160;) while others say that the intention is of secondary importance, (*Collamore v. Gillis*, 149 Mass. 581, 22 N. E. Rep. 46.) But, whatever may be the controlling principle, the preponderance of authority is to the effect that a building of a permanent character, erected by a vendee in possession under an executory contract of purchase, is part of the realty, and cannot be removed by him or his successors in interest, in the absence of an agreement to that effect. In *Ogden v. Stock*, 34 Ill. 522, the action was replevin for a house which had been erected by the vendee in possession under a contract of purchase, who, after failing to perform his contract, sold the house to the defendant, who removed it. The court gave judgment for the plaintiff, saying that it could not be presumed that the vendee when he affixed the house to the soil, had any intention of removing it. In *Hemmenway v. Cutler*, 51 Me. 407, a question arose, upon a writ of entry, as to the effect of an omission, from a levy, of a barn erected by a vendee in possession under a bond for a deed. If the barn was real estate, the omission rendered the levy void; otherwise, it was valid. The court held that the levy was void, and *APPLETON, C. J.*, delivering the opinion, said: "It is well settled that erections made by a mortgagor, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property." See, also, *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. Rep. 442. In *Westgate v. Wixon*, 128 Mass. 304, the action was for damages for the removal of a barn erected on the plaintiff's land by one Abbott, who was in possession under a bond for a deed. He failed to perform the conditions of the bond, but remained in possession, and the barn was removed by the defendant under a writ issued in a suit by a creditor. It was held that the plaintiff should recover, and the court, per *MORTON, J.*, said: "As a general rule, buildings are part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of realty, unless there is an agreement by the owner of the land, either express, or implied from the relations of the parties, that they shall remain personal property. * * * The barn in question was a substantial structure. It is clear from the facts agreed upon that Abbott built it, not for any temporary purpose, but for the permanent improvement of the land, which he expected to become his property according to the terms of the bond. When built, it became a part of the realty, and inured to

the benefit of the plaintiff as additional security for the performance of the condition of the bond. Abbott had no right to remove it, and his creditors had no right to attach it as his personal property." The foregoing were cases at law. The same rule is applied in equity. In *English v. Foote*, 8 Smedes & M. 444, the suit was to foreclose a mechanic's lien for work upon a house erected by a vendee in possession under a contract of purchase which he failed to perform. It was held that, under the statute in force in that jurisdiction, the lien extended only to the interest of the person who caused the house to be erected, and that the vendee had no interest in the house after it was affixed to the land. The court, per CLAYTON, J., said: "As a general rule, whatever is annexed to the freehold becomes a part of it, and cannot be severed from it. There are many exceptions to the rule, but it applies with all its strictness between vendor and vendee." In *McLaughlin v. Nash*, 14 Allen, 136, the suit was for an accounting after dissolution of partnership. Before the formation of the partnership the plaintiff was in possession under a bond for a deed, and had affixed certain articles to a building which was upon the land. When the partnership was formed, the defendant purchased an interest in the articles mentioned. The plaintiff failed to perform the condition of the bond, and after the dissolution of the partnership the owner leased the premises to the defendant. It was held that such of the articles as had been permanently affixed to the building were part of the realty, and the court, per GRAY, J., said: "The plaintiff had not the same right to remove fixtures annexed by him to the land so occupied by him without paying rent to the owner, under a contract for its purchase, as an ordinary tenant would have against his landlord. * * * His rights in this respect were no greater than those of a vendor or mortgagor against his vendee or mortgagee." See, also, *Allen v. Mitchell*, 13 Tex. 373. The rule between vendor and vendee to which the court refers in the passage last quoted is that in relation to things affixed by the vendor before the contract of purchase, or before a conveyance, if there is no contract, in which case the construction leans in favor of the vendee. *Fratt v. Whittier*, 58 Cal. 126. The decisions above quoted are in relation to things affixed by the vendee after the contract of purchase.

It is to be observed that the case before us is to be distinguished from that of erections by a person in possession under a revocable license. The rule as to licenses was laid down in *Little v. Willford*, 31 Minn. 178, 17 N. W. Rep. 282. But the court was careful to say: "A distinction is to be noted between a license and a contract for the purchase of land under which buildings are erected. In the latter case the builder's rights are determined by the nature of his contract, and upon his default the fixtures go with the land." The same distinction is stated by Cooley, (Cooley, Torts, § 429;) and, as to the general rule, see 1 Washb. Real Prop. (5th Ed.)

p. 7. In most of the cases above cited, the vendee, after making the erections, failed to perform his contract. But, so far as the question of fixtures is concerned, this circumstance is not material. If a building be once affixed to land so as to become a part of the realty, it does not change its character by subsequent non-action on the part of the person who affixed it. The case of *Hendy v. Dinkerhoff*, 57 Cal. 3, is not in conflict with the above decision. There the thing affixed to the realty did not belong to the person who affixed it. Such person, therefore, had no right, as against the owner of the thing, to make it a part of the realty; and the decision was that the owner of the realty stood in the shoes of the person who did the affixing, and had no greater rights than the latter had. It is true that in the case before us the houses were affixed to the land by a contractor; but he affixed them under a contract with the vendee, and for his benefit, and of course must be taken to have consented to the affixing, and to all its consequences. It results that the houses were part of the realty, and that the vendee had no greater right to them than to any other part of the property.

The defendants, however, advance two arguments, which apply not merely to the fixtures, but to the whole property. In the first place, they invoke the maxim that equity regards that as done which in good conscience ought to be done, and argue that after the contract the vendee was the trustee of the purchase money, and the owner in equity of the land, and could deal with it as he saw fit. As above stated, this argument has no reference to fixtures as distinguished from the land itself, but applies to the whole property. Nor does it depend upon whether the vendor has permitted the vendee to take possession before performance; for, under the rule relied upon, the vendee is as much the equitable owner where he has not taken possession as where he has. Nor does the argument depend upon whether the unpaid purchase money is due or not; for, by the terms of the rule, it applies as soon as the contract is made. If the argument is good at all, it requires that, as soon as a contract of purchase is made, the vendee should in every case be entitled to enter upon the enjoyment of the property, and be allowed to deal with it as he sees fit. But this is certainly not the law. The maxim referred to is not of universal application. 1 Story, Eq. Jur. § 64g. It was established by courts of equity to attain equitable ends, and it will not be applied to accomplish results which are inequitable; as, for example, to enable a vendee to waste or destroy the property before the performance of his contract. Before such performance, whatever interest he has is subject to be divested upon non-performance; for in case of non-performance the vendor is not compelled to foreclose a lien upon the property, but may rescind or retake possession. *Hannan v. McNickle*, 82 Cal. 126, 23 Pac. Rep. 271; *Connolly v. Hingley*, 82 Cal. 643, 23 Pac. Rep. 273; *Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. Rep. 804; *Troy v. Clarke*, 30 Cal. 419.

The interest of the vendee must therefore be conditional. *Non constat* that he will be able to perform the condition when the time for the performance arrives; and a court of equity will not take his performance for granted to such an extent as to allow him to waste or destroy the property. Nor does it make any difference that the vendor has permitted him to take possession. Such permission does not carry with it a right to waste or destroy the property in the case of a vendee any more than it does in the case of a tenant. The question involved was decided in the case of *Crockford v. Alexander*, 15 Ves. 138, in which Lord ELDON enjoined a vendee in possession from cutting timber, although he admitted that the vendee was, in equity, the owner of the estate. The case would be different if the vendee had performed all the conditions of his contract. In such case he would be the absolute owner of the equitable estate, and the vendor would have merely the dry legal title, which he would be compelled to transfer when required, and which he would not in the mean time be allowed to use in opposition to the interests or wishes of the vendee. But this would not be by reason of any presumed or supposititious performance by the vendee, but because he had actually performed. As above stated, the record does not show clearly whether the vendee has paid all the purchase money or not; but the inference from what is stated, and from the argument of counsel, is that he has not. And, as the defense is based upon an equity in opposition to the legal title, it was incumbent upon the defendants to make the fact appear. *Arguello v. Bours*, 67 Cal. 450, 8 Pac. Rep. 49.

In the next place, it is contended that the position of a vendor after an executory contract of purchase is analogous to that of a mortgagee; and that the rule that a mortgagee cannot have an injunction against the removal of a portion of the mortgaged premises, without showing that his security would thereby be impaired, applies here. This is but a variation of the preceding point. It is, in substance, saying that the vendee will be allowed to waste and destroy the property unless it be shown that the vendor's lien will thereby be impaired; and it depends upon the proposition that the position of the vendor is like that of a mortgagee. There are some respects in which the analogy holds; more especially in the case of a common-law mortgage, where the mortgagee has the legal title. But the likeness is by no means perfect. The vendor has not a mere lien for the security of money, which he must foreclose upon non-performance by the vendee. As shown by the cases cited under the preceding head, he may, upon such non-performance, rescind the contract and retake possession. He has therefore, in addition to the legal title, a reversionary interest in the equitable estate, conditional upon non-performance by the vendee, which interest will be protected in equity. The vendee on his side has, before performance, only a conditional equitable interest for equitable purposes; and, as above stated, a court of equity will not take his performance for

granted to such an extent as to enable him to grasp at once at the enjoyment of the property.

It results that the judgment is not sustained by the findings; but, in the somewhat uncertain condition of the record, we do not think that final judgment should be ordered for the plaintiff. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

87 Cal. 530

JUSTICE v. OTT. (No. 13,926.)

(*Supreme Court of California*. Jan. 29, 1891.)

GUARDIAN OF INCOMPETENT — ACTION ON WARD'S NOTE.

An action cannot be maintained against the guardian of an incompetent person upon a note made by the latter, when the latter is not joined or served with summons, and judgment entered by default will be set aside.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Wells, Guthrie & Lee, for appellant. *W. T. Williams*, for respondent.

BELCHER, C. This is an action upon a promissory note. A personal judgment for the amount due on the note was entered against the defendant, Ott, by default, and from that judgment he appeals. It is alleged in the complaint that Jesse Justice made and delivered to the plaintiff his promissory note for \$1,000, dated November 18, 1879, and payable five years after date, with interest; that plaintiff is still the owner and holder of the note, and that no part of the principal or interest thereof has been paid; "that on the — day of May, 1888, by an order of the superior court duly made and entered, said defendant, George T. Ott, was appointed the guardian of the estate and person of said Jesse Justice, and that he is now such guardian; that on or about the 18th day of May, 1888, plaintiff demanded of said guardian the payment of said promissory note, and the interest thereon, but said guardian refused to pay said note or any part thereof;" wherefore the plaintiff prayed for judgment against the defendant, George T. Ott, as such guardian, for the principal and interest due on the note, amounting to \$2,400. A summons was issued, addressed to "George T. Ott, guardian," etc., and he was thereby notified that, if he failed to appear and answer the complaint, the plaintiff would cause his default to be entered, and would take judgment against him for \$2,400 and costs of suit. The summons was served on the defendant personally, by delivering to him a copy thereof and a copy of the complaint, but, so far as appears, no service was made on or notice given to Jesse Justice. The affidavit shows service on the defendant, and states the time, but not the place, of service. On the 23d day

after the defendant was served, the clerk of the court, by direction of the plaintiff's attorney, entered his default, and on the next day entered against him a personal judgment for the amount prayed for in the complaint. It is very clear that this judgment cannot be sustained. The facts stated in the complaint do not show any personal obligation on the part of the defendant to pay the note. The obligation, if any, was on the maker, and the action should have been brought against him, though an incompetent, and not against his guardian. *Brown v. Chase*, 4 Mass. 436; *Raymond v. Sawyer*, 37 Me. 406; *Robinson v. Hersey*, 60 Me. 225; *Coombs v. Janvier*, 31 N. J. Law, 240; *Van Horn v. Hann*, 39 N. J. Law, 207; *Steel v. Young*, 4 Watts, 459; *Fox v. Minor*, 32 Cal. 118. If the action had been properly brought, the summons would have been served on both the incompetent and his guardian, (section 411, subd. 4, Code Civil Proc.,) and it would then have been the duty of the guardian to appear and defend the action, (*Gronfier v. Puymiro*, 19 Cal. 632;) and, if deemed expedient, the court might also have appointed a guardian *ad litem* to represent the incompetent, (section 372, Code Civil Proc.) Other grounds for reversal are argued by counsel, but they need not be considered. For the reasons above stated we advise that the judgment be reversed, and the action dismissed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the action dismissed.

87 Cal. 287

SAN BERNARDINO COUNTY v. REICHERT.
(No. 13,756.)

(Supreme Court of California. Dec. 23, 1890.)

COUNTY BOUNDARY LINES.

Act Cal. April 26, 1853, (St. 1853, p. 119,) organizing San Bernardino county, provided that said county should have for its southern boundary the northern boundary of San Diego county. The common boundary line of the two counties, as described in the acts organizing them, makes several express references to points on, and lines of, two ranchos, the N. and the V. At the time of the passage of said act, said ranchos were Mexican grants, and one H. had, under proper authority, made and put on record a survey thereof. In 1880 a patent issued for the V. rancho, and in 1882 one M. made a survey of the N. rancho, on which in 1884 a patent issued for the latter rancho. The H. survey was not finally approved, and was not the basis for either of the said patents. Held that, the surveyor general, in running the boundary line of said counties, properly adopted the H. survey, especially as parts of the description expressed in the act could not be applied to the M. survey, but did correspond with the H. survey.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKINLEY, Judge.

Harris & Gregg, Waters & Gird, and *H. Connor*, Dist. Atty., for appellant. *J. L. Copeland* and *Brunson, Wilson & Lamme*, for respondent.

McKINLEY, J. In July, 1887, the county of San Bernardino applied to the respondent,

surveyor general of the state, to survey the boundary line between said county and the county of San Diego. While the respondent was proceeding to perform that duty the appellant filed a petition in the superior court alleging, in substance, that he was proceeding to survey and run said boundary in a certain manner that was wrong, and upon a false theory, and praying for a writ of mandate compelling him to run the line in a certain other manner, which is alleged to be the right manner. The court rendered judgment against the appellant, who appeals from the judgment and from an order denying a new trial.

The act organizing the county of San Bernardino was passed April 26, 1853. St. 1853, p. 119. By that act the northern boundary line of San Diego county, which had been previously organized, is made the southern boundary of San Bernardino county. The boundaries of the two counties were afterwards substantially incorporated in sections 3943 and 3944 of the Political Code. The common boundary line between the two counties, as described in the acts organizing them, makes several express references to points on, and lines of, two certain ranchos called "San Jacinto Nuevo" and "San Jacinto Viejo." At the time of the passage of said act of April 26, 1853, these ranchos were known as "Mexican grants;" and one Hancock, a deputy United States surveyor, under directions of the proper authorities, had made and placed on record a survey of said ranchos. Afterwards, in 1880, a United States patent issued for the Viejo rancho, and, in 1882, one Minto, a United States deputy-surveyor, made a survey of the Nuevo rancho, upon which, in 1884, a United States patent issued for said last-named rancho. The Hancock survey does not appear to have been finally approved, and was not adopted as the basis for either of said patents. Appellant contends that the respondent, in running the line between the two counties, should have followed the lines of the ranchos as afterwards established by the Minto survey and the United States patents; while respondent contends that it was the intention of the legislature to determine what the boundary line was at and immediately after the passage of the act of 1853 organizing the county, that he should carry out that intention, and that in doing so he may consider the Hancock survey as tending to show where the legislature at that time intended to fix the line. The court adopted the view of the respondent, and admitted in evidence the said Hancock survey; and we are not able to see that in so doing any error was committed. This proceeding does not involve any question of title to real property, or of the correct boundaries of land as between private claimants. In determining any such question with respect to said ranchos, of course, the lines of the patents would govern. But the legislature, when in 1853 it passed the said act organizing said county, had power to fix the boundary line wherever it pleased, and for that purpose to adopt any description deemed proper to express its intention. It was the duty

—and it certainly may be presumed to have been the intention—of the legislature to adopt a line that could be then definitely fixed. It cannot be presumed that the intention was to describe a line that could not properly be ascertained until the lapse of some indefinite period, when the United States government, over which there was no control, should see fit, for other purposes, to issue patents for said ranchos, thus deliberately providing for the evils which must certainly come from an unknown and unknowable boundary between two municipal corporations. The Minto survey and the patents were not in existence until from 23 to 30 years after the passage of the act organizing the county. It furthermore appears that parts of the description of the line, as expressed in the act, cannot be applied to the Minto survey, while they do correspond with the Hancock survey. Our conclusion is that no error was committed by the court below. We do not, however, wish to be understood as deciding that the courts have jurisdiction to control the surveyor general in the matter here involved. Section 3972 of the Political Code provides that his action in such a case shall be “conclusive;” and in *People v. Boggs*, 56 Cal. 648, this court seems to have held that section not to be unconstitutional. But counsel for respondent do not make the point in their briefs or arguments, and we do not care to pass upon the question without fuller discussion. Judgment and order affirmed.

87 Cal. 323

ABBOTT v. SEVENTY-SIX LAND & WATER CO. (No. 13,980.)

(Supreme Court of California. Jan. 3, 1891.)

LEASE—OPTION TO BUY—RIGHT TO EXERCISE—EVIDENCE.

1. Where a tenant takes a lease with an option to extend it from year to year, and also to buy the land at the end of any year, at a price to be fixed by the lessor during the year, the fact that the clause containing the option to buy is by agreement omitted from a lease for the second year, but with a mutual understanding that the option is to continue, does not deprive the tenant of his right to exercise the option under the second lease.

2. Where the business relative to the lease and sale of the lands is left to the secretary of the corporation, the lessor, his statements to a lessee respecting the lease and the option to buy are admissible in an action by the lessee to compel a conveyance according to the terms of the option.

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

The business of defendant corporation was the sale of its lands, with the water and water privileges from its canals, to such persons as it could induce to buy them, and also by farm leases or “cropping contracts,” to get revenue from the lands while they remained unsold. The plan of defendant was to induce farmers to take the lands upon such leases or cropping contracts for one year, with the privilege of extending the same, from year to year, for a period of not to exceed two additional years; the tenant to have the option to buy the land leased by him, throughout the entire time while his lease

existed, either by the original term of one year, or an extension of the term, at prices to be fixed by the corporation annually; the tenant, if he should elect to buy, to notify defendant before the 1st day of October of the year in which he made such election; and his purchase to be made as of the date October 1st of that year; the corporation to have the right to change and fix the price of the lands leased before October 1st of each year, which price so fixed was to remain the price of the lands for the following year, and, unless such change of price was made, that which had before been put on the land should remain until a change should be made, to take effect on the 1st day of October thereafter. Plaintiff elected to continue his lease and option to buy for the year to come from October 1, 1886, and gave defendant notice of his election. Defendant accepted the notice and demand for the extension. In the second lease the clause mentioning the option to buy was erased, for the reason that it required a good deal of clerical work to fill it out, but it was mutually understood that the option was also extended.

Jarboe, Harrison & Goodfellow, for appellant. *Thompson & Thompson*, for respondent.

THORNTON, J. The option in plaintiff to buy the land under the lease or cropping contract entered into by the plaintiff and defendant, bearing date 7th day of December, 1885, continued for two years from the 1st day of October, 1886. It makes no difference that it was not inserted in the second lease. It was left out of the second lease by agreement, as something unnecessary. The defendant had a right to change the purchase price during the execution of the lease, provided it did so prior to the 1st of October of each year. It never did change this price. It therefore remained as in the first contract. The plaintiff exercised and gave notice of his intention to purchase, under the option clause above mentioned, on the 3d of September, 1887, and then offered to pay the installment of the purchase money then due, viz., one-fourth of it, and interest on the portion not then due, and offered to comply in all respects with his contract. The defendant refused to receive the money, and repudiated its contracts with the plaintiff. We think that the judgment is correct, and in accordance with the principles of law, and should be affirmed.

The statements of the secretary of the defendant corporation, made to plaintiff, were properly admitted. It is evident that the conduct of the whole business was left by the company to him; that he was fully authorized to act, and did act, for the company in its dealing with plaintiff, and others in the like situation, in regard to the business connected with the leasing and disposition of its lands. The determination of this action by the court below is in accordance with well-settled legal principles. The record shows no error.

Judgment affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

TYNER v. SEVENTY-SIX LAND & WATER CO.
(No. 13,981.)

(*Supreme Court of California.* Jan. 3, 1891.)

Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Jarboe, Harrison & Goodfellow, for appellant.
Thompson & Thompson, for respondent.

PER CURIAM. This case is similar to, and must be determined on the authority of, *Abbott v. Same Defendant*, ante, 693, (No. 13,980,) and in the same way. Judgment affirmed.

SHIPE v. SEVENTY-SIX LAND & WATER CO.
(No. 13,982.)

(*Supreme Court of California.* Jan. 3, 1891.)

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Jarboe, Harrison & Goodfellow, for appellant.
Thompson & Thompson, for respondent.

PER CURIAM. This case is similar to, and must be determined on the authority of, *Abbott v. Same Defendant*, ante, 693, (No. 13,980,) and in the same way. Judgment affirmed.

ABBOTT v. SEVENTY-SIX LAND & WATER CO.
(No. 13,983.)

(*Supreme Court of California.* Jan. 3, 1891.)

Department 2. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Jarboe, Harrison & Goodfellow, for appellant.
Thompson & Thompson, for respondent.

PER CURIAM. This case is similar to, and must be determined on the authority of, *Abbott v. Same Defendant*, ante, 693, (No. 13,980,) and in the same way. Judgment affirmed.

87 Cal. 499

CITY OF SAN LUIS OBISPO v. PETTIT.
(No. 13,856.)

(*Supreme Court of California.* Jan. 19, 1891.)

TAXATION—DOUBLE ASSESSMENT—LEVY.

1. Under Pol. Code Cal. § 3649, providing that any property discovered by the assessor to have "escaped assessment" for the last preceding year, if such property is still owned or controlled by the same person who owned or controlled it the previous year, may be assessed at double its value, money deposited with a county treasurer by order of court in a pending case may be doubly assessed if it "escaped assessment" the year before.

2. Where an assessment is invalid the property has "escaped assessment" within the meaning of section 3649.

3. Under Pol. Code Cal. § 3647, requiring money in litigation in possession of the county treasurer pending the suit to be assessed to him, an assessment of the money to the plaintiffs in the suit is invalid.

4. Under the municipal corporation act, § 871, (Laws Cal. 1883, p. 273,) providing that the city trustees shall provide by ordinance a system for the assessment, levy, and collection of city and town taxes, which shall conform as nearly as possible to the provisions of the state laws, "except as to the times for such assessment, levy, and collection," it is competent for the trustees to fix any time they may see fit for assessing, levying, and collecting the taxes; and the fact that the time fixed coincides with that fixed for the levy of state and county taxes does not affect the validity of the ordinance.

5. Under an ordinance passed in pursuance of the corporation act, providing for "assessing and collecting" city taxes in the manner prescribed by Pol. Code Cal. tit. 9, pt. 3, which contains provisions for levying taxes, authority is given to levy taxes.

6. The fact that one provision of the ordi-

nance provides that delinquent taxes shall be collected by the collector by sale, while section 879 of the corporation act provides that they shall be collected by suit by the city attorney, does not invalidate the entire ordinance, but only the inconsistent provision.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; T. H. REARDON, Judge.

Graves, Turner & Graves, for appellant.
William Shipsey, for respondent.

HAYNE, C. This was an action to recover delinquent taxes. The property taxed was a sum of money deposited with the defendant in his official capacity under an order of the superior court in a pending case. During the fiscal year 1887-88 the defendant reported the deposit to the assessor, who, however, did not assess it to him, but (probably acting under a mistaken view of the law) assessed it to the plaintiffs in this suit. The tax was not paid. In the following year the property was assessed to the defendant; but, upon the theory that it had "escaped assessment" the preceding year, the amount of the assessment was doubled. The trial court gave judgment for the plaintiff, and the defendant appeals. The points made relate to the validity of the assessment.

1. In doubling the assessment the assessor acted under a provision of the Political Code, which is as follows: "Sec. 3649. Any property discovered by the assessor to have escaped assessment for the last preceding year, if such property is in the ownership or under the control of the same person who owned or controlled it for such preceding year, may be assessed at double its value." The validity of this provision was affirmed in *Biddle v. Oaks*, 59 Cal. 95, in which case the court said that the legislature had power to impose a penalty for neglect to have an assessment made. In the case before us there was no such neglect, because the defendant reported the property to the assessor. But we do not understand the decision as confining the operation or validity of the provision to cases where there has been neglect on the part of the person to whom the assessment is made. The terms of the provision indicate no such limitation. The language is general, and applies to all cases where property has escaped assessment in the preceding year, whatever may have been the cause of such escape. Nor do we think that upon this construction the provision is invalid. Its evident purpose is to carry out the general intention pervading the revenue system, that all private property shall bear its share of the burden of taxation. This is certainly a legitimate purpose; and the means employed to carry it out are not, in our opinion, in violation of any constitutional provision. The section does not provide that the property shall not be assessed in proportion to its value. It provides, in effect, that in certain cases assessments for two different years may be made in one, and therefore goes in effect merely to the time at which an assessment may be made. We see no constitutional objection to this. It is true that in exceptional cases it might happen that the

property would increase in value since the preceding assessment, and hence that merely doubling the assessment would not be an accurate way of arriving at the value for the preceding year; but in the great majority of cases doubling the assessment would be a fair enough way of arriving at a valuation for the preceding year. And if in exceptional cases the method would result in an overvaluation, and it be assumed (for the purposes of the opinion) that in such cases the overvaluation would render the assessment void, it would have to be shown that the case was of such exceptional character. In this case no such question can arise, because the property assessed was money, and for all practical purposes was of the same value from year to year. The provision, therefore, is valid, and covers the case before us.

It is to be observed that the condition of the double assessment is not that the property should have escaped taxation. It is not enough, therefore, to show that the tax was not paid. The property must have escaped "assessment." But, in our opinion, the word "assessment" in this connection means a "valid assessment." A thing which has the semblance of an assessment, but which is void and of no effect, is for all practical purposes no assessment, and furnishes no reason why a proper assessment should not be made. The question, therefore, must turn upon whether the assessment for the year 1887-88 was valid or invalid. In our opinion, it was invalid. The method of making an assessment in such a case as this is prescribed by the following provision of the Political Code: "Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court." There was a plain violation of the provision of this section, and the well-established rule is that, if an assessment is not made as prescribed by the statute, it is void. *Grotefend v. Ultz*, 53 Cal. 666; *Grimm v. O'Connell*, 54 Cal. 522; *Hearst v. Egglestone*, 55 Cal. 367; *Brady v. Dowden*, 59 Cal. 51; *Bosworth v. Webster*, 64 Cal. 1; *Daly v. Ah Goon*, 64 Cal. 512, 2 Pac. Rep. 401; *Klumpke v. Baker*, 68 Cal. 559, 10 Pac. Rep. 197. It is true that the Code provides that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid," (Pol. Code, § 3628; but, whatever may be the meaning of this provision, it does not apply to personal property, (*Lake Co. v. Mining Co.*, 66 Cal. 17, 4 Pac. Rep. 876.) The assessment for 1887-88 was therefore invalid, and a reassessment in the following year was proper.

2. It is contended that there was no authority of law for making the levy. Section 871 of the municipal corporation act provides that the city trustees "shall have power, and it shall be their duty, to provide by ordinance a system for the assessment, levy, and collection of all city or town taxes, not inconsistent with the provisions of this chapter, which system shall conform, as nearly as the circum-

stances of the case may permit, to the provisions of the laws of this state in reference to the assessment, levy, and collection of state and county taxes, except as to the times for such assessment, levy, and collection." Laws 1883, p. 273. The ordinance passed in pursuance of the above provision contained, among other things, the following: "Sec. 3. The manner, form, and time of assessing and collecting city taxes shall be the same as is prescribed by the Political Code of the state of California for assessing and collecting state and county taxes; and all the provisions of title 9 of part 3 of said Political Code are hereby adopted, and are ordained to be, and are, the law for assessing and collecting city taxes, as to manner, mode and time," etc. The objection consists of two branches, which we shall consider separately. (a) It is argued that the statute above quoted forbids the city from assessing, levying, and collecting its taxes at the same time as the state and county. But we do not so construe the provision. It simply leaves those matters to the discretion of the city trustees, who may fix any time they see fit. There is nothing to prevent them from selecting the time fixed for the other taxes. (b) It is said that the ordinance in question provides only for "assessing and collecting" the taxes, and not for levying them, as to which it is contended that no provision is made. But, in the first place, we think that the words "assessing and collecting" are used in the ordinance in a general sense, and include the operation called "levying the tax." The words are so used in the constitution. As is said in the clear and satisfactory argument of the counsel for the respondent: "The foundation of the city taxing power is in the constitution. Article 11, § 12, provides that the legislature * * * may by general laws vest in the corporate authorities power to assess and collect taxes. There is no authority to 'levy,' unless one of the words 'assess and collect' includes levy." In the second place, the ordinance does not confine itself to an adoption of the provisions of the Code by a general reference to them as those in relation to the assessment and collection of taxes. It goes on to designate specifically the provisions adopted by saying: "And all the provisions of title 9, part 3, of said Political Code are hereby adopted." The part of the Code so designated contains provisions for levying the tax, (sections 3713-3719;) and the ordinance makes provision for the difference in officers, etc.

3. It is contended that the provisions of the ordinance quoted conflict with section 879 of the municipal corporation act. The section referred to provides, in substance, that the delinquent taxes shall be collected by the city attorney by suit in the name of the city, (Laws 1883, p. 277.) while the portions of the Political Code adopted by the ordinance provide that such taxes shall be collected by the tax collector by sale of the property, (section 3765 et seq.) But if it be conceded that these portions of the ordinance are in conflict with the statute, (as to which see *City of Placerville v. Wilcox*, 35 Cal. 21,) it does not follow that the whole ordinance is void.

"Nothing is better settled than that, if the part of a law or ordinance which is invalid is distinctly separable from the remainder, the latter can stand and the former be rejected." *Ex parte Christensen*, 85 Cal. 212, 24 Pac. Rep. 747. The provision for the collection of the delinquent taxes seems distinctly separable from the other parts of the ordinance, and may therefore be rejected. The proceedings in this case were in accordance with the statute, the suit having been brought under section 879, above referred to. In the view we have taken it is not necessary to consider the effect of the amended ordinance. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment and in the foregoing opinion. The money which was the subject of the double assessment for the year 1888-89 did not bear its share of taxation for the preceding year. If the owner had waived the invalidity of its assessment for the fiscal year 1887-88, and had paid upon such assessment the tax levied for that year, a different question would have been presented.

87 Cal. 489

SMITH v. MOHN. (No. 13,898.)

(*Supreme Court of California*. Jan. 19, 1891.)

VENDOR AND VENDEE—CONTRACT—ACTION FOR PRICE—FINDINGS.

1. In an action on a contract to buy land, which is set out in the complaint, a finding by the court that plaintiff "entered into an agreement in writing with the defendant * * * whereby plaintiff agreed to sell and defendant agreed to buy said land upon the terms and conditions set forth in plaintiff's complaint, and plaintiff's Exhibit No. 2," is a sufficient finding that defendant executed the contract, notwithstanding the exhibit is no part of the pleadings or record, as the finding is complete without the reference to the exhibit.

2. Plaintiff and defendant being the only parties to the contract, a finding of the amount "due the plaintiff upon said contract" is sufficient, without a finding that it is due from defendant.

3. Where defendant sets up as affirmative matter that his signature was obtained by fraud, and that another was the real purchaser, and was so regarded by plaintiff, findings that the signature was not obtained by fraud, and the plaintiff did not accept the contract with knowledge that another was the real purchaser, sufficiently cover the issues raised by the affirmative allegations.

4. Where a contract for the sale of land provides that time shall be of the essence, and that in case of the vendee's failure to comply with its terms he shall forfeit all rights, but does not provide that the vendor shall forfeit any right if the purchase money is not paid at the stipulated time, the vendor may enforce the contract and sue for the purchase money in case of the vendee's default. *Following Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Brunson, Wilson & Lamme, for appellant. Dunne & Hunter and Jay E. Hunter, for respondent.

BELCHER, C. This action was commenced on the 19th day of April, 1889, to recover the sum of \$1,000, with interest thereon, alleged to be due from defendant to plaintiff, under a contract for the sale of land. It is alleged in the complaint that on the 6th day of September, 1887, the plaintiff and defendant entered into a written agreement, a copy of which is set out in full, whereby the plaintiff, as party of the first part, agreed to sell and convey to the defendant, as party of the second part, and the latter to buy, a certain described parcel of land, for the sum of \$2,200, to be paid as follows: \$700 cash, the receipt of which was acknowledged; \$500 on January 1, 1888; and the balance of \$1,000 on May 1, 1888,—with interest at 8 per cent. It is further alleged that the first two payments were made, and that the sum of \$1,000, with interest, "became due, according to the terms of said contract, on the 1st day of May, 1888, no part of which has been paid by defendant, although often requested so to do. That plaintiff has duly performed all of the conditions of said contract to be performed by him to this time, and has been constantly and now is ready and willing, and prior to the institution of this suit offered to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance by defendant with the terms of said contract as therein set forth, but defendant said he would not accept a deed, and refused to pay said money." The agreement set out contains this provision: "It is further agreed that time is of the essence of this contract, and, in the event of a failure to comply with the terms thereof by said party of the second part, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto, and to moneys theretofore paid under this contract; and all his interest in or to said moneys, or said property, shall thereupon immediately cease, as fully as if said moneys had never been paid, or this agreement entered into. And the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed, with certificate of title." The defendant, by his answer, denied that "plaintiff and defendant entered into the written agreement, a copy of which is set out in the complaint;" admitted that he signed it; and averred "that his signature thereto was obtained by false and fraudulent representations of the said plaintiff, made by and through his agents employed by him for the sale of said premises in said contract described." He then states that he was solicited by one C. J. Longstreet to purchase the property, and declined to do so; that Longstreet and D. G. White, his partner in the real-estate agency business, informed him that they had contracted to purchase the property in his (defendant's) name and had paid, on account of the purchase price, a sum of money, which they claimed to have advanced for him; that he then and

there refused to confirm the purchase or to take the property, whereupon they produced the written contract, a copy of which is set out in the complaint, and which had then been signed by the plaintiff, and insisted that he should execute it, and become the purchaser of the property, and that he positively refused to make the purchase or sign the contract; that upon such refusal they informed the agent of plaintiff for the sale of the property that defendant refused to sign the contract, and offered to return the same to the agent, and cancel it, and demanded a return of the money paid by them on account thereof, but the agent refused to receive or cancel the contract, or to repay the money; that thereupon it was agreed between them that White should become the purchaser, procure the signature of defendant to the contract, and take an assignment thereof, and pay the balance of the purchase price; that Longstreet and White informed defendant of this agreement, and requested him to attach his signature to an assignment indorsed on the contract to White, and that he at first refused, but finally did it upon their assurance that it was a mere matter of form, and that he would incur no liability thereunder; that subsequently upon like request and assurance he signed the contract; that the plaintiff thereafter received the contract, and the first and second payments therein provided for, with full knowledge and notice that White was the purchaser of the property, and the real party in interest, as the vendee thereof; and that the plaintiff did not at any time call upon defendant for any money or to comply with any of the terms of the contract until after White had made default in the last payment; and that defendant never did make any payment for or on account of the said purchase, or furnish any money therefor. The case was tried, and the findings of the court were as follows: *First*, That on the 6th day of September, 1887, the plaintiff, being the owner of the parcel of land described, "entered into an agreement in writing with the defendant, G. F. Mohn, Sr., whereby the plaintiff agreed to sell and the defendant agreed to buy said land, upon the terms and conditions set forth in plaintiff's complaint, and the exhibit marked 'Plaintiff's Exhibit No. 2:.'" *second*, that Longstreet and White were not the agents of plaintiff, or employed by him for the sale of said premises; *third*, that the signature of the defendant to the said agreement of purchase and sale was not obtained by false and fraudulent representations of the plaintiff, made by and through his agents; *fourth*, that plaintiff did not accept and receive the contract, or the first and second payments thereon, with the knowledge and notice that White was the purchaser of the property, or the real party in interest as the vendee thereof; *fifth*, that the plaintiff, prior to the institution of this suit, offered to execute and deliver to defendant a deed of the premises, together with a certificate of title, and demanded of him the balance due on the contract, but defendant declined to accept the deed and refused to pay the money; *sixth*, that there is now due the plaintiff upon

said contract the sum of \$1,167, principal and interest. The court gave judgment for the plaintiff for the amount found due, with costs, and the defendant appealed. It is contended for appellant that the findings were defective and insufficient in several particulars.

First it is claimed that there was no sufficient finding that defendant ever executed the contract set forth in the complaint, or as to what were the terms and conditions upon which the sale was made. This position is rested upon the last clause of the first finding, that the parties entered into an agreement to sell and buy the land upon the terms and conditions set forth in the complaint, and the exhibit marked "Plaintiff's Exhibit No. 2." It is said that this exhibit is not made a part of the pleadings, findings, or record, and is not referred to except in this manner. But the contract of sale was set out *in hæc verba* in the complaint. The defendant admitted that he signed that contract, and only alleged in substance that he did not execute it, in a legal sense, for the reason that his signature was obtained by fraud. There is no question, therefore, as to what were the terms and conditions of the contract which the defendant signed, and on which the plaintiff relied for a recovery. The only question then is, was the defendant bound by the contract, or not bound by it, because of the alleged frauds? The words "and the exhibit marked 'Plaintiff's Exhibit No. 2,'" may be rejected as surplusage, as the finding is complete without them. It may be remarked in this connection, that the evidence is not brought up in the record, and we are not advised as to what was introduced, but, if need be, we might assume that plaintiff offered his contract, and it was received and marked as his "Exhibit No. 2."

It is next objected that the court found only the amount "due the plaintiff upon said contract," and not that the sum named was due from defendant. But as the plaintiff and defendant were the only parties who signed the contract, it must follow as a necessary inference, in view of the other findings, that if anything was due the plaintiff it was due from the defendant. We think, therefore, that this finding was sufficient.

It is further objected that the findings as to the affirmative matters set up in the answer were not sufficient. The substance of these matters is—*First*, that defendant's signature to the contract was obtained by fraud, consisting of false and fraudulent representations, etc.; *second*, that White was the purchaser and the real party in interest, and was so accepted and regarded by the plaintiff. It is true that findings should respond to and cover all of the material issues raised by the pleadings, but they should be statements only of the ultimate facts, and not of the probative facts. *Mathews v. Kinsell*, 41 Cal. 572. In this case, we think the findings did meet and negative all the ultimate facts affirmatively alleged in the answer, and that they should be held sufficient.

It is also contended that, under the rule that pleadings are to be construed most

strongly against the pleader, the averment in the complaint that plaintiff, "prior to the institution of this suit, offered to execute and deliver to defendant a deed of said premises, together with a certificate of title, upon compliance," etc., must be construed as relating to a time immediately preceding the institution of the suit; that the offer of a deed and demand of payment were therefore not made until nearly 11 months after the money sued for became due and payable; and that plaintiff, by his neglect to tender the deed and demand payment when the money became due, had lost all right to sue for and recover the money under the express provisions of the contract. The provisions of the contract relied upon as effecting this result are those above quoted. It will be observed that it is also averred in the complaint "that plaintiff has duly performed all of the conditions of said contract to be performed by him to this time." This was a sufficient averment of the performance of conditions precedent, (section 457, Code Civil Proc.,) and it is not denied by the answer. This being so, how can it be said that plaintiff was in default and thereby lost his rights? But however this may be, it should be noticed that the substance of the provisions relied upon is that time is of the essence of the contract, and if defendant shall fail to comply with its terms, then the plaintiff shall be released from all obligations to convey the property, and defendant shall forfeit all right thereto, and to the moneys paid, and all his interest in or to the said moneys and property shall immediately cease, as fully as if the moneys had never been paid, or the agreement entered into. In this there is no provision that the plaintiff shall forfeit his rights if the money is not paid on time; and in *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. Rep. 629, where a similar contract was under review, it was held that the failure of the vendee to make the payments provided for did not make the contract void, so far as the vendor was concerned, but that he had the option to avoid or enforce the contract, and might, if he elected to do so, sue for and recover the balance of the purchase money. That case seems to be decisive of this, and, as the above are all the points made for a reversal, we advise that the judgment be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

87 Cal. 589

RUSS LUMBER & MILL CO. v. GARRETTSON
et al. (No. 13,954.)

(Supreme Court of California. Feb. 3, 1891.)

MECHANIC'S LIEN—FORECLOSURE—COMPLAINT—
STATEMENT OF CLAIM.

1. Where, in an action to foreclose a lien for materials furnished the contractors, the complaint fails to state the contract price between the owner and the contractors, or the reasonable value of the work, but only that after the owner had notice that plaintiff was furnishing the materials there became due to the contractors an amount in excess of the sum due plaintiff, an objection to its insufficiency must be taken by demurrer or answer, and cannot be raised for the first time on appeal.

2. Under Code Civil Proc. Cal. §§ 1183, 1184, providing that in certain cases material-men may give notice to the owner of the amount and value of the materials to be furnished, and that the owner must reserve a sufficient amount due or to become due the contractor to answer such claim, a complaint to foreclose a lien for materials furnished is sufficient when it avers that due notice was given the owner of the amount and value of the materials to be furnished the contractors.

3. Where the complaint states the general character of the materials furnished, and their price, and then avers that plaintiff gave the owner written notice of the agreement to furnish the materials "as aforesaid," the notice given is sufficient, under Code Civil Proc. Cal. § 1184, requiring that it state the amount and value of the materials.

4. A claim of lien stating that defendant is the owner of a described lot, that he contracted with named persons to build a house thereon, that plaintiff furnished materials under a contract with the contractors, and gave due notice to the owner, wherefore it claimed the benefit of the Code of Civil Procedure relating to liens on property, is sufficient.

5. It is not necessary in a lien foreclosure suit that there be a personal judgment against

the contractors who are personally liable for the materials.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

L. L. Boone, for appellant. *Reinoehl & Harrison*, for respondent.

BELCHER, C. The plaintiff, a corporation, brought this action to foreclose a lien for materials furnished for, and used in, the erection of a building on land owned by defendant Garrettson. It is alleged in the complaint that on the 17th day of February, 1888, defendant Garrettson entered into a contract with defendants Wanberg & Nelson, whereby they agreed to erect and finish for him a building on a certain described piece of land; that on various occasions between the 22d day of February and the 20th day of May, 1888, the plaintiff, at the instance and request of the contractors, furnished materials, viz., lumber, laths, shingles, and windows, to be used, and which were actually used, in the erection and construction of the building specified in the contract; that the market value of the materials so furnished, and the amount agreed to be paid therefor, is the sum of \$1,112.56, of which sum \$300 has been paid, and the balance of \$812.56 is still due, owing, and unpaid to the claimant; that on the 23d day of February, 1888, the plaintiff duly gave to Garrettson a written notice that it had agreed to furnish the materials as aforesaid for the erection of said building, and thereafter there became and was due and owing from him to the contractors, on account of the contract, an amount largely in excess of the balance so due and unpaid to plaintiff, and sufficient to answer its claim, including costs and attorney's fees; that Garrettson is now, and during all the time herein specified was, the owner of the lot of land on which the building was erected, and all thereof is necessary for the convenient use and occupation of the building; that on or about the 20th day of June, 1888, the building was completed, and thereafter, on the 13th day of July following, plaintiff, for the purpose of securing and perfecting a lien for the moneys so due upon the building and land described, under the provisions of chapter 2, tit. 4, pt. 3, Code Civil Proc., filed for record, in the recorder's office of the county in which the property was situated, its claim of lien, which was duly verified, and three days later duly recorded, and a copy of which, marked "Exhibit A," was attached to and made a part of the complaint. Defendant Garrettson demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, "for the reason that the instrument set forth in said complaint as 'Exhibit A,' and purporting to be a notice of claim filed for record in the recorder's office, does not comply with the statute in such cases made and provided, inasmuch as there are no words or clauses contained therein which set out a claim of lien on certain property to be charged therewith, and the statement of demand is entirely wanting;" and also on the ground that the complaint

was ambiguous, uncertain, and unintelligible, "for the reason that it appears upon the complaint that the contract therein was for an amount exceeding one thousand dollars from the sum of money therein set forth, and from the fact that Wanberg & Nelson are made party defendants; but it does not state whether there was a written contract filed in accordance with law, or set out said contract in the complaint as the best evidence." The demurrer was overruled, and he then answered. The case was tried, and judgment rendered foreclosing the lien, as prayed for. From that judgment Garrettson alone appeals, without any statement or bill of exceptions.

It is argued for appellant that the complaint was insufficient, because there was no averment as to what was the contract price between the owner and contractors, or that there was any express agreement to pay anything, or as to what was the reasonable value of the work to be done; and hence, it is said, there was nothing to show that any sum ever became due under the contract from the owner to the contractors. It is true that neither the contract price nor the reasonable value of the work was specifically set forth in the complaint; and the averment that, after the plaintiff gave Garrettson written notice that it had agreed to furnish the materials, there became and was due and owing from him to the contractors, on account of the contract, an amount in excess of the balance due and unpaid to the plaintiff, was a statement of conclusions of law rather than of facts. And, of course, this statement, if tested by demurrer, would have been insufficient. It was, however, not so tested nor was it in any way traversed by the answer. The point seems to be made here for the first time. Under such circumstances, we think the complaint should be held sufficient in this regard.

In this connection it is suggested that if Garrettson agreed to pay a price for the erection of his building, and the amount exceeded \$1,000, the contract was void, unless properly recorded; and if the amount was less than \$1,000, he was not required to reserve 25 per centum thereof for 35 days after the building was completed, but could pay the price at any time and in any way agreed on by the parties. And it is said, for aught that appears in the complaint, the price may have been fully paid before the work commenced, or may have been a prior indebtedness. But the statute, after providing that if the contract price exceeds \$1,000, the contract, or a memorandum thereof, must be recorded or otherwise be wholly void, goes on to say: "And in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to be done and furnished at the special instance of the owner, and they shall have a lien for the value thereof." Section 1183, Code Civil Proc. And the next section (section 1184, *Id.*) has this provision: "Any of the persons mentioned in section 1183, except the contractor, may at any time give to the reputed owner a written no-

tice that they have performed labor and furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount and value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. * * * Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due, to such contractor, or other person, to answer such claim, and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter." Under these provisions, whether the contract was recorded or not, if proper notice was given, and if sufficient money was then due, or afterwards became due, from the owner to the contractors to pay the plaintiff's claim,—and that sufficient did become due is not denied or questioned,—it was the duty of the owner to withhold the same from the contractors, and the plaintiff is now entitled to have his claim of lien therefor enforced.

But it is urged that it does not appear what were the contents of the notice given by the plaintiff to the owner, and that it should therefore be held insufficient to meet the requirements of section 1184 of the Code. The complaint alleges that the plaintiff furnished the materials to be used in the construction of the building, stating in general terms the kind of materials, at the instance and request of the contractors, naming them, and that the amount agreed to be paid for all thereof was \$1,112.56. It is then alleged that the plaintiff gave to the owner of the property a written notice that it had agreed to furnish the materials as aforesaid, etc. The words "as aforesaid" evidently referred to the materials and the persons to whom they were furnished, and the value thereof as before stated, and hence we think the notice must be held sufficient.

It is also objected that the complaint must allege that a claim of lien has been verified and filed, containing certain statements, and that the complaint is insufficient in this respect. It was alleged that a claim of lien was verified and filed, and a copy thereof was attached to and made a part of the complaint, and whether it contained the required statements or not was shown by the lien itself. It is further objected that the claim of lien is defective, in that it does not purport to charge the property, nor state the name of the owner of the building, nor state to whom the materials were furnished, nor the terms of the contract. A substantial compliance with the statute is all that is

required. *Tredinnick v. Mining Co.*, 72 Cal. 78, 13 Pac. Rep. 152. The claim of lien states that Garrettson was the owner of a lot of land, which is described, and that he entered into a contract with Wanberg & Nelson by which they agreed to erect and finish for him a building on the lot, and that the building was completed at a time named; that the plaintiff furnished the materials under a contract with Wanberg & Nelson, by which they agreed to pay the market value thereof at date of delivery in cash, and the whole value and balance unpaid are stated; and that the plaintiff, on a day named, duly gave a written notice to Garrettson that he had agreed to furnish the materials as aforesaid; wherefore it claimed the benefit of the provisions of the Code of Civil Procedure relating to liens of mechanics on real property. The above seems to be a sufficient statement that Garrettson was the owner of the building which was erected for him on his land, and that the materials were furnished to Wanberg & Nelson, his contractors. To say that the name of the owner of the building, and the names of the persons to whom the materials were furnished, are matters of mere inference, since it does not necessarily follow that the owner of the land is the owner of the building, and the materials might have been furnished to a subcontractor or other persons, seems to us to be not even a plausible argument. So the terms of the contract, we think, were sufficiently stated. See *Hills v. Ohlig*, 63 Cal. 104, and *Jewell v. McKay*, 82 Cal. 144, 23 Pac. Rep. 139. And the demand that the plaintiff have the benefit of the law relating to liens was a sufficient statement that it claimed a lien on the described lot of land, with the building thereon. It is objected that there is a variance between the contract set out in the complaint and that set out in the claim of lien. We see no material variance. The contract, as set out in both papers, seems to be substantially the same.

It is also objected that the findings of the court are insufficient to support the judgment. This is rested upon the tenth finding, which reads as follows: "That on the 13th day of July, 1888, plaintiff, for the purpose of securing and perfecting a lien for the money so due it as aforesaid upon the land and premises and building aforesaid, hereinafter described, pursuant to the provisions of chapter 2, tit. 4, pt. 3, Code Civil Proc. Cal., filed for record in the office of the recorder of San Diego county, Cal., where said premises are situated, its claim therefor, duly verified in its behalf by its manager, S. S. Johnson, and that said claim of lien is in due form, and was filed in due time, and is a valid subsisting claim of lien under the law." We think the finding sufficient.

Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position. The case of *Phelps v. Mining Co.*, 49 Cal. 336, cited in support of it, only holds that the material-man, in an action to enforce a lien, was not entitled to a personal judg-

ment against the owner. We find no material error in the record, and advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, and the court below is directed, upon the filing of the *remittitur* therein, to allow the plaintiff, as a part of the costs upon this appeal, a reasonable fee for the services of its attorneys in this court.

87 Cal. 443

DREW v. PEDLAR *et al.* (No. 13,758.)

(*Supreme Court of California.* Jan. 3, 1891.)

CONTRACT TO CONVEY LAND—FORFEITURE—LIQUIDATED DAMAGES—DEMAND.

1. Defendant sold plaintiff land; terms, \$1,000 cash, \$7,500 in 60 days, balance on mortgage; time to be of the essence; defendant to be released from the contract if plaintiff failed to comply with the terms, and all money paid to be liquidated damages for non-fulfillment. Plaintiff failed to make the payment in 60 days, and, defendant having about a year thereafter refused to accept a tender of the amount and to execute a deed, plaintiff brought suit for the \$1,000, and defendant answered, admitting the contract; the payment of the \$1,000; alleging his performance of the contract, and plaintiff's abandonment thereof, and failure to make payments when due; but admitting plaintiff's subsequent tender and demand of a deed. Defendant also alleged that, on plaintiff's failure to perform his covenants, he treated the \$1,000 as forfeited, and the contract as abandoned by plaintiff, and that he converted it to his own use. The answer also alleged that, between the time of plaintiff's failure to make his payment and his subsequent tender, the property increased in value \$2,000. *Held*, that under Civil Code Cal. §§ 1670, 1671, providing that a stipulation fixing damages in case of breach of contract shall be void except where, from the nature of the case, it is impracticable to determine the actual damages; and section 3307, providing that the damages for breach of contract to purchase real estate shall be the excess of the amount due on the contract over the value of the land,—plaintiff was entitled to judgment on the pleadings.

2. Defendant, having elected to rescind the contract, was bound to return the money, and no demand therefor was necessary before suit.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

R. B. Terry and C. W. Thomas, for appellants. J. R. Webb and F. H. Short, for respondent.

VANCLIEF, C. On the 20th day of April, 1888, the parties to this action entered into a written agreement whereby the defendants agreed to sell, and the plaintiff to purchase, three lots of land in the town of Fresno, at the price of \$12,500, to be paid as follows: One thousand dollars upon the execution of the agreement; \$7,500 within 60 days from the date of the agreement; and to assume and pay a mortgage of \$4,000 to Robert B. Thompson; and also to pay the interest on the mortgage, and all taxes thereafter to become due on the land. The agreement also contains the following provision: "In the event of the failure to comply with the terms hereof by the said party of the second part, the parties of the first part shall be

released from all obligation, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto, and all money paid thereon shall be as liquidated damages for the non-fulfillment hereof by the party of the second part. And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying the said land free and clear of all incumbrances made, done, or suffered by the said parties of the first part, except as above specified. And it is understood that the stipulations aforesaid are to apply to, and to bind, the heirs, executors, and administrators and assigns of the respective parties, and that time is of the essence of this contract." The plaintiff paid \$1,000 upon the execution of the agreement, but failed to pay the \$7,500 when the same became due, and never offered to pay the same, or any part thereof, until the 24th day of April, 1889, (about 10 months after maturity,) when he tendered full payment, and demanded a deed for the land. The defendants then refused to accept payment or to execute a deed, and also refused to refund to plaintiff the \$1,000 paid by him upon the execution of the agreement, and elected to rescind the agreement. Thereupon the plaintiff commenced this action to recover the \$1,000 paid by him upon the execution of the agreement, formally alleging in his complaint the facts above stated. The defendants filed an amended answer, in which they expressly admit the execution of the contract and the payment of \$1,000, as alleged in the complaint; but allege that they have performed their part of the contract, and that plaintiff failed and refused to pay the \$7,500, or any part thereof, when the same became due, and that he abandoned the contract. They admit, however, that plaintiff made the tender of payment and demand for a deed on April 24, 1889, as alleged in the complaint. They further "allege that, on the failure of plaintiff to perform his said covenants, they treated the \$1,000 heretofore paid as forfeited, and said contract as abandoned by the plaintiff, and annulled, and that they converted the said \$1,000 to their own use." They further allege that "the said property had greatly increased in value between June 20, 1888, and April 24, 1889; that said increase was of the value of \$2,000." They "deny that they are indebted to plaintiff in any sum, or that plaintiff has sustained any damage by reason of any act of defendants, or either of them." To this answer the defendants added a cross-complaint, in which they set out the agreement; allege the payment of the \$1,000; the performance thereof on their part; the failure and refusal of the plaintiff to perform on his part, except as to the payment of the \$1,000; "that defendants are the owners and in possession of the land described in said contract; that said contract is a cloud upon defendants' title to said land;" and praying that the contract be declared void and of no effect, and that it be canceled, and for such further relief as they may be entitled to.

Upon due notice, plaintiff's counsel moved for judgment on the pleadings. At the time appointed, counsel for the respective parties appeared, and plaintiff's counsel argued the motion, and it was submitted on briefs to be thereafter filed, but defendants' counsel failed to file any brief. Some time after the expiration of the time agreed upon and allowed for filing briefs, to-wit, on October 12, 1889, the court rendered judgment for the plaintiff for \$1,000, and interest thereon from April 24, 1889, and costs. Thereafter, upon due notice, defendants' counsel moved the court to set aside the judgment on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that no written findings of fact were filed or made; (3) that material allegations of the complaint were denied; (4) that no answer was made to the cross-complaint; (5) that the answer stated new matter constituting a defense to the action. At the same time defendants' counsel made another motion to vacate the judgment on the ground "that said judgment was made and entered against defendants through their mistake, inadvertence, and excusable neglect." This motion was made on affidavits, in connection with which they proffered a draft of a second amended answer which they proposed to file in case the judgment should be set aside. The following are the affidavits upon which the motion was made: "R. B. Terry, being first duly sworn, deposes and says that he is now, and at all times since the defendants have appeared in this action has been their attorney in said matter; that when the motion heretofore made by plaintiff for judgment upon the pleadings herein was ordered submitted by the court upon brief thereafter to be filed by counsel for plaintiff, and briefs of defendants in reply thereto, affiant, upon receiving the briefs of counsel for plaintiff, was unable to find in the city of Fresno the authorities upon which his answer to said brief would be made, and that upon an examination of said authorities at hand affiant determined that, in order that the case should be fully determined upon its merits, that he would ask leave of the court to file a second amended answer; that, so intending, he did not answer such brief. R. B. TERRY." "A. J. Pedlar, being first duly sworn, deposes and says, that he is one of the defendants in the above-entitled action; that the judgment herein entered on the 12th day of October, 1889, was entered through mistake, inadvertence, surprise, and excusable neglect, and was shown in the affidavit of R. B. Terry, filed herewith. Affiant further says that he has fully and fairly stated the case in this action to his said counsel, R. B. Terry, who resides in the county of Fresno, state of California, and after such statement is advised by said R. B. Terry that he has a good and substantial defense on the merits of the action, and thoroughly believes the same to be true. A. J. PEDLAR." The proffered amended answer contained two averments in addition to the first amended answer, to the effect (1) that defendants had tendered to plaintiff a sufficient deed for the

lots on the 20th day of June, 1888, and at the same time demanded payment of the sum of \$7,500, which, by the terms of the agreement, the plaintiff was to pay "on or before sixty days from the date" of the agreement, but that plaintiff then refused to pay said sum, or any part thereof, and thereby released the defendants from all obligations under said agreement, and thereby also released all claim to the \$1,000 theretofore paid by him; and (2) that between April 20, 1888, and April 24, 1889, certain taxes and assessments, amounting to \$114.65, were levied upon said lots, and became due and payable, and that plaintiff never paid nor tendered them, or any part thereof, and that defendants were compelled to pay a street assessment of \$45. The proffered answer also contained the following, which was not in the first amended answer: "Defendants deny that they, or either of them, elected to rescind said contract of sale in complaint mentioned, or that they did rescind the same; but, on the contrary, allege that plaintiff rescinded said contract, and every portion thereof, long prior to the 24th day of April, 1889." The court denied the motions to set aside the judgment; and the defendants appeal from the judgment, and also from the order denying their motion, upon the judgment roll containing their bill of exceptions.

1. I think there was no error in rendering judgment on the pleadings. It clearly appears that the contract was rescinded long before the commencement of the action, and that it was so considered by both parties. Time was of the essence of the contract. Plaintiff failed to pay the \$7,500 on or before June 20, 1888, according to the agreement, and did not tender payment thereof until April 24, 1889, when the defendants refused to accept it and execute a deed, on the ground that plaintiff had abandoned and annulled the contract by failing to tender payment within the stipulated time,—60 days. They say in their answer that, upon the failure of plaintiff to pay according to the terms of the contract, they treated the contract as abandoned and annulled by plaintiff, and the \$1,000 paid as forfeited; and they do not deny the averment in the complaint that they "elected to rescind said contract of sale." From the time defendants refused to accept payment and execute a deed, (April 24, 1889,) the plaintiff has considered the contract rescinded, and bases his action partly upon that ground; his complaint stating facts from which a rescission is a necessary inference. Under these circumstances the plaintiff was entitled to recover the \$1,000 paid by him, less such actual damages as may have been sustained by the defendants by plaintiff's breach of the contract, (*Grey v. Tubbs*, 43 Cal. 364; *Cleary v. Folger*, 84 Cal. 316, 24 Pac. Rep. 280;) but such damages cannot be recouped in this action, for the reason that none such have been pleaded, (*Id.*) Counsel for appellants contend, however, that his clients are entitled, under the express stipulation of the contract, to retain the \$1,000 paid as liquidated damages, whereas respondent's counsel claim that the stipulation as to liquidated dam-

ages is void. This is the principal issue presented for decision. I think the stipulation is void, under the following sections of the Civil Code: "Sec. 1670. Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section. Sec. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." It appears from the nature of the contract under consideration that it would not be impracticable, or at all difficult, to fix the actual damage in this case, since section 3307 of the Civil Code provides a rule by which the damage in all cases of this kind may be measured and definitely fixed, as follows: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him;" that is, the excess of the agreed price over the value of the property to the party who agreed to sell. In *Field on Damages* (section 508) the rule is stated as follows: "The general rule of damages on failure of the vendee to take the property purchased, and pay for the same, would be the actual loss sustained by the vendor thereby; which would ordinarily be the difference between the actual contract price and the actual value of the land at the time of the breach, if the property shall have declined in value." See, also, *Eva v. McMahon*, 77 Cal. 467, 19 Pac. Rep. 872. The defendants not only failed to plead any damages to them, but alleged in their answer an increase of \$2,000 in the value of the property between the default of the plaintiff and their refusal to accept payment and execute a deed; and it does not appear that plaintiff ever had possession of the property, but does appear that defendants were in possession at the time they answered, and they can claim nothing for use and occupation. No material averment of the complaint was denied. The denial of indebtedness was but a conclusion of law inconsistent with the admitted facts. The defendants were not entitled to any affirmative relief upon their cross-complaint, which they have not obtained by the judgment on the pleadings. Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties; and, as the judgment on the pleadings partly rests upon that fact, it is conclusive evidence of the fact. The agreement was not recorded, and, not being acknowledged, was not entitled to record. Besides, the cross-complaint does not offer to refund the money, or any part thereof, admitted to have been received by the defendants under the contract. *Bohall v. Diller*, 41 Cal. 533. It is alleged that the complaint fails to state a cause of action, in that no demand is alleged. The action is to recover money had and received by defendants to

the use of the plaintiff; and it is alleged the defendants "refused, and still refuse, to pay to plaintiff said sum of one thousand dollars, or any part thereof." The answer admits the receipt of the money, and alleges that defendants "converted the said \$1,000 to their own use." From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary. *Quimby v. Lyon*, 63 Cal. 394.

2. It does not appear that there was any error or abuse of the discretion of the court in overruling the defendants' motions to set aside the judgment, and counsel for appellants has not urged this point here. The averment in the proffered answer that defendants tendered to plaintiff a deed of the 20th day of June, 1888, and demanded payment, etc., only shows that plaintiff was first in default. It does not change or dispute the fact that both parties considered and treated the contract as rescinded, as above stated; and, had it been inserted in the answer on which the judgment was rendered, the plaintiff would still have been entitled to judgment on the pleadings. I think the judgment and order should be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

37 Cal. 29

BIDWELL v. BABCOCK. (No. 13,695.)

(*Supreme Court of California*. Dec. 13, 1891.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—PLEADING.

1. Const. Cal. art. 12, § 3, provides that a stockholder of a corporation shall be personally liable for such proportion of all its debts contracted while he was a stockholder as the amount of shares owned by him bears to the whole of the subscribed capital stock. In an action to recover thereunder against a stockholder, plaintiff averred that between certain dates he sold to the corporation certain goods; that the total number of shares of stock thereof was 2,500; that 2,170 shares "were subscribed for, issued to, and owned by, various parties who were the owners of said stock" during said time; and that during that time defendant owned 972 shares, "and is indebted to plaintiff herein in the sum of \$384.91," etc. Held, that the complaint was insufficient, since it failed to show that the 2,170 shares were all the shares subscribed at the time the debt was incurred, and consequently for what proportion of the debt defendant was liable.

2. Defects in the second and third causes of action in a complaint cannot be supplied by the statements in the first cause of action, in the absence of references thereto.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Hunsaker & Britt, for appellant. *Alex. G. Watson* and *W. J. Walker*, for respondent.

VANCLIEF, C. The defendant was sued as a stockholder of a corporation—the San Diego Street-Car Company—under section 322 of the Civil Code, to recover his proportionate part of certain alleged in-

debtedness of the corporation. His demurrer to the complaint was overruled, and, upon his failure to answer, judgment was rendered against him by default. This appeal is from the judgment, on the judgment roll, and the overruling of the demurrer is assigned as error. The complaint embraces three causes of action: (1) Indebtedness of the corporation for goods sold and delivered by the plaintiff "during the time" between December 6, 1888, and January 23, 1889; (2) indebtedness of the corporation to H. L. Shaug, for goods sold and delivered by him, during the same time, assigned to the plaintiff; and (3) indebtedness of the corporation to Morris and Breadlove for goods sold and delivered by them, during the same time, assigned to plaintiff. The indebtedness of the corporation, alleged in the three causes of action, amounts to \$853.72. After properly stating the organization of the corporation, its existence during the time within which the indebtedness was incurred, and that its whole capital stock consisted of 2,500 shares of the par value of \$100 per share, the complaint proceeds as follows: "(4) That a large number of shares of said stock, to-wit, twenty-one hundred and seventy, were subscribed for, issued to, and owned by, the various parties who were the owners of said stock, as hereinafter specified, during the time between the 6th day of December, 1888, and the 23d day of January, A. D. 1889, both days inclusive, between which dates the debts hereinafter set forth were incurred." Then, after alleging the indebtedness of the corporation as above indicated, comes the ninth paragraph, as follows: "(9) That during the time mentioned in paragraph 4 of this complaint, to-wit, between December 6, 1888, and January 23, 1889, the defendant, E. S. Babcock, Jr., was the owner of, to-wit, 972 shares of the capital stock of said San Diego Street-Car Company, and is indebted to plaintiff herein in the sum of, to-wit, \$384.91, under section 322 of the Civil Code of California, and other laws of the state of California; that said sum has been demanded of defendant, but he has refused to pay the same, or any part thereof." The allegations as to the organization and existence of the corporation, the amount of its whole capital stock, and in regard to the portion thereof subscribed, and the portion thereof owned by the defendant, are made only in connection with the first cause of action. None of them are repeated or referred to, in connection with the second or third cause of action, as alleged in paragraphs 7 and 8 of the complaint.

The grounds of the demurrer are stated as follows. "(1) That the said complaint does not state facts sufficient to constitute a cause of action. (2) That the said complaint is uncertain, ambiguous, and unintelligible, in this: that it does not appear therefrom what number of shares of the capital stock of the San Diego Street-Car Company had been subscribed for at the time of the creation of the alleged indebtedness mentioned in said complaint; nor does it show what proportion the amount of stock and shares of stock alleged to be owned by the defendant bears

to the whole of the subscribed capital stock of the San Diego Street-Car Company; nor does it show what proportion the stock of the defendant bore to the whole subscribed stock of said company at the time of the creation of such alleged indebtedness; nor does the said complaint show what proportionate part of each of the several sums of indebtedness of the San Diego Street-Car Company shown in said complaint is the liability of the defendant. *Second.* Defendant also demurs to that portion of said complaint contained in the paragraph thereof numbered 7, upon the ground that the same attempts to set forth a separate cause of action against this defendant, and that the same does not state facts sufficient for that purpose. *Third.* On the same grounds stated in the above specification of demurrer No. 2, the defendant demurs to that part of the plaintiff's complaint contained in the paragraph thereof numbered 8."

The constitution of 1879 (article 12, § 3) provides: "Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation." Section 322 of the Civil Code, as construed by this court, has substantially the same meaning and effect as the above quotation from the constitution.

1. It is essential, to the statement of a cause of action under this provision of the Code and constitution, that the complaint state the proportion which the stock, owned by the defendant at the time the debt sued for was incurred, bears to the whole subscribed stock at the same time, or that it state facts from which such proportion can be deduced. But the complaint in this case states neither the proportion, nor facts from which it may be deduced. In this case, the required proportion cannot be ascertained, by any process, without a knowledge of the whole number of shares of "the subscribed capital stock" existing immediately before and at the time each debt sued for was contracted or incurred. This knowledge, however, is not communicated by the complaint. To affirm, as in the fourth paragraph of the complaint, that 2,170 shares "were subscribed for, issued to, and owned by the various parties who were the owners of said stock during" a specified period of 49 days, within which the debts were contracted, is no limitation upon the number of shares subscribed for and owned during a portion of that period within which the debts, or some of them, may have been incurred; since the debts may have been incurred at different points of time within that period, and all may have been incurred on the last day of the period. Nor, indeed, does the averment limit the number of subscribed shares owned prior to and during the entire period specified. It is perfectly consistent with an averment that all the capital stock of the corporation (2,500 shares) was subscribed and owned by various

persons prior to the specified period; and also consistent with an averment that the remainder of the stock (330 shares) was subscribed and owned on the third day of the period, and thence until the close of the period. Therefore, for aught that is alleged in the complaint, 2,500 shares may have been subscribed for prior to the period specified, and certainly that 330 shares, in addition to the 2,170, may have been subscribed within that period and prior to the creation of the debts sued for. The averment relates only to subscribed stock that existed during the whole period of 49 consecutive days. It neither affirms nor denies, expressly or by implication, that an additional number of shares of subscribed stock existed during the last 40 days of that period; yet, according to paragraphs of the complaint numbered 5, 7, and 8, all the debts sued for may have been incurred within the last 40 days of that period. The complaint should have averred, in substance, if the fact was so, that there were 2,170 shares of subscribed stock, and no more, at the time each debt was incurred.

2. The second and third counts are defective, in that they fail to state the existence of the corporation, the amount of its capital stock, the portion thereof subscribed, or the portion of the subscribed stock owned by defendant, or to refer to the statement of these facts in the first count. The defects in the second and third counts are not supplied by statements in the first count, in the absence of any reference to them in the second and third. *Haskell v. Haskell*, 54 Cal. 262; *Barlow v. Burns*, 40 Cal. 351. I think the judgment should be reversed, and the cause remanded, with instruction to sustain the demurrer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with instructions to sustain the demurrer.

(3 Cal. Unrep. 385)

HEWETT v. DEAN *et al.* (No. 14,011.)¹

(Supreme Court of California. Jan. 30, 1891.)

MORTGAGE FORECLOSURE—NOTE DUE ON DEFAULT IN INTEREST—TAXES—COUNSEL FEE—PLEADING.

1. Where a note secured by mortgage declares that, on failure to pay the annual interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder, demand after default is not necessary to support an action for the entire sum. Bringing the suit to foreclose is sufficient demand. *Following Whitcher v. Webb*, 44 Cal. 127.

2. A delay of three months after default in the interest is not a waiver of the right to exercise the option, when the delay is caused by reason of defendant's request to be allowed a few days additional in which to pay the interest.

3. A mortgage, given to secure a contemporaneous note bearing 12½ per cent. interest, provided that "all payments made by the mortgagee for taxes and assessments on said premises, excepting taxes on the interest of the mortgagee therein," might be included in the decree of foreclosure. The mortgagee signed a separate agreement to credit the mortgagor with 2½ per cent. interest on the note if the latter presented receipts showing that he had paid "all taxes against

¹Rehearing granted.

the property covered by the mortgage." *Held*, that this was not an agreement by the mortgagor to pay taxes on the money loaned, nor could parol evidence be given that such was the intention, for the purpose of avoiding the entire interest, under Const. Cal. art. 13, § 5, declaring any contract by which a debtor agrees to pay taxes on the money loaned shall be void as to any interest specified therein.

4. The note provided that, if suit was commenced to enforce its payment, the maker would pay 5 per cent. on the principal as an attorney's fee, and the mortgage provided for the payment of "a reasonable counsel fee" upon foreclosure. The complaint alleged "that the sum of \$300 is a reasonable attorney's fee or counsel fee for the foreclosure of said mortgage." *Held*, that this was sufficient to support a judgment for an attorney's fee without averring that plaintiff had actually incurred expense for that purpose.

5. But plaintiff was not entitled to recover as counsel fee more than 5 per cent. on the principal, as provided in the note.

Commissioners' decision. Department 2. Appeal from superior court, Orange county; J. W. TOWNER, Judge.

Victor Montgomery, for appellants. *Ray Billingsley*, for respondent.

BELCHER, C. C. This is an action to foreclose a mortgage on real property. The note, to secure which the mortgage was given, was for \$2,500, dated October 29, 1887, and payable three years after date, with interest at the rate of 12½ per cent. per annum, payable annually, and if not so paid to be compounded annually, and bear the same rate of interest as the principal. The note then contained the following provisions: "And should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Should suit be commenced to enforce the payment of this note, we agree to pay an additional sum of 5 per cent. on principal as attorney's fees in such suit." The mortgage also provided: "And the mortgagors promise to pay said note according to the terms and conditions thereof, and in case of default in payment of same, or of any installment of the interest thereon when due, the mortgagee may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee, to be fixed by the court." The action was commenced on the 18th day of January, 1889, and the complaint alleged that no part of the principal or interest mentioned in the note had been paid; and "that because of said interest not having been paid when due, and upon the provision with reference thereto contained in said note, the plaintiff elects to consider and declare the whole sum of principal and interest of said note now due and payable." The prayer was that the plaintiff have judgment for the sum named in the note as principal, and interest thereon as the note specified, compounded annually, "and for 5 per cent. on the said principal sum of \$2,500, for attorney's fees, as provided in said promissory note, and being such reasonable counsel fee, as provided in said mortgage, and for costs of suit," and also that the usual decree of foreclosure be entered. Subsequently the plaintiff filed an amendment to his complaint, alleging that on or

about the 20th of November, 1888, he demanded personally of the defendant G. L. Dean the payment of the whole sum of principal and interest; and on the 4th of December, 1889, he filed a supplemental complaint, alleging that on the 29th of October of that year another installment of interest fell due, and that no payment whatever of interest or principal had been made. The defendants demurred generally and specially to the complaint as amended, and the demurrer was overruled. They then answered, and by their answer denied that plaintiff made any demand for the payment of the principal of the note prior to the commencement of the action, and alleged that no notice of plaintiff's election or option to consider the principal and interest of the note due was ever given by him to them, or either of them; prior to the commencement of the action. They also set up a written memorandum, signed by the plaintiff, agreeing to credit the defendants with 2½ per cent. of the 12½ per cent. stipulated interest, provided the defendants should present receipts showing the payment of all taxes against the property covered by the mortgage on or before the 15th day of December of each year, and alleged that the memorandum was made at the time the note and mortgage were executed, and was a part of the transaction, and that they had paid all state, county, and municipal taxes assessed against the property, and were therefore entitled to a credit of the 2½ per cent. per annum on the interest. The case was tried, and the court found that the plaintiff signed and delivered to the defendant G. L. Dean the memorandum set forth in the answer, at the time the note and mortgage were executed; that an agreement was thereby made between the plaintiff and defendants that the rate of interest on the note should be 10 per cent. per annum only, provided the defendants should pay all taxes levied against the mortgaged property subsequently; that the defendants paid the state, county and municipal taxes on the property for the fiscal year 1888-89, and the municipal taxes for the fiscal year 1889-90, but had not paid the state and county taxes for the last-named year, and were entitled to a reduction of the interest on the principal to 10 per cent. per annum for the first year only; that the plaintiff had paid all state, county, and municipal taxes assessed against the mortgage; that no part of the principal sum nor of the interest thereon mentioned in the note and mortgage had been paid; that no notice that plaintiff had elected, or exercised his option, to consider the principal and interest of the note due was given by plaintiff to defendants, or either of them, prior to the commencement of the action, and that no demand was made by plaintiff upon defendants for the payment of the whole sum of principal and interest other than by bringing the suit; that the sum of \$300 is such reasonable attorney's fee as is provided in the note and mortgage; and that at the time of the trial, December 21, 1889, the amount of principal and interest due and unpaid on the note was \$3,149.60. A decree of foreclosure was accordingly en-

tered, adjudging that there be paid to the plaintiff from the proceeds of the sale of the property the amount found due, and \$300 for attorney's fee, and costs of suit. The defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

1. The appellants contend that it was necessary for respondent, before commencing his action, to give them notice that he had exercised his option to treat the whole sum of principal and interest as due, and to make demand for the payment of the whole sum, and also that, by his delay to commence the action for nearly three months after the first installment of interest became due, he waived the right to exercise such option. The promise to pay the interest annually was absolute, and the first installment became due at the expiration of one year after the date of the note. The stipulation in the note that, if the interest should not be paid when due, then the whole sum of principal and interest should immediately become due and payable at the option of the holder, was without any conditions or limitations requiring notice or demand. The makers knew of this provision, and their failure to pay the interest when it became due left it wholly optional with the holder to insist upon the payment of the whole debt, or not, as he might elect. In *Whitcher v. Webb*, 44 Cal. 127, where the note in suit contained a provision similar to that involved here, it was held that a failure to pay the interest when it became due made the whole amount of the note due absolutely, at the option of the holder, without any notice from the holder to the payor. The court said: "The plaintiff had no duty to perform to the defendant, and the latter no excuse to delay the payments which he had stipulated to make." In *Dean v. Applegarth*, 65 Cal. 391, 4 Pac. Rep. 375, the note in suit bore interest at the rate of 1 per cent. per month, payable monthly, in advance, and it was stipulated that, in case default should be made in the payment of any of the interest when due, such installment or payment thus in default should bear interest from the day of maturity until payment at the rate of 2 per cent., compounding monthly, and at any time during such default the entire unpaid balance of the principal sum should, at the option of the holder of the note, and not otherwise, become due and payable, and the principal sum so due and payable should bear interest thereafter at the rate of 2 per cent. per month, compounding monthly, until paid. When the action was commenced, the note, by its terms, had become due, and the question was as to what interest the plaintiff was entitled to recover. The court said: "This provision as to the compounding of the interest on the principal sum was only intended to have operation when, after default in the payment of an installment of interest, and before the principal sum had matured, the plaintiff elected to have the principal become due, so that he might bring his action at once to foreclose." It did not appear from any averment in the complaint or otherwise that any option was made or manifested in any way by

the plaintiff prior to the commencement of the action; and it was held that this option must have been exercised and manifested in some way before it could have effect. The court then, speaking of the ways in which the option might have been manifested, said: "He [the plaintiff,] might have brought his action to foreclose immediately on default, and this would have been a sufficient election." In *Insurance Co. v. Shepardson*, 77 Cal. 345, 19 Pac. Rep. 583, the court said: "The promise to pay the interest annually was absolute. The only question left to the option of the holder was whether, upon the failure to pay such interest, the whole amount of principal and interest should immediately become due and payable, without any act on the part of the holder showing his election to exercise the option given him. The case as presented does not call for a decision of this question, but we think the case of *Whitcher v. Webb*, 44 Cal. 127, determines it adversely to the appellant." As to demand, the general and well-settled rule is that, in an action to recover money payable on demand, or at a fixed time, or on the happening of an event, it is not necessary to show actual demand before bringing suit. The institution of the suit is a sufficient demand. *Zeil v. Dukes*, 12 Cal. 479; *Halleck v. Moss*, 22 Cal. 266; *Luckhart v. Ogden*, 30 Cal. 556; *Cummings v. Howard*, 63 Cal. 503.

In the light of the foregoing authorities, it is clear, we think, that the plaintiff could maintain his action without showing notice of his election or demand of payment prior to, or otherwise than by, the institution of his suit. In *Crossmore v. Page*, 73 Cal. 213, 14 Pac. Rep. 787, it was held that an option given to the holder of a promissory note to have the same become due immediately upon default in the payment of the interest as therein provided, in order to be available as against an indorser, must be exercised within a reasonable time after default, and that a delay of seven months before attempting to exercise the option was unreasonable.

The delay in commencing this action was, as we have seen, less than three months after the default in paying interest, and the circumstances connected with and accounting for the delay are as follows: The plaintiff testified that on or about October 20, 1888, he met the defendant G. L. Dean, and that "Mr. Dean said to me he wanted I should have this money, but he said, 'I have use for it, and if you can just let me have a few days,'—or something like that,—'I want it to pay for a car-load of material.' I told him, 'Mr. Dean, I am expecting it. I have counted on it, and want the money, but I can get along for a few days.' We was speaking about the interest, and that was a little before the interest became due. I wanted the money, but I didn't propose to press him." The defendant G. L. Dean testified substantially to the same effect, but fixed the time as about October 27th. He stated that plaintiff told him he had use for the money, but under the circumstances he would extend the time to pay the interest, and would not push him. The defendants

also put in evidence a letter, dated October 27, 1888, which was written by plaintiff's attorneys, and addressed to and received by defendants, stating that the interest on their note, due the 29th inst., was payable at the attorneys' office, where the note would be found, and that prompt payment was expected. It thus appears that the delay complained of was at the request of defendants. Under this showing we do not think it can be said that plaintiff's delay to institute his action was for an unreasonable length of time, or that he thereby waived his right to exercise the option given him.

2. The point is made that the words "all taxes against the property covered by the mortgage," as used in the memorandum set up in the answer, included taxes upon the mortgage as well as upon the land; and, if so, it is argued that the memorandum, under the provisions of section 5 of article 13 of the constitution, rendered null and void the promise in the note to pay any interest. At the trial counsel for defendants offered to prove that the words above quoted were intended by the parties, and understood by them, to cover and include the mortgage tax. On objection, the offered evidence was excluded, and this ruling is assigned as error. We see no error in the ruling. The section of the constitution cited reads as follows. "Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." The promise in the note to pay interest at 12½ per cent. was absolute; and the mortgage provided that the mortgagee might include in a decree of foreclosure "all payments made by the mortgagee for taxes and assessments on said premises, excepting taxes on the interest of the mortgagee therein." The memorandum was not signed by the defendants, and they did not thereby obligate themselves to pay any taxes on the land or mortgage. It simply provided that, if they should present receipts showing the payment of all taxes against the property, then the interest on their note was to be 10 per cent. per annum only. They might or might not pay all or any of the taxes at their pleasure, and the evidence showed that the plaintiff in fact paid all taxes assessed against his mortgage at the time they became due. See *Marye v. Hart*, 76 Cal. 291, 18 Pac. Rep. 325.

3. It is contended that the court erred in finding that \$300 was a reasonable attorney's fee, and in allowing the plaintiff that amount. This is rested upon the fact that there was no allegation in the complaint that the plaintiff had paid that sum, or incurred any liability to pay it, and hence it is claimed that the finding was outside of the issues, and not authorized. But the complaint alleged "that the sum of \$300 is a reasonable attorney's fee or counsel fee for the foreclosure of said mortgage;" and, if any averment as to the fee was necessary, this certainly was sufficient. See *Carriere v. Minturn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514; *Rapp v. Gold Co.* 74 Cal. 532, 16 Pac.

Rep. 325; *White v. Allatt*, (Cal.) ante, 421. The cases cited and relied upon by appellants are not in point. In *Patterson v. Donner*, 48 Cal. 369, the action was commenced and prosecuted by the plaintiff personally; and in *Bank v. Treadwell*, 55 Cal. 379, the attorney for plaintiff was employed by it to perform its legal business under a regular monthly salary, and it had neither paid nor become liable to pay to him anything as counsel fees. It was held in each case that, under the circumstances shown, counsel fees could not be allowed; the court, in the latter case, saying: "The object of the law allowing counsel fees is not to afford an opportunity, under cover of the name, for a speculation on the part of the creditor, but to reimburse him in a proper amount for a sum which he pays, or becomes liable to pay, or to relieve him of the burden of paying counsel fees." No such circumstances appear here.

But, even if the plaintiff was entitled to a counsel fee, it is strenuously urged that the amount allowed was too large; that the court could properly allow only \$125. This position, we think, should be sustained. The note provided for an attorney's fee of 5 per cent. on the principal in case an action should be commenced to enforce its payment. The mortgage provided for a reasonable attorney's fee in case of foreclosure. These papers should be read together as constituting one contract in this regard. Civil Code, § 1642. And, besides, the plaintiff asked for only "five per cent. on the said principal sum of \$2,500 for attorney's fees. It has been held that, when the mortgage fixes the amount of the attorney's fee, it is error for the court to allow a larger sum than that so fixed. *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. Rep. 514. We think that rule should be applied here.

We find no other error in the record. The findings seem to be sufficient and without conflict. We therefore advise that the judgment be modified by reducing the amount allowed for attorney's fees to \$125, and that as so modified the judgment and order be affirmed; the appellants to recover costs on appeal.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by reducing the amount allowed for attorney's fees to \$125, and as so modified the judgment and order are affirmed; the appellants to recover costs on appeal.

(87 Cal. 561)
SAN DIEGO FLUME CO. v. CHASE. (No.
13,888.)

(Supreme Court of California. Jan. 30, 1891.)

WATER-RIGHTS—CONSTRUCTION OF CONTRACT.

A water contract provided that defendant could make connections by two 2-inch pipes with plaintiff's flume, and that "all water drawn from said flume shall be taken and drawn from said pipes for the purpose of irrigating, through standard pipes of not more than 1½-inch diameter;" that plaintiff will convey "a water-right of 2¼ inches of water, miner's measure, under a 4-inch pressure," etc.; that the amount of water he is entitled to shall be measured by "the amount of water that he may draw from said pipes through

1½-inch iron pipe standards in his said grounds," etc. *Held*, that defendant was entitled only to 2¼ inches of water under 4 inches pressure, and not to all he could take by the two 2-inch pipes, and distribute through the two 1½-inch pipes.

Department 2. Appeal from superior court, San Diego county; WALTER VAN DYKE, Judge.

Shaw & Holland, for appellant. *Levi Chase and Hunsaker, Britt & Goodrich*, for respondent.

PER CURIAM. This action was brought for the purpose of having a contract for the sale of a water-right for irrigation purposes reformed, and that it be declared that the amount of water "conveyed to and owned by the defendant be limited by said contract to 2¼ inches of water, miner's measure, under a 4-inch pressure, and no more, and that he be entitled and required to take the same in accordance with such reasonable rules and regulations as may be established from time to time by plaintiff," and for such other equitable relief in the premises as should be proper. The contract sought to be reformed is made a part of the complaint, and shows that plaintiff and appellant, who is the party of the first part, "contracts and agrees that the party of the second part [defendant and respondent here] shall have the right to make two connections with the said flume of said party of the first part of a two-inch pipe entering the side thereon near the bottom. * * * The pipe aforesaid shall be extended from the points of connection with said flume to, and be connected with, the pipe system of the party of the second part in said orchard, and thereafter all water drawn from said flume shall be taken and drawn from said pipes for the purpose of irrigating, through standard pipes of not more than 1½-inch diameter, or carried through 1½-inch rubber hose, as hereafter provided. That the party of the first part will convey to the party of the second part a water-right of two and one-quarter (2¼) inches of water, miner's measure, under a four-inch pressure, to be taken and used as hereinafter provided, and subject to the conditions usual with said party of the first part in the sale of water-rights to other parties. That the water to be taken and had by the party of the second part under this agreement, and under and by virtue of his water-rights aforesaid, shall be measured, estimated, and determined by the amount of water that he may draw from said pipes through 1½-inch iron pipe standards in his said grounds, and to be used exclusively thereon, from the 1st day of May to the 1st day of November, both inclusive, during ordinary seasons; but, should an extraordinarily dry spring or fall necessitate a longer use of water for irrigation, he shall have the right to use and take the same through said pipes in the same way as hereinbefore provided, but in that case shall pay the party of the first part an extra amount therefor, proportionate to the sum hereinafter specified to be paid by the party of the second part for the six-months use first aforesaid." A demurrer to this complaint having been overruled, the defendant an-

swered, admitting the contract to be as set out in and attached to the complaint, and denying all other allegations, and also filed an amended cross-complaint, (a demurrer to the original having been sustained,) the *gravamen* of which was that under this contract he was entitled to have a specific performance of it, so that the effect thereof would be that he was to take and receive (through two 2-inch pipes placed in the side of the flume of the plaintiff, from whence water was to be drawn, and connected with the defendant's pipe system, by which he irrigated his fruit farm) all the water he might require for the irrigation of his said property, and for the use of the stock and persons kept or employed thereon, that he might draw from one and one-half inch standard pipes in his irrigation system, and for damages and other relief, consisting, among other things, of the restoration of the 2-inch pipes connected with the flume as they had originally stood, and to remove all natural obstructions to the flow of the water in these pipes; the defendant having been limited as to the flow of water by an obstruction erected by the plaintiff at the flume so that only 1½ inches would flow into each of the 2-inch pipes. An answer to this cross-complaint was filed. When the case came on for trial the plaintiff abandoned its action for a reformation of the contract. Then the defendant moved for judgment on the pleadings in the cross-action for the specific performance of the contract, as he claimed it was to be interpreted, and for nominal damages; he alleging that the plaintiff, by its answer to the cross-complaint, had admitted all the material allegations of that pleading. This motion was sustained, and judgment entered in accordance therewith. The plaintiff appeals.

The real matter to be determined on this appeal is how much water the defendant was entitled to under the contract to take from the plaintiff's flume; the appellant claiming it to be only 2¼ inches under a 4-inch pressure; the respondent claiming it to be all the water he could take through his two 2-inch iron pipes connected with the flume, to be distributed by means of two 1½-inch iron standard pipes. The construction given by the trial court to the contract, as appears by its decree or judgment, is not correct. The quantity of water which the defendant was to get from the plaintiff's flume for a certain specified sum of money was 2¼ inches, miner's measure, under a 4-inch pressure, from "the 1st day of May to the 1st day of November, both inclusive, during ordinary seasons; but, should an extraordinarily dry spring or fall necessitate a longer use of water for irrigation," he is to have the right to use "and take the same through said pipes in the same way" as he took the 2¼ inches for a specified term, as above set forth, but in that case he must pay the plaintiff an extra amount therefor, proportionate to the sum he was ordinarily to pay for the season from the 1st day of May until the 1st day of November, inclusive. But the quantity of water to be taken was to be admeasured to him through his two 2-inch

iron pipes, connected on his land with two 1½-inch standard pipes. The method of taking this quantity of water does not affect the amount which the first clause of the contract relating thereto fixed, unless a construction be given to that clause which will make it entirely inoperative. It reads thus: "That the party of the first part will convey to the party of the second part a water right of two and one-quarter (2¼) inches of water, miner's measure, under a four-inch pressure, to be taken and used as hereinafter provided, and subject to the conditions usual with said party of the first part in the sale of water-rights to other parties." But, giving it the construction we have, it is in entire harmony with the clause following: "That the water to be taken and had by the party of the second part under this agreement, and under and by virtue of his water-rights aforesaid, shall be measured, estimated, and determined by the amount of water that he may draw from said pipes through 1½-inch iron pipe standards in his said grounds." The one clause refers to the amount of water to be taken; the other to the manner of its taking.

Two and one-quarter inches of water, miner's measure, under a 4-inch pressure, it is the privilege of the defendant to take and distributed daily, as he pleases, over his land, through its pipe system attached to the plaintiff's flume; and this daily quantity of water he is entitled to for the season heretofore set forth. But he is not entitled to any more during that season, except, as stated in the contract, when an "extraordinarily dry spring or fall necessitates a longer use of water for irrigation," when he is to get it by paying a sum of money proportionate to the sum he was ordinarily to pay for water during the season as above stated. Judgment reversed.

(87 Cal. 526)

HARRIS v. SAN DIEGO FLUME CO. (No. 13,998.)

(Supreme Court of California. Jan. 30, 1891.)

AGENCY—AUTHORITY OF AGENT—BROKER'S COMMISSIONS.

1. A resolution of the board of directors of a flume company authorizing its superintendent to "enter into negotiations with contractors and others for work on the line of the flume, in his discretion, subject to the approval of the board," does not empower him to employ a broker to find a suitable contractor, in the absence of evidence that such a course is necessary and usual in the ordinary course of business.

2. The fact that the superintendent had been permitted to do many things in San Diego county outside the ordinary duties of his position did not imply authority to bind the company to pay the broker, when the latter had no knowledge of his doings in San Diego county.

3. The company cannot be held on the theory that it accepted the benefit of the broker's services, when it had no knowledge of them at the time it made the contract with the contractor thus found to build the flume.

Commissioner's decision. Department 2. Appeal from superior court, San Diego county, GEORGE PUTERBAUGH, Judge.

Deakin & Story and Thos. J. Capps, for appellant. Shaw & Holland, for respondent.

HAYNE, C. This was an action to recover \$5,000 as brokerage for negotiating a contract. The complaint contained two counts, but the plaintiff elected to go to trial upon a *quantum meruit*. The trial court gave judgment for the defendant, and the plaintiff appeals. The principal question discussed by counsel relates to the authority of the person who employed the plaintiff. The defendant was a corporation "to construct and operate a flume for the transmitting of water." At the period in question its flume had not been constructed. The engineering work was being done, and the business of acquiring rights of way, etc., was being attended to. In the beginning of August, 1886, the company sent its superintendent, one W. E. Robinson, to San Francisco to negotiate a contract for the construction of the flume. He employed the plaintiff as broker to find a contractor, and through the plaintiff's exertions a suitable person was found. The claim is for compensation for services as such broker.

1. The defendant cannot be held on the ground of ostensible or apparent authority. There is evidence to the effect that, in the county of San Diego, Robinson was permitted by the company to do things outside of his ordinary duties as superintendent. And the plaintiff's son, who was an engineer in the employment of the company, testified that, on the eve of Robinson's departure for San Francisco, the president told him that Robinson "had full authority" to enter into contracts. This latter evidence is contradicted; the former is not. But neither is ground for a decision in favor of plaintiff on the theory of an ostensible or apparent authority. For it does not appear either that the alleged statement of the president was communicated to the plaintiff, or that he was aware of the latitude which had been permitted Robinson in San Diego. It may possibly be surmised that he had knowledge of the circumstances; but the fact is not stated, and a mere surmise is not sufficient. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civil Code, § 2317. There are two essential features of an authority of this character, viz., the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient; for a party has no right to take the agent's word for the existence of his authority. In the case before us, as above stated, it does not appear that the acts of the company which are supposed to have been sufficient to justify a belief in Robinson's authority were known to the plaintiff; and, if not, they could not have generated in his mind any belief on the subject of the agency. There may be other reasons why the plaintiff cannot recover on this ground, but the foregoing is sufficient.

2. There was no actual authority, either express or implied. The measure of the agent's authority was the following resolution of the board of directors of the com-

pany: "Resolved, that W. E. Robinson be authorized to proceed to San Francisco and enter into negotiations with contractors and others for work on the line of the flume, in his discretion, subject to the approval of this board; also that he be authorized to enter into negotiations with capitalists for the purchase of not exceeding \$500,000 in the bonds of the company." Nothing appears to have been done by the plaintiff in relation to the disposition of the bonds. His claim is for finding a contractor who was willing to enter into a contract for the building of the flume. In the language of appellant's counsel, "for the peculiarly difficult and rare services rendered by him in introducing and assisting in procuring Mr. Moore to take this contract, the plaintiff claims the moderate commission of \$5,000." In relation to this we concede in favor of the appellant that the words, "subject to the approval of this board," contained in the resolution, refer only to the contract for the construction of the flume, which was to be negotiated by Robinson, and that he had implied authority "to do everything necessary or proper and usual in the ordinary course of business for effecting the purpose of his agency. Civil Code, § 2319. But we are not able to say that the employment of a high-priced broker is necessary or proper and usual, in the ordinary course of business," for finding a contractor to build a flume. At least, we do not think that the court can take judicial notice that such is the case, and we do not find any satisfactory evidence of it in the record. There is evidence that it was a matter of some difficulty to induce contractors to go to so distant a field of action, and some evidence that the plaintiff's services had a value. But the latter evidence seems to be on the general theory that whatever a broker does has a value. Upon the whole evidence, we cannot say that the finding of the trial court should be disturbed.

3. The defendant cannot be made liable upon the theory that it appropriated the benefit of the plaintiff's services. The unauthorized arrangement made by Robinson with the plaintiff was collateral to the flume contract, and the defendant knew nothing of such services at the time the flume contract was entered into. The other matters do not require special attention. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

87 Cal. 543

CLARKE v. REIS, Treasurer. (No. 13,880.)

(Supreme Court of California. Jan. 30, 1891.)

CITY POLICE DEPARTMENT—LIFE INSURANCE FUND.

Act Cal. April 1, 1878, (St. Cal. 1877-78, p. 879,) fixed the compensation of police officers of the city and county of San Francisco at a certain sum per month, and directed the treasurer of the city and county to "retain from the pay of each police officer the sum of two dollars per

month, to be paid into a fund to be known as the 'Police Life and Health Insurance Fund,' of which \$1,000 was to be paid to the personal representative of any member of the police force on his death. Held that, as the police officer never received the amount so retained, nor had any power of disposition over the same, he had no vested property right in such fund, and on his discharge from the force he was not entitled to a return of the amount contributed by him. Following *Pennie v. Reis*, 80 Cal. 269, 22 Pac. Rep. 176; affirmed, 132 U. S. 471, 10 Sup. Ct. Rep. 149.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; E. R. GABER, Judge.

Act Cal. April 1, 1878, (St. Cal. 1877-78, p. 879,) fixed the compensation for each member of the police force of San Francisco at a sum not exceeding \$102 a month for each one, and provided that the treasurer of said city and county should "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'Police Life and Health Insurance Fund.'" The act declared that on the death of any member of the police force after January 1, 1878, there should be paid to his representatives, by the treasurer, out of the said life and health insurance fund, the sum of \$1,000; and that in case any officer should resign, from bad health or bodily infirmity, there should be paid to him from that fund the amount of the principal which he may have contributed thereto.

Alfred Clarke, for appellant. George Flournoy, Jr., for respondent.

FOOTE, C. This action was brought for the purpose of forcing, by writ of mandate, the respondent to pay the appellant, who was the assignee of a claim of a dismissed police officer, one Pugh, the amount of \$256, principal, and costs and damages to the amount of \$25. This sum of money was claimed under and by virtue of an act of the legislature approved April 1, 1878. St. Cal. 1878, p. 879. It is asserted that the \$2 per month which the police officer claims to have paid into the fund held by the treasurer was money in which he had a vested right, and that on his discharge he was entitled to have it returned to him or his representative. The petition was demurred to as not stating facts sufficient to constitute a cause of action; the demurrer was sustained, and the writ dismissed. From the judgment rendered in the premises this appeal is taken. The statute, under which this right is set up by the plaintiff, has received construction from the appellate court of this state in *Pennie v. Reis*, 80 Cal. 269, 22 Pac. Rep. 176, and from the supreme court of the United States, in the same case, on writ of error. 132 U. S. 471, 10 Sup. Ct. Rep. 149. These cases hold that a police officer, such as the assignor of the appellant, never had any claim on the fund involved here, except upon the happening of certain contingencies, mentioned in the act of the legislature of California, to which we have just adverted, under which act alone could any right have vested in the plaintiff or his assignor. The voluminous and argumentative petition filed herein does not, in our opinion, state such facts as bring the

appellant within any of the contingencies of the statute which he invokes, and we therefore advise that the judgment be affirmed.

We concur: HAYNE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(87 Cal. 569)

McLENNAN v. BANK OF CALIFORNIA. (No. 12,944.)

(Supreme Court of California. Jan. 31, 1891.)

TRIAL—BY COURT — FAILURE TO FILE DECISION—FINDINGS.

1. Code Civil Proc. Cal. § 632, which requires a judge, in an action tried before him without a jury, to render and file his decision within 30 days after the cause of action has been submitted to him, is directory merely; and a new trial will not be granted for the judge's failure to comply with the provision.

2. Plaintiff, the owner of a note, placed it for collection in the hands of defendant's cashier, his intimate friend, and in whom he had unbounded confidence. The cashier had the note renewed, placed the renewed note in the bank for collection as deposited for his own account individually, and used the proceeds personally. Though informed by the cashier that the renewed note had been collected, plaintiff never demanded payment from the bank, or any one else except the cashier, and never drew a check against the proceeds, or made any effort to get them. Years afterwards, when the cashier had died, and during a temporary suspension of the bank, plaintiff brought an action against it for the proceeds of the note. *Held*, that the court was justified in finding that the note had been left with the cashier for collection in his individual capacity, and not as agent for the bank, and that the court was not bound to believe plaintiff's confused and contradictory testimony that he had deposited the note with the bank for collection.

3. The fact that the statute of limitations has apparently run against a counter-claim set up by the bank against plaintiff does not render inadmissible the books of the bank containing the original entries of the transactions, as the bank may be able to show facts which will take the claim out of the operation of the statute.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. G. MAGUIRE, Judge.

George B. Merrill, (T. I. Bergin, of counsel,) for appellant. F. G. Newlands, for respondent.

FOOTE, C. This action was brought by Donald McLennan, now deceased, and was tried, judgment entered, and notice of intention to move for a new trial served and filed during his life-time. After his death his administrator, the present plaintiff, was substituted, and a new trial refused. From the order made in the premises the plaintiff appeals. The action is to recover of the defendant, a banking corporation, the sum of \$10,000, and interest. It is alleged in the complaint that on the 27th day of November, 1869, the Mission & Pacific Woolen Mills, Consolidated, a corporation, made, executed, and duly indorsed and delivered to the plaintiff a certain promissory note for \$10,000. That upon the receipt of that note the plaintiff deposited it with the defendant, to be collected in due course of banking business.

That the note, and certain accrued interest thereon, was paid by the maker of the note to the defendant on the 26th day of April, 1870. That afterwards, on the 26th of August, 1875, the defendant closed the doors of its bank, stopped payment, etc., and refused to pay the plaintiff the money collected by it for him. The defense was that the note was never received by the bank from the plaintiff for collection, but was given by the plaintiff into the hands of W. C. Ralston to be collected, and the proceeds used by him for his own benefit, and that in accordance with this the money was collected by the bank at the request of Ralston, placed to his credit, and paid out to him on his checks drawn against his account as a depositor with the bank. The statute of limitations was set up, and also certain demands against the plaintiff held by the bank, were pleaded by way of set-off, to an amount exceeding the claim of the plaintiff. The court found in favor of the defendant: "That the plaintiff never deposited the said note of November 27, 1869, with the defendant to be collected; that the plaintiff never deposited said note of November 27, 1869, with the defendant." It further held that the plaintiff's cause of action, if it had been otherwise good against the bank, which it was not, was not barred, but that the cause of action by the defendant, on its counter-demands against the plaintiff, was barred by the statute of limitations. So that, upon the findings as made, judgment was rendered against the plaintiff for costs.

The first ground urged for a reversal of the order denying a new trial is that the court did not give its decision and file it with the clerk within 30 days after the cause was submitted for decision under section 632 of the Code of Civil Procedure. The provision of the statute in question is directory merely. *Broad v. Murray*, 44 Cal. 228; *McQuillan v. Donahue*, 49 Cal. 157; *Hayne*, New Trials & App. § 238, note 13.

The main ground, as it seems, urged by the appellant for the reversal of the order is that the trial court misconstrued the evidence given in the cause, and that the findings against the plaintiff are not in accord with such evidence, if properly and legally considered. The only oral evidence in the case introduced by the plaintiff to sustain the contention that the note was placed in the hands of Mr. Ralston, the then cashier of the Bank of California, for collection by the bank, the proceeds to be placed therein to the credit of the plaintiff, was the testimony of Donald McLennan and the witness Tibbey; the latter having been at one time an employee of the bank, but was not at the time he testified. Mr. Ralston, the only other person who might have testified as to the exact nature of the transaction by which he took the note from McLennan for collection, was dead at the time of the trial. So that whether he took it as cashier of the bank, or in his individual capacity, must rest mainly, if not entirely, upon whether the emphatic and positive statements made by McLennan and Tibbey ought to have been given full credit by the trial court. The note

which it is claimed that Ralston collected, and had the proceeds placed to his credit in the bank, and drew it out by check and used it for his own private purposes, was made in renewal of a second note, which last had been in the hands of Tibbey, a friend of McLennan's, to be collected by Tibbey for McLennan. When it became due, Tibbey placed it in another bank for collection, and Col. Fry, the president of the mill corporation, the maker of the note, was not ready to pay it, and told Mr. Ralston, who was largely interested in the corporation, of the fact of the inability of the corporation at that time to meet the note, and that Tibbey had it for collection. Ralston was, as appears abundantly in the record, a man and friend in whom McLennan had the utmost confidence, at whose instance the latter had several times given his name on various notes, and had at Ralston's personal request loaned at one time \$30,000 to the mill corporation. In fact, it would appear as if McLennan, on account of the confidence he had in Ralston, and his intimate personal and business relations with him, as shown by McLennan's evidence, if he had been requested to do it, would at any time have intrusted or loaned to Ralston either his name, credit, or money. Under these existing personal relations between Ralston and McLennan, Mr. Ralston inquired of Tibbey about this second note. He was informed that the note was held in confidence as agent by Tibbey. Then Tibbey saw McLennan, who told him to tell Ralston who the note belonged to. This was done, and an interview occurred between Ralston, Tibbey, and McLennan, by means of which Ralston became possessed of the note, had it renewed, and placed the renewed note in the bank for collection as deposited for his own account individually, and used the proceeds personally. Another circumstance appears in the case in the evidence of McLennan, and that is that although he says that Ralston told him the money had been collected on the note, and placed to McLennan's credit in the Bank of California, he never once made any inquiry of any one else about the bank if such was the fact; never made any demand for it for years afterwards, or during Ralston's life-time, except to Ralston; and never drew a check against it, or made any effort to get it, as is usual in cases when men have money on deposit in banks. After Ralston's death, and during the temporary suspension of the bank, this action is brought, and when a large alleged indebtedness of McLennan to the bank is barred by the statute of limitations, and his claim, being against a bank, cannot be likewise barred. All these facts were before the trial court. In addition to certain suspicious facts and circumstances, which time does not admit of mention, it appears in the testimony of McLennan that he first positively and emphatically declared that he had no interest or claim in the third note, and afterwards declared that he had; the reason which he assigns for not claiming this interest in the first instance being as stated by himself, in answer to questions by his counsel, which

questions and the answers are: "Question. This morning you were asked in regard to the first and second notes, and you said that the third note was not yours. I should like to know if you have any explanation to make about that. Answer. Well, I made a great mistake this morning, because I thought that, not having any physical connection in the third note, that it might not belong to me, or it might prejudice my standing in court. I at once saw my mistake, and beg now to correct it. I claim ownership in that note, the same as the other two notes. I claim ownership in any note having any connection with the transaction. Q. You also said that you never authorized or ratified the taking up of the third note. What do you mean by that? A. Well, I mean to say by that, whatever the bank done in connection or in the shape of an accommodation to the mill, of course it was no doings of mine, any more than the proceeds from any accommodation they might afford the mill. I claim the payment,—claim the money." From this it seems as if the witness thought himself justified in making his recollection conform to his supposed interests, and that he was ready to and did make what he calls a "mistake" in his own favor as to the statement of a fact, or a claim of interest, when to do otherwise, and state the fact or claim correctly, would, as he said, "prejudice my standing in court." Space forbids us to enumerate all the other instances, either, as claimed, resulting from the want of recollection or otherwise, where it would seem that the witness caused "intestinal" conflicts in his testimony, or made statements inherently improbable in their nature. But such appears to us to have been the character of his testimony; and under such circumstances we do not see, in view of the decisions of the appellate court of this state, that the trial court was compelled to regard as true his statement as to how Ralston became possessed of the note. *Crook v. Forsyth*, 30 Cal. 662; *Bernal v. Wade*, 46 Cal. 667; *Blankman v. Vallejo*, 15 Cal. 639-646; *Baker v. Insurance Co.*, 79 Cal. 34-41, 21 Pac. Rep. 357; *Mogk v. Peterson*, 75 Cal. 501, 17 Pac. Rep. 446. Mr. Tibbey's mistakes and corrections also leave it doubtful if his recollection of the facts just as they occurred when Ralston took the note are to be relied on; and, besides, the peculiar relations between Ralston and McLennan, and all the facts and circumstances surrounding the transaction, and the conduct of the plaintiff afterwards, as above adverted to, might well cause the trial judge to doubt the correctness of the memory of the witness.

It is further claimed that the books of the bank showing the alleged indebtedness of the plaintiff, as set up by counterclaim, were inadmissible in evidence. The transactions of a bank, relating, in large measure, to its customers, to the receipt of money from them, and the paying of it out to them, on loan or check, it would seem as if their books showing the original entries of such transactions are admissible and competent evidence for the bank. *Morse Banks*, (3d Ed.) § 295, note, pp. 510, 511; *Bank v. Knapp*, 3 Pick. 96,

109; *Watson v. Bank*, 8 Metc. (Mass.) 217, 220, 221. Even if the claim of the defendant was barred by the statute of limitations, this did not render this evidence to show the original indebtedness inadmissible, for it might happen in such a case that the party introducing it would be able to show facts which would take it out of the operation of the statute; and after the date of the claim, and its nature, are shown, it then becomes a question for the court to determine, from all the evidence, whether such claim is or not enforceable under the statute. While a recovery on such claim may be barred, this does not render proof of the claim in the first instance incompetent. Besides, the findings of the court are that the claim was barred; hence the plaintiff is not prejudiced. The same rule applies to the objection to the admission in evidence of the promissory note for \$16,841.75 executed by the plaintiff to the defendant.

There are other objections urged to the admission or exclusion of evidence. We have given to arguments made and authorities cited minute and thorough consideration, and have examined the transcript carefully, but we cannot see wherein any prejudice could have been suffered by the plaintiff. The decision of the court was unquestionably correct; and even if some evidence was admitted, and other evidence excluded, perhaps improperly, it yet appears that even then the evidence unobjected to in the record was unaffected, as that admitted against objection and that excluded was not of sufficient importance to change the result. Perceiving no prejudicial error in the record, we advise that the order appealed from be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(91 Cal. 194)

FOSS *et al.* v. HINKELL. (No. 14,014.)¹

(Supreme Court of California. Feb. 2, 1891.)

BOUNDARIES—EVIDENCE.

In ejectment, where defendant claims that the land is within the exterior boundaries of a rancho, and consequently not included in the patent to plaintiff, and supports this claim by the original petition, the *expediente*, the *diseno*, the act of judicial possession, various maps, decrees, and proceedings, and also by oral testimony of witnesses as to the exterior boundaries of the rancho, the evidence may warrant a finding that the land in controversy is within the exterior boundaries of the rancho.

Department 2. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Edwin Baxter, for appellant. Will D. Gould and Jas. H. Blanchard, for respondent.

MCFARLAND, J. This is an action of ejectment. Judgment went for defendant, and plaintiffs appeal. Plaintiffs claim title under a United States patent to the Southern Pacific Railroad Company, dated April 4, 1879, and a deed from said company to plaintiffs, dated June 20, 1887. Defendant claims as a pre-emptor, contend-

ing that at the date of the definite location of the Southern Pacific Railroad, which was on or about April 3, 1871, the land in contest was within the exterior limits of the San Jose Rancho, a valid Mexican grant, and was therefore reserved from the grant to the railroad company. There was a former trial of this case, and a former appeal. At that trial the court made certain findings, and gave judgment for plaintiffs. On appeal, this court determined most of the questions involved favorably to defendant, (*Foss v. Hinkell*, 78 Cal. 153, 20 Pac. Rep. 393,) and the decision of this court then made as to those questions has become the law of the case. But this court reversed the judgment for want of a finding whether or not the land was within the exterior boundaries of said rancho. The court below had found that according to a survey called the "Thompson Survey" the land was within said boundaries, and that according to a survey called the "Hancock Survey" it was not; and this court, in its opinion, said: "The exterior limits of the rancho do not depend on any survey made of it. The land sued for may be within such exterior limits, though excluded from the survey. Though Hancock may have excluded this land from his survey, it still may be within the exterior boundaries of the rancho as granted by the Mexican government. What the exterior limits of such granted rancho were must be determined by the *expediente* of the grant issued by the Mexican government, including petition, *diseno*, and grant, the boundaries designated in which may be identified by parol evidence. See *Doolen v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228." And for this defect in the findings the judgment was reversed, and the cause remanded, "with directions to the court below to find, on the testimony already introduced, and such further testimony as may be introduced by either party, whether or not the land in suit was, on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose, as granted by the Mexican government, and on such findings to enter judgment." And so, when the case went back to the trial court, there was only one issue—the one last above stated—to be determined. When the case was heard again in the trial court, that court, following the said directions of this court, found "that the land in suit was on the 3d day of April, 1871, within the exterior boundaries of the Rancho San Jose as granted by the Mexican government," and gave judgment accordingly for defendant; and it is evident that the judgment must stand, unless the court committed material errors in ruling upon the admissibility of evidence, or unless the said finding is not supported by the evidence.

Appellants took certain exceptions to the admission of certain evidence; but the point is not pressed in the brief, and—especially when we consider what was decided when the case was here before—we see no error on this point.

The main contention of appellants is that the finding is not supported by the

¹Rehearing granted.

evidence. Their counsel argue that the court must have found the land in suit to be within the exterior boundaries of the rancho, simply because it was claimed that said boundaries included said land. But there was introduced in evidence the original petition, the *expediente*, the *diseño*, the act of judicial possession, various maps, decrees, and proceedings, and also oral testimony of witnesses as to the exterior boundaries of the rancho. It would be a useless labor here to review all this evidence. It is sufficient to say that after a full consideration of the evidence we are not prepared to say that the court was not warranted in finding that the land in suit was within the exterior limits of the San Jose Rancho "as granted by the Mexican government." The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

(57 Cal. 566)

CAMPODONICO v. OREGON IMP. CO. (No. 13,606.)

(Supreme Court of California. Jan. 31, 1891.)

MORTGAGES ON GROWING CROPS—STORING IN WAREHOUSE—MORTGAGOR'S INSOLVENCY.

1. The lien of a mortgage on growing crops is not lost by the mortgagor's storing the property in a warehouse, under an agreement with the mortgagee that it should be stored in the latter's name; and the action of the warehouseman in issuing the receipt in the name of the mortgagor, instead of the mortgagee, as he had been directed to do, does not entitle the mortgagor's assignee in insolvency to a preference over the mortgagee.

2. Section 55 of the California insolvent act, which provides that any transfer of property by an insolvent shall be void as to his creditors, when the transferee has reasonable cause to believe that it was made to hinder and delay creditors, does not make void the transfer of the warehouse receipt to the mortgagee by the mortgagor on the day he filed his petition in insolvency, as the mortgagee, by virtue of his mortgage, was entitled to the property, which was worth less than the debt for which it was mortgaged.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Graves, Turner & Graves, for appellant. Venable & Goodchild, for respondent.

PER CURIAM. Action to recover damages for the conversion by defendant of certain personal property, consisting of beans and barley, grown upon land farmed by one Dodge, in the county of San Luis Obispo, in 1888. Judgment was rendered in favor of the plaintiff, and from this, and an order denying its motion for a new trial, defendant appeals. The court below found, in substance, that in May, 1888, the said Dodge duly mortgaged to plaintiff the said beans and barley then growing to secure the sum of \$1,500 and interest, which mortgage was properly recorded. That between May 31, 1888, and October 27, 1888, the said Dodge, at the request of plaintiff, had the said property hauled from the land on which it was grown, and delivered to the defendant at its warehouse, instructing the person hauling it to store the same as the property of

plaintiff, in accordance with plaintiff's request. That upon delivery of the first lot hauled the defendant was notified that said property belonged to plaintiff, and that the delivery was made for him. That from time to time, as delivered, the defendant gave to the teamster of Dodge who hauled it tags of weight, reciting that the same was received from said Dodge, and not naming the plaintiff. On October 27, 1888, Dodge surrendered these tags to defendant, and requested the agent in charge of defendant's warehouse to issue a warehouse receipt to plaintiff for said property, but that the agent issued such receipt in favor of said Dodge, the said Dodge protesting that the same should show that said beans and barley were stored for plaintiff. Plaintiff did not know that the property had been stored in the name of Dodge until October 28, 1888, when he was informed of that fact by Dodge, and of the further fact that the same had been attached on the day before by one Aaron in a suit against Dodge. On the 29th of October, Dodge indorsed and assigned the warehouse receipt to plaintiff, and the defendant was on the same day notified by plaintiff that he was the owner of the property. After this assignment, and upon the same day, Dodge filed his petition in insolvency, and was thereupon adjudged insolvent. Aaron was appointed assignee in the insolvency proceedings, and as such sold the property in controversy to one Sinsheimer, and on December 17, 1888, the defendant, by order of said Sinsheimer, shipped the same, and without the knowledge or consent of plaintiff, to the consignee of said Sinsheimer in San Francisco.

1. These findings support the judgment. The lien of respondent's mortgage was not lost by his permitting the mortgagor, Dodge, to haul the mortgaged property from the land on which it was grown, and its storage in defendant's warehouse, under the circumstances disclosed in the findings. *Byrnes v. Hatch*, 77 Cal. 244, 19 Pac. Rep. 482. The neglect or refusal of defendant's agent to issue a receipt showing that the property was stored in the warehouse for the plaintiff did not change the effect of the agreement, made between plaintiff and his mortgagor, Dodge, as to the way in which it should be stored, so as to destroy the mortgage lien in favor of the assignee of the insolvent Dodge. The attachment proceedings need not be considered, as the attachment was dissolved when Dodge was adjudged insolvent.

2. The assignment of the warehouse receipt, made by Dodge to the plaintiff, on the day of the filing of Dodge's petition in insolvency, was not void as a preference, under section 55 of the insolvent act.¹ As the value of the property was less than the debt for which it was mortgaged, nothing was withdrawn from the reach of the assignee representing the creditors of Dodge, and, if it be conceded that the ef-

¹ This section provides that the transfer of property by an insolvent shall be void if the transferee had reasonable cause to believe that it was made to hinder and delay creditors.

fect of this transaction was in form a transfer of the legal title to the property described in the receipt, it was nevertheless valid as against the assignee. *Catiin v. Hoffman*, 2 Sawy. 486. The other assignments of error do not require special discussion. Judgment and order affirmed

(87 Cal. 576)

FRICK *et al.* v. MORFORD. [(No. 13,659.)
(Supreme Court of California. Feb. 2, 1891.)]

ASSESSMENTS—VALIDITY—APPEAL—MANDAMUS.

Under Act Cal. March 18, 1885, § 11, providing that the contractor having any objections to the legality of the assessment shall appeal to the city council, which may alter the same as may be just, and that its decision shall be conclusive upon all persons entitled to appeal, a contractor who does not appeal from the act of the superintendent of streets in making an assessment, which includes the cost of work called for by the specifications, but not authorized by the "resolution of intention," cannot compel him by *mandamus* to make another assessment.

Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Hugh J. & William Crawford, for appellants. *Charles McFarland* and *Sargent & Harpham*, for respondent.

HARRISON, J. The plaintiffs applied to the superior court of Los Angeles county for a writ of mandate to the superintendent of streets of the city of Los Angeles, directing him to make an assessment for certain work done by them in laying a sewer in Seventh street, under a contract with the city authorities. In their application they aver that they entered into a contract with the superintendent of streets by which they agreed to lay the sewer "in accordance with plans and specifications therefor on file in the office of the city surveyor, * * * but said plans and specifications were faulty and erroneous, in this: that about eight feet of sewer more were required by said plans and specifications to be laid, and were laid by affiants, than was authorized by the resolution of intention;" that they had performed their work to the satisfaction of the superintendent of streets, and that he accepted the same and made an assessment therefor, "and in said assessment included the cost and incidental expenses of said unauthorized eight feet;" that they brought an action to recover the amount of a portion of the assessment against one H. L. Williams, who had refused to pay the same, "because of said excess of work;" and that they had dismissed the said action. The defendant demurred to the application, and his demurrer having been sustained, the plaintiff declined to amend, and appealed to this court from the order denying the writ. The plaintiffs do not, in their application, aver in terms that the assessment that had been issued was void, nor can we say from the facts averred by them that it was void. Neither do they aver that the court in which they brought an action upon it decided that it was void, but they say that they dismissed their action against Williams upon "becoming convinced from the rulings of the honorable court that judgment could not be recovered by them." If the

assessment was a valid one, the superintendent of streets cannot be required to make another, and unless facts showing that it was not valid were clearly set forth in their application, the court was justified in refusing to grant the writ.

1. The plaintiffs do not show very clearly in their application wherein the plans and specifications which were on file in the office of the city surveyor "required about eight feet of sewer more to be laid" than was authorized by the resolution of intention, but we understand therefrom that they required the sewer to be laid to a point 988 feet west of the east line of Pearl street, instead of 980 feet westerly therefrom, as specified in the resolution. If this be the fact, it would result that the plaintiffs laid the westerly eight feet of the sewer without authority, and that they are not entitled to an assessment for that portion of the work done by them. It does not result, however, that the assessment for the work done by them that had been authorized by the resolution of intention was void. Neither does it clearly appear from the application where the lot of Williams was situated with reference to this excess of eight feet. If it was wholly or in part within the eight feet, the plaintiffs are not entitled to an assessment against that part of the lot not fronting upon the work authorized by the city council. If his lot was east of the 980-foot limit, the assessment against it would not be rendered void by the fact that the entire assessment purported also to make a charge upon lots that were not within the resolution of intention. Inasmuch as the price at which the plaintiffs were to do the work was estimated by the lineal foot, the cost of that which was done by them outside of the 980-foot limit could be easily segregated from the remainder. *Himmelman v. Hoadley*, 44 Cal. 276.

2. If the assessment embraced only the frontage upon the 980 feet covered by the resolution of intention, but included the expense of laying the sewer in the eight feet outside of that limit, it was an error which could have been corrected by the city council upon appeal, and the failure to take such appeal was conclusive upon the owner as well as upon the contractor. *Himmelman v. Hoadley*, supra; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. Rep. 1143. If the lot of Williams as assessed was partly within the 980 feet authorized by the resolution of intention to be "improved" by the sewer, and partly outside thereof, it was the duty of plaintiffs to appeal to the city council within 30 days after the date of the warrant for the purpose of having the assessment corrected. Upon such appeal the city council would have limited the assessment to the 980 feet authorized by their resolution of intention. Section 11 of the act of March 18, 1885, (St. 1885, p. 156,) provides that "the contractor * * * having or making any objections to the correctness or legality of the assessment * * * shall, within thirty days after the date of the warrant, appeal to the city council. * * * Upon such appeal the said city council may * * * set aside, alter, modify, or correct the assessment in such manner as to them shall

seem just; * * * and may instruct and direct the superintendent of streets to correct the assessment in any particular, or to make and issue a new assessment to conform to the decisions of the city council in relation thereto. All the decisions and determinations of said city council * * * shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have remedied and avoided." It was the duty of the plaintiffs, and not of Williams, to take this appeal. They were interested in having a legal and correct assessment. If the assessment was illegal and created no lien upon his land, Williams was not a person who would feel "aggrieved," and was not required to appeal for the purpose of giving to the plaintiff a valid assessment. *Smith v. Cofran*, 34 Cal. 310. It follows that inasmuch as the plaintiffs did not appeal from the act of the superintendent of streets in making the original assessment, they are concluded thereby, and are not entitled to have it corrected in any other mode. It is unnecessary to decide whether any part of the work to be done under the resolution of intention "is the improvement of an entire crossing," or whether it was necessary to post notices of the passage of the resolution "in front of each quarter block liable to be assessed." The order appealed from is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

87 Cal. 597

FINCH v. RIVERSIDE & A. RY. CO. (No. 13,657.)

(*Supreme Court of California*. Feb. 2, 1891.)

STREET RAILWAYS—CONSTRUCTION—RIGHTS OF ABUTTERS—FRANCHISE.

1. A street-railway company may use a street for its track without compensating the owner of the fee. Distinguishing *Weyl v. Railroad Co.*, 69 Cal. 203, 10 Pac. Rep. 510.

2. In Civil Code Cal. § 498, requiring street-railway tracks to be placed as "nearly as possible" in the middle of the street, the words "as nearly as possible" are equivalent to "as nearly as practicable."

3. Where the only evidence that it is impracticable to place the track in the middle of the street is the testimony of two witnesses that to so place it would interfere with traffic somewhat, because, the street being only 40 feet wide, there would not be room for teams to pass on either side of the track, but who do not state that there is an extensive traffic on the street, nor that it would not be practicable to put the track in the middle, it is insufficient to support a finding that it was not "practicable" to locate the track in the middle of the street.

4. Where a member of the board of city trustees is a subscriber to the stock of a corporation obtaining the franchise for a street railway, and is himself one of the committee to whom the application for the franchise is referred, which committee reports favorably, the franchise is void, notwithstanding that no corporation was formed at the time the stock was subscribed for, and that the franchise was granted to individuals, a committee of the subscribers, who conveyed it to the company.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; C. W. C. ROWELL, Judge.

H. C. Rolfe, for appellant. W. J. McIntyre, for respondent.

HAYNE, C. This was an action of ejectment brought by the owner of the fee of one-half of a street in the city of Riverside called "Cypress Avenue," against a street-car company, which was alleged to be using such half of the street in an unauthorized and unlawful manner. The trial court gave judgment for the defendant, and the plaintiff appeals.

There is no dispute about the plaintiff's ownership of the fee of half of the street, nor about the existence of the street, and the consequent right of the public to use it as a highway. The question litigated is whether the defendant's use of it was unauthorized and unlawful. In this regard several points are made.

1. It is contended that the defendant could not use the street for the purposes of its track without first making compensation to the plaintiff, and the case of *Weyl v. Railroad Co.*, 69 Cal. 203, 10 Pac. Rep. 510, is cited. But that case was not in relation to a street railway, but to an ordinary railroad whose route took it through a street. And we think there is a difference between such a case and the present. The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street in a city or town for the tracks of a street-car company is of this class, and is therefore authorized.

2. It is argued that the track was not located as required by law. The provision of statute in relation to the subject is that "the city or town authorities, in granting the right of way to street-railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with the following conditions: * * * First, to construct their track on those portions of the street designated in the ordinance granting the right, which must be as nearly as possible in the middle of the street." Civil Code, § 498. The order granting the franchise did not prescribe the precise part of the street upon which the track was to be located. It was merely that the franchise be granted to the applicants "according to their application;" and, while the application named the streets through which the road was to run, it did not refer to any particular portion of any street. There was, however, a general ordinance, applicable to all street-car companies, providing that "the track shall be laid as near the center of the street or streets along the route of the railway as practicable." It will be observed that the effect of this was that the board did not exercise its own judgment as to the portion of the street to be occupied by the track, but left it to the company to construct their track as near the middle of the street "as practicable." The company evidently did not consider it practicable to place the track in the middle of the street, and accordingly placed it on the side next the plaintiff's lot. The precise location is not shown by the record; but the court finds that "it was not practicable to locate the track in the middle of Cypress avenue." The court further finds that the franchise provided that the track was to be laid "along the eastern side of Cypress avenue," (which, as

above shown, it did not provide;) and that "the location of the defendant's track was in conformity with the requirements of said franchise." The plaintiff's position is, in the first place, that the words "as nearly as possible" do not mean "as nearly as practicable," as held by the trial court; and that, even if they do, the finding that it was not practicable to locate the track in the middle of the street is not sustained by the evidence. In relation to the first question we think that the statute means "as nearly as practicable." As a matter of course, it is always physically possible to place a track in the middle of a street. It may not be legally possible. For example, there may already be a track there under a franchise which it is beyond the power of the board to revoke. But even if a track were placed in the middle of the street, under a revocable license, we think that the board would have power to authorize the laying of another track so as not to interfere with the first. So if, as is sometimes the case in rural towns, a row of trees were in the middle of the street, the track could be placed on one side. And we are not prepared to say that the conditions of traffic might not be such as to require a similar location. The use of the words "as nearly," in connection with "as possible," shows that it was foreseen that a location in the middle of the street could not always be made; and we think that, from the nature of the case, the meaning must be that the location must be controlled in some degree by the circumstances of the particular case.

But we do not think that the evidence in the case before us shows any reason why the track could not be located in the middle of the street. Only two witnesses testified on the subject. One of them said, in substance, that it was "impractical" to place such a track in the middle of such a narrow street, (it was 40 feet wide,) because it would interfere with traffic. To use his own language: "It is impractical to put it in the center of such a narrow street, because it interferes a little bit with the travel, just about the same as when Mr. Finch goes across to his lot 210. It interferes with the travel in passing teams. If the travel is very great, it interferes materially. It depends on how much travel there is." But the witness did not state how much travel there was. The other witness said that a track in the middle of a street would interfere with traffic "very extensively." But he went on to say: "Putting a street railway in such a street would interfere with the use of the street for other travel wherever you put it. But I should deem it advisable not to put any street railway in the center of such a narrow street, for the reason that it will obstruct the travel to such extent that teams, for instance, cannot pass each other on either side of the track without crossing the track. There would be no room on each side for teams to pass. * * * Of course it is practicable." The effect of this testimony is merely that in the opinion of the witnesses the requirement of the law is wrong, and that it is more convenient to the traveling public to have the track on the side of the street.

But the law certainly means more than this. It is an injustice to the property owners on one side of the street to have the obstruction placed close to their doors. And for this, among other reasons, the law requires that it must be placed as near the middle of the street as practicable, and enjoins a "strict compliance" with the requirement.

3. It is contended that the franchise is void because a subscriber to the stock of the company was a member of the board of city trustees, and took an active part in the proceedings in relation to the franchise; and we think that this position must be sustained. It appears that when the application for the franchise was made a number of protests were put in, and the matter was referred to a committee of two, of which E. W. Holmes was one. This committee made a report in writing, recommending that the application be granted. The report was adopted, and the franchise granted at the next meeting. Several months prior to this an agreement to subscribe to the capital stock of a street-car company to be formed on lines similar to those of the defendant was gotten up, and by it E. W. Holmes subscribed for 200 shares of stock. A committee of subscribers was appointed to apply for a franchise. The personnel of this committee was subsequently changed to some extent. The application was made by the committee, and was granted, on the favorable report of the committee of two, of which Holmes was a member, as above stated. Subsequently the committee made a deed of the franchise to the company. It is true that there was no testimony to show that E. W. Holmes, the city trustee, was the same person as E. W. Holmes, the subscriber. But, in the absence of evidence to the contrary, identity of person will be presumed from identity of name. It is also true that no corporation was formed at the time of the subscription, and that the franchise was granted to several individuals, and not to a company. But, as above shown, the individuals constituted a committee of the subscribers appointed for the purpose of applying for the franchise, and after they obtained it they transferred it to the company formed in pursuance of the subscription. We think that it sufficiently appears that the franchise was granted for the benefit of a corporation to be organized by a number of subscribers, of whom the city trustee was one, and was subsequently transferred to the corporation; and, taking this to be the fact, the case falls within the principle of *San Diego v. Railroad Co.*, 44 Cal. 106. The trustee was one of a committee of two to whom the application was referred, and the favorable report of this committee, which was adopted by the board, must have influenced its action. In our opinion this vitiated the franchise. For the above reasons we think that the defendant was a mere intruder upon the street, and under the case of *Weyl v. Railroad Co.*, above cited, the plaintiff can maintain ejectment against it. We therefore advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial.

87 Cal. 603

YARNELL V. CITY OF LOS ANGELES *et al.*
(No. 13,920.)

(Supreme Court of California. Feb. 3, 1891.)

DEPOSITARIES OF PUBLIC MONEYS—CONSTITUTIONAL LAW.

1. The charter of Los Angeles, § 44, (Act Cal. Jan. 31, 1889,) directing the city council to appoint as a depositary of the public moneys the bank offering the highest rate of interest therefor, and the treasurer to deposit the city funds there daily, is void, being inconsistent with Const. Cal. art. 11, §§ 13, 16, 17, providing that the legislature shall not delegate to any private corporation, company, or individual the right to interfere with or control any county, city, or municipal money, and that the public moneys shall be deposited with the treasurer, and that making any profit out of such moneys shall be a felony; and also with Pen. Code Cal. §§ 424, 426, punishing by imprisonment the misappropriation of public moneys by the person charged with keeping them.

2. A tax-payer of the city can sue to enjoin the execution of an illegal contract by the city with a bank for the deposit with it of the public moneys.

Department 2. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Chapman & Hendrick, for appellant. *C. McFarland, S. M. White, and Graff, Gibbon & Creighton*, for respondents

McFARLAND, J. This is an action brought by a resident, and tax-payer, against the city of Los Angeles, M. D. Johnson, treasurer of said city, and the City Bank, a private corporation. The purpose of the action is to enjoin the said treasurer from depositing the public moneys of the city with said bank, pursuant to a certain contract between the city and the bank. Defendants filed a general demurrer "that said complaint does not state facts sufficient to constitute a cause of action." An answer and supplemental answer were filed, together with some affidavits, and the case was submitted. Subsequently the court rendered judgment, by which it was "ordered, adjudged, and decreed that the demurrer to the complaint be sustained;" that plaintiff was not entitled to the injunction; that the order to show cause be discharged, and the action dismissed; and that defendants recover their costs. Plaintiff appeals from the judgment, and it is clear that the appeal turns upon the sufficiency of the complaint, and the correctness of the decision of the court upon the demurrer. Upon the face of the complaint appear the following facts: The city of Los Angeles is a municipal corporation existing under what is generally called a "freeholders' charter," formed in pursuance of the amendment of section 8 of article 11 of the state constitution, approved March 10, 1887, (St. 1887, p. 88.) The charter was approved by the senate and assembly on January 31, 1889. Section 44 of the charter provides, among other things, (in

brief,) that it shall be the duty of the city clerk, on a certain day of January in each year, to advertise for sealed proposals from banks of deposit as to the terms upon which they will "receive and disburse the public moneys of said city." The proposals are to specify the rate of interest, estimated upon daily balances, which the bank will allow on the public moneys deposited; and "the bank offering the highest rate of interest shall be appointed the depositary of public moneys." After it is ascertained who is the highest bidder, the council is to enter into a contract with the bank, providing that the latter shall pay "all warrants drawn upon the city treasurer" so long as there is city money in the bank to meet the warrants on the various funds. Provision is made for a bond to be given by the bank. "Upon approval of such bond, and the signing of such contract, the council shall direct the city treasurer to deposit each day, when such bank is open for transaction of business, with the bank thus selected, all public moneys of said city by him collected or received. For each such deposit the treasurer shall take the receipt of the bank, and from and after the deposit of such money in said bank the treasurer and his bondsmen shall no longer be liable therefor." Under this section of the charter the city made the kind of contract provided for therein with the defendant the City Bank, and the defendant Johnson, treasurer, was, under such contract, about to deposit the public money in said bank when this action was commenced. The question presented is whether or not the provisions of said section 44 of the charter are constitutional and valid.

Section 6 of article 11 of the constitution provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws;" and the amendment to section 8, of article 11, under which the Los Angeles charter was framed, provides that certain cities may frame charters for their own government, "consistent with and subject to the constitution and laws of this state." If, therefore, the provisions above stated of said section 44 of the charter in question are inconsistent either with the constitution or with any law which is "general" in the sense in which it is used in the clauses above quoted, then they are invalid and void. And we think that they are inconsistent with both. There are several clauses of the constitution which point to the intent that public moneys shall not be used by or for the benefit of private persons and corporations, but one or two of them only need be invoked here. Section 12 of article 11 provides that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." The only method

proposed to avoid this provision is to say that while the legislature may not do the thing prohibited it may authorize its creatures, municipal corporations, to do it. But the thing which the legislature is forbidden to do it cannot delegate to another to do, unless such power of delegation is given by the constitution itself. And in other places there is such power of delegation given; for instance, in section 12 of article 11 the legislature is forbidden to impose taxes on municipalities for municipal purposes, but may, by general laws, vest such power in the municipal authorities; and in section 14 of the same article, the legislature is prohibited from creating any offices in municipalities for the inspection, etc., of merchandise, etc.; but it is provided that the municipality "may, when authorized by general law, appoint such officers." In section 13, however, there is no such power of delegation given. Under the construction contended for by respondent, while the legislature is prohibited by section 26 of article 4 from authorizing lotteries, it could give that power to municipalities. Again, carrying out the same intention, section 16 of article 11, which does not speak of the legislature, but deals directly with municipalities themselves, provides that all moneys of any municipal corporation coming into the hands of any officer thereof shall immediately be deposited "with the treasurer, or other legal depository, to the credit of such city, town, or other corporation, respectively, for the benefit of the funds to which they respectively belong." The word "treasurer" is the one by which the custodian of public money is usually designated, and he is a public officer; and the phrase "other legal depository" is clearly used to designate such public officer, whether he be called in any particular municipality "treasurer" or by some other name. It certainly does not mean a private individual or corporation. And in the case at bar the relation between the city and the City Bank, under the contract, is, we think, simply that of creditor and debtor,—the bank being a borrower of the public money. But if the bank could be held to be a public officer, then the contract would be in the face of section 17 of article 11, which provides that "the making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law." In this section the phrase "making of profit out of county, city, town, or other public money" is an independent clause, and, of itself, constitutes a felony, and is not dependent upon the subsequent words, "not authorized by law," so that these latter words need not be here construed.

We think, also, that the section of the charter under review is inconsistent with both the spirit and the letter of the general laws of the state relating to public moneys. For instance, section 426 of the Penal Code defines "public moneys" as including all moneys belonging to "any city,

county, town, or district;" and section 424 provides that "each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe-keeping, transfer, or disbursement of public moneys, who" commits certain acts with respect to such public moneys as are enumerated in ten subdivisions of the section "is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state." This is certainly a "general law" within any reasonable definition of that term that could be suggested, and the forty-fourth section of the charter is clearly inconsistent with it. Counsel contend that said section 424 (Pen. Code) is qualified, in most part at least, by the words "without authority of law," which occur in the first subdivision. But, waiving here the meaning of the word "law," as applied to a charter adopted by only a part of the law-making power, it is sufficient to say that section 424 enumerates a great many things which one having custody of public moneys may do which are not "authorized by law" in any sense, and which are declared to be crimes punishable by imprisonment in the state prison, and by debarment from office. But if a private corporation should commit any of these crimes, how could it be made to suffer the penalty prescribed? It has neither a body to be imprisoned, nor a right to hold office of which it could be deprived. It seems clear, therefore, that a scheme which places public moneys in the possession and control of a private corporation is entirely inconsistent with the provisions of the section of the Code above quoted. Without referring with further detail to other provisions of the constitution and the laws, our conclusion is that the parts of section 44 of the charter of the city above referred to, and the said contract attempted to be made under it, are inconsistent with both the constitution and the general laws of the state; that the complaint in this action states facts sufficient to constitute a cause of action; and that the court below erred in sustaining the demurrer.

(The point is hinted at, though not pressed in the briefs, that a tax-payer cannot maintain this action. We suppose that counsel wish the case decided on its merits, and not upon an issue in the nature of one raised by a dilatory plea, for their arguments go almost entirely to the point of the constitutionality and validity of the part of the charter assailed. We think, however, that in this case, where it is proposed to take all the public moneys of the municipality out of the hands of their legal custodian, and place them in the possession and control of a private corporation, a tax-payer has sufficient interest in the subject-matter to prevent by suit the consummation of the illegal act.)

The judgment is reversed, with direction to the superior court to overrule the demurrer to the complaint.

We concur: DE HAVEN, J.; SHARPSTEIN, J.

88 Cal. 1

In re MOORE'S ESTATE. (No. 14,062.)

(Supreme Court of California. Feb. 10, 1891.)

SPECIAL ADMINISTRATOR—EXPENDITURES—COMPENSATION.

1. The special administratrix of an estate is on the same footing as a receiver in equity, as to expenditures incurred in and about the estate; and the mere fact that she has exceeded a sum fixed by an order of court to be expended in repairing the property of the estate is no ground for disallowing the excess, provided it was a reasonable expenditure, and necessary to keep the property in repair.

2. Since Code Civil Proc. Cal. makes no special provision for the compensation of a special administrator, but leaves it in the discretion of the court, it is not improper for the court to take the rate of compensation fixed by statute for an administrator as the standard in determining such compensation of a special administrator.

Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

Frank M. Stone, for appellants. *Charles B. Younger*, for respondent.

HARRISON, J. The special administratrix of William H. Moore, deceased, having filed her final account for settlement, the heirs of the decedent filed objections to the allowance of certain items therein, and the court, after hearing the parties thereto, settled the account by allowing a number of items objected to, and disallowing the remainder. From this order the heirs have appealed to this court.

The chief objection to the action of the court is its allowance for certain expenditures in the repairs of the Pacific Ocean House. Prior to making these repairs the special administratrix had obtained an order from the superior court allowing her to expend a certain sum of money for said repairs, in which was designated the particular repairs to be made, the amount allowed for each, and which also declared, "the above amounts being the full costs of repairs which said administratrix is authorized to make." After obtaining this order she proceeded with the repairs, and completed some at less

expense than she was authorized to make, while in others she expended more than was permitted by the order; and she also made other repairs which were not included within the order, so that the total amount expended by her was in excess of the amount allowed by the order. It is urged by the appellants that the court was not authorized to allow any items in her account for expenditures which were not embraced within its previous order allowing her to make the repairs. The office and duties of a special administratrix are very similar to those of a receiver in equity. Each is appointed by the court to take charge, under its directions, of property in litigation, or which is involved in the proceedings before it, with a view to its care and preservation for the parties to whom the court may ultimately decide that it belongs. The powers and duties of each are special, and limited to such as are defined by statute, or expressed in the order of his appointment, or which he may from time to time receive for the purpose of more effectually preserving the estate intrusted to his charge. If it becomes necessary during his management to make any repairs, his expenditures therefor must be sanctioned by the court appointing him, either by previous order or by subsequent approval, before he can reimburse himself from the funds of the estate. A prudent person would obtain from the court an order therefor before making such repairs, but it is not an indispensable requisite that he should do so. If he is willing to forego such protection, and to rely upon his belief that the court will ratify his acts, there is no rule of law which will deprive the court of the power to reimburse him if his acts and expenditures are approved. In *Tempest v. Ord*, 2 Mer. 55, Lord ELDON said that "formerly the court never permitted a receiver to lay out money without a previous order of the court; but now, when the receiver had laid out money without such previous order, it was usual to refer it to the master, to see if the transactions were beneficial to the parties, and, if found to be so, the receiver was allowed the money so laid out." This rule was followed in *Adams v. Woods*, 15 Cal. 206, where the action of the district court in disallowing certain payments by the receiver on the ground that they had been made without any previous order of the court was reversed. See, also, *High*, Rec. § 180; *Hynes v. McDermott*, 14 Daly, 104. We do not think that the items in the account of the special administratrix for the repairs made by her should be disallowed merely because she had not obtained a previous order to make them, or because she had expended more than she was allowed. It was quite as competent for the court to approve her disbursements for repairs made without a previous order as it was to order in advance that the repairs should be made; and, if it was competent for the court to allow the items in her account without a previous order having been obtained therefor, it was equally competent to allow such repairs as she might have made in

excess of the amount allowed by the order. In either case the court must determine whether, under all the circumstances, the repairs were necessary, and the expenditures reasonable. These matters must of necessity be left to the discretion of the judge in settling the account; and, unless it appears that such discretion has been abused, it is not subject to review. The court in the present case heard testimony offered by the respective parties in reference to the contested items, and, after examining it, we cannot say that it was insufficient to support its order. Neither can we say that the court improperly allowed the items for the expenses of a horse and buggy, which were objected to by the heirs. For aught that appears in the record they were expenses necessarily incurred in her management of the estate. Code Civil Proc. § 1616. Appellants also object to the allowance to the special administratrix of commissions upon the estate that came into her hands. The Code of Civil Procedure does not make any special provision for the compensation of a special administrator, but leaves it to the discretion of the court in the settlement of his account. We cannot say that it was improper for the court to take the rate of compensation fixed by the statute for an administrator as the standard for determining a proper allowance to be allowed the special administratrix in the present case. To the objection that by this course an estate may be subjected to the payment of double commissions, it is sufficient to say that the court having charge of the estate has the power to prevent any improvident diversion of its funds during administration. The order appealed from is affirmed.

I concur: GAROUTTE, J.

PATERSON, J. I concur. Some of the items in the account seem on their face to show an attempt to improve the property, rather than to preserve it; but as the witness Cope testified that all the work done was necessary to put the house in tenantable condition, and as there is no evidence to the contrary, except an inference which may arise from the apparent nature of the work done, it cannot be said that the order of the court is not supported by the evidence. I think the burden of proving the necessity of the expenditures rested upon the administratrix as to all items objected to; and, if all the evidence introduced is in the bill, the court ought to have rejected the item of buggy hire. The bill, however, does not purport to contain all the evidence introduced, and, if it did, the item referred to is so small that counsel for appellant would not desire a reversal or modification on account of an error as to it alone.

(86 Cal. 189)

PARKS v. DUNLAP. (No. 14,027.)

(Supreme Court of California. Oct. 22, 1890.)

DISMISSAL OF ACTION—EFFECT—RES JUDICATA.

The voluntary dismissal of an action to quiet title as to a mortgagee of defendants is not an adjudication in his favor as to the validity of

his mortgage, in the absence of an agreement to that effect, and does not bar plaintiffs, in whose favor judgment was rendered, from asserting, on foreclosure of the mortgage, that the mortgagors had no title to the land.

Department 1. Appeal from superior court, Ventura county.

Blackstock & Shepherd, for appellant.
J. Hamer and W. H. Wilde, for respondents.

WORKS, J. This is an action to foreclose a mortgage. There was a judgment in favor of the defendant in the court below, and a new trial was denied. The plaintiff appeals. The only question in the case in this court is whether there has been a prior adjudication between the parties to this appeal of the questions involved in this suit. The respondents in this action brought a suit against the appellant and the parties who executed to him the mortgage sued on herein to quiet title to the property in controversy. In the complaint in that case it was alleged that the respondents were the owners of the land; that the appellant's mortgagors had no title thereto, but were asserting ownership therein adverse to the respondents; that, so claiming to own the land, they had executed the mortgage now in suit to the appellant, but that said mortgage was invalid. In that action the appellant demurred to the complaint, whereupon the respondents voluntarily dismissed the action as to him. His claim to the lands, either as mortgagee of the claimants or otherwise, was not set up or litigated; and the dismissal was not upon any agreement or compromise of the case as to him, so far as the record in this case shows. The respondents proceeded to trial as to the mortgagors of the appellant, and recovered a judgment against them that the respondents were the owners of the land, and that they had no title thereto or interest therein. This judgment was affirmed on appeal to this court. *Snodgrass v. Parks*, 79 Cal. —. ¹ The contention of the appellant is that the dismissal as to him in the former action was a *retraxit*, amounted to an adjudication in his favor, as to the validity of his mortgage, and is a bar against the respondents to any defense against it. Conceding, however, that the question in litigation in the former action was the same now presented, it is well settled that the voluntary dismissal of an action, without any agreement of the parties or other circumstances tending to show that such dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action. The authorities cited to the effect that a judgment on demurrer, when the demurrer goes to the merits of the action, may be a bar, are not in point. The judgment rendered was not on the demurrer, but upon a dismissal. The demurrer was not presented or passed upon by the court. Such a dismissal is not a bar. *Merritt v. Campbell*, 47 Cal. 545. It may be otherwise, as we have said, where the dismissal is upon agreement of the parties. *Id.*; *Crossman v. Davis*, 79 Cal.

603, 21 Pac. Rep. 963. Judgment and order affirmed.

Fox and PATERSON, JJ., concurred.

87 Cal. 613

HASS v. WHITTIER *et al.* (No. 13,809.)

(Supreme Court of California. Feb. 5, 1891.)

INSOLVENCY—PREFERENCE—VALIDITY.

Under Insolvent Act Cal. 1880, § 55, providing that if any person, insolvent or in contemplation of insolvency, makes any payment or transfer within one month before the filing of a petition by or against him, with a view to give a preference to any creditor, and if the person receiving such payment has reasonable cause to believe that it was made to prevent the ratable distribution of the insolvent's assets, the conveyance or payment shall be void, a conveyance by an insolvent of his property to a creditor must be both made and received with the intent to give a preference, and it is not void because received by a creditor intending to obtain a preference, unless the insolvent also had the intention of giving one.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; *WALTER VAN DYKE*, Judge.

Barclay, Wilson & Carpenter, for appellants. *Chapman & Hendrick and Graves, O'Melveny & Shankland*, for respondent.

VANCLIEF, C. The object of this action is to recover from defendants \$856.99, the value of certain personal property alleged to have been sold and delivered to defendants by the insolvent, in payment of a debt of \$900, within one month before the filing of the petition against him by his creditors, contrary to the provisions of section 55 of the insolvent act of 1880. The judgment of the court below was in favor of plaintiff for the sum demanded, and the defendants appeal on the judgment roll, contending that neither the complaint nor the findings of fact state a cause of action. A general demurrer to the complaint was overruled.

So far as applicable to this case, section 55 of the insolvent act is as follows: "If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, * * * makes any payment, assignment, transfer, or conveyance of any part of his property, * * * the person receiving such payment * * * having reasonable cause to believe that such person is insolvent, and that such * * * payment * * * is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way to hinder, impede, or delay the operation of, or to evade any of the provisions of, this act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor." It is neither alleged in the complaint, nor found as a fact by the court, that the insolvent transferred the property to the defendants "with a view to give a preference to any creditor or person having a claim against

¹ 21 Pac. Rep. 429.

him;" but it is found that the transfer was made to and received by the defendants in satisfaction of a valid debt of \$900, due them from the insolvent. It is further found, however, that the property was received by the defendants "with a view to give said defendants a preference, and to pay said indebtedness to said firm (defendants) before and in preference to all other creditors of said Edgar Sessions, and with a view to prevent the said property, so transferred, from coming to his assignee in insolvency, and to prevent the same from being distributed ratably among his creditors, and to defeat the object of the said insolvent act of 1880; and the said defendants, and each of them, at the time of said assignment and transfer and acceptance of said property, had reasonable cause to believe, and, as the plaintiff is informed and believes, well knew, that the said Edgar Sessions was insolvent, and that the said transfer and assignment was made for the purpose above mentioned,"—this finding being copied from the complaint. Unless the insolvent transferred the property with the view or intention to give preference to some creditor or person having a claim against him, it makes no difference what were the views or motives of the defendants in receiving the property, or what they suspected or believed about the solvency of Sessions. I think the judgment should be reversed and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

87 Cal. 616

SOUTHERN CALIFORNIA NAT. BANK OF LOS ANGELES v. WYATT *et al.* (No. 13,725.)

(*Supreme Court of California.* Feb. 5, 1891.)

NEGOTIABLE INSTRUMENTS — MAKERS—INDORSERS.

Under Civil Code Cal. § 3108, providing that "one who writes his name upon a negotiable instrument otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an 'indorser,'" one who signs as maker, with the addition of the word "surety" to his signature, is liable to the payee as maker.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Graves, O'Melveny & Shunkland, for appellant. Barclay, Wilson & Carpenter and Gottschalk & Luckel, for respondent.

BELCHER, C. C. This is an action upon a promissory note, dated December 5, 1888, and payable 90 days after date. The instrument appears to be a joint note, signed by each of the defendants, with the word "surety" written after the name of defendant Busch. The defendants, other than Busch, suffered default. He answered, and alleged that he signed the note neither as maker nor acceptor, and "that he wrote his name upon said negotiable

instrument as a surety, without any consideration whatever, but solely for the accommodation of the makers of said instrument, and delivered it with his name thereon to co-defendant Mitchell, who delivered the same to the plaintiff, all of which facts were known to the plaintiff at the time of said delivery." He further alleged that no notice of the presentment and non-payment of the note was given to him for more than 10 days after its maturity, and that he never waived its presentment or notice of its dishonor. The court below gave judgment against all of the defendants, and the defendant Busch appeals.

It is contended for the appellant, and this is the only point made, that as he wrote "surety" after his name, and was known by the payee to be a surety for the other makers, he became, in legal effect, an indorser, and not a maker, of the note, and was discharged from liability thereon, for the reason that no notice of its presentment and non-payment was given to him within the time prescribed by statute. This position is rested upon section 3108 of the Civil Code, which reads as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an 'indorser,' and his act is called 'indorsement.'" We do not think the judgment can be reversed on this ground. The next two sections of the Code are as follows: "Sec. 3109. One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose. Sec. 3110. When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereon may be made upon a paper annexed thereto." In *Fessenden v. Summers*, 62 Cal. 484, cited by appellant, the note was indorsed in blank by the defendant Thompson before delivery to the payee. The indorsement was for the purpose of adding credit to the note, and plaintiff made a loan upon the strength of the indorsement. The question was whether Thompson was to be treated as an indorser or guarantor of the note. It was held that, under sections 3108 and 3117 of the Civil Code, he was an indorser, and as such entitled to notice of non-payment. That case is not in point, for the reason that here the appellant did not indorse the note, but signed his name to it in the place of a maker. Since the decision of *Aud v. Magruder* in 1858, (10 Cal. 282,) where, as here, it appeared from an *addendum* to the name of one of the makers of the note in suit that he was a surety thereon, it has been uniformly held by the supreme court of this state that, where one subscribes his name to a promissory note in the place of a maker, he will, as between himself and the payee, be treated as a maker, and held liable as such, though he was in fact only a surety for the other makers, and this was known to the payee when he received the note. *Aud v. Magruder*, 10 Cal. 282; *Dane v. Corduan*, 24 Cal. 157; *Damon v. Pardow*,

34 Cal. 278; *Chafoin v. Rich*, 77 Cal. 476, 19 Pac. Rep. 882. This rule has not been changed by the Code, and the appellant was therefore not an indorser of the note, and his liability did not depend upon due notice of demand and non-payment. We think the judgment should be affirmed, and so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

87 Cal. 619

AVERY v. CLARK *et al.* (No. 13,890.)

(Supreme Court of California. Feb. 6, 1891.)

MORTGAGES—MECHANICS' LIENS—PRIORITIES.

1. Where the purchaser of land sells it before obtaining a conveyance, and puts his vendee in possession, and upon getting a conveyance immediately conveys to his vendee, taking a mortgage in part payment of the price, he waives any previous lien he may have had on the land for the price, and must rely solely on the lien of his mortgage, which accrues from its date.

2. Under Code Civil Proc. Cal. § 1186, providing that mechanics' liens shall be preferred to any lien that may have attached subsequent to the time when the materials were furnished, materials furnished to a person in possession under a contract of sale constitute a prior lien to a mortgage subsequently given the vendor for the price.

3. Where materials are furnished under a contract, and part of them are procured from another, who refuses to deliver them unless paid for by the contractor, the latter, having paid for them, can include their cost in his claim of lien.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

T. J. Carran and Walter Bordwell, for appellant. *Wells, Guthrie & Lee, C. McFarland*, and *Albert Crutcher*, for respondents.

HARRISON, J. This is an action for the foreclosure of a mortgage made by the defendants Humeston to one Robbins, and by him assigned to the plaintiff. The defendants, other than the mortgagors, are claimants of mechanics' liens for labor and materials furnished in the construction of a dwelling-house upon the premises described in the mortgage. Judgment was rendered for a sale of the premises, and directing that out of the proceeds of the sale the claims of the respondents (McCarthy, Clark, and Humphreys) should have priority in payment over the mortgage claim of the plaintiff. From this judgment the plaintiff has appealed, upon the ground that his claim was the first lien upon the lands.

The case is here upon the judgment roll alone, and presents the following facts: September 24, 1888, A. S. Robbins, the plaintiff's assignor, being in possession of a lot of land in Los Angeles, under a contract of purchase from one Griffes, who was the owner, made an agreement with the defendant Cassie M. Humeston to sell her the same for the sum of \$2,200, of which she then paid \$200, and took possession of the land. This agreement was never recorded. In the latter part of October of the same year the defendant R.

C. Humeston, husband of said Cassie, with her consent, and at the advice of Robbins, began the construction of a dwelling-house upon the lot, which was completed April 16, 1889. No written contract was made for the construction of the house, and its value or cost exceeded \$1,000. January 5, 1889, Griffes executed to Robbins a deed of the lot, and on the same day Robbins conveyed it to Mrs. Humeston, and at the same time Mrs. Humeston and her husband gave him their four promissory notes for \$500 each, for the unpaid amount of the price thereof, and executed the mortgage in question to secure their payment. Both of the deeds were recorded on the day of their date, and the mortgages two days thereafter. March 19, 1889, the plaintiff purchased the mortgage and notes from Robbins, who on that day "assigned" them to him. Prior to the date of this mortgage, viz., December 3, 1888, the respondents Clark and Humphreys entered into a verbal contract with R. C. Humeston to furnish lumber and other materials as might be required in the construction of the house, and between that day and April 10, 1889, furnished materials which were used in such construction, to the value of \$2,017, for which they afterwards filed their claim of lien. At the time of making this contract they knew that Mrs. Humeston claimed the land under a contract, and was indebted to Robbins for the purchase money to the extent of \$2,000. The court does not find on what day Clark and Humphreys commenced to furnish the materials other than that it was "between the 3d day of December, 1888, and April 10, 1889;" but it is conceded in the brief of counsel for appellant that they commenced to furnish them on the 3d day of December, 1888.

It is contended by the appellant that, by virtue of the contract of sale between Robbins and Mrs. Humeston, there was created in favor of Robbins a vendor's lien for the unpaid portion of the purchase money, which was preserved in the mortgage that was taken at the time Robbins conveyed the property to her, and that the right to enforce this lien passed to the plaintiff by the assignment to him of the notes and mortgage, and has priority over the liens of the respondents. A vendor's lien is not the result of any agreement or any intention of the vendor and vendee, but is a simple equity raised by courts for the benefit of the vendor of real estate. It is a privilege purely personal, and cannot exist in favor of any but the vendor. It does not exist in his favor if he has other security for the land which he has conveyed. It is not assignable, even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase money. It has been uniformly held in this state that this lien is lost by any act on the part of the vendor manifesting any intention on his part not to rely upon the lien, and that, although it is competent for him to take security for the payment of the purchase price of the land, and by an express agreement not lose his right to resort to this lien, yet his taking such security is *prima facie* a waiv-

er of the lien; and, in the absence of some agreement to the contrary, the vendee will hold the land discharged from such lien. In *Hunt v. Waterman*, 12 Cal. 301, the vendor had taken a mortgage on the property sold, for the payment of the entire purchase money, but, by reason of some defect, the mortgage was unavailing as a security. He then brought an action to foreclose his vendor's lien. The court says: "The question in this case is directly presented whether in this state a vendor's lien exists when a mortgage security is taken for the purchase money. Decisions of the various courts have been numerous on this branch of jurisprudence, and are not harmonious. The better rule, supported by the weight and number of authorities, is to hold the silent lien of the vendor extinguished whenever the vendor manifests an intention to abandon or not to look to it; and it held that he does this whenever he takes other and independent security upon the same land, or a portion of the same land, or on other land. When he looks to other security he loses this tacit lien." In *Baum v. Grigsby*, 21 Cal. 173, Judge FIELD, delivering the opinion of the court, says: "When any other independent security is taken, as a mortgage on the land, or upon other property, or the personal responsibility of a third person, the lien is held to be waived unless there is at the time an express agreement for its retention. The taking of a distinct, independent security is presumptive evidence of the waiver." It is also the established rule in this state that this lien is not assignable, and that the assignee of the right to recover the money for which the land was sold cannot enforce the lien. *Baum v. Grigsby*, supra; *Camden v. Vail*, 23 Cal. 633. In *Baum v. Grigsby*, the court says: "The cases which deny that the lien passes with the personal security of the vendee do not rest, except in a few instances, upon the want of a special assignment from the vendor, but upon the ground that the lien is in its nature unassignable, and to that conclusion we have arrived. * * * The assignee of a note given for the purchase money has not parted with the property which he seeks to reach in consideration of the note he has received. He has never held the property, and has therefore no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another." These principles were afterwards formulated in the Civil Code, which provides, (section 3046:) "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Section 3047: "Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract." Properly speaking, a vendor's lien does not exist until the vendor has parted with his title. So long as he retains the title he cannot be said to have any implied

lien upon the land. The security which he then has for the purchase money is created by express reservation, and cannot be impaired by any act of the vendee. This is an express lien existing by virtue of a contract executed between the parties, and is capable of assignment and enforcement by his assignee. *Taylor v. McKinney*, 20 Cal. 618. Such a lien is open and manifest to the world, and is entirely different from the secret, invisible lien which the law implies in behalf of the vendor when he parts with the title, and which is known only to the parties to the transaction, and those to whom they may communicate the fact. For such a lien equity makes no special provision, but leaves the parties to rely upon the contract which they have executed between themselves. Whatever was the nature of the security held by Robbins prior to January 5, 1889, by virtue of the contract of sale between him and Mrs. Humeston, whether it was a vendor's lien or a lien in the nature of a mortgage, or whether, inasmuch as he did not himself have the title to the land, it was a security differing from either of these, when he took the promissory notes of Mrs. Humeston and her husband, secured by their mortgage upon the land which he then conveyed to her, he waived whatever lien he had prior to that date, and thereafter had only the lien that existed by virtue of the mortgage. The unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer." In addition to her personal obligation he had the personal obligation of her husband, together with their mortgage on the land to secure the same. By these acts his vendor's lien, if he had any, was extinguished, and his prior security was merged in the mortgage, and became an open, public, and express lien. Nor did the insertion in the mortgage of the clause, "this mortgage is given in part-payment of the purchase money of the within-described property," have the effect to extend the lien by relation to the date of the contract of sale. These words do not constitute or imply any agreement or intention for the preservation of a prior lien. The fact that the mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase money of the land is none the less a waiver of his vendor's lien. The plaintiff in this case has, however, only such rights of lien upon the land as Robbins could transfer, and such as he did transfer, on the 19th of March, 1889, by his assignment of the notes and mortgage. He does not in his complaint allege any assignment to him of any other lien than was created by the mortgage, his allegation being that "on the 19th day of March, 1889, for a valuable and sufficient consideration, said plaintiff purchased said mortgage and notes from said A. S. Robbins, who then and there duly assigned, transferred, set over, and delivered the same to the plaintiff;" and the finding of the court is in accordance with this allegation. We have seen above that as the assignee of Robbins he is not entitled to assert any vendor's lien in his own behalf.

Section 1186, Code Civil Proc., declares that "the liens provided for in this chap-

ter are preferred to any lien, mortgage, or other incumbrances which may have attached subsequent to the time when * * * the materials were commenced to be furnished." Inasmuch as the only lien which the plaintiff has is that of his mortgage, which did not attach to the land until January 5, 1889, and as the respondents commenced to furnish the materials for which their lien was allowed prior to that date, it follows that their lien was preferred to the lien of the plaintiff. Nor do the provisions of section 2898 of the Civil Code give to the plaintiff, under the facts of this case, priority for the lien of his mortgage in disregard of this section. Section 1192, Code Civil Proc., provides that "every building * * * constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner, or person having or claiming an interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter," unless such person shall give notice that he will not be responsible for the same. Not only did Robbins fail to give any such notice, but the court finds that he "consented to and advised the construction of said dwelling-house." Although he was not the "owner" of the lands until January 5, 1889, yet by virtue of his contract with Griffes, he was until that date, and for several months prior to the time when the respondents began to furnish materials, a "person having or claiming an interest therein," and that interest, to its entire extent, became subject to their lien. The principle upon which liens are allowed in favor of mechanics and material-men is that their labor and materials have given value to the buildings upon which they have been expended, and that it is inequitable that the owner of the land, who has contracted with them for such improvement, or who has stood by and seen the improvement in progress without making objection, should have the benefit of their expenditures without making compensation therefor. Even in the absence of the foregoing provisions of the Code, it would be in contravention of well-established rules if, under the facts of this case, the lien of Robbins should have priority over that of the respondents. Having advised the construction of the dwelling-house upon land then owned by him, under the most elementary principles of equity he would not be permitted to avail himself of this increased value for the purpose of enhancing his own security at the expense of those who had themselves given value to the land. There was no error in allowing to Clark and Humphreys, as a portion of their claim, the sum of \$190 for certain glass used in the building. The court found that Clark and Humphreys furnished to the defendant R. C. Humeston materials of the value of \$2,037.84, to be used in the construction of the dwelling-house, and that "of and included in said amount is a claim for glass amounting to \$190, furnished by the firm of Schlesinger & Goldwater," and that Schlesinger & Goldwater refused to deliver

the same until paid for. The court does not find that Schlesinger & Goldwater furnished the glass to Humeston, but does find that the material furnished by Clark and Humphreys to Humeston was of the above value, and that in this amount was this claim for glass which Schlesinger & Goldwater refused to deliver until paid for, and that Clark and Humphreys paid Schlesinger & Goldwater for the glass. These findings are entirely consistent with the fact that Clark and Humphreys agreed with Humeston to furnish the glass for the dwelling-house, and for that purpose bought the same from Schlesinger & Goldwater, but that Schlesinger & Goldwater refused to deliver the glass to them until it was paid for, and that thereupon Clark and Humphreys paid for the glass, and furnished it according to their contract with Humeston. As the appeal is taken upon the judgment roll without any bill of exceptions, we must assume that the evidence was sufficient to support all the findings of the court. The foregoing principles, which give priority to the lien of Clark and Humphreys, are also applicable to the lien of McCarthy. We cannot say that the description of the land in the claim of lien filed by him is not "sufficient for identification." Code Civil Proc. § 1187. The judgment of the court below is affirmed.

We concur: PATERSON, J.; GAROUTTE, J.

SHATTO v. CROCKER. (No. 13,730.) 87 Cal. 629

(Supreme Court of California. Feb. 7, 1891.)

MALICIOUS PROSECUTION—INJURY TO FEELINGS—OBJECTIONS—EVIDENCE.

1. In an action for malicious prosecution, damages for injury to plaintiff's feelings, caused by the arrest, are recoverable under a general allegation of damages.

2. An objection to the admission as a whole of a copy of the record of the proceedings in the criminal trial, when, by Code Crim. Proc. Cal. § 912, is made *prima facie* evidence of the facts therein stated, is properly overruled where the inadmissible portions of the copy are not specified in the objection.

Department 1. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

J. M. Damron, for appellant. Anderson, Fitzgerald & Anderson, for respondent.

PATERSON, J. This is an action for damages, occasioned by the malicious prosecution of a criminal action against the plaintiff before a justice of the peace of Los Angeles county. The findings of the court were in favor of the plaintiff, and judgment was entered against the defendant for the sum of \$400 and costs. Appellant claims that the court erred in permitting the plaintiff to testify to the injury to his feelings caused by the arrest, the only special damages alleged being \$25, paid an attorney for the defense of the respondent in a criminal action, and \$50 loss on account of detention from business for two days. We think that the evidence was properly allowed under the general allegation as to damages. Bodily pain and suffering come under the head of general damages, because they result naturally and

directly from bodily harm; and injuries to the feelings flow as naturally and as directly from treatment like that complained of herein. 1 *Suth. Dam.* pp. 763-766. Appellant contends, also, that the court erred in overruling his objection to the introduction in evidence of copies of the complaint, warrant of arrest, proceedings, and docket entries in the criminal action tried before the justice of the peace, certified by the latter. The papers were attached together, and were objected to as a whole. They included a certified copy of the entries in the docket. Such copy is made *prima facie* evidence of the facts stated, by the provisions of section 912, Code Crim. Proc. As some of the evidence offered as a whole was admissible, and as appellant failed to specify any particular portion to which he addressed his objection, there was no error in the ruling of the court. *Board v. Keenan*, 55 Cal. 647. Furthermore, it appears from the defendant's own evidence that he prosecuted the case referred to, and that the plaintiff was acquitted. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

87 Cal. 643

In re CORKER'S ESTATE. (No. 13,941.)

CORKER v. CORKER.

(*Supreme Court of California.* Feb. 9, 1891.)

WILLS—REVOCATION BY MARRIAGE—MARRIAGE CONTRACT.

1. Under Civil Code Cal. § 1299, which declares that a will is revoked by the subsequent marriage of testator and the survival of the wife, unless provision has been made for her by "marriage contract," and which provides that no other evidence to rebut the presumption of revocation shall be received, the marriage contract, to rebut such presumption, must purport on its face to make provision for the wife in lieu of testamentary provision, and the court cannot receive any evidence of the intention of the parties, or their relative conditions of wealth at the time it was executed, or the effect which will result from its enforcement.

2. A deed of separation between husband and wife, which refers to a conveyance of land executed to the wife by the husband, in consideration of which she releases him from his marital obligations, and renounces all claim to his property after his death, but which does not indicate that either of the parties had in mind the subject of a will executed by the husband before his marriage, or that the instrument was executed in lieu of testamentary provision for her, is not a "marriage contract," within the meaning of the above section, so as to rebut the presumption of revocation arising from the subsequent marriage; and it is the duty of the probate court to deny the probate of the will, without inquiring into the reasonableness of the consideration for the wife's release of the husband, provided for in the deed of separation.

Department 2. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Smith & Northrop, for appellant. *E. Baxter and Wells, Guthrie & Lee*, for respondent.

HARRISON, J. John R. Corker died in the county of Los Angeles, September 12, 1889, leaving a writing purporting to be his last will, which was executed December 12, 1883; and on September 18, 1889, John F. Corker, who was named therein

as executor, presented the same to the superior court of said county, together with his petition for its probate, and the issuance to him of letters testamentary thereon. To this petition the respondent, Aurelia J. Corker, filed written opposition, alleging that the said will had been revoked by reason of the marriage of the decedent to her subsequent to its execution, and that no provision had been made for her either in the will or by marriage contract. To this opposition the petitioner answered, alleging that after such marriage, and prior to the 9th of October, 1888, the decedent and contestant mutually agreed to separate and live apart, and "in pursuance of said agreement the said John R. Corker and Aurelia J. Corker, on said 9th day of October, 1888, entered into a marriage contract, or agreement in writing," under their hands and seals, which was duly acknowledged, and recorded in the office of the county recorder of Los Angeles county; and that in consideration of the covenants in said marriage contract contained, "and as settlement and division of all their property rights, the said John R. Corker, on said 9th day of October, 1888, executed to Aurelia a deed" for certain real estate in Los Angeles county, (describing the same,) of which she thereupon took the possession, and that they then separated, and never after resumed marriage relations. The following is the instrument referred to in his answer as a marriage contract or agreement: "It is agreed by and between Aurelia J. Corker and John R. Corker, husband and wife, of Los Angeles city and county, state of California, as follows: The said Aurelia J. Corker, in consideration of the said John R. Corker conveying to her, by good and sufficient deed this day executed, contemporaneous herewith, the lands therein described, does hereby release and absolve him, the said John R. Corker, from in any manner contributing to her support as his wife or otherwise, during their and each of their natural lives. That she releases and conveys to him all right, claim, or interest that she may have in or to all community property which has been or shall hereafter be acquired by her said husband; all right or claim to alimony, or attorney's fees, costs, or support in any manner during litigation or otherwise, are for the same consideration (in case a proceeding for the dissolution of the marriage between them is instituted by either party hereto) is hereby released, and the said John R. Corker is absolved and discharged therefrom; and for the same consideration she releases all right, claim, or interest that she may have by law or otherwise in or to any property, real or personal, that he may have at the time of his death, or to which he may then be entitled, and all right, claim, and interest in or to his estate after he is dead. In consideration of the foregoing, the said John R. Corker has conveyed, and does hereby again convey, sell, and assign and set over, to the said Aurelia J. Corker, as her own separate property, the lands and premises described in said deed of even date herewith, to have, hold, and convey the same with-

out let or hindrance from him, collect, receive, have, and enjoy the rents and profits therefrom, and discharges, releases, and absolves her and her property now or hereafter acquired by her from any, all, and every right, claim, or interest which he may have therein because the same being in law community property. And it is further mutually agreed between the parties hereto that they will each support and maintain themselves, sell, convey, purchase, mortgage, and do all business regardless of the other, the same as if they were unmarried; the intention being to hereby settle now and forever all property rights and interests and relieve each other of all obligations growing out of or imposed by their marital relations, as far as they can under the law; and they hereby agree that they will immediately separate and live apart from each other. As there are no children born of said marriage, and none have been adopted by them, there are none to be provided for by the parties hereto. In witness whereof the parties to this agreement have hereunto set their hands and seals this 9th day of October, 1888. [Seal.] AURELIA J. CORKER. [Seal.] JOHN R. CORKER." At the hearing upon these issues the contestant, for the purpose of defeating the effect of the instrument of October 9, 1888, offered evidence to show that the property conveyed to her in consideration of its execution was her separate property, and that consequently the agreement made no "provision" for her, and was without consideration. The court, in its decision, took this view of the transaction, and found that the property so conveyed to her had for a long time prior thereto been her separate property; that there was no other consideration for the execution of the agreement; that the agreement itself was not fair and reasonable in its terms; that the release therein by the wife was not founded upon sufficient consideration; and that no provision had been made for her by the decedent, either by marriage contract or in the will; and thereupon denied probate to the will. A motion for a new trial was made by the proponent upon the ground that the evidence was insufficient to justify the findings of the court that the property so conveyed to the wife was her separate property, or that the agreement of October 9, 1888, was without any other consideration, or was not fair and reasonable in its terms; and, also, its finding that no provision had been made for her by marriage contract. The motion for a new trial was denied, and from this order the proponent has appealed to this court.

Section 1299 of the Civil Code is as follows: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received." The term "marriage contract," as found in this section, is not defined in the Code. The section itself is nearly identical with section 12 of the act

concerning wills, passed April 10, 1850. At that time the legislature had before it the bill defining the rights of husband and wife, which became a statute April 17, 1850, (St. 1850, p. 254,) and which contained a chapter headed "Marriage Contracts." An examination of the sections in that chapter will show that the term, as used therein, refers entirely to antenuptial contracts; and it is fairly presumable that the "marriage contract" referred to in section 12 of the act concerning wills (now section 1299 of the Civil Code) is the one referred to in the act of April 17, 1850, defining the rights of husband and wife. When the Civil Code was adopted, this term in the chapter on "Husband and Wife" was changed to "Marriage Settlement" and "Contract for Marriage Settlement," (Civil Code, §§ 177-181;) and, in consideration of the provisions of section 5 of the Civil Code, we must presume that the "marriage settlement" found in these sections is the same as the "marriage contract" found in the act of April 17, 1850, and consequently the same as the "marriage contract" referred to in section 1299 of the Civil Code.

Stewart, in his treatise on Marriage and Divorce, § 32, says: "Contracts or conveyances, in contemplation of marriage, whereby property is promised to or settled on either or both of the parties, by either or both of the parties, or by a third party; and contracts whereby either or each of the parties releases or modifies, or agrees to release or modify, his or her property rights, which would otherwise arise from the marriage,—are called 'marriage settlements' or 'contracts.'" And in the same section he also says: "Marriage settlements made after marriage, unless in pursuance of antenuptial articles or agreement, are simply contracts between husband and wife." It is unnecessary, however, to decide in this case whether the marriage contract referred to in section 1299 is limited to antenuptial contracts, or whether a post-nuptial agreement between husband and wife may be so framed as to constitute such a marriage contract, inasmuch as the instrument here is a post-nuptial agreement, which does not, in terms, purport to be a marriage contract. Section 1299 unequivocally declares that, except in the instances therein specified, "if after making a will the testator marries, and the wife survives the testator, the will is revoked." When the will is offered for probate, the surviving wife, in order to defeat its probate, need only show that she was married to the testator subsequent to its execution. The burden is then cast upon the proponent to show the existence of one of the conditions which except it from this rule. If the wife is not mentioned in the will, he must show that "provision has been made for her" by "marriage contract." And, in order to emphasize the rule that the instrument itself is the only mode of proof, the section further declares: "And no other evidence to rebut the presumption of revocation must be received." The plain meaning of this clause is that, unless the instrument shows upon its face that it is a "marriage contract" within the meaning of the sec-

tion, and that by it "provision" has been made for the wife, and that such provision was intended to take the place of testamentary provision for her, the will is revoked. The wife is not called upon to introduce any further proof, and the proposition is limited in his proof to the marriage contract itself. Nor can the court receive any evidence for the purpose of showing the intention of the parties to the instrument, or their relative conditions of wealth at the time it was executed, or the effect which will result from its enforcement. If the instrument is a "marriage contract," and purports to make "provision" for the wife, the court cannot inquire into the character or extent or reasonableness of such "provision" any more than it can in other contracts between parties who are *sui juris*. If the parties are themselves satisfied with the "provision," it is not for the court to substitute its judgment for theirs as to its sufficiency. So long as the execution of the contract is not impeached, it is as binding upon the parties as would be any other contract. If the instrument does not on its face purport to make provision for the wife in lieu of testamentary provision, the court cannot receive evidence of any character for the purpose of showing that such was the intention of the parties. The provision of the statute forbidding any other evidence than the contract itself is peculiarly appropriate to all post-nuptial agreements. As the husband and wife can enter into any engagement or transaction with each other respecting property, which either might, if unmarried, (Civil Code, § 158,) such an agreement made by them ought not to receive a construction that does not appear upon its face to have been its object, or which will operate a different result from that which is fairly deducible from its terms. If the husband and wife have, each of them, separate property, and they choose to deal with each other respecting it, either by way of exchange or purchase and sale, such dealing should not be made the pretext of asserting some right which does not appear from the terms of the instrument to have been in their minds. If the husband during the marriage makes to his wife a conveyance of certain property, such conveyance ought to be regarded as a gift, rather than a "provision" for her, which would prevent his antenuptial will from being revoked by his marriage.

The instrument executed between Corker and his wife partakes more of the nature of a deed of separation than of a marriage contract. It does not purport to make any "provision" for the wife; nor is there anything in its terms that indicates that either of the parties had in mind the subject of a will, or that the instrument was executed in lieu of making testamentary provision for her. It refers to another instrument executed to her by her husband, in consideration of which she releases him from certain marital obligations. The instrument itself does not contain any of the elements of a "marriage contract." As soon as this instrument was presented to the court, and the court saw from an inspection of it that it was not a mar-

riage contract, its power under the proceedings before it was limited to denying probate to the will. After it had been shown that there was no marriage contract in which provision had been made for the wife, the court was only required to determine the person who had the right to administer upon the estate. Whatever rights of property passed under the contract, or whether it could be enforced, or whether the widow has any right in the estate of her deceased husband, are questions that may arise when distribution of the estate shall be sought, but could not then be investigated. Sitting at that time merely as a court of probate, it had no jurisdiction to inquire into the sufficiency of the consideration for which the deed to the wife was executed, or for the release then executed by her to her husband, or whether the property described in the deed to her was at the time of its execution her separate property, or whether the contract itself was fair or reasonable. Its findings and determinations upon these subjects were without authority, and binding upon no one. These questions could be presented and determined only in a tribunal having jurisdiction to inquire into them, and where the parties who would be affected thereby would have an opportunity to be heard. The court seems to have reached this conclusion, since in its judgment it merely declared that the will was revoked, and therefore denied it probate. Whether the evidence before the court was sufficient to justify its findings upon the other propositions is immaterial. If there was sufficient evidence to justify its finding of the ultimate fact that no provision had been made for the wife by any marriage contract, that decision or finding is not impaired by the fact that there was not sufficient evidence to justify the immaterial findings which it made; and its order denying a new trial was correct, and should be affirmed; and it is so ordered.

We concur: GAROUTTE, J.; PATERSON, J.

davit of the appellant was so directly contradicted by the affidavits on behalf of the respondent that the court was not bound to accept it as true. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.

88 Cal. 79

POIRIER v. GRAVEL. (No. 13,734.)

(Supreme Court of California. Feb. 16, 1891.)

ACTION ON NOTE—PLEADING—CONSIDERATION—
VACATING JUDGMENT.

1. Civil Code Cal. § 1614, provides that "a written instrument is presumptive evidence of a consideration." Section 1615 places the burden of showing want of consideration with the party seeking to avoid it. *Held* that, in pleading upon a note, it is unnecessary to aver a consideration.

2. A complaint set out a contract whereby defendant agreed to pay money in installments when realized from the products of certain land which she owned, and then alleged that she had sold and conveyed to other persons the land and the products thereof, and had not paid the money as agreed. *Held* a sufficient statement of a breach of the contract.

3. Upon a motion to vacate a default judgment, the proofs were conflicting, but plaintiff's affidavits showed clearly that defendant's failure to answer in time did not arise from mistake, inadvertence, or excusable neglect. *Held*, that the motion was properly overruled.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. CLARK, Judge.

Brousseau & Hatch, for appellant. *H. H. Appel*, for respondent.

BELCHER, C. The plaintiff brought this action in April, 1889, to recover the sum of \$1,500 on a written instrument, which reads as follows: "Los Angeles, Cal., February 9, 1888. \$1,700. I hereby promise to pay to Godfrey Poirier the sum of seventeen hundred dollars out of the net proceeds of the products, whether mineral, timber, wood, or any other thing, raised or taken from section 3 of township 11 north, range 15 west of the San Bernardino meridian, in Kern county, state of California; the said sum to be so paid in installments, in such amounts and at such times as I shall realize each month from such products, after payment of all costs and expenses of the gathering or obtaining and selling such products. The said sum of money to be paid only and exclusively from such products of said land as I may be entitled to, and no other property of mine shall be subject to said debt or obligation. MARY PAULINE GRAVEL." It is alleged in the complaint that the defendant, being the owner of an undivided one-half interest of the land described, and being indebted to the plaintiff in the sum of \$1,700, executed and delivered to plaintiff the instrument on the day of its date, and the plaintiff then and there accepted the same; "that, since the making and delivery of said instrument by defendant to plaintiff, the said defendant has sold, disposed of, and conveyed away to other persons the said land and premises in said agreement described, and all mineral, timber, and wood products thereof, and everything that could and might be gathered and raised from land, and said defendant is no longer the owner thereof; that said

88 Cal. 110

THOMPSON v. THOMPSON *et al.* (No. 13,386.)

(Supreme Court of California. Feb. 21, 1891.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial is properly refused, where the newly-discovered evidence is argumentative, and a mere repetition of the testimony at the trial, and the documentary evidence relied on is not shown to be relevant, and where the affidavit filed with the application is contradicted by the affidavits of the other party.

Department 1. Appeal from superior court, Santa Clara county; JOHN REYNOLDS, Judge.

J. C. Black, for appellants. *D. W. Burchard*, for respondent.

HARRISON, J. The appeal in this action is without merit. The evidence introduced at the trial justified the finding of the court that the respondent was the owner and entitled to the possession of the premises described in the complaint, and that they were unlawfully withheld from her by the defendants. Although a portion of the testimony in behalf of the plaintiff was in some particulars contradicted by the testimony of the appellant, yet the version given by the witness for the plaintiff of the transaction which resulted in her purchase of the premises was so fully corroborated by other uncontradicted portions of his testimony that the court would not have been justified in disregarding it, either in its decision upon the trial, or upon the appellant's motion for a new trial. The newly-discovered evidence set forth in the affidavit of appellant, upon which she sought a new trial, consisted chiefly of a repetition of her testimony at the trial, and is more of an argumentative character than a statement of facts. The documentary evidence referred to in the affidavit is of a date long subsequent to the purchase by the plaintiff of the lands in controversy; and no fact is stated in her affidavit which in any way connected this documentary evidence with such purchase. Moreover, this affi-

defendant has not paid the said sum of seventeen hundred dollars, save and except the sum of two hundred dollars, or thereabouts; and there is due, owing, and unpaid, from defendant to plaintiff, the sum of about fifteen hundred dollars." Wherefore judgment is asked for the sum of fifteen hundred dollars, and costs of suit. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on the 6th of May the demurrer was overruled, and 10 days allowed to answer. Four days later notice of the ruling on the demurrer was served on defendant's attorneys, and on the 31st of the same month, no answer having been filed, judgment by default was entered against the defendant by the clerk for the amount prayed for and costs. On the 7th of June an execution on the judgment was issued and levied on defendant's property, and notice of the time and place of sale was published. On the 2d of July defendant served on plaintiff a notice that on the 8th of that month she would move the court for an order vacating the judgment and setting aside the default taken, upon the ground that the default was entered against her by mistake and inadvertence, and also upon the ground that the judgment was irregular and void, because the complaint did not state facts sufficient to constitute a cause of action. This motion was subsequently heard by the court upon affidavits introduced on both sides, and denied. The defendant then appealed from the judgment, and the order denying her motion.

1. It is contended for appellant that her demurrer to the complaint should have been sustained, but we think the ruling proper. The written instrument imported a consideration for its execution, and the burden of showing a want of consideration sufficient to support it was upon the defendant. Civil Code, §§ 1614, 1615. The recital that the defendant, "being indebted," executed the instrument, was not necessary, and may be rejected as surplusage. It is true that a complaint for breach of contract must state the breach in unequivocal language. We think the complaint here fully complied with this rule. It set out the contract whereby the defendant agreed to pay a sum of money in installments, when realized by her from the products of certain land which she owned, and then alleged that she had sold and conveyed to other persons the land and the products thereof, and had not paid a part of the money which she had agreed to pay. This being so, the balance unpaid became immediately due and payable, and the plaintiff could maintain an action for the recovery thereof. The case in this respect is like that of *Wolf v. Marsh*, 54 Cal. 228. There the defendant executed to the plaintiff a written agreement whereby he promised to pay a sum of money when realized from the profits of certain coal mines in which he owned an interest. Before the mines had yielded any profits to the defendant he sold and conveyed his interest in them to a stranger. "By so doing," it was said by this court, "he voluntarily put it out of his power ever

to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary that, 'if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not arrived.' Bishop, Cont. § 1426." See, also, *Love v. Mabury*, 59 Cal. 484.

2. We cannot say that the court below erred in refusing to vacate and set aside the judgment on the ground that it was taken against defendant through her mistake and inadvertence. The affidavits introduced on the hearing of the motion were conflicting in their statements. Those read by the plaintiff very clearly showed that defendant's failure to answer in time did not arise from mistake, inadvertence, or excusable neglect. The learned judge who heard the motion must have thought that the plaintiff's affidavits stated the facts truly, and in this we are unable to see that he was mistaken. In our opinion the judgment and orders should be affirmed, and we so advise.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

87 Cal. 531

BROCK v. PEARSON *et al.* (No. 13,869.)

(Supreme Court of California. Feb. 2, 1891.)

VENDOR AND VENDEE—ASSIGNMENT OF CONTRACT—AUTHORITY OF AGENT—EVIDENCE—LIS PENDENS.

1. Where the holder of a contract of sale of land transfers it to another in consideration of a conveyance to himself of an undivided fourth interest in the land when a conveyance shall be obtained from the vendor, and the purchaser, by his agent, makes a quitclaim deed of this fourth interest immediately on securing the contract, it operates as an assignment of a one-fourth interest in the contract.

2. This deed was afterwards destroyed at the instance of the purchaser (defendant) of the contract of sale, in order, as he testified, that he might have a clear title to the property, so that he could "handle" it, the seller of the contract to have an interest in the profits arising from the land. Plaintiff's testimony was that the deed was destroyed so that defendant might acquire a clear title to the entire property, a fourth interest in which he was then to convey to plaintiff. Defendant's agent did in fact execute to plaintiff's agent a written assignment of a fourth interest to plaintiff, when the deed was destroyed. Plaintiff also testified that he was to be interested in the profits of a corporation to be formed to take the land, and not in the property itself. *Held*, the quitclaim deed was destroyed with the single intention of giving defendant a clear title, and not "with intent to extinguish the obligation thereof," within Civil Code Cal. § 1699.

3. The fact that plaintiff's own testimony relative to the intention of the parties in destroying the deed is conflicting, he having testified at one time that he was only to be interested in the profits of a corporation to be formed to take the land, does not bind him to its least favorable aspect for himself, but, it being shown by a preponderance of evidence that he in fact was to have a fourth interest in the land, he is entitled to that.

4. Defendant's agent negotiated the transac-

tion, under verbal instructions "to make the best terms he could to get hold of the property," but he was instructed by letter, which was shown to plaintiff, to "sign nothing to any one," as defendant would "give the contract to carry the various interests" in the land. *Held*, that the agent had authority to assign plaintiff a fourth interest in the land, in consideration of plaintiff's transferring to defendant his contract of sale.

5. Plaintiff having filed a *lis pendens* before defendant conveyed to third parties, these latter are charged with notice of his rights.

Commissioners' decision. Department

1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

King & Sautley, Houghton, Silent & Campbell, and John D. Bicknell, for appellants. *Stephens, Appel & Stephens, E. L. Campbell, and Brosseau & Hatch*, for respondent.

HAYNE, C. This was a suit to compel the conveyance of an undivided one-fourth interest in a tract of 704 acres of land in the county of Los Angeles. The trial court decreed the conveyance of a one-eighth interest, and the defendants appealed. The general features of the case are as follows: On the 9th of June, 1887, the owner of the land, one A. W. Timms, gave the plaintiff a contract of sale thereof for the sum of \$25,000. The defendant Pearson was desirous of acquiring the property, and instructed one H. V. Burner to negotiate for its purchase. The latter effected an arrangement with plaintiff whereby he was to give up his bargain upon certain terms, which are considered below. The contract of sale, however, was not transferred directly to Pearson or to Burner. By Burner's direction it was transferred to one Weller, who acted in obedience to his instructions. As soon as Weller received the contract of sale, he (by direction of Burner) gave to plaintiff a quitclaim deed purporting to convey a one-fourth interest in the land. On being informed of this, Pearson (who seems at that time, at least, to have supposed that the deed conveyed some title to plaintiff) insisted that it should be destroyed; and under instructions to this general effect Burner induced plaintiff to destroy the deed, under an arrangement which will be considered below. A few days after this (viz., on July 9, 1887) Weller transferred the contract of sale to Burner, who, on the same day, made the first payment to the owner, received a deed from him, executed a mortgage back, and then conveyed the property to Pearson. On the 20th of the same month the plaintiff commenced the present suit, and recorded a notice of *lis pendens*. Subsequently, Pearson transferred certain interests in the property to third persons, and on October 20th of the same year joined with them in a conveyance of the property to the San Pedro Harbor, Dock & Land Improvement Company. On April 23d of the following year, this corporation conveyed 92 acres of the property to the defendant, the Southern Pacific Railroad Extension Company. The plaintiff subsequently parted with one-half of his one-fourth interest.

The main questions discussed are the following, viz.: What was the agreement which Burner made with the plaintiff for

the transfer of the contract of purchase, and what was its effect? what was the effect of the destruction of the "deed" from Weller to Burner? and what was the authority of Burner in the premises?

1. The court finds, in substance, that the agreement made by Burner with the plaintiff was that, if the latter would give up his contract with the owner of the property, Pearson would purchase the property in accordance with such contract, "and would then and there, in consideration of the transfer of such agreement, convey to plaintiff an undivided one-fourth interest in and to said premises, free from all liens and incumbrances." This agreement was not in writing. But there is not the slightest doubt that it was made. Burner so swears, plaintiff so swears, Weller so swears, and there is no evidence to the contrary. The court further finds that, in pursuance of this agreement, the plaintiff transferred the contract of purchase to Weller, who immediately gave to plaintiff a deed purporting to convey an undivided one-fourth interest in the land; and the evidence in support of this finding is uncontradicted. Now, inasmuch as Weller had no title to the land, he could convey none to the plaintiff. But the parties seem to have regarded the "deed" as sufficient to protect the plaintiff's rights. And we think that it operated as an assignment of a one-fourth interest in the contract of sale. *Heinlin v. Martin*, 53 Cal. 321; *Hilton v. Young*, 73 Cal. 196, 14 Pac. Rep. 684. It is possible that as against the owner of the property the contract could not be split up in this manner. But no such question can arise between the parties here. It results that after this arrangement the plaintiff had a one-fourth interest in the contract.

2. What was the effect of the destruction of the deed above mentioned? The defendants contend that such destruction was in pursuance of an arrangement made for the purpose of placing the title to the whole property in Pearson, so that he could "handle" it, and that the intention was to extinguish the obligation held by plaintiff, as provided in section 1699 of the Civil Code, and to substitute an arrangement by which the plaintiff was not to have any right to the land, but was only to be interested in the profits to arise from the "handling" of Pearson. The findings, however, distinctly negative any such idea. The court finds that the deed was destroyed under an agreement that when defendant should obtain the legal title he "would immediately better and fully secure plaintiff to an undivided one-fourth interest in and to the same;" that the arrangement was not that plaintiff should be interested only in profits to arise from the acts of Pearson, but that the original agreement "was never modified or changed." These findings are sustained by the testimony of Burner, by the testimony of Weller, and by the testimony of one Barber. And, what is more to the purpose, it was proven that a writing was in fact executed by Weller, (who still held the contract of sale,) whereby a one-fourth interest in such contract was assigned to one Stratton, who was the agent and at-

torney for plaintiff. In this regard Stratton testified that he was the attorney for plaintiff, and that the arrangement was that, "in lieu of that deed, an assignment should be taken by me to hold for Brock as trustee temporarily until the purchase should be finally consummated, and Pearson should execute proper documents to secure Mr. Brock in his interest." As against this overwhelming evidence, the defendants rely upon the testimony of the plaintiff himself, and insist that he should be bound by it. It is undeniable that the plaintiff (who does not seem to be a very clear-headed man) testified, in a suit by a third party against Pearson, that he was to be interested in the profits of a corporation to be formed, and not in the property itself; and he testified to something like that in the present suit. But he also gave testimony going to show that the corporation was to be a thing of the future, and was not to operate as a present extinguishment of his interest. Thus he says: "I did not understand that he was to sell the property, because I claimed one-fourth in it, and should be consulted, but simply to enable him to carry out a certain scheme of a corporation that was eventually to take this property." And the other witnesses testify that, while there was some talk about a corporation, nothing definite was concluded in relation to it.

We cannot agree to the proposition that the plaintiff is bound by such of his testimony as was favorable to the defendants. At the very most, it only amounted to a conflict in the evidence; and it has been said that a conflict is "all the more fatal for being intestine." *Crook v. Forsyth*, 30 Cal. 662; *Bernal v. Wade*, 46 Cal. 666. But we go further than this. We think it clear upon the evidence that the right of the plaintiff to an interest in the land was not intended to be extinguished, and that the talk about profits related merely to future action, which was that the property should be put in the hands of Pearson, so that he could "handle" it for the benefit of those interested in it. Such an arrangement could be no stronger than a power of attorney to Pearson. This could be revoked at any time, and whatever arrangement was made was undoubtedly revoked by the commencement of the present suit, and the recording of the notice of *lis pendens*. One of the learned counsel for the appellants urges in this regard that the plaintiff "cannot place the title unincumbered in Pearson for the purpose of a trade, obtain the money of the corporations, and then be heard to claim that the property was incumbered by some secret trust in favor of himself." And the others say: "Brock permits Pearson to have a clear title for the very purpose of conveying the property to a corporation clear of all incumbrances, and then, when Pearson has so conveyed to such corporation, Brock jumps up to ask that the corporation deed back a part of the property to him," with more in the same strain. The counsel overlook the fact that the present suit was commenced, and the notice of *lis pendens* recorded, on July 20, 1887, and that the conveyance to the first corpora-

tion was not made until October 20, 1887, and to the second not until April 23, 1888. Furthermore, there is not a syllable of evidence in the record to the effect that Pearson ever paid, or offered to pay, any portion of the profits to the plaintiff. On the contrary, he denied that plaintiff had any right to the land, and after the suit was commenced said that he should never get a cent.

3. What was the authority of Burner in the premises? The court finds that Burner "at all times was the duly-authorized agent of the defendant Pearson, with general power to purchase said property." There is evidence in support of this finding. Burner testifies that he "received verbal instructions from the defendant John W. Pearson to purchase the property;" that such instructions "were simply verbal, to get hold of the property as best I could,—that is, to make the best terms I could to get hold of the property;" and that he was not simply to ascertain what the property could be bought for, but to "get hold" of it. We do not see any evidence contradicting these statements. The argument for the appellants is founded on what occurred subsequently. In this regard Burner testifies that after the arrangement was made by which the plaintiff transferred his contract to Weller, and the latter gave back a deed to plaintiff, he (Burner) went to San Francisco, and told Pearson what had been done; whereupon the latter said that "the transaction was satisfactory, except that he did not want that deed out. He said he wanted that deed destroyed. He said he would assign the various interests himself." Pearson's account is somewhat different from this. But he wrote a letter to Burner, in which he said: "There must be no lien or obligation on the 700 acres except the \$15,000. I will give the contract to carry the various interests to you and your friend, and for the man from whom you get the bond; so sign nothing to any one," etc. This letter was shown to the plaintiff, and Burner testified that "the transaction would never have went through if I hadn't got the letter then that he would agree to carry those interests satisfactorily to all parties." Upon this evidence the only argument that can be made with any semblance of merit is that Burner had no authority to sign anything; that the culminating act was to be done by Pearson himself; and that the plaintiff knew this, because the letter was shown to him.

But the answer is that there was no need for him to sign anything. As shown under the first head of this opinion, the giving of the deed from Weller to the plaintiff operated as an assignment of a one-fourth interest in the contract. The giving up by plaintiff of his bargain was sufficient consideration for this assignment. And Burner had ample authority to make the arrangement, because, as above shown, he was sent with general instructions to "make the best terms I could to get hold of the property." This shows a right in the plaintiff. It devolved upon the defendants to show that such right was destroyed. And in order to do this they

are driven to rely, and do rely, upon the destruction of the deed with the consent of the plaintiff. But, in order to sustain this, it was necessary to show that the deed was destroyed "with intent to extinguish the obligation thereof." Civil Code, § 1699. And we think we have shown conclusively, under the second head of this opinion, that there was no intent to "extinguish" the right of plaintiff to a one-fourth interest in the land. It was evidently destroyed under a belief that it conveyed title to the land, and the object was to have the title in the name of Pearson. But the oral evidence clearly shows that there was no intent to extinguish plaintiff's right to a conveyance, which was the only obligation the "deed" could have, and this is further manifest from the fact that a writing evidencing such right was actually given. The intent with which the deed was destroyed is the material thing; and in relation to this it is of no consequence whether Burner or Weller had authority to sign anything or not.

4. The defendants, other than Pearson, had notice of the plaintiff's right when they purchased the property. This is found by the court, and it seems plain that the notice of *lis pendens* was sufficient to charge them with notice. *Randall v. Duff*, 79 Cal. 116, 19 Pac. Rep. 532, and 21 Pac. Rep. 610. The amendment to the complaint did not destroy the effect of the notice of *lis pendens*. The other matters do not require special mention. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

88 Cal. 12

SHAIN v. EIKERENKOTLER. (No. 13,019.)

(Supreme Court of California. Feb. 12, 1891.)

APPEAL—DISMISSAL—INSUFFICIENCY OF TRANSCRIPT.

An appeal from an order vacating the levy of an execution will be dismissed when it does not appear that all the papers used on the hearing were contained in the transcript.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Vincent Neale, for appellant. Geo. W. Fox, for respondent.

PATERSON, J. This is an appeal from an order granting a motion to vacate the levy of an execution. The transcript contains a copy of the notice of the motion, indorsed, "Read on hearing of motion to vacate levy of execution, November 16, 1888. JAMES G. MAGUIRE, Judge." Also a copy of the affidavit used, indorsed in the same manner, a copy of the order granting the motion, of the notice of appeal, and the affidavit of service thereof. When the cause was called for argument to-day, (February 11th,) the respondent moved to dismiss the appeal, on the ground that there was nothing in the record to show that the court below acted upon the papers referred to in the transcript, and the

motion was granted. It is claimed by appellant that the indorsement made by the judge is a sufficient authentication of the papers used, and that no other certificate is necessary to identify them, and that a bill of exceptions is unnecessary. There is nothing to show that all of the papers used on the hearing in the court below are before us in this transcript. The judge may have granted the motion on account of the invalidity of the judgment; the execution itself may have been void. It is claimed by appellant that these things will not be presumed, because the notice of motion states that the application will be made on the ground that the property upon which the execution was levied is exempt from execution sale. This may be granted, although as a matter of fact the notice states that the motion will be based on all the papers in the case, and still the order will be sustained upon the presumption that counter-affidavits were filed and used by the respondent. There is nothing to show that counter-affidavits were not filed, and every presumption is in favor of the validity of the judgment. We do not hold that a bill of exceptions is necessary in cases of this kind. The papers may be properly authenticated by the certificate of the judge; but it must be made to appear in some manner that all of the papers used on the hearing are contained in the transcript. In this case it appears simply that the papers referred to and copied in the transcript were indorsed as having been used on the hearing, and placed on file in the court below; whether or not any other papers were used on the hearing, as stated before, does not appear. For the reasons above stated the order dismissing the appeal will stand as entered herein.

We concur: HARRISON, J.; GAROUTTE, J.

88 Cal. 84

Ex parte BAKER. (No. 20,795.)

(Supreme Court of California. Feb. 16, 1891.)

CRIMINAL LAW—QUASHING INFORMATION—ILLEGAL COMMITMENT.

Pen. Code Cal. § 995, subd. 1, provides that an information may be set aside where the accused was not legally committed before the filing thereof. Held that, when information is quashed thereunder, the prisoner cannot be held for the filing of a new information without another examination before a committing magistrate.

Department 1. Habeas corpus.

Carroll Cook and J. E. Foulds, for petitioner. William S. Barnes, Dist. Atty., for the People.

GAROUTTE, J. This is an application for the discharge of the prisoner, under a writ of *habeas corpus*. He is confined in the county jail of the city and county of San Francisco awaiting trial, under an information charging the offense of embezzlement. One of the grounds relied upon by the petitioner for his discharge is that the information upon which he is about to be tried is void by reason of the fact that he has never been legally committed by a magistrate. It appears that the court, upon motion of the defendant, set aside the first information filed against him,

upon the ground that he had not been legally committed by a magistrate, and ordered that the district attorney file another information, and it is upon this second information that the defendant is about to be tried. An information can only be set aside upon the grounds: (1) That before filing thereof the defendant had not been legally committed by a magistrate. (2) That it was not subscribed by the district attorney of the county. Section 995, Pen. Code. The phrase "legally committed," as used in the foregoing section, refers to the examination of the case, and the holding of the defendant to answer as prescribed by title 3, c. 7, Pen. Code. Section 997, Pen. Code, which prescribes the course to be pursued after an information has been set aside upon motion of the defendant, is vague and unsatisfactory; yet it appears therefrom that the court can only order a new information to be filed when the one in the first instance has been set aside by reason of the failure of the district attorney to subscribe his name thereto, and that when the information is set aside, because the defendant has not been "legally committed," then he must be taken before a committing magistrate for another examination, if the district attorney desires to further prosecute the case. After the magistrate has decided that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, it is his duty to return to the superior court the warrant, depositions, indorsements thereon, undertaking, etc.; and it is upon these depositions and indorsements that the information is based. And, if the information is set aside upon the ground that the defendant has not been legally committed, it can readily be seen that it would be idle for the court to order another information to be filed, for the same fatal defects would necessarily be present at any future hearing. The prisoner is entitled to his discharge, and it is so ordered.

We concur: PATERSON, J.; HARRISON, J.

87 Cal. 633

Ex parte CLARK. (No. 20,190.)

(Supreme Court of California. Feb. 9, 1891.)

ADOPTION—PROCEEDINGS—RIGHTS OF PARENT—ESTOPPEL.

1. Where the answer to a petition for a writ of *habeas corpus* by a parent for possession of her child is signed by "John D. R.," who claims the child under an agreement to adopt signed by "David R.," and an order of adoption to "Jacob R.," the child must be surrendered to petitioner, as the order shows no right in "John D. R."

2. Civil Code Cal. § 226, provides that persons interested in the proceedings on adoption must appear "before the judge of the superior court of the county where the person adopting resides." *Held*, that an order of adoption is invalid unless it appears from the record that the person adopting resided in the county under the jurisdiction of the superior court before which proceedings were had.

3. Where the order of adoption is invalid on the face of the record, the child must be surrendered, though proceedings are pending to amend the record and make the order valid.

4. Acquiescence for several years by a parent in the claim of adoption does not estop her

from claiming the child on the ground that the order of adoption is invalid.

In bank. *Habeas corpus*.

M. Cooney, for petitioner. Henry I. Kowalsky, for respondents.

PATERSON, J. Petitioner is the mother of Charles Henry Clark, a minor, and the respondents, who are husband and wife, claim that he has become their child by adoption. This claim is based upon an order made November 16, 1888, by Hon. JOHN F. FINN, one of the judges of the superior court of the city and county of San Francisco. Attached to the order is a written consent signed by James P. Clark and Annie E. Clark, the parents of the child, consenting that "said Charles Henry Clark may be adopted by Jacob Reulein." Following this is a written agreement and consent signed by David Reulein and Mrs. Katie Reulein, in which the latter consents that David Reulein might adopt the child, and in which David Reulein agrees to adopt the child, and treat him thereafter in all respects as his own lawful child. The order of the judge recites that the parents, James P. and Annie E. Clark, and Jacob Reulein and Katie Reulein, his wife, appeared before him, bringing with them said Charles Henry Clark, aged two years and eleven months; that he examined each of said persons separately, and from such examination found that Jacob Reulein was desirous of adopting said Charles; that his wife, Katie, consented to such adoption, and that it was for the best interests of the child that such adoption should take place; that the parents having signed the necessary consent, and said Jacob Reulein having executed the proper agreement, it was therefore ordered that said Charles Henry Clark should thenceforth be regarded and treated in all respects as the child of said Jacob Reulein. The petitioner herein alleges that the child is restrained of his liberty by John D. Reulein and Katie Reulein. The writ was addressed to them, and an answer has been filed signed by John D. Reulein and Katie Reulein, admitting that they hold the custody of the child, and claiming the right to do so under the order above referred to. It will be observed that the parents consented to the adoption of their child by Jacob Reulein; that the agreement to adopt is signed by David Reulein; and that the order of the court gives the child to Jacob Reulein. There is nothing in the record of the proceeding to show that the names of Jacob Reulein, David Reulein, and John D. Reulein indicate one and the same person. In our opinion, the order is void, and affords respondents no warrant for the detention of the child. It confers no right upon them, and is manifestly too uncertain, when read in connection with the agreements and consents upon which it was based, to render any one liable as the parent by adoption,—especially one whose name does not appear in the record at all.

There is another objection which is fatal to the validity of the proceeding. Section 226, Civil Code, provides that all the persons interested must appear before the judge of the superior court of the county

where the person adopting resides. There is nothing in the order, or in any of the papers referred to, showing that Jacob Reulein or David Reulein was a resident of the city and county of San Francisco. It has been held—and we think correctly—that in cases of this kind, the power of the court being special, and not exercised according to the course of the common law, its decisions must be regarded and treated like those of courts of limited and special jurisdiction; and that jurisdiction in such cases, although the court be one of general jurisdiction, must appear by the record, as to both subject-matter and the person. *Ferguson v. Jones*, 17 Or. 204, 20 Pac. Rep. 842. We have held that our law of adoption is not unconstitutional, (*Estate of Stevens*, 83 Cal. 322, 23 Pac. Rep. 379;) but to acquire any right under it its provisions must be strictly followed, and all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former. A child by adoption cannot inherit from the adopting parent unless the act of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and, as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law; and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another. *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. Rep. 902; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. Rep. 907.

It was stated on the argument that proceedings were pending before Judge FINN to amend the record so as to show that the respondent John D. Reulein is the same person referred to in the proceedings as Jacob Reulein and David Reulein. Assuming that the power to amend the record as suggested exists,—a matter upon which we express no opinion,—we must on *habeas corpus* take the record as we find it, and determine the rights of the parties accordingly.

Counsel for respondents earnestly urge the court to consider that the claim of respondents has been acquiesced in for several years by the petitioner; that respondents have treated the child well; that a warm affection has sprung up between him and themselves; that petitioner practically abandoned her child when she consented that the order of adoption might be made; and asks permission to prove that respondents are in every sense more worthy to have the custody of the child than the petitioner is. But there can be no estoppel in such a case, and the fitness relatively of the respective parties to care for the child is not a proper subject of inquiry in this proceeding. It is conceded

that both parties are competent and fit persons to care for the child. It is doubtless true, as claimed by respondents, that a parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation; but there is no basis for any such claim in this case. The minor is a young child, incapable of caring for himself, and there is no pretense that the respondents have any authority over him other than such as is conferred by the order referred to. It is ordered that the respondents, John D. Reulein and Katie Reulein, forthwith restore to the petitioner herein the care, custody, and control of said Charles Henry Clark.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; SHARPSTEIN, J.; McFARLAND, J.; GAROUTTE, J.

87 Cal. 631

WINN v. SHAW. (No. 13,909.)

(Supreme Court of California. Feb. 9, 1901.)

COUNTY BOARD—PURCHASE OF LAND—NOTICE—INJUNCTION.

1. The California "County Government Act," § 25, subd. 8, confers authority on the board of supervisors to purchase real estate, but provides that no such purchase shall be made unless a notice of such intention is published for at least three weeks in a newspaper of general circulation published in the county, describing the property, and naming the vendor, the price, and the time for completing the purchase. *Held*, that this is mandatory, and without such publication the board has no authority to make the purchase.

2. A tax-payer may maintain a suit to enjoin the drawing of a warrant for the price of land purchased without the publication of the prescribed notice.

3. To warrant the granting of such injunction, it is not necessary that it be alleged or shown that the county or plaintiff will be damaged if the purchase is completed, or that the value of the land is less than the price to be paid.

In bank. On rehearing. For former report, see ante, 244.

DE HAVEN, J. This is an appeal by the defendant, Shaw, who is the auditor of the county of San Benito, from a judgment enjoining him, as such auditor, from drawing a warrant of said county in favor of one Hodges. The court found that the plaintiff is a resident elector and taxpayer in the county of San Benito; that the board of supervisors of said county made an order declaring their intention to purchase from one Hodges, for the sum of \$550, a certain described piece of land for the use of the county, and directed the clerk to give notice of said intention, as required by law; that there were at all times two newspapers of general circulation published in said county, but said notice of intention was not published in any newspaper in said county; that, without such publication, the board of supervisors, at the time fixed in said notice of intention, passed an order to purchase said real estate, and directed the appellant, as auditor, to draw his warrant on the county treasurer for the sum of \$550, in favor of said Hodges, upon the delivery of a deed conveying the title to said land, to be approved by the district attorney, and

that defendant threatens, and will, unless restrained, draw said warrant, in accordance with said order. The findings further show that in January, 1890, the board of supervisors of said county fixed the price of all county advertising for the ensuing year at 75 cents per square for the first insertion, and 25 cents for each subsequent insertion. In March following the plaintiff and one Shaw, who were the proprietors of the two only newspapers published in the county, entered into an agreement, adopting a uniform schedule of prices to be charged by them for advertising and printing, stipulating that the same should "extend to all county work, and, where possible and necessary, said county work shall be divided as equally between the two offices as possible, each receiving a profit proportionate to the work done." By this agreement said newspaper proprietors were to charge for county printing \$1.50 per square, first insertion, and 75 cents per square for each subsequent insertion. The court further finds that neither of said newspapers was "willing" to publish said notice of intention for the price fixed by the board of supervisors, "but they were at all times willing and able to publish the same at the rate fixed by their agreement." It is also averred in the complaint, and not denied in the answer, "that the said sum of money will be paid by the treasurer of the said county of San Benito to said J. I. Hodges, upon receipt of said warrant and the delivery of said deed." The foregoing constitute all the material facts necessary to be considered in giving judgment on this appeal.

1. The county government act provides as follows: "Sec. 25. The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * * (8) To purchase * * * any real or personal property necessary for the use of the county, * * * but no purchase of real property must be made unless a notice of the intention of the board to make such purchase, describing the property to be purchased, the price to be paid therefor, from whom it is proposed to be purchased, and fixing the time when the board will meet to consummate such purchase, shall be published for at least three weeks in some newspaper of general circulation published in the county, or, if none be published in the county, then by posting such notice," etc. This provision of the statute, prescribing the manner in which the board shall proceed in making a purchase of real property, cannot be construed as simply directory, but such provision operates as a limitation upon the power of that body to make any purchase of real property, and unless the publication is made as directed the board has no jurisdiction to act at all. The manifest design of the law is that notice of such proposed action shall be given to the tax-payers of the county whose property may be affected by such a purchase, so that by remonstrance or petition they may be able to prevent it, or at least be afforded the opportunity to be heard in the matter, and we have no

doubt that a compliance with the statute in this respect is essential to the validity of any such contract of purchase. It is urged, however, that to hold this provision of the statute mandatory is to place in the power of newspaper publishers to enter into illegal combinations, which in effect deprive the board of supervisors of any voice in the matter of determining what shall be paid by the county for such publications, or of exercising any judgment in relation to such subject. And it is argued that this case affords an illustration of the manner in which a county may be subjected to the payment of exorbitant charges, or else cease to perform such governmental functions as, in order to be legally exercised, require published notice at some stage of the proceeding, one instance of which is to be found in the section of the county government act relating to the enactment of ordinances. This is an argument, however, which could more properly be addressed to the legislature. The language of the statute under consideration is plain, and the court must give effect to it as it is written, and, if the evils suggested are likely to flow from this construction, the remedy must be by legislative action. Doubtless the law could be amended so as not to destroy its efficiency, by providing that the publication may be made in any paper circulating in the county, or giving the board a discretion in selecting a paper likely to give notice.

2. The appellant contends that a taxpayer cannot maintain an action in this class of cases, and as authority for this position refers to the cases of *Linden v. Case*, 46 Cal. 174; *McCoy v. Briant*, 53 Cal. 249; and *Merriam v. Supervisors*, 72 Cal. 519, 14 Pac. Rep. 187. While there is some general language in each of these cases which lends support to the contention of the appellant on this point, still they are on the facts distinguishable from this, as in neither of them did it appear that the remedy of injunction was necessary in order to keep the county money from being illegally drawn from the treasury. But be that as it may, we are of opinion that a tax-payer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county. The weight of authority seems to be in harmony with this view. *Crampton v. Zabriskie*, 101 U. S. 601; 2 Dill. Mun. Corp. (4th Ed.) §§ 914, 922. In *Foster v. Coleman*, 10 Cal. 279, the right of the tax-payer to maintain such an action seems to have been assumed; and in the later case of *Shakespear v. Smith*, 77 Cal. 638, 20 Pac. Rep. 294, it was held that a tax-payer of a school-district could compel the cancellation of an illegal warrant drawn upon the superintendent of streets, and that such officer could, in the same action, be restrained from drawing a requisition on the county auditor, as directed by such illegal order.

3. It is further urged that there is no allegation or finding that the county or plaintiff will suffer any damage if the

land of Hodges is accepted and paid for; that it does not appear that its value is any less than the price agreed to be paid for it. But the question here is not whether the county will profit or lose by the transaction. If the law forbids the making of such a contract, unless preceded by publication of the notice of intention to make it, that must be the end of the matter, as in such case there can be no legal liability upon the part of the county to pay, and the object of this action is to prevent an illegal payment of public money. This principle was applied in *Shakespear v. Smith*, supra. In that case it was not denied that the school-district was justly indebted to the payee in the order named, and the courts said: "The only vice in the transaction consists in its allowance by a party in interest, which raises an implication of fraud, and renders the order void." The vice of the contract in this case is that it was made without authority of law, and, this appearing, it is void. There are other matters discussed in the brief of counsel, but we have not thought it necessary to discuss them. The question as to the validity of the contract made between the proprietors of the newspapers is not involved in this case. Judgment affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; PATERSON, J.; SHARPESTEIN, J.; GAROUTTE, J.

(91 Cal. 129)

PICO v. COHN *et al.* (No. 13,892.)¹

(Supreme Court of California. Feb. 11, 1891.)

VACATION OF DECREE—FRAUD—BRIBING WITNESS.

A decree will not be vacated merely because the prevailing party obtained it by bribing a witness to swear falsely.

In bank. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge. *Anderson, Fitzgerald & Anderson and Del Valle & Munday*, for appellant. *A. Brunson and Stephen M. White*, for respondents.

BEATTY, C. J. This is a suit in equity to vacate and annul a final decree in another action between the same parties on the ground that it was procured by fraud. The superior court sustained a demurrer to the complaint, and thereupon gave judgment for the defendants, from which the plaintiff appeals. The principal question presented by the appeal, and the only question we find it necessary to consider, is whether the complaint, taken as true, presents a case entitling the plaintiff to the relief demanded, or to any relief. It is alleged that in April, 1883, the plaintiff was owner of several parcels of real estate in Los Angeles, then worth over \$200,000, and of still greater value now. That one parcel of the land had been sold under decree of foreclosure, and the time for redemption was about to expire. That there were other pressing liens resting upon the whole property, amounting, with the sum necessary to redeem the parcel sold, to about \$62,000 as then estimated. That plaintiff was anxiously endeavoring to raise money to effect such re-

demption and save his property from sacrifice. That one B. Cohn, since deceased, whose administrator is the principal defendant herein, offered to loan, and did loan, him the necessary sum, taking for security a grant absolute in terms of the incumbered property. The consideration expressed in the deed was the exact sum at which the liens and incumbrances on the land were estimated,—\$62,000. The value of the land was, as above stated, over \$200,000. Within a month or two after the execution of his deed, plaintiff tendered Cohn \$65,000, and demanded a reconveyance, which was refused, whereupon he commenced an action to compel a reconveyance, alleging in his complaint that his grant to Cohn was, in fact, a mortgage to secure a loan. Cohn answered, alleging that the transaction was an absolute sale. Upon a trial of this issue the superior court found for the plaintiff, and decreed a reconveyance upon payment of \$103,000, this being the amount of the sum originally advanced by Cohn, and certain additional sums which he was found to have expended subsequently in the compromise and settlement of other claims against the property. But on motion of the defendants in that action the superior court ordered a new trial unless the plaintiff would consent to a modification of the findings and decree, adding \$35,000 to the amount to be paid defendants upon reconveyance of the land; and, the plaintiff failing to consent to such modification, the order for a new trial was made absolute, and, upon appeal of the plaintiff, was affirmed by this court. 67 Cal. 258, 7 Pac. Rep. 680. Thereupon a new trial was had in the superior court, but before a different judge, who found upon the principal issue in favor of the defendants, and decreed against the right of redemption. From that decree, and an order denying his motion for a new trial, the plaintiff again appealed to this court, where the decree and order were affirmed, (78 Cal. 384, 20 Pac. Rep. 706,) upon the ground that, the evidence being conflicting, the findings of the lower court could not be disturbed. It is to annul the decree so affirmed that the present action is brought, and the fraud by which it was procured is shown by allegations in substance as follows: At the date of the original transaction with Cohn, Pico was an old man over 80 years of age, unable to speak or understand the English language, unused to complicated statements or accounts, easily deceived, and in great distress and trouble regarding his business affairs. He confided in Cohn, relied upon him implicitly, and at his solicitation abstained from consulting his usual legal advisers. In the conduct of the negotiations with Cohn the only other person present was one Pancho Johnson, who knew everything that took place, and well knew that the transaction was a loan and security, and not a purchase and conveyance absolute; and, shortly after the execution of the deed, so stated in the presence of Pico's attorneys and numerous other persons. Relying on Johnson's knowledge of the transaction, and his statements concerning it, Pico

¹ Rehearing granted.

called him as a witness on the first trial of the action to redeem, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance; but, in spite of his adverse testimony, the court, as above shown, found for the plaintiff. Before the cause came on for trial a second time, Johnson was dead; but his testimony, as given on the first trial, had been reduced to writing, and was on file among the papers in the case. Plaintiff and his counsel knew that this testimony was false in its general statement to the effect that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify; but they had no evidence of such bribery, although they had used the utmost diligence to discover it. Upon mature consideration, they decided at the second trial to put in evidence the written transcript of Johnson's testimony at the first trial. Among their reasons for doing so were the following: Other testimony in the case showed that Johnson was present during the negotiations between Pico and Cohn, not only as interpreter, but as the particular friend and adviser of the former; and counsel for plaintiff feared that by omitting to offer Johnson's testimony they would incur the odium of suppressing evidence known to exist, whereas by putting it before the court they would have the advantage of some facts that they could prove by no other witness. They would have his admission of other facts inconsistent with the theory of a sale. The court would see that he was hostile to Pico, and he could be contradicted by proof of his statements made in the presence of others. Without going more fully into the reasons which induced counsel for plaintiff to submit the testimony of Johnson to the consideration of the court on the second trial of the former action, we content ourselves with saying that the allegations of the complaint show that the course pursued by them was, under the circumstances, wise and proper, if not absolutely necessary. But, contrary to their expectations, the court believed his false testimony, and for that reason alone decided against the plaintiff. In support of this conclusion, the complaint sets out the substance of all the testimony of Cohn and Pico, and in detail the material portions of Johnson's testimony, from which, with other averments, it appears that but for Johnson's positive perjury and suppression of the truth the judgment here in question would not have been given. This being shown, it is next alleged that, after the final affirmance of that judgment by this court, plaintiff made the discovery that Cohn had paid Johnson \$2,000 to testify falsely. The particulars of this bribery and its discovery are detailed in the complaint, and show that on the very morning that Johnson gave his testimony Cohn placed \$2,000 in the hands of one Forbes, with directions given in Johnson's presence to pay it to him if he testified to an absolute sale, and that, immediately after he had so testified, he demanded and received the money.

It is averred, and we think sufficiently shown, that upon proof of these facts there is a reasonable certainty that plaintiff would upon another trial gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest. *U. S. v. Throckmorton*, 98 U. S. 65, 66, and authorities cited. In all such instances the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him, on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is, of course, a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured

testimony; for, if this could be done once, it could be done again and again, *ad infinitum*. But counsel for appellant seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of its being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson; that this was collateral and extrinsic; that it was not, and could not have been, the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident. It may be safely asserted that a witness does not often deliberately perjure himself without being induced thereto by some fraudulent or corrupt practice on the part of him who gets the advantage of the perjury. It is a matter of indifference what particular form such corrupt practice takes. The evil and the wrong is in the perjury which follows. In this case the truth of Johnson's evidence was necessarily drawn in question at the trial, and determined by the decision of the court; and all that has since been discovered is another item of testimony bearing on that point. We cannot find any substantial ground upon which this case can be distinguished from *U. S. v. Throckmorton*, supra. The decision in that case has been approved by this court as recently as *In re Griffith*, 84 Cal. 113, 23 Pac. Rep. 528 and 24 Pac. Rep. 381. The following decisions of this court are also in point: *Allen v. Currey*, 41 Cal. 321; *Mining Co. v. Mitchell*, 59 Cal. 176. Many other authorities to the same effect are cited in the brief for respondents. On the other hand, the case of *Laithe v. McDonald*, 7 Kan. 254, 12 Kan. 340, directly supports the position of appellant, as does the case of *Fabrilus v. Cook*, 3 Burrows, 1771. The cases of *Verplanck v. Van Buren*, 76 N. Y. 247, and *Dringer v. Railway Co.*, 42 N. J. Eq. 573, 8 Atl. Rep. 811, contain expressions which seem to imply the same doctrine, but they do not directly support it. Other cases cited by appellant are less in point. We think, on the whole, that it is settled by the great weight of authority that the plaintiff's action cannot be maintained, and that the judgment of the superior court must be affirmed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

88 Cal. 6

LIND *et al.* v. CLOSS. (No. 13,379.)

(Supreme Court of California. Feb. 11, 1891.)

RAPE—CIVIL ACTION—EVIDENCE.

The complaint in an action by husband and wife alleged that defendant forcibly assaulted the wife, and had sexual intercourse with her against her will. She testified that defendant forcibly got into bed with her, and assaulted her, but did not have connection with her, and that she was made sick and so remained for more than a month, but she did not tell her husband of the occurrence until 10 days after it. Defendant testified that he had connection with her on that occasion and subsequently, but each time with her

consent. He also testified, without being contradicted, that two days afterwards he took her to the railroad station at her request, and that she asked him to call on her at S., whither she was going. He further testified that afterwards, in the presence of a third person, he stated to her that he had had connection with her with her consent, and that she did not deny it. This third person was in court, but did not testify, and the wife did not contradict defendant on this point. Held, that the evidence would not sustain a verdict for plaintiffs.

In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

F. P. Tuttle, (Grove L. Johnson, of counsel,) for appellant. J. D. Sullivan and J. M. Tulweiler, for respondents.

PER CURIAM. When this cause was in department 1 the following opinion was prepared by Commissioner BELCHER. It is hereby adopted by the court in bank, and for the reasons therein stated the judgment and order of the superior court are reversed, and the cause remanded.

"The facts stated in the complaint are these: The plaintiffs were husband and wife, and on or about the 26th day of October, 1887, at their residence in the town of Auburn, Placer county, 'the defendant wickedly, maliciously, and violently assaulted said Johanna Lind, one of the plaintiffs herein, by jumping upon her while she was in bed, and holding her down, and, willfully contriving and intending to injure plaintiffs, defendant did then and there ravish and carnally know said Johanna Lind, without her consent and against her will, whereby she was made sick and sore in body,' etc., to the plaintiffs' damage in the sum of \$50,000. The answer denies that defendant, at the time named in the complaint, or at any time, violently or wickedly or maliciously or at all assaulted the plaintiff Johanna, or that he jumped upon her or held her down, or that he ravished her or carnally knew her against her consent or against her will, and denies that she was made sick or sore in body, or that by reason of the premises plaintiffs had suffered damages in the sum of \$50,000, or in any other sum. The case was tried before a jury, and a verdict returned for \$2,500 damages, for which judgment was entered. The defendant moved for a new trial upon the ground, among others, that the verdict was not justified by the evidence, and his motion was denied. The appeal is from the judgment and order.

"The plaintiff Johanna was called as a witness, and testified that she was born in Germany and had been married about six years; that she was married in Connecticut, and about a year thereafter came to California; that in April, 1887, she and her husband went to defendant's place, and worked for him for one month; that they then left, but after about three months the husband again worked for defendant for one month; that in September, 1887, they went to live in a house known as the 'Collins House,' and about fifteen minutes' walk from defendant's house; and that on the morning of October 18th the husband went to San Francisco, leaving the witness alone with her two children. What afterwards occurred

the witness relates as follows: 'When evening came I put the children to sleep, and I locked my door, and then I sat down to write a letter. Before I went to bed I went again to see if the doors and windows were fastened tight. I then went to bed. I could not sleep. I was afraid, and very near midnight I heard somebody knock. Somebody came then to the house and knocked several times, and asked if Mr. Lind was at home. I didn't answer the first, but then he knocked again and said, "Mrs. Lind, open the door. I want to come in to you;" and I could hear then right away it was Mr. Closs, and I said, "No, sir, Mr. Closs;" I was not going to open the door. "If you want to see me, come tomorrow,"—I would be at home; and he went, and it was only a minute and I heard something at the back door, and in a minute he stood in my sleeping-room where I was lying with my children, and he said that I should make room for him in the bed, so he might come into bed to me, and I told him I would not let him come in the bed; and he said I should not be particular, and that I was such a funny woman. I was not like other women he had ever known in his life. And so in that time he had his clothes off, and he jumped right into bed, and I put my little baby on the side, because I wanted and needed both my hands; and he took off the quilt, and he tried to do several things. He took hold of me, and was trying to do what he wanted. I struggled with him fifteen or twenty minutes. I told him he should leave me, and that I should make it hot for him, and so at last he got out of the bed, and dressed himself, and went away. I didn't rest any that night, and in the morning was sick, and remained sick two or three days. My husband came home the next day, and I was sitting there sick when he came home, and the next day after that we packed up, and the third day we went to San Francisco, and I got sicker and sicker. Was sick a month after that. I had pains all over, and brain fever; pains in my head.' And on cross-examination the witness said: 'I went to bed on this night about 9 or 10 o'clock. My bedroom is a front room. To get into my bedroom a person coming in the back door would have to pass through two rooms. Before Closs came in he knocked at the bedroom window several times. I heard a noise at the back door, and in a moment Closs was in the room. The door opened with very little noise. I heard no crashing sound. I examined the lock afterwards, and there was nothing broken. There was a light in the bedroom. I had my two children in bed with me, one on each side of me. When Closs came in I said to him, "You have no business here," and that he should walk right out. He commenced talking to me, and while he was talking he was taking his clothes off. He disrobed entirely down to his undershirt. I remained in bed all the time. As quick as he had his clothes off he jumped into the bed, threw the bedclothes over, and lifted up my clothes. We did not wake the children up. I was pushing him away from

me. He did not beat or strike me. He did not accomplish his purpose. He then got up, dressed, and went away. He didn't hurt me, but tried to keep me down. In the latter part of October, about ten days after it occurred, I told my husband. I told my husband just as I have stated here. After talking with my husband he said he would fix Closs, and he would demand \$1,000 from Closs; and I sat down and wrote a letter to Closs demanding \$1,000. I first went to a lawyer about it in January, 1888. Closs called on me while I was in San Francisco, about three weeks after this trouble. He called again between Christmas and New Year's, and saw my husband and myself. He called on me and my husband at those times in San Francisco to try to settle.'

'The defendant was a witness in his own behalf, and testified that he had a ranch of eighty acres, about one mile from the town of Auburn, on which he had resided for about four years; that in February, 1887, he desired help on his ranch, and advertised for it; that in answer to the advertisement the plaintiffs came to his ranch, and the wife went to doing household work and the husband outside work for him; that they then left and moved into the 'Collins House,' which was about ten minutes' walk from his house. He then says: 'In October she told me her husband was going to San Francisco. I went to her house about half-past ten or eleven o'clock. I did not know whether Lind had returned or not. I knocked at the window, and asked if Lind was there, and I asked her to let me come in, and she told me first to go away and come tomorrow. Mrs. Lind told me that he was not there, and then I went around, and went in by the open back door. * * * The door was not locked. I was not obliged to put my shoulder to the door, and made no unusual effort to get in. When I lifted the thumb-latch the door opened readily. I went in the bedroom, and Mrs. Lind picked up a child which was in the bed, and put it in an adjoining bed. I undressed myself and stayed there a couple of hours. Mrs. Lind asked me to come back the following day. I saw her next day and the day after, and she was not sick at all. Mrs. Lind asked me for the use of my buggy to go to the station, and I myself took Mrs. Lind to the depot in the buggy the second day after this night. She gave me her address in San Francisco, and invited me to call when I went down. I went to see her in San Francisco, and she there told me that her husband had suspected something, and she had told him only of this one night when he was away, and that her husband was mad, and I should give him a few dollars. I saw Mrs. Lind in the presence of Mr. Sullivan, and there told her that she knew I never had used any violence, and that it was all done with her will. She admitted that. She then said she wouldn't like to go to Auburn, and if I would pay \$500 she would not. I never used any violence on her, and never made any assault upon her. Everything was done with her will and consent.'

"The husband was called as a witness

in rebuttal and testified: 'Had a conversation with Closs about Christmas, 1887, and he told me about having connection with her on the night of October 18, 1887, and that he had never done so before.'

"This was substantially all the testimony in the case, and the question is, did it justify the verdict? The court instructed the jury that the complaint charged a violent assault made by defendant upon the person of Mrs. Lind, and that she was debauched against her consent and will; that the case turned upon the question of violence, and that if violence was used, as charged, then they should find for the plaintiffs; but that if no violence was used, the connection being with her consent, then the verdict should be for defendant. The instructions were the law of the case, so far as the jurors were concerned, and they were bound to follow them, whether they deemed them correct or not. As to whether violence was used or not, the testimony was conflicting. Mrs. Lind stated positively that violence was used, and the defendant stated equally positively that it was not. If the case had been rested on this conflict alone, the judgment, under a well-settled rule, would have to be affirmed. But other facts and circumstances appeared which seem to us to militate strongly against the truthfulness of Mrs. Lind's statements. The following examples may be noted: She testified that defendant did not accomplish his purpose, and that she told her husband about the matter as she had told it in court, and yet the complaint, which was verified by the husband and filed in February following, charges that he did accomplish his purpose, and this defendant in effect admitted both in his answer and testimony. How is this discrepancy to be accounted for? She further testified that she did not tell her husband of the outrage which she had suffered for ten days, though she was made sick by it, and so continued for a considerable time. Is it probable that a woman would, under such circumstances, remain silent so long in the presence of her husband? The defendant testified that two or three days after the alleged offense, when Mrs. Lind was about to leave for San Francisco, she asked him for the use of his buggy to go to the station, and that he took her to the depot in his buggy; and this is not denied. Now, is it conceivable that a woman, who had been treated as it is claimed she had been, would so soon ask or accept such favors from the man who had committed the wrongs against her? Defendant further testified that Mrs. Lind gave him her address in San Francisco, and invited him to call on her there; and this is not denied. Now, is it possible that she would have done so if she had been assaulted, as stated, two days before? Again, defendant testified that on one occasion, when he saw Mrs. Lind in San Francisco, he told her, in the presence of Mr. Sullivan, that she knew he had never used any violence, and she so admitted. Now this statement was either true or false. If true, it shows that the plaintiffs, under the instructions of the court, were not entitled to recover. But it was not denied, though she and Sullivan

must have been in court, and if untrue presumably would have denied it. It has been several times held in this state, where the accused parties had been convicted of rape on the testimony of the complainant alone, and under circumstances tending to throw discredit upon her testimony, that the judgments should be reversed; the court saying that 'a conviction upon such evidence would be a blot upon the jurisprudence of the country and a libel upon jury trials,' and that 'the ends of justice demand that the cause shall be tried anew.' *People v. Benson*, 6 Cal. 221; *People v. Hamilton*, 46 Cal. 540; *People v. Brown*, 47 Cal. 447; *People v. Ardaga*, 51 Cal. 371. We think these cases in point here, and that the ends of justice require that this case be tried anew. We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

"I concur: FOOTE, C."

88 Cal. 99

In re AH YOU. (No. 20,760.)

(*Supreme Court of California.* Feb. 18, 1891.)
POWERS OF SUPERVISORS—VISITING DISORDERLY HOUSE—EXCESSIVE PUNISHMENT.

1. Where the legislature confers upon the board of supervisors the power to determine the penalties, specifying a maximum limit, which shall be incurred for the breach of its regulations, the board must itself designate the penalty for each offense, and not leave it to the discretion of the judge.

2. St. Cal. 1861, p. 552, giving the board of supervisors of the city and county of San Francisco power to determine the penalties for breach of its regulations, with the maximum limit of \$1,000, or six months' imprisonment, or both, does not authorize the maximum penalty for violation of every regulation. The penalty must be reasonable, with reference to the offense, and section 33 of order 1587, as amended by order 1955, of the board of supervisors, leaving it to the discretion of the judge to fix the punishment for visiting a house of ill fame, with a maximum limit of \$1,000 fine, or imprisonment not exceeding six months, or both, since it gives the judge power to fix an unreasonable punishment for the offense, is void.

In bank. Habeas corpus.

L. E. Phillips, for petitioner. *William S. Barnes*, Dist. Atty., for respondent.

HARRISON, J. The petitioner was convicted in the police court of the city and county of San Francisco of a misdemeanor, for visiting a house of ill fame, and on the 7th day of March, 1890, was sentenced "to pay a fine of four hundred dollars, and, in default of payment thereof, that he be imprisoned in the county jail of said city and county at the rate of one day for each one dollar of fine until said fine is satisfied." Under a commitment issued upon this judgment he was immediately taken into the custody of the sheriff, and has since that day been confined in the county jail of San Francisco. Section 33 of order No. 1587, as amended by order No. 1955, of the board of supervisors of the city and county of San Francisco, under which his conviction was had, is as follows: "It shall be unlawful for any person in the city and county of San Francisco to keep or maintain, or become a

inmate of, or a visitor to, or in any manner to contribute to the support of, any disorderly house, or houses of ill fame, or place for the practice of gambling, or knowingly let or underlet, or transfer the possession of, any premises for use by any person for any of said purposes. Every person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not less than twenty dollars, or imprisonment not less than ten days." The maximum amount of the punishment for this offense is not defined, but is left to the discretion of the court, except as it is qualified by the provisions of section 1 of order 1587, which reads as follows: "Any person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." Construing these two sections together as defining the extent of the punishment of the offense, it results that the ordinance provides that the penalty for visiting a house of ill fame shall not be less than \$20, nor more than \$1,000. Municipal ordinances must be reasonable, and the penalties prescribed for their violation must also be reasonable as well as definite. It is not essential, however, that the precise amount of the penalty for each offense shall be designated in the ordinance. It is sufficient if it be left to the discretion of the court, within fixed, reasonable limits. The maximum limit must, however, be reasonable. Dill. Mun. Corp. §§ 338, 341. The legislature (St. 1861, p. 552) has given to the city and county of San Francisco power "to determine the fines, forfeitures, and penalties that shall be incurred for the breach of regulations established by its board of supervisors," with the maximum limit of \$1,000, or six months' imprisonment, or both. But it does not follow that the city is authorized to affix this maximum penalty for the violation of every regulation that it may establish under its general power to define offenses and prescribe penalties therefor. It is not justified in prescribing the same penalty for each offense which it may define. Penalties should be prescribed with reference to the offenses which are committed, rather than to the power under which they may be prescribed. This power to "determine" the penalties which shall be incurred for the breach of its regulations has been conferred upon the city, and must be exercised by its board of supervisors, and not left to the discretion of the judge before whom the offense is tried. In re Frazee, 63 Mich. 408, 30 N. W. Rep. 72. The board of supervisors must itself fix, within limits which are reasonable, the penalty to be incurred for the violation of each ordinance. If, however, the board of supervisors does not determine the penalty in any other terms than that it shall not be less than \$20, but leaves to the judge the power to affix the maximum amount of punishment which the legislature has authorized to be affixed for the

violation of any ordinance, instead of fixing the penalty within reasonable limits, it gives to the judge the discretion of determining what the penalty shall be for each offense. This has the same effect as if it had itself fixed the maximum limit of the penalty at \$1,000. But a municipal ordinance which shall prescribe a fine of \$1,000, as the penalty for visiting a house of ill fame, would be not only unreasonable, as imposing a punishment greatly disproportionate to the offense, but would also be inconsistent with the general principles of the Penal Code upon kindred topics. In the exercise of the power conferred upon it to "regulate all practices which are contrary to public order and decency," by virtue of which this ordinance was adopted, (St. 1863, p. 540,) it was incumbent upon the city to frame the ordinance, so far as practicable, in harmony with the general laws of the state. Ex parte Kearny, 55 Cal. 225; Dill. Mun. Corp. § 319. The act of which the petitioner was convicted is not enumerated among the crimes which are defined in the Penal Code, but is made an offense solely by virtue of the ordinance. The legislature has not deemed it necessary to prescribe any punishment therefor, and, from the statutes which it has adopted upon kindred topics, the penalty allowed by the ordinance in question must be held to be not in harmony with its general policy. By the provisions of section 647 of the Penal Code, a person "who lives in and about houses of ill fame" is punishable only by imprisonment in the county jail not exceeding 90 days, and, by section 315 of that Code, the extent of punishment to be inflicted upon the person who "keeps" a house of ill fame is limited to imprisonment in a county jail not exceeding six months, or a fine not exceeding \$500, or both. We are of the opinion that so much of the ordinance in question as permits a fine of \$1,000 to be imposed as the penalty for visiting a house of ill fame is unreasonable, and not in harmony with the laws of the state, and therefore void. The petitioner must therefore be discharged from custody. It is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; SHARPSTEIN, J.; PATERSON, J.; GAROUTE, J.

McFARLAND, J. I concur in the order discharging the petitioner, upon the ground that under a penal statute or ordinance, imposing imprisonment not exceeding a certain term, or fine, or both, a defendant cannot be kept in jail, under the pretense of enforcing the fine, for a term longer than the maximum term of imprisonment prescribed by the statute. This has always been my opinion. In this case the petitioner should have been discharged at the end of six months, which is the maximum term of imprisonment prescribed. Under the other view (if the ordinance be valid) the petitioner could have been fined \$1,000, and, in default of payment, sent to jail for a thousand days, which, under the circumstances, would have been still more cruel and absurd.

88 Cal. 20

GIANT-POWDER CO. v. SAN DIEGO FLUME CO. (No. 13,906.)

(Supreme Court of California. Feb. 12, 1891.)

MECHANIC'S LIEN—COMPLETION OF WORK.

A contractor engaged in preparing a flume-bed, surface ditch, and terminal approaches for a water-works company abandoned the contract, with the consent of the company. *Held*, that the company, by releasing the contractor, and taking control of the work for the purpose of completing it, "occupied" and "accepted" it, within the meaning of Code Civil Proc. Cal. § 1187, (Amend. Laws Cal. 1887,) which requires a material-man furnishing material to a contractor to file his lien claim within 30 days after the completion of the structure, and which provides that the "occupation" of the structure by the owner, or its "acceptance" by him, shall be deemed conclusive evidence of completion; and a material-man who files his lien within 30 days after the company assumed control of the work acquires a valid lien for material furnished the contractor.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; JOHN R. AITKEN, Judge.

J. F. Cowdery, for appellant. Shaw & Holland, for respondent.

FOOTE, C. This action was brought against Joseph Johndrew, "an original contractor," for the San Diego Flume Company, and that corporation, to recover a judgment for the value of materials furnished the contractor, which were used in his work upon the structure for the flume company, and to enforce a material-man's lien upon the structure, under section 1183 of the Code of Civil Procedure. The evidence and the findings indicate that, after the 6th day of June, A. D. 1887, there existed a valid contract between the contractor and the owner, so that, as to all materials furnished after that date, the plaintiff could file its lien claim, by virtue of the existence of the contract. The court below seems to have proceeded under this impression, and to have based its decision, which was against the plaintiff, so far as the right to enforce its lien was concerned, or any other claim against the flume company, upon the theory that its claim of lien had been filed before the acceptance, completion, use, or occupation of the structure, according to the terms of section 1187 of the Code of Civil Procedure, as amended in 1887. The plaintiff appeals from the judgment against it in favor of the flume company, and from an order refusing a new trial.

Does the evidence sustain the finding that the plaintiff filed its lien claim before the defendant had accepted, used, or occupied the work which the contractor had left in an uncompleted state? The work which the contractor was to perform was the grading of a flume-bed, surface ditches, and tunnel approaches, from the defendant's diverting dam on the San Diego river to its proposed city reservoir near San Diego, and the excavation of about 3,000 lineal feet of tunnels, and lining the same with masonry, and also timbering same, in accordance with the plans and specifications. Thus it will be observed the contractor was not to complete the flume, or to make complete the proposed water-works of the defendant, but only to prepare the place upon which the flume was

to be thereafter placed. He was to lay the foundation, as it were, on which the flume was to rest. In this respect the work to be done was somewhat similar to the laying of a foundation on which to erect a house. It appears that about August 9, 1887, the contractor abandoned his contract, and ceased all work thereunder; that two or three days after that the flume company took possession of the flume line upon which the contractor had been working, and proceeded to complete the work which he had left unfinished. But the court finds that it neither used nor occupied the tunneling, grading, and work which Johndrew had agreed to do. "Nor did it on or about the 10th of August, 1887, or at any time, or at all, ever accept the structure which Johndrew had been engaged in constructing for it, or accept the uncompleted part thereof." The part of section 1187, Code Civil Proc., here involved reads: "* * * And in case of contracts, the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, shall be deemed conclusive evidence of completion." The provision seems to have been enacted in the interest of and for the better protection of lien claimants like the plaintiff. The words of the statute "occupy or use" or "accept" have reference not only to the occupation, use, or acceptance of a dwelling or other house, but to any kind of structure, building, or improvement in which the materials of a lien claimant have been used. What, then, is to be deemed their meaning, with regard to the matter in hand? The facts appear to be that the contractor, on or about the 9th of August, 1887, was unable to go on with his work. Then, or a day or two thereafter, the defendant made an arrangement by which the contractor was to be absolved from his obligation under the contract, which was to be abrogated, and the defendant was to pay a certain proportion of his debts, on conditions, not including that of the plaintiff, and to have and retain certain property belonging to the contractor. It thereupon took control and possession of the work, and proceeded to complete it. The defendant, having gotten rid of the contractor by this arrangement, dominated, controlled, and applied to its uses the uncompleted work of the contractor, in the prosecution of which the materials of the plaintiff had been used. It occupied the work, so far as could be done, in its then state. But it used and occupied his work after the rescission of its contract with the contractor, making this work subservient to its purposes in completing the structure. It took from the contractor what he had done of the work, and also certain property of his, released him from his contract, and agreed to settle some of his debts. If it released the contractor, took his work, and some of his property, and agreed to pay some of his debts, this would appear to be, in a certain sense, an acceptance of his work. It did not occupy and use the work in the sense that it was complete according to the terms of the contract,

but, after the contractor was released, it used and occupied it as the contractor had done before. His responsibility on the contract to the defendant was ended. The latter took his work and other property, and proceeded under this agreement to use and occupy the work, agreeing at the same time to pay a certain proportion of the contractor's debts; that is, it took and used, under agreement with him, what he had left, and absolved him from his contract. The lien claim was filed on the 5th of September, 1887, within 30 days after the acceptance, use, and occupation above stated. Under our view of the statute this was sufficient. The contractor's connection with the defendant was completed and ended. The defendant accepted the work he had done, and used and occupied it so far as it was capable of being so used or occupied. The findings are not supported by the evidence. We think the judgment and order should be reversed, and so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

McFARLAND, J. I concur in the judgment of reversal solely upon the ground that, in my opinion, the main points in controversy were settled against respondent on the former appeal, (78 Cal. 193, 20 Pac. Rep. 419,) and the law of the case applies; otherwise I would hold that the lien of appellant was premature. And, where the question is open, I could not concur in the doctrine that there can be a lien for powder exploded in blasting for the foundation of a house or a flume. "Materials used in the construction," as employed in the mechanic's lien law, means, in my opinion, only such material things as go in, and become part of, the building or structure. In the eye of justice, a merchant who deals in lumber or hardware has no more right to a lien than a merchant who deals in potatoes, or flour, or sugar; and the former have a lien only as a legislative privilege. The language should not be strained for the purpose of enlarging the privileged class. The appellant has no powder in the structure, and never had. It merely exploded some there.

DE HAVEN, J. I concur in the judgment, and in the foregoing opinion of Commissioner FOOTE. The question whether powder exploded in the work of constructing a flume or tunnel may be regarded as a part of the "materials used in the construction" is not involved in the disposition of this appeal.

88 Cal. 150

SAN DIEGO LAND & TOWN CO. v. NEALE
et al. (No. 13,674.)

(Supreme Court of California. Feb. 14, 1891.)

EMINENT DOMAIN—COMPENSATION—ELEMENTS OF
VALUE—EVIDENCE.

1. On condemnation of land for public use, the present market value, and not the value to the owner or to the person seeking to condemn it, is the basis of compensation.

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2. In condemnation of land for reservoir purposes, estimates of value based on the cost of the proposed water-works, the increase of population, extension of the water system, and the probable income and profit from the works are not admissible.

3. It is proper to consider any facts showing the nature of the land, and its adaptability for reservoir purposes; such as the area of the watershed, and amount of water, the amount of surrounding irrigable land, and the cities and towns being supplied with water from wells.

4. A witness' opinion as to the value of land should be rejected if it is based entirely on incompetent matters.

5. The introduction of irrelevant evidence on one side without objection does not justify the admission of evidence of the same character on the other side.

6. It is proper to show that a witness, who gives his opinion as to the value of the land, formerly entertained a different opinion.

7. The opinion of witnesses who have never seen the land until after the right to compensation and damages accrued should not be received.

In bank. Appeal from superior court, San Diego county; JOHN R. AIKEN, Judge.

Hunsaker & Britt and J. E. Deakin, for appellants. Luce, McDonald & Torrance, (Wm. F. Herrin, of counsel,) for respondent.

PATERSON, J. This is a proceeding to condemn land for reservoir purposes. On the former appeal (78 Cal. 63, 20 Pac. Rep. 372) the judgment was affirmed as to all the issues except the issue as to the value of the land. The cause was remanded for a new trial of that issue, a trial was had, and a judgment on a verdict for \$122,657.50 and costs of suit was entered in favor of defendants; but the plaintiffs moved for a new trial, which motion was granted, and the defendants have appealed.

It would be sufficient for us to say that as the order appealed from is one granting a new trial, and as the evidence as to the value of the land condemned is conflicting, the decision of the court below, in the absence of a showing of an abuse of discretion, will not be reversed. This rule has been so many times announced, it would be a work of supererogation to cite authorities in support of it. As some of the rulings of the court below at the trial, in our opinion, were erroneous, however, we deem it advisable to refer to them for the guidance of the court at the next trial.

When the motion for a new trial was called for hearing, the defendants objected to the same being heard, on the ground that the court had no jurisdiction to hear or determine a question of fact as to value. The same objection, although somewhat different in form, was presented on the former appeal, and overruled. 78 Cal. 65, 20 Pac. Rep. 372. The burden of proof as to value was on the defendants. California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 63, 7 Pac. Rep. 123; Monterey County v. Cushing, 83 Cal. 507, 23 Pac. Rep. 700. It was their duty to allege and prove the value. Both parties assumed at the trial that there was an issue as to value, the case proceeded to trial and judgment upon that assumption, and the defendants cannot now complain.

The nature of defendant's land, and its situation with respect to the reservoir of

plaintiff, is shown in the opinion filed on the former appeal. 78 Cal. 66, 20 Pac. Rep. 372. It was there held that the court erred in allowing defendants to introduce evidence of value based on the fact that plaintiff's dam was already in course of construction, or upon "the circumstance that the land susceptible of irrigation from the reservoir would be enhanced in value * * * by having irrigation facilities afforded to it. * * * Where there is no actual current rate of price, and where, in consequence, the court must arrive at the value from a consideration of the uses to which the property may be put, it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land." This court held that the present value of the property for prospective purposes might be given, and that it was proper, therefore, to show the value of the property for reservoir purposes, although it had never been used for such purposes. The court below, however, in its rulings and instructions at the last trial, seems to have entirely misconceived the scope and effect of our former decision. Instructions were given based upon facts so remote from the real issue in the case as to mislead the jury on the question of damages. As stated before, it was decided on the former appeal, and is the law of the case, that the value of the land for any special purpose may be taken into account as one of the elements tending to show its market value. The fact that the land is suitable for such a purpose, and a chance exists that it may some time bring an enhanced value therefor, has a tendency to increase its market value, and may properly be considered in determining what its present market value is. In this connection, it is proper to say that the learned judge who wrote the opinion in *Alloway v. City of Nashville*, 88 Tenn. 510, 13 S. W. Rep. 123, evidently misapprehended our decision in this case on the former appeal. We did not hold that the value of the land for reservoir purposes was a measure of damages, independent of any other consideration or element of value. On the contrary, the opinion distinctly states that the market value is to be the measure of damages, and that evidence of value for a special purpose is only to be considered as an element of the question. Neither the value in use to the plaintiff nor to the owner is to govern. Indeed, to guard against misapprehension, the court was careful to say: "The word 'value' is used in different senses. * * * For the purposes of the law of eminent domain, however, the term has reference to the value in exchange or market value. There are some cases which seem to hold that the value in use to the owner is to be taken, if it exceeds the market value. But it will generally be found, on careful examination, that such cases either relate to the damage accruing to the owner from the taking, and not to the value of the property itself, or overlook the distinction between the two things. The *consensus* of the best considered cases is that, for the purposes in hand, the value to be

taken is the market value. * * * The problem, then, is to ascertain what is the market value. * * * From the necessity of the case, the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. * * * What is done is merely to take into consideration the purposes for which the property is suitable, as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it; which, in a general sense, may be said to be the market value." In the *Tennessee* case, the court, not having the record in this case before it, fell into the error of saying that "in that case it was held that it was competent to prove the value of the land for a reservoir site, and to make that value the measure of damages, independent of any other consideration or element of value." The market value is the ultimate fact to be determined by the jury. If the land has a value for any particular purpose, its market value may be thereby enhanced. If its value for one purpose is to be excluded, why not for another? A vacant lot in a city cannot be condemned and taken at its value for agricultural purposes. If land which has been used only for pasture contains valuable mineral deposits, it cannot be taken for public use without reference to what reasonable purchasers would, in the opinion of experts, be willing to give for it, taking into consideration the character of such deposits. The fact that the plaintiff wants the land for a particular purpose should not defeat the defendant in his efforts to show its market value by showing as an element its value for that particular purpose; and the fact that the plaintiff is the only person who has thus far offered to purchase is immaterial. The true distinction is that the demand of the plaintiff alone is not to be considered exclusive of other considerations. It goes to make up the aggregate of demands, or probable demands, which is one of the elements of the inquiry. There is nothing in what we have said inconsistent with what was decided in *Gilmer v. Lime Point*, 19 Cal. 47, or *Railroad Co. v. Pearson*, 35 Cal. 247. In the former case the defendant offered to show what the land was worth to the government as a site for fortification. As the government was the only possible purchaser for such a purpose, it was apparent that the attempt to show what it was worth for a fortification was an attempt to prove what was its peculiar value to the government. In *Railroad Co. v. Pearson* the defendant attempted to show what the land would be worth to the owner, provided the state should thereafter grant him a wharf franchise; and the court simply held that such a fact was too remote and speculative.

An attempt is made to distinguish a case where the owner of the land sought to be condemned occupies a commanding position from one where the land is remote from the dam-site. This contention was disposed of adversely to the appellants in the decision on the former appeal. Land which is remote from the dam-site may have a less value than land at the

dam-site; but the rule governing the admissibility of evidence must necessarily be the same in each case. The question in each case is, what is its market value? and is determined by the same rules. It will not do to say that land sought to be condemned for a reservoir purpose has no value for such purpose because it is too remote from the dam-site. The very fact that this land is sought to be condemned for such a purpose is an admission of its adaptability therefor. But at the last trial the evidence was not confined to the question of the adaptability and value of the property as a reservoir-site, considered as an element in the determination of its actual or market value. Witnesses were allowed to give estimates of value based upon speculative improvements, increase of population, extension of water systems, and profits which would result from the distribution and sale of the water; thus permitting the defendants to show, practically, what plaintiff, or another in its situation, could afford to pay for the land, rather than go without it. It was admitted at the trial that "it was not practicable to have constructed a reservoir upon the 350.45 acres of land in controversy in this action except in connection with the adjoining land of the plaintiff below it, and lying between the defendant's land and the dam-site." The plaintiff had constructed a dam by which water was impounded, covering all the land below defendant's land, and, in fact, at the time of the trial, a portion of the lands in controversy. One of the witnesses (Sproul) testified on behalf of defendants that it would cost \$960,000 to construct a dam, system of mains, and distributing pipes, in order to utilize the reservoir to its utmost capacity over the territory tributary to it; and that, estimating the market value of water to be \$100 per acre for irrigation, and 10 cents per 1,000 gallons for domestic purposes, the value of the land in controversy was \$841 per acre on January 13, 1887. He stated that in arriving at that conclusion he estimated the cost of construction of a suitable dam and mains through the lands to be irrigated; assumed that National City had a population of 2,000, and that its increase in the next 10 years would amount to 6,500; that the quantity of water would irrigate 20,000 acres of land; that it would take 10 years to complete the system, and dispose of the entire volume of water, at the rate of 2,000 acres per year; allowed \$15,000 for running expenses, taxes, etc., and a sinking fund of \$11,000 to renew the system at the end of 20 years; credited the reservoir for the sale of water-rights and water-rates received from National City; charged the reservoir interest at the rate of 10 per cent.; and carried the same system of debits and credits through a term of 10 years, showing a balance at the end of the tenth year of \$1,623,064 after all the indebtedness had been paid. This balance he considered as the amount that would be due to the land at the end of 10 years. "The present worth of that amount, discounted at ten per cent., or if that amount had been paid at the beginning of the ten

years instead of at the end, it should have been \$624,225, which, divided between 742 acres of land, amounts to \$841 an acre. The testimony was objected to, the objection was overruled, and plaintiff excepted. After it was admitted, the plaintiff moved the court to strike it out, on the ground that it was based upon considerations and contingencies so remote, uncertain, and speculative as to be wholly inadmissible and incompetent as a basis for fixing the market value of the land in question on the 13th day of June, 1887, or at any other time. The court denied the motion, and plaintiff excepted. Another witness (Ryan) estimated the land to be worth \$600 per acre, basing his conclusion upon similar calculations and contingencies, and upon the assumption that it was to be used in connection with plaintiff's reservoir.

It is contended by appellants that the testimony of these witnesses, and other testimony of a similar nature, was admissible, because there were no similar properties in the market, by a comparison with which the market value of the property in controversy could be arrived at; that the method pursued was simply fixing the actual value by calculation,—by considering the necessary expenditure in putting it in condition for certain purposes, and the probable income and profit which would result from its use. Many cases are cited in support of this contention; among them *Boom Co. v. Patterson*, 98 U. S. 403; *Railroad Co. v. McGhee*, 41 Ark. 202; and *Railroad Co. v. Woodruff*, (Ark.) 5 S. W. Rep. 792. But none of the cases cited go to the extent claimed for them. In *Boom Co. v. Patterson* the court said that, as a general rule, compensation to the owner is to be estimated by reference to the uses for which the lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future, and that the adaptability of the land for a certain purpose is a proper element for consideration in estimating the value of the lands when appropriated for public use. There is nothing in the report of that case to show that the defendant was permitted to prove the cost of constructing the boom, and the profits which would result to the company from the use thereof. In *Railroad Co. v. Woodruff*, supra, the court said: "If the market value is the price for which the property could be sold on the market, we will next be led to inquire, how is the market value to be proven? This is usually done by calling witnesses who are familiar with the property, and asking their opinion as to such value. * * * When the witness has made his estimate as to the market value of the property, it is competent to support his estimate by having him describe the property, giving its location, advantages, and surroundings, though ordinarily this would be uncalled for, unless his estimate was attacked on his cross-examination, in which case the party introducing him would have ample opportunity to rebut any facts which might appear to be derogatory to his estimate. * * * We

deem it proper, however, to say that the presiding judge should not suffer collateral issues to spring up and multiply, or the jury be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the ascertainment of the market value of the property." In the case at bar the opinion of some of the witnesses was based on speculative and conjectural calculations of expenditure and profit for a period of five years', and others on a basis of ten years', use of the property in controversy, in connection with the property owned by plaintiff. The facts and figures relied on in support of these opinions not only threw no light on the question, but must have operated to confuse and mislead the minds of the jury. Of course, as was said in *Boom Co. v. Patterson*, it is perhaps impossible to formulate a rule to govern the appraisement of property in all cases; but it is easy and safe to pursue the course pointed out by the court in *Railroad Co. v. Woodruff*. Let the witnesses in direct examination state their opinion as to the market value of the property, "having regard to the existing business wants of the community, or such as may be reasonably expected in the immediate future," and support their estimates by a description of the property, giving its location, surroundings, and advantages for any particular use, if it have any. Opposing counsel should then be "allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make," and for the information of the jury, and to test the value of the opinion given, be permitted the widest latitude in cross-examination. The following authorities establish the proposition that the compensation to be awarded the owner of the land condemned cannot be based upon the value of the property to the person or company in charge of the public use, nor by its necessities, and that it is not proper to take into consideration the profits which may result from the use of the land, especially where the profits depend upon the expenditure of large sums of money in carrying out the contemplated enterprise: *Canal Co. v. Archer*, 9 Gill. & J. 481; *Gardner v. Inhabitants of Brookline*, 127 Mass. 358; *Burt v. Wigglesworth*, 117 Mass. 302; *Railroad Co. v. Balthasar*, (Pa.) 17 Atl. Rep. 518; *Dorlan v. Railroad Co.*, 46 Pa. St. 520; *Railroad Co. v. Galgiani*, 49 Cal. 139.

Appellants contend that the court did not err in refusing to strike out the testimony objected to, because the witnesses were competent to express an opinion as to value, and the reasons for such opinion can only affect the weight to be given to their testimony; but we think that where a witness bases his opinion entirely upon incompetent and inadmissible matters, or shows that such matters are the chief elements in the calculations which lead him to such conclusions, it should be rejected altogether. *Railroad Co. v. Balthasar*, (Pa.) 13 Atl. Rep. 294. It clearly appears that the witnesses referred to based their estimate of the value of the property upon an anticipated investment of a large

amount of money in an extensive system of water-works, and founded their opinion largely upon hypothetical expenditures and receipts of money, and an increased demand for water. The court, too, adopted the same erroneous rules, and under its instructions the jury must have found such price as in the opinion of the witnesses the land might bring, or probably would bring, at some future period, if plaintiff or another in its situation should extend the works as contemplated by the witnesses.

It is claimed by the appellants that the plaintiff ought not to be heard to complain of the ruling of the court in admitting the testimony referred to, because its own witnesses had given testimony of the same character; but, as was said when the case was here before, "the introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence upon the other side." See, also, *Walkup v. Pratt*, 5 Har. & J. 56. But, if the ruling of the court could be sustained for the reasons urged, the court in some of its instructions to the jury, as stated before, adopted the same rules as those followed by the witnesses in their testimony. The court instructed the jury, at the request of defendant, that, in considering the weight to be given to the opinions of witnesses as to the value of the land for reservoir purposes, they might take into consideration, among other things, the character and capacity of the works necessary and proper for the utilization of the defendants' land for reservoir purposes; the quality and condition of the lands irrigable from the reservoir; the need of such lands for irrigation in order to make them habitable and productive, together with the needs of the inhabitants of cities and towns within reach of this system of water-works, and appearing on the 13th of June, 1887, to be dependent upon it for water; the proportion which the defendants' land bears to the remainder of the plaintiff's reservoir; the quantity of water, the storage of which is secured by the use of the defendants' land in connection with the adjoining land of plaintiff or other persons, and the value of such water as a salable commodity in the neighborhood tributary to this reservoir on the 13th day of June, 1887; also, that in considering the value of the land for reservoir purposes, as a guide to ascertaining its market value, the question was not what it was worth to plaintiff, as owner of the remainder of the reservoir and dam-site, in June, 1887, doing business as they proposed to do, but it is, what was it worth to any reasonable person, able and willing to buy, and intending to acquire by purchase for condemnation the dam-site and the remainder of the reservoir, and to use the whole for supplying water for public use over the territory tributary to this system? that the jury had a right to consider, if it be a fact, the proximity of the land to an eligible dam-site, and its availability for reservoir purposes, in connection with such dam-site and other adjacent lands.

The court had fairly and fully instructed

the jury, at the request of plaintiff, on the subject of value; but these instructions, given at the request of the defendants, were erroneous, because they, in effect, indorsed the methods of calculation employed by the defendants' witnesses, and informed the jury—at least the jury undoubtedly so understood it—that they might find the value to be what the land was worth to the plaintiff, or another in its situation, and that this might be determined by a calculation of the probable profits from sales of water and water-rights at prospective prices. The cost of works necessary for the utilization of the land for reservoir purposes was an element in the calculation as conjectural and speculative as would be the cost of a railroad, and rolling stock necessary for the operation thereof, in fixing the value of land condemned for railroad purposes. The quality and condition of the lands to be affected was as foreign to a legitimate estimate of the market value of the land as the size and growth of a city on the line of the railroad would be in fixing the value of land taken for railroad purposes. The necessities of the public are never taken into consideration in fixing the value. They are an element which must be proved before the land can be taken, but are never an element of the question as to compensation. The proportion which the defendants' land bore to the remainder of the plaintiff's reservoir, and the quantity of water which would be stored by use of the defendants' land in connection with the land of plaintiff, and the value of the water as a salable commodity, were clearly improper elements to be considered. *Canal Co. v. Archer*, and other cases, *supra*. The question was not what the property was worth to a person intending to acquire it and the dam-site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself; in other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with *bona fide* purchasers generally, but its necessities cannot be taken advantage of. So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir, or as a part of the entire reservoir-site, such fact should be considered; but the value of the land when used in connection with the plaintiff's land cannot be taken as a criterion, for this would be taking the value to the plaintiff as the measure of compensation. The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam-site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property; but for the reasons stated its adaptability for reservoir purposes should not have been con-

sidered "in connection with such dam-site and other adjacent lands."

Respondent has requested a decision on every one of the 17 assignments of error in the statement; but, in view of what we have said regarding the rulings of the court and the instructions, it seems unnecessary to do so. It is sufficient to say that any facts showing the nature of the land in controversy, and its adaptability for reservoir purposes, may be shown. The area of the water-shed and amount of water were matters proper to be considered; for a reservoir would be useless without water. That there was land irrigable from the reservoir, and cities and towns which were being supplied with water from wells, were matters not only tending to show that it was a practical reservoir-site, but bearing directly upon its value. The condition of the property, the uses to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the lands, (*Boom Co. v. Patterson*, *supra*;) but to attempt to ascertain the value by estimating the cost of works necessary for its use for a particular purpose, the cost of operation, prospective sales, and estimated profits, increased demands through growth of population, etc., requires "a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. * * * The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful." *Searle v. Railroad Co.*, 33 Pa. St. 64.

The court did not err in overruling plaintiff's objection to the question asked Mr. Schuyler during his cross-examination. It was proper to show that he had at some prior time entertained a different opinion as to the value of the property.

Some of the witnesses on both sides never saw the land in controversy until several years after the date of the summons, at which time the right to compensation and damages accrued. We think their opinions ought not to have been received.

We think that the company should pay the costs of this proceeding, on account of the manner in which it opened and proved its case at the last trial. Section 1255 of the Code of Civil Procedure provides that "costs may be allowed or not, and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court." Mr. Lewis, in his work on Eminent Domain, (section 559,) in speaking of the question of costs, says: "It seems to us that courts should be guided by the following principles and considerations in the matter: By the constitution, the owner is entitled to just compensation for his property taken for public use. He is entitled to receive this compensation before the property is taken or his possession disturbed. If the parties cannot agree upon the

amount, it must be ascertained in the manner provided by law. As the property cannot be taken until the compensation is paid, and as it cannot be paid until it is ascertained, the duty of ascertaining the amount is necessarily cast upon the party seeking to condemn the property; and he should pay all the expenses which attach to the process. Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void. * * * If the statute gives the condemning party a right of appeal, it cannot cast the costs upon the owner, even if the assessment is reduced." See, also, *In re New York, W. S. & B. R. Co.*, 94 N. Y. 287. Whatever may be the constitutional rights of the parties, we think in this case, under section 1255, that it will be a proper exercise of discretion to require the company to pay costs. The order is affirmed, and the court below is directed to tax the costs of the last trial and of this appeal against the plaintiff.

We concur: MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.; SHARPSTEIN, J.

BEATTY, C. J. I concur in the judgment on the ground that there was such a conflict of evidence on the question of value as to warrant the order directing a new trial, but I do not think the superior court erred in ruling upon the motions to strike out testimony, or in its instructions to the jury.

88 Cal. 16

HARRON v. CITY OF LONDON FIRE INS. CO.
(No. 13,754.)

(Supreme Court of California. Feb. 12, 1891.)

INSURANCE COMPANIES—AGENT'S AUTHORITY—
VERBAL CONTRACT OF INSURANCE.

An insurance agent's commission certified that he had full power to receive proposals for insurance, fix rates of premiums, and receive money, subject to the company's rules and regulations, and such instructions as might be given from time to time by its general agent. The lessee of an hotel made a verbal agreement of insurance with the agent, who stated that a formal application was not necessary. The company, prior thereto, had written policies on the building, and its general manager had written the agent that he would give his attention to any insurance required on the hotel and contents, and upon another occasion that he would take the whole line, and place it in such companies as was specially desired. *Held*, that this was sufficient to support a finding that the agent was authorized to make the contract.

Department 2. Appeal from superior court, Kern county; R. E. ARICK, Judge.

Jarboe, Harrison & Goodfellow, for appellant. *Haggin & Van Ness*, for respondent.

MCFARLAND, J. This is an action to recover \$5,000 upon an alleged parol contract for the insurance of furniture, etc., in the Southern Hotel, at Bakersfield, in Kern county. The verdict and judgment were for plaintiff, and defendant appeals. The defendant is a corporation organized under the laws of Great Britain, and does business in the Pacific states and territories under the management of W. J. Callingham, and its head office under his charge is in San Francisco. It has local

agents in various cities and towns, and on July 6, 1889, its agent at Bakersfield was, and for a long time had been, H. A. Blodget. On that date a small fire occurred in the Southern Hotel, of which plaintiff was lessee, and in which she had a large amount of furniture and other personal property. The hotel was conducted and managed by her brother, W. H. Harron, who was her general agent for that purpose. Being alarmed at the occurrence of the fire her said agent went to said Blodget in the afternoon of said July 6th, and told him that he wanted an insurance on said furniture, etc., to take effect immediately, and that if he could not obtain it from him he would go elsewhere; and it is clear that the jury were warranted by the evidence in finding that a contract of insurance on said property for one year for \$5,000 was then and there made by defendant with plaintiff, to take effect immediately, provided Blodget had the authority to make such contract for defendant. On the next day, July 7th, a general conflagration, not originating in said hotel, destroyed nearly the entire town, including plaintiff's said property, which was of a value exceeding \$5,000. The real question in the case is, was the jury authorized by the evidence to find that Blodget had power to bind the defendant? There are some minor points made about certain rulings of the court, but we do not think that in such rulings any material error was committed.

Blodget had a written commission from defendant, which certifies that he is appointed agent of defendant "with full power to receive proposals for insurance against loss or damage by fire in Bakersfield and vicinity, to fix rates of premium, and to receive moneys, on behalf of the City of London Fire Insurance Company, Limited, of London, Eng., subject to the rules and regulations of said company, and such instructions as may be given from time to time by the general agents of the western department of the United States." The foregoing words in quotation marks are the only words in the instrument which either grant or restrict the powers of Blodget. Appellant contends that Blodget's powers must be determined by the commission, and that it does not include the power to accept applications, or to make any insurance contracts; while counsel for respondent contends that such power is fairly included in the language of the instrument. We do not think it necessary to determine whether the general scope of the commission, properly construed, includes the authority here questioned, because we think that in this particular case there were "such instructions * * * given * * * by the general agents" of defendant as authorized Blodget to make the contract sued on. Harron testified that at the time of the contract he asked Blodget, "Don't I want to make a written application?" and was answered, "No; you are not asking for this insurance. You are giving it to Mr. Callingham upon his asking for it. * * * I have letters from Mr. Callingham asking for that insurance; consequently it is not necessary for you to

make a written application." Blodget testified that "I told him [Harron] that I could furnish him insurance; that Mr. Callingham had asked for the insurance on the furniture of the hotel; that I had promised to give it to him, and that I would send it to him; and that it would cover from then." Furthermore, it appears in evidence that defendant had taken policies on the Southern Hotel; that on April 11, 1889, in a letter to Blodget about those policies, Callingham wrote as follows: "I dropped you a line yesterday asking if there would be some insurance required on the hotel furniture and other contents of the building. * * * If any insurance is required as suggested, I shall be very glad to give my attention to it;" and that on April 10th he had written to Blodget as follows: "If the furniture of the Southern Hotel is to be insured, I could take care of the whole line for you, and would place it in any companies that you specially desire." We think that this testimony and evidence was sufficient to justify the jury in finding that Blodget had authority to make the contract with plaintiff, and that he did make it on behalf of defendant. There is no pretense that a written policy embracing the oral contract would not have been made, of the date of July 6th, if the fire had not taken place before it could have been done. Callingham, when on the witness stand, did not pretend that there was any other reason for rejecting the policy. There is nothing in the point that the plaintiff's brother and manager of the hotel, W. H. Harron, had no authority to act for plaintiff. Judgment and order denying the motion for a new trial affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

88 Cal. 26

LUCO v. TORO. (No. 12,566.)

(Supreme Court of California. Feb. 12, 1891.)

APPEAL—DIVIDED COURT—AFFIRMANCE.

Const. Cal. art. 6, § 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary. On motion to affirm a judgment it appeared that the cause had been several times heard and submitted, in which no decision was reached owing to the change in the *personnel* of the court, and an equal division of opinion among the judges qualified to act; but before an opinion was written three new judges qualified to hear the case were selected. *Held*, that the cause should be presented on its merits before the newly-constituted court, and the motion will be denied.

In bank. Appeal from superior court, San Diego county; THOMAS H. BUSH, Judge.

Const. Cal. Jud. Dept. § 2, provides that the supreme court shall consist of a chief justice and six associate justices, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank, but if four justices so present do not concur in a judgment,

then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four judges shall be necessary.

I. N. Thorne and E. W. McKinstry, (Oliver P. Evans, of counsel,) for appellant. Harry L. Titus and Henry M. Smith, (George H. Smith, of counsel,) for respondent.

PATERSON, J. When this cause was first submitted the judgment of the court below was affirmed, four justices concurring. One of the justices who participated in the decision was not present at the argument, but it was understood by the members of the court at the time of the decision referred to that counsel for both parties had stipulated at the hearing—as counsel had in nearly every other case on the calendar for the term at which this case was heard—that any justice not present at the argument might participate in the decision. Upon a representation made by counsel for appellant, after the decision, that no such stipulation had been entered into, and upon their motion, based on the ground that only three of the justices who heard the argument had participated in the decision, the judgment was set aside. Since that time the cause has been heard and submitted several times, but no decision has been reached, owing to a change in the *personnel* of the court, and an equal division of opinion among the six justices qualified to act. At the last October term counsel for respondent moved that the judgment be affirmed, it appearing that the justices qualified to act were equally divided in opinion. It is admitted that a mere failure to agree cannot have the effect, *ipso facto*, of an affirmance, for the constitution requires the concurrence of four justices to pronounce judgment; but it is claimed that it then becomes the duty of the justices who voted for a reversal to unite with their associates in affirming the judgment. The reason given for this contention is an argument *ab inconvenienti*. It is said that if this rule is not followed the case might be continued for four years, until a change in the membership in the court occurs; "and, then again, the same condition of things might still continue, and this would require a further continuance; and thus it might happen that the case would never be decided." Many English and American authorities are cited in support of the motion, and no cases to the contrary have been found by respondent; but the decisions must be read in the light of the circumstances under which they were rendered. Some of the cases referred to went off on the authority of statutes providing that in cases of equal division among the judges the judgment should be affirmed, others upon a rule following the practice of the English courts, and the others upon the ground of expediency. The case of *Ayers v. Bensley*, 32 Cal. 632, is hardly in point. There a judgment had been rendered by a constitutional quorum, and it was only on petition for rehearing that a division occurred. The rule has always been with respect to petitions for rehearings that as many justices as are necessary to pro-

nounce the judgment must concur in granting a rehearing, or the petition will be denied. In jurisdictions presided over by judges holding for life, or for terms so great as to make the probability of a change in the membership of the court remote, the judgment of affirmance follows a division *ex necessitate rei*. In such a case the decree does not import a division as to the nature of the judgment, but as to the questions of law and fact involved in it. While the decree is a bar to any subsequent action for the same cause, no matters of law are decided, and it therefore possesses no dignity as a judicial precedent, but carries upon its face a badge which precludes any application of it in future under the doctrine of *stare decisis*. The judges simply agree that it is expedient to finish the litigation. It is a public expediency, and is often expedient also with respect to the interests of the parties. Supported by these considerations, and the presumption of correctness which always attaches to the judgment of the court below, it is proper and right that the judges who were in favor of a reversal should waive any insistence of opinion, and unite with their associates in an affirmance of the judgment. This they do without in any way relinquishing their convictions upon the questions of law or fact involved in the case. But here there are no such considerations as induced the decisions in the cases referred to. At the time the motion was made it was evident that before the time for the next term of court at which the cause would be heard, three, at least,—including the justice disqualified to act,—and possibly four, of the justices, would be succeeded by others on the bench. Within a month after the motion was made, and before an opinion was written, an election occurred, which resulted in the choice of three new justices, all of whom are qualified to assist in deciding the cause on its merits. Under these circumstances, we thought at the time the motion was submitted, and still think, that the cause should be presented on its merits before the court as now constituted. The motion is therefore denied.

We concur: BEATTY, C. J. MCFARLAND, J.; SHARPSTEIN, J

HARRISON, DE HAVEN, and GAROUTTE, JJ. Although we were not present at the argument of the motion, which was afterwards submitted on briefs, counsel for appellant not being present at the time the motion was made, we have considered the point made by respondent, and concur in the views expressed in the opinion of Justice PATERSON.

marshal's duties, provides that he shall, for service of any process, receive the same fees as constables. *Held*, that the compensation fixed by the trustees under section 855 was for all duties imposed on the marshal.

Department 2. Appeal from superior court, Los Angeles county; WILLIAM P. WADE, Judge.

Gage & Roberts, for appellant. W. A. Arthur, for respondent.

PER CURIAM. This is an action to recover for services rendered by the plaintiff as city marshal of the defendant. A general demurrer to the complaint was interposed and sustained. The plaintiff declined to amend, and thereupon the court gave judgment that he take nothing. From that judgment he appeals. The facts stated in the complaint are in substance as follows: In April, 1886, and again in 1888, the plaintiff was duly elected city marshal of the city of Pasadena, a municipal corporation of the sixth class. Each term of office was two years, and after each election he duly qualified and entered upon the discharge of his official duties. His compensation for both terms was fixed by the board of trustees of the city at \$800 per year, and was paid. Between the 31st day of July, 1886, and the 30th day of April, 1888, he rendered services to the defendant corporation, in arresting offenders, and summoning witnesses and jurors, by virtue of warrants of arrest, subpoenas, and *venires* duly and regularly issued out of the recorder's court of the city, and for these services the defendant became and is indebted to him in the sum of \$863.55. Again, between the 1st day of May, 1888, and the 22d day of March, 1889, he rendered other like services, for which the defendant became and is indebted to him in the sum of \$318.25. Before commencing his action, he demanded of defendant payment of both sums, but the defendant refused, and still refuses, to pay the same, or any part thereof. The act of the legislature, entitled "An act to provide for the organization, incorporation, and government of municipal corporations," approved March 13, 1883, (St. 1883, p. 93,) provides, in the chapter relating to "Municipal corporations of the sixth class," (section 855,) that "the clerk, treasurer, marshal, and recorder shall severally receive, at stated times, a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." And section 880 of the same chapter provides what duties the marshal shall be required to perform. Among other things, it says: "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority. * * * He shall, for service of any process, receive the same fees as constables. He may appoint, subject to the approval of the board of trustees, one or more deputies, for whose acts he and his bondsmen shall be responsible, whose only compensation shall be fees for the service of process, which shall be the same as those allowed to the marshal." In Pritch-

87 Cal. 520

MUNDELL v. CITY OF PASADENA. (No. 14,013.)

(*Supreme Court of California*. Jan. 26, 1891.)

CITY MARSHALS' FEES.

St. Cal. 1883, p. 93, § 855, provides that marshals of cities of the sixth class shall receive a compensation to be fixed by ordinance by the board of trustees. Section 880, prescribing the Cal. Rep. 23-25 P.—72

Att v. Stanislaus Co., 73 Cal. 310, 14 Pac. Rep. 795, the plaintiff was marshal of the city of Modesto, a city of the sixth class, in the county of Stanislaus. He brought his action against the county to recover for services rendered by him in the execution of process, such as warrants of arrest and subpoenas, issued out of a justice's court of the county in criminal cases. A demurrer to the complaint was interposed and sustained. It was said by this court, referring to the provisions of the statute above quoted: "The compensation fixed by the board of trustees under section 855 is to be for all duties imposed on the marshal by the act. These duties are set forth in section 880, (St. 1883, p. 277,) and include the duty to execute and return all process issued and directed to him by any legal authority, and by the same section, for the service of any process, he is to receive the same fees as constables." And again: "It does not appear that the board of trustees of the city of Modesto has passed any ordinance fixing the compensation of the marshal, but we presume it has. If it has passed such ordinance, the marshal is only entitled to the compensation so fixed. If no such ordinance has been passed by it, then the marshal can recover nothing." It was held that the demurrer was properly sustained, and the judgment was affirmed. That case is directly in point here, and upon its authority it must be held that the demurrer in this case was properly sustained, and the judgment must be affirmed. So ordered.

88 Cal. 45

COOPER v. COOPER. (No. 13,908.)

(Supreme Court of California. Feb. 14, 1891.)

DIVORCE—EVIDENCE OF PARTY—CORROBORATION.

A wife suing for divorce testified to various acts of violence, and her attorney testified the husband was a man of violent passions, and in private conversation had admitted to the witness that he had used violence upon the wife on various occasions, had pinched her arms, forcibly prevented her from leaving the house, and applied harsh names to her. It was shown also that he began an action for divorce, which he discontinued before this suit, alleging that she attempted to poison the minds of their children against him, and had stated in their presence that she hoped some accident would befall him, so he could not return, and that she had threatened to kill him. Held sufficient corroboration under Civil Code Cal. § 130, forbidding a divorce on the uncorroborated evidence or admissions of the party.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

J. W. Hughes, (A. L. Hart, of counsel,) for appellant. Chauncey H. Dunn, for respondent.

BELCHER, C. This is an action for divorce on the ground of extreme cruelty. The complaint charged the defendant with many acts of cruelty, extending over a period of several years, and the answer admitted all the averments of the complaint in this regard. After trial, the court found that all the averments of the complaint were true; that \$5,000 would be a fair share of the community property for

the plaintiff, and that the property rights of the parties had been amicably settled; that the defendant was better fitted to have the care, custody, and control of the children than the plaintiff, and was better able to support them. A decree was accordingly entered, dissolving the bonds of matrimony between the parties, and awarding to the plaintiff \$5,000 as her share of the property, and to the defendant the care and custody of the two minor children. Within 10 days after the decree was entered the plaintiff changed her attorney, and moved for a new trial, on the ground that the findings were not justified by the evidence, because they were supported only by her own uncorroborated testimony. The motion was denied, and thereupon she appealed from the judgment and order. At the trial the plaintiff was a witness, and testified to many acts of cruelty on the part of the defendant, such as repeatedly calling her harsh and opprobrious names, threatening her with violence, seizing her with great force and violence, pinching her arms until they were black and blue, striking her upon the face and body, leaving black and blue marks from his blows, throwing her upon the floor in a rude, angry, and threatening manner, and compelling her to leave the family residence and seek shelter elsewhere, which acts, as she said, were committed without any fault or provocation on her part, and had caused her great physical pain and mental anguish and sorrow. She also testified that about two years before—and this was alleged in the complaint—the defendant commenced an action against her for divorce on the ground of cruelty "without any cause therefor, and finally dismissed the same after having shamed and humiliated me by the charges which he brought against me." The complaint in the former action was introduced in evidence, and it stated, among other things, that the defendant, (plaintiff here,) by innuendoes and slurs and untruths, had attempted to poison the minds of the children of the parties against the plaintiff "for the purpose of causing them to mistrust and dislike plaintiff, and to deprive plaintiff of the affection of his said children naturally due him; that continuously since said defendant's return from Chicago, as aforesaid, she has said in the presence of and to said children, when plaintiff was absent or about to be absent from the city of Sacramento, the residence of plaintiff and defendant, attending to plaintiff's business, that she hoped some accident would befall plaintiff, so that he could not, or, for some other reason, would not, or ever, return to defendant or to said children; that on or about the 3d day of January, A. D. 1886, she (defendant) threatened to kill plaintiff, and has since said she then intended to do so." Grove L. Johnson, the plaintiff's attorney, was also called as a witness in her behalf, and testified that he was well acquainted with the plaintiff and defendant; that he had known them for many years; that the defendant, in conversation with him, had admitted that on several occasions he had used vio-

lence upon the plaintiff; that he had seized her by the arm, and forcibly prevented her from leaving the house on several occasions; that on one occasion he had pinched plaintiff's arms, and that he had also used harsh and opprobrious names to her. He further testified that the defendant is a man of strong and ungovernable temper, and accustomed to have his own way; that the plaintiff is a small, frail, and delicate woman, and her constitution is such that she cannot stand much mental suffering; that he knew of the divorce proceedings brought by defendant against the plaintiff, in which defendant charged plaintiff with cruelty; that Mrs. Cooper was afraid to and did not contest the same; that Mr. Cooper dismissed them of his own motion after they had come partly to trial; that said divorce proceedings had caused Mrs. Cooper much sorrow and trouble and grievous mental suffering, and had troubled her mentally a great deal, as the witness had ascertained and seen from many conversations with her. The above was, in substance, all the testimony showing cause for a divorce, and the only question is, was the plaintiff's testimony sufficiently corroborated to meet the requirements of section 130 of the Civil Code? That section provides: "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties." Under this section it evidently is not necessary that the plaintiff's testimony be corroborated as to every fact and circumstance testified to. It is enough if there be corroboration as to some fact or facts which is or are sufficient to support the action and justify the entry of a decree in plaintiff's favor. *Matthai v. Matthai*, 49 Cal. 90. In *Evans v. Evans*, 41 Cal. 103, the court, speaking of the statute then in force, and which was similar to the provision of the Code above quoted, said: "The statute does not define to what extent the corroboration must go. In the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence, the statute only requires that there shall be some corroborating evidence." We think there was some corroborating evidence in this case. One of the acts of cruelty alleged in the complaint was the institution by the defendant against the plaintiff of a former suit for divorce, without any cause therefor. The charges made in the complaint in that case, if untrue, were extremely cruel and unjust, and such as no husband should ever be permitted to make against his wife. That the charges were made was shown by the complaint itself, which was introduced in evidence; and that they were untrue must be presumed from the fact that the plaintiff voluntarily dismissed his suit, though he had by threats and fear prevented the defendant from appearing to contest it. These facts, with the testimony of Mr. Johnson, certainly corroborated the plaintiff's testimony as to one act of extreme cruelty on the part of the defendant, and we think this

sufficient corroboration to uphold the judgment. It follows, in our opinion, that the judgment and order should be affirmed, and we so advise.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

PATERSON, J. I concur in the judgment on the ground that the plaintiff is not a "party aggrieved" within the meaning of sections 657, 938, Code Civil Proc. Plaintiff was granted all the relief she prayed for. She was asked by the court whether she wanted the children, and she replied that she did not, because Mr. Cooper had always been kind to them, always had the care of them, and could take better care of them than she could. The property rights of the parties had been settled amicably between them. There is nothing, therefore, in the record upon which the plaintiff can base a claim of grievance; and I am at a loss to understand the object of the motion for a new trial and of this appeal. While it is true, as stated in *McBlane v. McBlane*, (Cal.) 20 Pac. Rep. 61, cited in the briefs, the public has an interest in the result of every action for divorce, and the court, on grounds of public policy, should exercise its discretion to the fullest extent in securing to both parties a full and fair hearing on the merits, the public has no right to appeal, nor has any one the right to represent it. Plaintiff probably desires a new trial for the purpose of securing some additional relief in regard to property matters, but as to such matters the public has no more interest than it has in any other action involving property rights.

88 Cal. 111

BOYS v. SHAWHAN *et al.* (No. 13,353.)

(*Supreme Court of California*. Feb. 24, 1891.)

JOINT DEFENDANTS—SEVERAL JUDGMENT.

Where an action for money is brought against three defendants alleged in the complaint to be indebted to plaintiff, and the court finds that all the allegations of the complaint are true, a judgment against two of them only, on such finding, is erroneous.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Henry McPike, for appellants. *D. C. Ward*, for respondent.

PER CURIAM. The plaintiff brought this action against W. D. Shawhan, Mary Shawhan, and John E. Shawhan, and alleged in his amended complaint that on the 22d day of December, 1886, "the said defendants, and each of them," were indebted to his assignor in the sum of \$408.55, for certain merchandise "sold and delivered to said defendants at their special instance and request." The defendants answered the complaint, denying all of its allegations. The court, having tried the cause without a jury, made the following finding of fact: "That all the allegations and averments in the plaintiff's amended complaint are true;" and, as a

conclusion of law, found "that said plaintiff is entitled to judgment against said defendants W. D. Shawhan and Mary Shawhan, and each of them," for the sum claimed in the complaint. Judgment was thereupon entered against the defendants W. D. Shawhan and Mary Shawhan only, and from this judgment they have appealed. It was error in the court below to render judgment against them upon the facts found by it without at the same time rendering judgment against their co-defendant, John E. Shawhan; and for this error the judgment is reversed, and the cause remanded for a new trial.

88 Cal. 112

Ex parte MORRISON. (No. 20,802.)

(*Supreme Court of California*. Feb. 24, 1891.)

HABEAS CORPUS—REGULARITY OF JUDGMENT.

Where a judgment of conviction, regular on its face, is rendered against a vagrant under Pen. Code Cal. § 647, he will not be released from confinement in the house of correction on *habeas corpus* on the ground that the first clause of that section is unconstitutional, it not appearing under which clause he was convicted.

In bank. *Habeas corpus*.

J. A. Harris, for the prisoner. Wm. S. Barnes, for the People.

DE HAVEN, J. This is a proceeding upon *habeas corpus*. It appears from the return to the writ issued that F. P. Morrison, the person in whose behalf the writ was issued, is detained by the superintendent of the house of correction of the city and county of San Francisco, under and by virtue of a judgment of the police court of said city and county, convicting the said Morrison of the crime of vagrancy, and adjudging that he be imprisoned therefor in said house of correction for the period of 90 days. The judgment was rendered February 5, 1891. The judgment appears to be regular on its face, and it does not appear therefrom under which clause of section 647 of the Penal Code said Morrison was convicted. It was argued that the first clause of this section is unconstitutional, but we cannot assume, for the purpose of passing on this question, or of discharging the prisoner, that this is the particular clause under which the conviction was had. The complaint, upon which the judgment was rendered, is not in this record. We cannot say from the record before us that the judgment is void. The said Morrison is remanded, and the writ discharged.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.; PATERSON, J.; HARRISON, J.; SHARPSTEIN, J.

88 Cal. 30

WISE et al. v. WILLIAMS et al. (No. 13,071.)

(*Supreme Court of California*. Feb. 12, 1891.)

ADMINISTRATORS—ALLOWANCE OF CLAIMS—RIGHTS OF HEIR—NOTICE TO CREDITORS.

1. Where a husband and wife declare a homestead on property they have mortgaged, the mortgage must be presented against the husband's estate for allowance after his death, notwithstanding the complaint in foreclosure expressly waives all recourse to any property of the estate except that described in the mortgage.

2. Under Code Civil Proc. Cal. § 1490, providing that notice to creditors of an estate "must be published as often as the judge or court shall direct, but not less than once a week for four weeks," a notice published for the first time on July 24th, and once a week thereafter, till August 21st, inclusive, while the order of publication was not made till August 2d, is ineffectual, and a claim presented December 20th following, and allowed, is in time.

3. Though by Code Civil Proc. Cal. § 2011, the affidavit of publication is made evidence of the fact, it is *prima facie* evidence only; and where the files of the newspaper in which the notice was published show that it was published once a week from July 24th to August 21st, inclusive, they will prevail over the affidavit that the notice was published on August 28th also.

4. Though a mortgage is allowed against the estate by the administratrix, and approved by the judge, the heir is not bound thereby, but may, under Code Civil Proc. Cal. § 1636, giving him the right to contest claims that have been improperly allowed in the probate proceedings, show, in an action to foreclose the mortgage, that the debt has been paid, or that payments thereon have not been credited.

5. The appellate court cannot direct final judgment upon evidence.

In bank. Appeal from superior court, Merced county; CHARLES H. MARKS, Judge.

Edward P. Cole and E. Jackman, for appellants. J. K. Law, for respondents.

PER CURIAM. This was a suit for the foreclosure of a mortgage. The trial court gave judgment for the defendants, and the plaintiffs appealed. This is the second time the case has come before the appellate court. The former judgment, which was upon demurrer, was reversed upon the ground that the complaint was not subject to the objections taken by the demurrer; and the court held, among other things, that the allowance of a claim by an administrator, and its approval by the judge, stopped the running of the statute of limitations. See 72 Cal. 544, 14 Pac. Rep. 204. As a matter of course, nothing that was then decided is open to question now. The facts material to the present appeal are as follows: The mortgage sought to be foreclosed was made in 1877 by John Connell and Sarah, his wife, to secure the payment of a note made by the former. After the execution of the note and mortgage they declared a homestead upon the property, and subsequently the husband died, leaving an estate of less than \$10,000. On the 19th of July, 1880, letters of administration were issued to the wife, and, in accordance with section 1491 of the Code of Civil Procedure, she gave notice to creditors to present their claims within four months from the first publication of the notice. The first publication was on July 24, 1880, but there was no order for publication until August 2d. The findings show a sufficient publication of the notice, but the evidence does not, as will be explained below. On November 27th a decree of due notice to creditors was made. On the 20th of the following December the plaintiffs presented their claim, and it was allowed by the administratrix as presented, and approved by the judge, and filed on the next day. On the 27th of the same month an order was made that the homestead be set apart to the widow, and a little more than a year afterwards she

died. Letters of administration upon her estate were issued to the defendant Hallinan, and letters upon her husband's estate were issued to the defendant Williams. The complaint states that the plaintiffs "expressly waive any and all recourse upon said note and mortgage against any property of the estate of said John Connell, other than the land above described as included in said mortgage." It does not appear what, if any, interest the wife had in the property at the time the mortgage was made; and nothing is said, either in the pleadings, findings, or evidence, as to the presentation of a claim to the wife's administrator. The counsel seem to have assumed that it was not necessary to present such a claim, and, following their lead, we have confined our examination to the husband's estate.

1. Inasmuch as a homestead had been declared upon the property, it was necessary to present a claim against the husband's estate, notwithstanding the waiver contained in the complaint. *Camp v. Grider*, 62 Cal. 20; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. Rep. 375; *Association v. King*, 83 Cal. 440, 23 Pac. Rep. 376. As has been stated, the claim was presented and allowed by the administratrix, and approved by the judge. But the respondents contend that such presentment and allowance was after the time prescribed by law, and, for that reason, of no effect. We do not agree with respondents on this point. The first publication was made on July 24, 1880, but no order for publication was made until August 2d. Now we do not think that a publication in advance of the order of court was of any validity. The statute provides that the notice "must be published as often as the judge or court shall direct, but not less than once a week for four weeks." Code Civil Proc. § 1490. The legal period of publication is to be fixed by the judge. Until he acts, it cannot be known whether the period of publication will exceed the statutory minimum or not. Without an order therefor there can be no legal period of publication, and consequently no authority for publishing. Now, inasmuch as the paper was a weekly paper, and the first publication was on July 24th, there must have been two publications before the order was made, viz., one on July 24th and one on July 31st, and, under the view we have taken, these two publications were of no effect. Notwithstanding this, however, if the affidavit were the only evidence on the subject, a sufficient publication would be shown; for it states that notice was published "once every week from the 24th day of July, 1880, to and until the 28th of August, 1880, both days inclusive," which would give four publications after the order was made, viz.: August 7th, 14th, 21st, and 28th. But the affidavit is not the only evidence on the subject. The files of the newspaper itself were introduced, and they showed that the notice was not published on August 28th. This contradicted the affidavit. Now, while the affidavit was made evidence by the statute, it is *prima facie* evidence only. *Id.* § 2011. And the newspaper itself is certainly more satisfactory evidence of its contents than any affidavit

would be, and we do not regard the decree, establishing due notice to creditors, as conclusive. It results that there were only three publications after the order for publication was made, and this is below the statutory minimum. The presentation and allowance of the claim were therefore in time.

2. The court found that all that was due upon the claim had been paid except \$861; and the appellants contend that this finding is not sustained by the evidence, and that the allowed claim could not be impeached by evidence that it had been paid previous to its allowance. There is evidence sufficient to sustain this finding of the court, and it was competent in this case for the son and heir of the deceased mortgagor to show either that the debt to secure which the mortgage was given had been paid, or that payments thereon had been made, and not credited. The allowance of the claim by the administratrix, and its approval as allowed by the judge of the court in which the estate of the deceased mortgagor is being administered, are not conclusive upon the heir. Such action would not of itself be conclusive, if the administratrix or plaintiffs were proceeding in the superior court to obtain a decree in the probate proceeding directing that such allowed claim be paid, and no greater effect can be given to it in this action. The plaintiffs cannot, by resorting to this action, deprive the heir of the right given him by section 1636 of the Code of Civil Procedure to show that their claim was improperly allowed in the administration proceedings.

3. The cause of action is not barred by the statute of limitations. As we have stated, it does not appear what, if any, interest the wife had in the property at the time the mortgage was made, and as no claim was presented against her estate, if she had any separate interest it could not be reached by the case as it is presented. And, so far as her rights as successor in interest of her husband are concerned, it was held upon the former appeal that the allowance of the claim stopped the running of the statute of limitations.

4. Appellants ask that final judgment in their favor be directed. But it is the settled rule here that the appellate court cannot direct final judgment upon evidence. The case must go back to the trial court to have the facts established. Judgment and order reversed.

87 Cal. 523

UNDERWOOD v. UNDERWOOD. (No. 13,688.)

(Supreme Court of California. Jan. 28, 1891.)

SETTING ASIDE JUDGMENT—DISCRETION OF COURT.

On appeal the court below will not be held to have abused its discretion in setting aside a judgment quieting title in plaintiff, on a showing that the disclaimer filed by defendant's attorney was under a misapprehension on his part that defendant's conveyance of the property to a third person was made before commencement of the suit.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Horace Bell and H. M. Smith, for appel-

lant. *T. J. De Puy* and *C. C. Stephens*, for respondent.

PATERSON, J. This is an action to quiet title to several parcels of land situate in the city of Los Angeles. A *lis pendens* was filed by plaintiff at the time the action was commenced. The defendant filed her verified answer, denying that plaintiff had any right, title, or interest in any of the lots described in the complaint. After this answer was filed, the defendant sold and conveyed to the respondents, John S. Underwood, Mary E. Regan, and Samuel A. Moore, all of the lots described in the complaint, except "lot 13 in block A." Thereafter, the attorney of defendant having died, she employed another attorney, who, after being informed by her of all the facts, filed an amended and unverified answer, disclaiming on the part of the defendant any interest in any of the property described in the complaint, except said lot 13. The court found that defendant was the owner of said lot 13 in block A, and that plaintiff was the owner of the other lots in controversy, and judgment was entered accordingly on April 18, 1889. On July 22, 1889, the defendant moved the court to set aside the judgment, and for permission to amend her amended answer by striking out said disclaimer, on the ground that the amended answer containing the disclaimer had been filed through inadvertence and mistake. In support of her application she filed an affidavit setting forth that upon the advice of her first attorney she had sold the property (described in the disclaimer) to said Underwood, Regan, and Moore in good faith, and for valuable consideration; that, upon the death of her attorney, she had employed another counsel, and the latter, after being informed of all the facts, filed an amended answer containing the disclaimer, "he believing and understanding that said conveyances were made prior to the commencement of this action;" that "said disclaimer was an inadvertence and mistake of fact; that judgment was entered against her by reason of said mistake, and that she had no notice of the state of pleadings until July 10, 1889, when a writ of assistance was served on one of her grantees." Affidavits were filed by John S. Underwood and Mary E. Regan, alleging that the facts set forth in defendant's affidavit were true, and asking that they might be allowed to come in and defend against the claim of the plaintiff. The attorney who filed the amended answer made an affidavit showing that when he drew it he understood that the property described in the disclaimer had been conveyed by defendant before the suit was commenced. Counter-affidavits were filed by Horace Bell, showing that they had taken a portion of the property described in the disclaimer from the plaintiff for a valuable consideration subsequent to the judgment, without notice of any transfer by defendant, and after a search of the record, which failed to disclose any conveyance from defendant, and after the attorney for defendant had informed them

that he knew of nothing that would invalidate the conveyance to them. The court granted the motion to set aside the judgment, and from its order the plaintiff has appealed. The showing made on motion to set aside the judgment is a very weak one, but we are always unwilling to interfere with the decision of the court below in matters of this kind. The attorney for the defendant doubtless acted in good faith, and, as he supposed, for the best interest of his client, but under a mistake of fact as to the time when defendant had parted with her interest in the lots. We cannot say, under all the circumstances, that the court below abused its discretion. The order appealed from is therefore affirmed.

We concur: **HARRISON, J.**; **GAROUTTE, J.**

87 Cal. 610

HOYT v. SAN FRANCISCO & N. P. R. Co.
(No. 14,066.)

(*Supreme Court of California.* Feb. 3, 1891.)

On rehearing. For former report, see ante, 160.

DE HAVEN, J. The appeal in this case was dismissed by the court in bank on December 11, 1890, and a rehearing thereafter granted. Upon full consideration we are satisfied with our former opinion, and for the reasons therein stated the motion to dismiss the appeal must be granted. It is true that for some purposes a day is regarded as an indivisible unit, and that, in the cases where such rule properly applies, courts refuse to look into fractions of a day for the purpose of determining which of two acts was first in point of time; but, when the question whether one legal right shall have priority over another depends upon the order of events occurring on the same day, this rule is necessarily departed from. *Bank v. Burkhardt*, 100 U. S. 689; *Louisville v. Bank*, 104 U. S. 474. And in *Maine v. Gilman*, 11 Fed. Rep. 214, it is said: "It is insisted that the law knows no fractions of a day. But this ancient maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, or a decree was entered, or an attachment was laid, or any title accrued." In the case of *Hill v. Finnigan*, 54 Cal. 313, the material fact, as to whether the notice of motion to dismiss was given prior to the time of filing the transcript, was a matter of controversy, and what was there said about not looking into fractions of a day for the purposes of dismissing an appeal must be considered as having reference only to the then state of facts before the court, and the general language there used should not be considered as furnishing a rule for a case like this, in which it is not denied that the notice of motion to dismiss was given before the filing of the transcript on appeal. Appeal dismissed.

We concur: **BEATTY, C. J.**; **McFARLAND, J.**; **PATERSON, J.**; **SHARPSTEIN, J.**; **HARRISON, J.**; **GAROUTTE, J.**

87 Cal. 329

BAKER v. BRICKELL *et al.* (Nos. 12,992,
13,574.)

(Supreme Court of California. Feb. 4, 1891.)

HUSBAND AND WIFE—OCCUPATION OF GOVERNMENT
LAND—BONA FIDE POSSESSION—TRUST.

In 1860 a married man went into possession of part of the government land known as the "Outside Lands" of San Francisco. In 1863 he died, and his wife, with their children, continued in possession, and was in possession at the passage of Act Cong. March 8, 1866, (14 U. S. St. at Large, p. 4,) relinquishing and granting the right and title of the United States in said land to the city of San Francisco, in trust, to be "disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof by themselves or tenants on the passage of this act," on such terms as the legislature should prescribe. Thereafter the city deeded the land to the widow, she having complied with the various ordinances and legislative acts relative thereto. *Held*, that she took the lands not absolutely in her own right, but in trust for her children. Per BEATTY, C. J., dissenting.

For majority opinion, see ante, 489.

BEATTY, C. J., (*dissenting*.) Respondent's petition for a rehearing of this cause having been denied by the court, I cannot allow the occasion to pass without expressing my dissent from the conclusion of the department upon the point principally considered in the opinion of Justice THORNTON. If the decision of the court had been rested upon the proposition that under the homestead laws of California Mrs. Baker, on the death of her husband, became by right of survivorship the sole and exclusive owner, as against her children, of the entire estate in the lands covered by their joint declaration of homestead, irrespective of its value at the time of such declaration or of her husband's death, I might not have dissented from that view. But the judgment and order of the superior court are reversed, and the cause is remanded for a new trial, to be had in accordance with the views expressed in the opinion, which thereby become, and must remain, the law of the case. Among the views so expressed is one from which I feel constrained to express my dissent. It is held—as I understand the opinion—that Mrs. Baker, by mere force of the act of congress of 1866, granting to the city of San Francisco the outside lands, and independent of any right accruing to her under our homestead laws, became entitled to a conveyance from the city of all the lands left in her possession by the death of her husband, to be held by her in her own right, to the exclusion of her children. This conclusion is based upon a narrow and literal construction of the clause of the act requiring the city to convey the lands granted to the parties in *bona fide* actual possession thereof by themselves or tenants at the date of the passage of the act. It assumes either that the person lawfully in possession by himself or tenant at the date of the passage of the act was the sole object of the bounty of the government, without regard to the character or capacity in which he had obtained or held the possession, or it assumes that when John H. Baker died in 1863, leaving his widow and minor children in possession of the

land in controversy, he had no estate in the land to which they could succeed, and that the possession so devolved upon her as head of the family was held by her absolutely in her own right, and not in any representative capacity. If this is true, —if the children of John H. Baker inherited no interest in this land from him when he died,—it must be equally true that if their mother also had died before the passage of the act of 1866, they would have inherited nothing from her. What, then, would have happened? Being minors and orphans, they and the land would naturally have passed into the charge and custody of a guardian, who would have been found in the *bona fide* actual possession of the land, as head of the family, at the passage of the act of 1866. Such guardian would have been just as clearly within the literal terms of the act in the case supposed, as Mrs. Baker actually was in the case as it is; and if the representative character in which she held the possession, and her trust relation to her children, must be ignored, so must the representative character and trust relation of the guardian have been ignored; and on precisely the same reasoning which sustains the exclusive right of Mrs. Baker to receive a conveyance of the land, it must have been held that the guardian was entitled to a conveyance of the land to the exclusion of his wards. But I venture to say that no court would have carried the principle here decided, to this, its logical and necessary consequence. In my opinion it would have been held, in the case supposed, that it was the duty of the guardian to obtain a conveyance of the lands from the city, and that he would hold them, when so conveyed, in trust for his wards, according to their several and respective rights as heirs and successors of their deceased parents. And, upon the same grounds, I am of the opinion that Mrs. Baker, when she obtained a conveyance of these lands, (considering the matter without reference to her rights under the homestead law,) held them in trust for her children, according to their respective rights as heirs of her deceased husband.

88 Cal. 121

DONAHUE v. MEISTER. (No. 14,074.)

(Supreme Court of California. Feb. 25, 1891.)

QUIETING TITLE—JURY TRIAL—MINING CLAIMS—
NOTICE OF LOCATION.

1. Under Const. Cal. art. 1, § 7, providing that the right to trial by jury shall be secured to all and remain inviolate, defendant, in an action to quiet title under Code Civil Proc. Cal. § 738, is entitled to jury trial on the issues of prior possession and ouster when his verified answer shows that shortly before the commencement of the action he was rightfully in possession, and was ousted by plaintiff and wrongfully kept out of possession by him.

2. Where, by a local mining custom, notices of location of quartz claims must be in writing, and "posted conspicuously in a conspicuous place upon the claim located at or near the lode line," a notice of location written on paper, folded with the writing inside, and placed on a mound of rocks about three feet high, under two flat rocks, to protect it from the weather, but with a part of the margin exposed to view, is properly posted, especially where it appears that the claimant properly marked the boundaries, and for three years, until ousted, performed annually the amount of labor required by law.

In bank. Appeal from superior court, Nevada county; WALLING, Judge.

Thos. S. Ford, for appellant. *John Caldwell*, for respondent.

McFARLAND, J. This is, in form, an action, under section 738 of the Code of Civil Procedure, to quiet title to a certain quartz mining claim and land called by plaintiff the "Uncle Sam" claim. The complaint is in the usual form, and contains an averment that plaintiff is in possession of the premises in contest. In the answer all the averments of the complaint are denied except that of possession. It is further averred in the answer that the south half of said Uncle Sam claimed by plaintiff is identical with the north half of a quartz mining claim, called the "Waldeck," belonging to defendant; that defendant is entitled to the possession of said south half of said Uncle Sam, and "was lawfully possessed thereof" for several years next preceding April 6, 1889; that on said April 6th "the plaintiff wrongfully and unlawfully entered thereon" and ousted defendant therefrom; and that plaintiff wrongfully withholds the same from defendant. In the prayer of the answer the defendant asked, in addition to general relief, that he "be restored to the possession of that

part of the Waldeck ledge described as being in controversy." At the proper time defendant demanded a jury "on the issue raised by his said averments of prior possession and ouster." The plaintiff opposed the demand because the case was a proceeding in equity; and on that ground the court refused a jury. The court then proceeded to try the case, and, after making certain findings, rendered judgment against defendant, from which he appeals. And the first point made by appellant is that the court erred in denying his demand for a jury. We think that in this contention appellant is right.

It is quite clear that the legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the state constitution which says that "the right to trial by jury shall be secured to all, and remain inviolate." Article I, § 7. And section 738 of the Code must not be construed as intending to violate that provision of the constitution unless that construction be unavoidable. Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the constitution was adopted, and therefore either party has the right to have such issues tried by a jury. (*Taber v. Cook*, 15 Mich. 322,) and section 738 need not be construed as attempting to take away that right. The main effect of said section is to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if, in such a suit, issues arise which are clearly legal and cognizable in a court of law, the Code does not take away the right to have such issues tried by a jury. Formerly an action like the one at bar could not have been maintained at all. Plaintiff would have been compelled to wait until the defendant chose to disturb his possession by an action. The Code enabled one in his position to commence the legal contest; but when he thus brings a defendant into court he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right, under the constitution, to have them tried. The nature of the action to quiet title before and after the Code provision is clearly stated by FIELD, C. J., in *Curtis v. Sutter*, 15 Cal. 262. At that time the provision of the statute was substantially as it is now, except that the plaintiff was required to be in possession. The learned judge says: "This statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. Such bills were of two classes. Those of one class lay where the right which the plaintiff asserted was controverted by numerous persons, holding distinct and separate interests upon a common source. A right of fishery asserted by one party, and controverted by numerous riparian proprietors on the river, and the right to tithes claimed by a parson and controverted by his parishioners, are instances cited

by Story where a bill of this nature would lie. Bills of the other class lay where the plaintiff was in possession of real property, and his possession had been disturbed by legal proceedings, in which his title had been successfully maintained. To the prosecution of bills of this latter class the concurrence of three particulars was essential,—the possession in the plaintiff, the disturbance of that possession by legal proceedings on the part of the defendant, and the establishment of the right of the plaintiff by judgment in his favor in such proceedings. *Shepley v. Rangely*, 2 Ware, 249. The necessity of bills of this class naturally arose from the nature of the action of ejectment, which being founded on a fictitious demise between fictitious parties, a recovery therein constituted no bar to another action. Thus the successful party might, by repeated actions, be subjected to vexatious and harassing litigation, and to procure repose courts of equity interpose and finally determine the controversy. It was in this way only that adequate relief could be administered. *Devonsher v. Newenham*, 2 Schoales & L. 208; *Welby v. Duke of Rutland*, 2 Brown, Parl. Cas. 39. Under the statute of this state it is unnecessary for the plaintiff to delay seeking the equitable interposition of the court until he has been disturbed in his possession by the institution of a suit against him, and until judgment in such suit has been passed in his favor. It is sufficient if, while in the possession of the property, a party out of possession claim an estate or interest adverse to him. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted. It does not follow from the fact that the suit is brought in equity that the determination of questions purely of a legal character in relation to the title will necessarily be withdrawn from the ordinary cognizance of a court of law. The court, sitting in equity, may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Upon the verdict of the jury, if a new trial be not granted, the court will then act, by either dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and of no effect, and awarding a perpetual injunction against its assertion to the property in question. There is no difficulty in so conducting a suit, under the statute, as to fully protect the legal rights of the parties, and at the same time to secure the beneficial results afforded by a court of equity in bills of peace, which is repose from further litigation." In *People v. Center*, 66 Cal. 551, 5 Pac. Rep. 263, 6 Pac. Rep. 481, which was an action like the one at the bar, the court refers to *Curtis v. Sutter*, and says: "It may be the original defendants herein would have been entitled to demand a jury to try the legal issue as to the right of possession, but a jury was expressly waived." And there is the same intimation in *Hyde v. Redding*, 74 Cal. 497, 16 Pac. Rep. 380. Counsel have not called our attention to

any cases in this state where the point now under discussion has been clearly decided adversely to appellant's contention, although cases can no doubt be found where the court, not having its attention closely called to the subject, has assumed that the proceeding under the Code is an equitable action, and referred to the general rule that courts of chancery need not call upon juries for assistance. But it is clear that the right to a jury trial cannot be avoided by merely calling an action equitable. If that were so, the legislature, by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat the constitutional provision on the subject. In *Hyde v. Redding*, supra, the court intimates that the proceeding under section 738 of the Code may be either a suit in equity or an action at law. It is really a statutory action. The Code confers equitable rights so far as it grants the power to maintain the action at all, and the decree is in form equitable; but if it has to deal with ordinary common-law rights clearly cognizable in courts of law it is to that extent an action at law. And the proper course to be pursued in such a case is clearly pointed out by Judge FIELD in *Curtis v. Sutter*, supra.

The point here involved has been more thoroughly considered by the supreme court of Pennsylvania than in any other tribunal to which our attention has been called. In that state the legislature attempted in several different acts to avoid the right of trial by jury by providing new proceedings in equity for the determination of issues which parties clearly had the right to have determined by courts of law and juries; and in every instance the court held, either that the act was unconstitutional, or that it should be so construed as not to cut off the right of trial by jury. In one of those cases the court, in commenting on the attempt above stated, say: "If this could be done, there is not an ejectionment in the common-law courts which, by the inversion of parties, could not be brought into a court of equity." *Haines' Appeal*, 73 Pa. St. 172. In another case the court, speaking of the provisions of the constitution, say: "It cannot mean that the legislature may confer upon the supreme court and the courts of common pleas the power of trying according to the course of chancery any question which has always been triable according to the course of law by a jury." *Norris' Appeal*, 64 Pa. St. 281. In another case the court say: "An act of the assembly transferring any part of the jurisdiction of the common-law courts to a court of chancery, would be unconstitutional." *Tillmes v. Marsh*, 67 Pa. St. 508. The limits of this opinion will not allow more extended quotations from other cases, but the point will be found to be fully discussed and pointedly decided in *Coal Co. v. Snowden*, 42 Pa. St. 488; *Norris' Appeal*, 64 Pa. St. 275; *Haines' Appeal*, 73 Pa. St. 169; and *Tillmes v. Marsh*, 67 Pa. St. 507.

In the case at bar, according to the verified answer, defendant was entitled to possession, and was in the possession, of the disputed premises a short time before

the commencement of the action, and was ousted by the plaintiff. If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit and thus inverting the parties, could not deprive defendant of his right to a jury. If it were not for the provision of the Code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about the right to a jury; but, while the legislature had the power to grant the plaintiff the privilege of himself commencing the suit, it had not the power to give him, and we think did not intend to give him, the privilege of thus depriving defendant of his constitutional right. We have discussed this point somewhat at length because there is a growing tendency to resort to the statutory action to quiet title when other actions would be more appropriate; and it is well to consider the general nature of the proceeding. But, as other difficult questions may hereafter arise where this form of action is used, it is proper to say that the decision in the case at bar rests upon the facts of the case. It is decided here only that where the answer shows that the defendant was rightfully in possession, and was ousted by plaintiff, and wrongfully kept out of possession, upon the trial of those issues the defendant is entitled to a jury trial. For the reason above given the judgment must be reversed; but as there may be another trial of the case it is necessary to notice another point made by appellant.

As we understand from the findings, the court rendered judgment against defendant solely upon the ground that the original notice of location which defendant put on the Waldeck claim on October 7, 1886,—nearly three years before plaintiff's location,—was entirely invalid, and all acts done afterward worthless, because it was not posted in a proper manner. The court found that there was a local mining custom in the district that all notices of location of quartz claims should be in writing, and "posted conspicuously in a conspicuous place upon the claim located, at or near the lode line of said claim, and recorded in the office of the county recorder of said Nevada county." We gather from the findings that defendant's notice was in due form, and was put upon the lode line, and was duly recorded; that he properly marked his boundaries; that he performed annually upon the claim the amount of labor required by law and on that part of the claim which is in dispute; that his location was made in good faith; and that from October 7, 1886, to April, 1889,—the time when plaintiff's location was made,—he "in all other respects complied with law and custom except as to the manner of posting the notice." The notice was placed on the claim in this way: It was written on one side of a sheet of paper which was folded, with the writing inside, and placed upon a mound of rocks three feet high, and upon the notice were placed two flat rocks, so

that about three-fourths of an inch of the margin of the paper was exposed to view, the rest of the paper being obscured by the two stones which covered it. For this reason the court held that the notice was not conspicuously posted, and that therefore the entire location was void. In so holding the court, we think, erred. It was not found that the notice was so placed for the purpose of concealing it; but it was found that the location was made in good faith, and that "in posting said notice defendant, Meister, (who posted the same,) intended protecting it from the weather, and had made prior locations in the same way." It is further found that "other devices were resorted to by miners to protect the notices from the weather, such as covering the notice with glass, or folding it in a box and placing the box in a conspicuous place." If the plaintiff had attempted to relocate the claim immediately after defendant's notice had been placed there, and before defendant had done further acts of possession, and before there had been any legislation by congress upon the subject, and the only question had been as to the sufficiency of the posting, still we think that the posting, as shown by the findings, would have been sufficient. A substantial compliance with mining customs, where good faith is shown, is certainly sufficient. It appears that various devices were resorted to by miners in the district to protect their notices from the weather. The method which defendant adopted is certainly not more objectionable than "folding it in a box." An artificial mound of rocks on the line of a lode is a conspicuous object, which would naturally attract the attention of one seeking information as to a former location of the lode; and the slightest examination of the mound would result in the discovery of the written notice. Plaintiff should have seen it, and if he did see it, and had the actual knowledge which it gave, but concluded to take advantage of what he deemed a defect in the manner of posting, the technical point which he thus made is entitled to but little consideration. It does not appear how much labor and money defendant expended on his claim during the several years preceding plaintiff's entry, except that he expended more than was necessary to comply with the law; but if he had expended large sums of money in developing the mine, and had sold interests to others at high prices, the proposition to forfeit it all because he partly covered his original notice with two stones to protect it from the weather would, we think, have appalled either judge or jury. But the above view is greatly strengthened when we reflect that under the laws of congress the original notice cuts but little figure after the other acts necessary to the valid location of the mining claim have been done. The notice is valuable chiefly as a temporary protection to the locator while the other acts are being performed. Under the law of congress, "distinctly marking the location upon the ground, so that the boundaries may be readily traced," is necessary, and is the main act of original location. *Holland v. Mining*

Co., 53 Cal. 149. In *Gleeson v. Mining Co.*, 13 Nev. 464, BEATTY, J., delivering the opinion of the court, speaks of congressional legislation on the subject as introducing "a system in which the preliminary posting and recording of notices is entirely out of place, except as a means of protecting a claim during the time necessary for tracing the ledge and marking the boundaries of the location. When the location is thus marked, all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete." We quote the above remarks, not to the point that a mining custom requiring the posting of a notice in a particular way can be wholly disregarded, (which is not necessary here to be decided,) but as showing additional reasons why such a custom, when invoked years after all other acts of location have been done, should receive a liberal and not a strict construction. Our conclusion is that (whatever evidence may be presented on another trial) under the facts as shown in the findings before us the the posting of defendant's original notice should be held to have been a substantial and sufficient compliance with the said custom. The judgment is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; DE HAVEN, J.; HARRISON, J.; GAROUTTE, J.; SHARPESTEIN, J.; PATERSON, J.

88 Cal. 268

PEOPLE v. CHEW SING WING. (No. 20,661.)
(Supreme Court of California. March 7, 1891.)

HOMICIDE—INSTRUCTIONS—FUNCTIONS OF THE JURY.

1. Where, on indictment for murder, the evidence does not show circumstances which are made by statute conclusive of murder in the first degree, an instruction that, if the testimony is believed, the prosecution has made out a case of murder in the first degree, by showing premeditation, deliberation, and malice, is erroneous, being in contravention of Const. Cal. art. 6, § 19, prohibiting a charge to the jury with respect to matters of fact.

2. The supreme court, on appeal, cannot weigh the evidence to find that the judgment was warranted notwithstanding an erroneous charge.

3. The error in such instruction is not cured by a subsequent statement by the court not particularly withdrawing his remarks, but merely charging the jury that they must disregard any opinions he may have expressed on the evidence, of which they are the sole judges.

In bank. Appeal from superior court, city and county of San Francisco; J. Mc-M. SHAFTER, Judge.

J. N. E. Wilson and T. D. Riordan, for appellant. W. H. H. Hart, Atty. Gen., for the People.

DE HAVEN, J. The defendant was by information charged with the murder of one Leuy Jing. He was tried, and convicted of murder in the first degree, and sentenced to be imprisoned for life. He appeals from the judgment and order refusing him a new trial. Upon the trial one Chang Fook, a witness for the people, testified: "I was going up Baker's alley

on the night of the 13th of July, 1889, in San Francisco. * * * I saw Leuy Jing coming down the alley and the defendant coming seven or eight steps behind him. I saw the defendant fire a pistol at Leuy Jing. After the defendant fired the shot he ran back up the alley, while Leuy Jing kind of hurried off down towards Dupont street. * * * When I saw Leuy Jing shot he ran down the alley. * * * He said, 'Save life,' and he said, 'Sun Wing has shot me.'" There were also introduced the dying declarations of the deceased, which were, in substance, that defendant shot him; that he turned, and saw him; that defendant followed him out of his room. He further said: "He accused me of asking Cum Moon for money. I did not attempt to hurt him or any one." This was all of the evidence in the case tending to show the circumstances of the shooting, and the court gave the following instruction to the jury: "If the testimony bearing upon the question of the killing, so far simply as the deceased is concerned, and the means by which he came to his end, are believed by you, it would undoubtedly make out a case by the prosecution of murder in the first degree, under the statutes. The testimony tends to show, under the circumstances, that the killing—whoever committed it—must have been deliberate, must have been premeditated, must have been unlawful, and must have been malicious. All the elements of murder in the first degree occur upon the testimony, if believed, as given in the case, and by the conversation of certain persons. The only question would be as to who committed the murder. The testimony is, I believe, uncontradicted, that this man, the deceased, was shot in that alley, in what is called 'Chinatown' in this city, in the night, in the back; that he ran a short distance, fell, and was picked up, and died of that wound; and that the murderer—so far as the immediate evidence is concerned, as to the act of killing—escaped from the spot without any further detection than this given by the testimony of one witness, who professes to have seen the transaction."

1. This instruction contravenes section 19 of article 6 of the constitution of this state, which declares: "Judges shall not charge juries with respect to matters of fact, but may state the testimony, and declare the law." *People v. Ybarra*, 17 Cal. 171; *People v. Ah Lee*, 60 Cal. 85. In *People v. Ybarra*, supra, the court, speaking through COPE, J., say: "This provision is violated whenever a judge so instructs as to force the jury to a particular conclusion upon the whole or any part of the case, or to take away their exclusive right to weigh the evidence and determine the facts. The meaning of the provision is that the judge shall decide upon the law, and the jury upon the facts, and that the former shall not invade the province nor usurp the powers of the latter. The judge has no more right to control the opinion of the jury upon a matter of fact than the jury have to disregard the directions of the judge upon a matter of law." There is no question arising in a trial for mur-

der more peculiarly or purely one of fact than the one whether the killing was done with deliberation and premeditation, or in the decision of which so much is necessarily left to the sound sense, discretion, and experience of the jury, who, under the constitution, are made the exclusive triers of that issue. In *People v. Ah Lee*, 60 Cal. 86, this court said: "And we think it to be well settled in this state that it was error to instruct the jury that there were no circumstances in the case to reduce the offense below that of murder in the first degree. The question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree was one which it was 'peculiarly the province of the jury to determine.'" If the witnesses in this case had testified to a taking of the life of deceased under any of the circumstances enumerated by section 189 of the Penal Code as conclusive evidence of murder in the first degree, such as by means of poison, lying in wait, or torture, it may be that an instruction in the form given in the court below could be upheld; as, in that case, if the evidence were true, it could be said as a matter of law that the crime committed was murder in the first degree, because the act itself is made conclusive evidence of the fact that it was willful, deliberate, and premeditated. But the question arising upon the evidence here is far different; and whether the shooting of Leuy Jing was willful, deliberate, and premeditated was purely a question of fact, to be determined as an inference from all the circumstances surrounding the act, and was solely a matter for the jury to find and declare for themselves. No matter how clearly it may have appeared to the court that the circumstances or manner of the killing, as given by the witness, would, if truly given, furnish sufficient evidence of everything essential to make the killing murder in the first degree, still the constitution forbade the judge to announce his conclusion to the jury, and the defendant was entitled to have that question submitted for decision to the jury alone, as being the only persons authorized to pass upon it, and was entitled to a verdict based upon their own judgment, entirely uninfluenced by the opinion of the court as to what inferences of fact should be drawn from the evidence relating to this particular fact.

2. Nor are we permitted here to weigh the testimony for the purpose of determining whether the verdict of the jury is not right upon the evidence. What was said by the court in *People v. Valencia*, 43 Cal. 556, is in point here: "We are not justified in saying that the error was productive of no injury to the defendants, because we may be satisfied that the jury ought to have found from the evidence, as they did, that the defendants are guilty of murder in the first degree. The question as to the deliberation and premeditation of the defendants is one which is peculiarly the province of the jury to determine; and should we sustain the charge of the court because of the apparently satisfactory character of the evidence, that ques-

tion would virtually be withdrawn from the jury."

3. The error in this charge was not cured by this subsequent statement of the court: "I am not allowed to assist you in any way by suggestions on the testimony. And if you should think that there is any intimation of my opinion, or anything else, you should utterly disregard it. It is only your business to decide these questions of fact." This was not a withdrawal or a qualification of the former statement of the court that the killing of Luey Jing was murder in the first degree, if the witnesses for the prosecution were believed. Other parts of the charge are excepted to, but it is not necessary to pass upon any other assignment of error in the case. Judgment and order reversed.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTE, J.; HARRISON, J.; PATERNON, J.; SHARPSTEIN, J.

(88 Cal. 36)

BOOTH *et al.* v. PENDOLA *et al.*¹ (No. 13,267.)

(Supreme Court of California. Feb. 13, 1891.)

MECHANICS' LIENS—PLEADING.

1. Where two separate buildings are constructed at different times, under different contracts between the owner and the same contractor, a mechanic's lien may be jointly filed against both, without specifying the amount due on each.

2. To render a judgment for a mechanic's lien valid, where the contract is not recorded, there must have been an allegation in the complaint, and a finding of the court, as to the value of the material furnished and the work done.

Affirming 23 Pac. Rep. 200.

In bank. On rehearing. For former report, see 23 Pac. Rep. 200.

PER CURIAM. This is an action brought by plaintiffs having several liens of mechanics and material-men against property owned by Pendola, deceased, in his life time. The findings show that Pendola entered into a written agreement with one Hamilton on March 29, 1887, for the construction of the Western Hotel, in the city of Santa Barbara, and on the 15th of June entered into another contract with said Hamilton to build a cottage near said hotel and on the same lot. Neither of these contracts was recorded. Belt & Co. furnished materials for both buildings, for which Hamilton agreed to pay a reasonable price. The court finds, that the reasonable value of the materials furnished by them was \$363.99. On May 2, 1887, Hamilton entered into an agreement with Backus & Heyl, by the terms of which the latter were to paint the hotel for the sum of \$365, and the cottage for the sum of \$135. The court finds that of these sums \$131.71 remains unpaid. Lightner & Buckingham furnished materials for, and performed certain work on, the cottage, for which Hamilton was to pay the sum of \$335, and performed certain work on, and furnished materials for, the hotel, for which they were to receive the sum of \$975, of which the sum of \$535.35 remains due and unpaid.

¹ Modifying 24 Pac. Rep. 714.

1. The claims of lien filed by Backus & Heyl and Lightner & Buckingham segregate and specify the amounts which they were to be paid on each building, and state the total of the amounts paid to them and the balance due on both buildings. It is not stated, either in the complaint or in the findings, how much remains due on each of the buildings, and the question is presented whether a joint lien can be filed against two buildings where they are separate structures which have been erected at different times, and under different contracts between the owner and the original contractor. It seems to be conceded that a joint lien may be filed against two buildings erected at the same time and under the same contract. We think there can be no doubt that such is the case; and whatever may be the rights of an original contractor, having constructed two separate buildings under two separate and valid contracts, we think that in the case at bar the only effect of the failure to state how much labor and material was furnished one building, and how much the other, is to postpone the liens of these claimants and give precedence to the liens of others.

2. The complaint alleges that Hamilton agreed to pay Backus & Heyl the sums of \$365 and \$135, above referred to, and that he agreed to pay Buckingham & Lightner the sum of \$975 for work done on, and material furnished for, the hotel, and \$335 on account of the cottage; but it is nowhere alleged, nor does the court find, what was the value of any of the materials furnished or any of the work performed. Such allegations and findings were necessary, and the judgment cannot be supported without them. The contract between the owner and Hamilton was never filed for record. It was void, and while it is doubtless true that the contract price agreed upon between Hamilton, the agent of the owner, and the material-men and laborers, is *prima facie* evidence of the value of the materials furnished and labor performed, and would support a finding of value, we think that an allegation and a finding on the subject are essential to support a judgment in actions of this character. All other points made by appellant and worthy of consideration were noticed by Mr. Justice McFarland in the opinion filed in department, (23 Pac. Rep. 200,) and we are satisfied with the conclusions therein reached.

Judgment as to plaintiffs Buckingham and Heyl is reversed, and the cause is remanded for new trial, with permission to amend their pleadings as they may be advised. In all other respects the judgment is affirmed.

(88 Cal. 68)

ALHAMBRA ADDITION WATER CO. v. MAYBERRY. (No. 13,126.)

(Supreme Court of California. Feb. 14, 1891.)

WATER-RIGHTS—CONSTRUCTION OF CONTRACT.

1. W., the owner of land in which a stream took its origin, made an agreement with K., the occupant of government land through which the stream flowed, whereby W. granted to K. the right to enter on W.'s land, and, by means of a ditch, conduct onto the upper part of K.'s land the water from said stream, for use for irrigat-

ing his land during two days of each week; and K. granted to W. the right to enter on the lands occupied by him, and dig such ditches as he wished to, to distribute the water over lands of W. Thereafter K. obtained title to the government land occupied by him, bought part of W.'s land above, through which the stream flowed, subject to a reservation of all water-rights, and from different sources acquired the lands below the lands which he occupied at the date of the contract. Plaintiff succeeded to the lands and water-rights of W.; defendant, to those of K. Held, that defendant could not claim water-rights under the contract and also as riparian owner through the subsequent purchases along the lower part of the stream. PATERSON, J., dissenting.

2. On the land purchased from W. by K., defendant, and not plaintiff, has the right to develop water by digging wells, running tunnels, etc., so long as the natural flow of the stream is not interfered with.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Houghton, Silent & Campbell, for appellant. *Bicknell & White and Chapman & Hendricks, (Cross & Denison, of counsel,)* for respondent.

BEATTY, C. J. There is in the county of Los Angeles a natural stream issuing out of the Canada del Molino, and called "Mill Creek," which flows southward from the mouth of the Canada towards the town of Alhambra. In the year 1860, the land embracing the source of Mill creek, and extending to and including the mouth of the Canada, belonged to B. D. Wilson; south of and adjoining the land of Wilson, and including the lower course of Mill creek, was a tract of government land, embracing 154 acres, occupied by E. J. C. Kewen. Mill creek flowed across this tract and upon other vacant land of the United States. In its ordinary stages, and in its natural condition, the stream flowed but a short distance below the land occupied by Kewen. In order to irrigate higher portions of his land and get a head for conducting water to his house under pressure, it was necessary for Kewen to divert water from the stream on the lands of Wilson, and it was also convenient for Wilson to conduct a portion, at least, of the water used by him in irrigation across the lands occupied by Kewen. Under these circumstances, Wilson and wife on the one side, and Kewen and wife on the other, entered into the following contract: "This indenture, made this seventh day of May, A. D. 1860, between Benjamin D. Wilson and Margaret, his wife, of the first part, and Edward J. C. Kewen and Fannie, his wife, of the second part. Whereas, the said Benjamin D. Wilson is the owner of a certain tract of land called the 'Rincon de San Pasqual,' situate in the county of Los Angeles, the boundaries of which, are set out and described and are known to the parties hereto; and whereas, there is a certain stream of water, which takes its rise upon said tract of land and flows through a glen or Canada, called 'Canada del Molino,' or 'Mill Stream,' which glen is the glen which is in front of the old mill formerly possessed by the mission of San Gabriel, and being upon the banks of a certain fresh-water lake called 'Lake Vineyard,' which stream, after passing through

the said glen, flows over the boundary line of the said tract of land called 'Rincon de San Pasqual,' and on and upon the lands outside thereof; and whereas, the said parties of the second part possess certain lands outside of and bounding on said boundary lines, upon which they are desirous of bringing the said water flowing in said Mill stream, to which the said Benjamin D. Wilson is willing to consent in the manner and mode and for the considerations hereinafter expressed: Now, therefore, this indenture witnesseth, that the parties of the first part for and in consideration of the grants and privileges to said Wilson hereinafter made, and of the free, effective, and undisturbed enjoyment thereof, have granted, released, remised, and conveyed, and by these presents do grant, release, remise, and convey to the parties of the second part the right of entry for themselves and servants in, over, and upon those certain lands, being in the county of Los Angeles and in the tract of land called 'Rincon de San Pasqual,' which said tract of land has been finally surveyed by the United States surveyor general, which said certain lands are those lying within and on the western side of the glen or Canada, called the 'Canada del Molino,' or 'Mill Stream,' the mouth whereof is to the northward of the old mill formerly occupied by the mission of San Gabriel, near the lake now called 'Lake Vineyard,' and after entry thereupon the right of guiding and conducting for two days in each week, commencing Friday and continuing through Saturday—that is, Friday and Saturday of each week—the water flowing in said glen, along the western side, in the upper water ditch now existing therein, a portion whereof was dug and opened in the fall of last year, together with the privilege of keeping the same in repair, the right of digging earth therein, and after guiding and conducting said water along said ditch, as aforesaid, the exclusive right to use and distribute the same for the purpose of irrigating their lands during the said two days in each week: provided, nevertheless, that when the said waters shall not be used for the irrigation of the lands aforesaid, that then they shall be permitted to flow in the manner and mode as directed by said Wilson. To have and to hold the said right of entry as aforesaid and the privileges thereunto annexed to the said parties of the second part, or either of them, owner or owners of the land now occupied by them, and to their or his heirs forever. And the parties of the second part, for and in consideration of the grant hereinbefore made, have given, granted, remised, released, and confirmed, and by these presents do give, grant, remise, release, and confirm to said Benjamin D. Wilson and his heirs and assigns a right of entry for himself and his servants in and upon all the lands now occupied by them, called the 'Rancho del Molino,' being the same tract of land hereinbefore referred to, for the purpose of opening new water ditches upon and through the said lands, or of using those already opened, and for the purpose of erecting and building aqueducts or flumes,

or of using those already erected, and of keeping the said water ditches, flumes, or aqueducts in repair, and for these purposes the right to dig earth; also the right of way in and upon said lands for the purpose of guiding and conducting said water as the said Wilson may desire or wish, through said water ditches, flumes, or aqueducts now or to be opened or built upon or over the said lands in such directions, along such levels, and in such manner and mode as may seem to him expedient and useful, but not so as to wantonly and uselessly injure them, the parties of the second part and either of them shall permit to flow except as hereinafter specified, without disturbance, diminution, or injury, through and over their said lands along the said water ditches, flumes, or aqueducts, to such point or points outside thereof as the said Wilson may from time to time select; subject, nevertheless, to the right of the parties of the second part to use the water for irrigation of the said lands now occupied by them, flowing in the upper or higher ditch, or in any water ditch, flume, or aqueduct used, dug, or erected by the said parties of the first part upon the lands of the parties of the second part, or either of them, as aforesaid, during the two days hereinafter specified, and subject to their further right to conduct so much of the water in the upper ditch at any time when it may be flowing therein through a pipe two inches in diameter as may be sufficient to fill the same for the purposes of domestic use and for the playing of a fountain. And all the parties hereto mutually covenant to perform all the obligations herein contracted, and agree that the agreements and stipulations herein shall bind as well themselves as their heirs, executors, and administrators and assigns. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written. B. D. WILSON. [Seal.] MARGARET WILSON. [Seal.] E. J. C. KEWEN. [Seal.] FANNIE KEWEN. [Seal.]" Subsequently Kewen acquired the title to the government land occupied by him, and he also acquired 50 acres, including the mouth of the canada from Wilson, subject to a reservation of all water-rights, and from different sources he acquired the lands along the course of the stream below and adjoining the land which he claimed and occupied at the date of the contract. All these lands and all his rights under the contract were thereafter sold and duly transferred to the defendant. The plaintiff has acquired certain lands from Wilson, and succeeded to all his rights under the contract. Both parties have continuously claimed and asserted, and in this action are claiming and asserting, the rights secured to their respective predecessors by the contract, and none other. But they differ widely as to its proper construction, and the defendant is using water at times and for purposes which the plaintiff contends are in excess of his rights, and injurious to it.

This action was brought to determine the respective rights of the parties in the waters of the stream. The superior court

sustained the claims of the plaintiff, and made a decree declaring and establishing its rights, and enjoining the defendant from infringing the rights so established. Defendant appeals from the judgment and from an order denying a new trial. The assignment of error principally relied on is that the superior court gave an erroneous construction to the contract of May 7, 1860. But we think the court construed the contract according to the intention of the parties, as shown not only by its terms, but by their subsequent action under it. They seem to have acted upon the assumption that they had a right to divide between themselves the entire flow of the stream, and their agreement, though inartificially drawn and most awkwardly expressed, clearly evinces that such was their intention. Nor can it be urged against this construction that it imputes to the parties an intention to do that which they had no right to do. For, so far as appears, they were at that time the sole occupants of the lands bordering the stream, and the lands through which it flowed after leaving the lands of Kewen belonged to the United States. Such being the case, they had a right to appropriate the entire stream for any beneficial purpose. Evidently they contemplated such an appropriation for the purpose of irrigating the land then in possession of Kewen, and, subject to the limited rights secured to him by the terms of their agreement, for the further purpose of irrigating any lands owned, or thereafter to be acquired, by Wilson, whether riparian to the stream or not. There was nothing unlawful or improper in such an agreement, or in such appropriation and diversion of the water, as between themselves, or as against the United States. It was held by the superior court, correctly, as we think, that by the contract Wilson and his successors acquired, as against Kewen, and those claiming under him, the right to use all the waters of the stream and to divert the same to lands not riparian, subject only to the rights of Kewen, as defined by the contract, *i. e.*, the right to use the entire flow of the stream on Friday and Saturday of each week for the irrigation of the land owned or occupied by him at the date of the contract, the right to maintain his ditch and divert the water on the land of Wilson, the right to draw water therefrom, whenever it might be flowing therein, for domestic purposes, and for playing a fountain, to the capacity of a two-inch pipe, and the right to use the ditches, pipes, and works of Wilson, situated on his land, for the purposes of irrigation on Fridays and Saturdays. It was also correctly held by the superior court that Wilson, in his conveyance to Kewen of the 50-acre tract, reserved all water-rights then possessed by him, whether dependent on the contract or appurtenant to the land conveyed. But it is contended by the appellant that since he has become the owner of the lands bordering on the stream below the land owned or occupied by Kewen at the date of the contract, he has, as a riparian proprietor, a right to insist upon his share of the waters of the stream for the irri

gation of those lands, independent of and superior to any rights of any party under the contract. But he cannot at the same time claim under the contract and against it. As above stated, the case shows that he, as well as his predecessor, Kewen, has always claimed and exercised the rights secured by the contract and wholly dependent upon it. In his answer in this case he makes no claim as a riparian owner, but relies on his construction of the contract. We do not see how he could maintain positions so inconsistent, even if his claim as a riparian owner was clearly well founded. But he seems to have acquired all his riparian land through Kewen. If this is so—if Kewen, after entering into the contract with Wilson, acquired title to the lands below him—his riparian rights as owner of such land became subordinated to the rights he had granted to Wilson by the contract. At least, it is certain he could not at the same time insist upon rights as a riparian owner inconsistent with the right he had granted to Wilson, and at the same time claim and exercise rights granted by Wilson upon no other consideration than his own grant to him. He could not at the same time enjoy the benefits of his contract and repudiate its burden. But, as we have seen, both Kewen and the defendant have always claimed under the contract, and to that they must look for a definition of their rights. In one particular, however, the findings and the decree are unwarranted by the evidence and by a proper construction of the contract and deed from Wilson to Kewen conveying the 50-acre tract. It is found as a fact, and decreed accordingly, that plaintiff, as successor to Wilson, has a right to develop water on the 50-acre tract, and that the defendant has no right to develop water thereon. We do not think that plaintiff has any such right, if by developing water is meant the digging of wells, running of tunnels, and the like. Nor do we think that the defendant is precluded, as successor of Kewen, either by the deed or contract, from digging wells, running tunnels, etc., on the 50-acre tract for the purpose of obtaining water, so long as he does not thereby interfere with or perceptibly diminish the natural flow of the stream. The decree of the superior court should be modified, so far as necessary, to bring it in harmony with these views. The cause is remanded, with directions to the superior court to modify its decree accordingly, and as so modified it will stand affirmed; the appellant to recover costs of the appeal.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; DE HAVEN, J.; GAROUTTE, J.

PATERSON, J., (*dissenting*.) I concur in the judgment in so far as it directs a modification of the decree, but am unable to concur with the majority in the construction of the contract between the Wilsons and the Kewens. I am unable to see in that contract an intention on the part of the parties thereto to convey or partition their water-rights. The object of the contract was to secure water for the tract of

land then owned by the respective parties. Wilson could not get it upon his land—portions of his land—without crossing the lands of Kewen. Kewen could not get it upon certain portions of his land, which he desired to irrigate, without the use of the ditch he had constructed on Wilson's land. It seems that Wilson never used this ditch, but he could get water on his land lying east of Lake Vineyard by ditches, flumes, and aqueducts, through which to carry the water upon and across Kewen's land. Each granted to the other an easement for the purpose of conducting the water upon his land. In fixing the time each was to use the water, they did not necessarily convey any water-right, and, in the absence of an intention to do so clearly appearing in express and unequivocal terms, it should not be held that they did. If a third person had purchased the land lying below the 154.32 acres owned by Kewen, he certainly would not have been bound by the contract between Wilson and Kewen. He could have maintained his right to the use of the waters of the stream as a riparian proprietor, notwithstanding the fact that the stream had its source on the lands of Wilson. *Kidd v. Laird*, 15 Cal. 179; *Canal Co. v. Kidd*, 37 Cal. 311; *Gould v. Stafford*, 77 Cal. 68, 18 Pac. Rep. 879. As between themselves, of course, Wilson and Kewen could dispose of their water-rights as they chose; but they could not affect the rights of lower proprietors, and I am unable to see how the defendant can be estopped from claiming the same right that any other purchaser of the land below the Kewen lands would have had as a riparian owner. If he had owned the lower tract at the time the contract was entered into by Wilson and Kewen, or if he had purchased it before he purchased the Kewen tract, it does not seem to me that he would have lost his rights as a riparian owner of the first tract purchased, simply because his second grantor had entered into the contract with Wilson. I am at a loss to understand why he waived his riparian rights as owner of the lower tract by purchasing the Kewen tract. When he purchased the lower tract he took with the grant all the right that any other grantee could have taken. But, as stated before, it seems clear to me that the only object of the parties to the contract was to secure the right of way, each from the other, for conducting water across the land,—the agreement as to the time each was to use the water being a mere matter of convenience,—and the use of the water contemplated by the parties was confined to the lands then held by them. It may be, and doubtless is, true, that the defendant is entitled to use the water on the Kewen tract only in accordance with the terms of the contract between Wilson and Kewen, and that he would have no right to use the ditch or pipes located above for the purpose of conducting water upon the lower tract,—the tract below the land held by Kewen at the time the contract was made; but as to such lower tract, I think the defendant is entitled to use the water in the same manner as if no contract had ever been

entered into between Wilson and Kewen, and as if defendant had never purchased the upper tract from Kewen. The defendant did not in express terms set up his right as a riparian proprietor in the lower tract, and there may be a doubt as to whether such right has been litigated herein. If the issues and the decree do not cover the rights of the defendant as riparian owner of the tract below, regardless of the contract, what I have said is inapplicable to the case; but it seems to me that the decree determines all the rights of the defendant to the use of the water, without regard to any particular tract of land. I therefore dissent from that portion of the judgment which sustains in part the decree of the court below.

88 Cal. 92

HILL v. WILSON *et al.* (No. 13,586.)WILSON *et al.* v. HILL. (No. 13,587.)

(Supreme Court of California. Feb. 16, 1891.)

VENDOR AND VENDEE—FRAUDULENT REPRESENTATIONS.

1. Defendants sold to plaintiff land and stock in a water company, representing that the water supply to which the stock entitled him was sufficient to irrigate the land and render it capable of producing crops. *Held*, that the representation was not a mere expression of opinion, but a material statement that there was a permanent and sufficient supply of water for irrigation.

2. Where certificates of stock are transferred by indorsement in blank, and not on the books of the company, an offer by the transferee to deliver them to the transferrer on failure of the consideration is a sufficient tender.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Waters & Gird, for appellant. *Hargrove & Bledsoe* and *H. C. Rolfe*, for respondents.

PER CURIAM. The case of *Hill v. Wilson* and wife was brought to foreclose a mortgage given by the defendants for a balance of purchase money alleged to be due for the real estate described therein, sold by the plaintiff to the defendants. To this complaint the defendants pleaded that the plaintiff had induced them to purchase the land and execute the mortgage by certain false and fraudulent representations. The action of Wilson and wife against Hill was one to rescind the sale of the land by Hill to them and cancel the mortgage, on the same grounds set up in their answer as a defense to the action to foreclose the mortgage; so that the issues in the two cases were substantially the same. There was a demurrer to the answer in the foreclosure suit and to the complaint in the action to rescind, which presented the same question. By stipulation the two cases were consolidated and tried together, and are brought to this court in the same transcript. The evidence is the same in both cases, so far as it becomes material on this appeal. The court below found for the defendants in the foreclosure proceeding and for the plaintiff in the action to rescind, and in the latter case decreed that the mortgage be delivered up by the defendant, and that he repay the purchase money paid in

cash, amounting to \$2,000. Hill appeals in both cases.

It is contended by the appellant that neither the answer in the first case nor the complaint in the last was good, because the representations alleged to have been made were not as to existing facts, but were mere opinions; that the offer to rescind was not made in time; and the tender made was not sufficient. The sale made by Hill was of the land, 45 shares of stock in a certain water company, 5 cords of wood, and a cow, for the sum of \$6,000. The shares of stock entitle the holder to so much of the waters of a certain water-ditch, to be used for irrigation and domestic purposes, and was for that reason only valuable in connection with the land. The allegation as to the fraudulent representations was as follows: "The said plaintiff, for the purpose of inducing the defendants to purchase the land and water-right hereinabove described, did falsely and fraudulently and deceitfully represent to defendants, and did by such false, fraudulent, and deceitful representations induce defendants to believe, that the said land was well and abundantly watered by means of the said forty-five shares of said Timber Ditch Water Company, and the water to be furnished for use on said land by the said ditch that the said Timber Ditch would carry, and that there would be flowing therein during all the dry and irrigating season of the year from two to three hundred inches of water, measured under a four-inch pressure, which was and would be sufficient and ample to irrigate the whole of said land, so that the same would produce large and valuable crops of alfalfa and other grasses. And the defendants, relying upon and believing said representations to be true, entered into the contract for and made the purchase of said land and premises, as hereinabove stated, without making any other or further inquiry or examination as to the water supply aforesaid, believing and relying upon the statements and representations of said plaintiff with reference to the said water supply, and, being entirely unacquainted with that portion of the country, entered into said contract and made said purchase of the said land and water-right solely and exclusively upon the representations and statements of the plaintiff that the said land was well and abundantly supplied with water for the purpose of irrigation during all the dry and irrigating season, which was the sole and only inducement to defendants to purchase said premises. That the soil of said lands is dry and sandy in character, which, without an abundant supply of water for irrigation, is absolutely unfit for farming or agricultural purposes of any character whatever, which was well known to plaintiff." These were not the mere expressions of opinion. They were statements of very material and important facts, and such as were well calculated to induce the purchase. It was not a statement that there would be water from a certain stream or ditch, but that the ranch was well supplied with water. This was a statement of an existing sup-

ply of water. Nor could it be construed as a mere statement that at the time the representation was made it was supplied with sufficient water. To say that the ranch was well watered was equivalent to a statement that it had a supply of water sufficient to irrigate and produce crops at all proper seasons of the year; and this was expressly stated. The allegations were sufficient in this respect. The allegation was that the vendees discovered, by the failure of the water supply on the 20th of June, that the representations were false; and they offered to rescind, and tendered a reconveyance of the land, and to return the certificates of stock, on the 20th of August. This, we think, was a reasonable time within which to offer to rescind, and the cause cannot be reversed on this ground.

It is insisted that the tender on the offer to rescind was not sufficient because the cord-wood and the cow were not tendered, and the certificates of stock were not tendered in such form as to vest the title in Hill if the tender had been accepted. The allegation as to the tender is as follows: "Defendants further allege and aver that as soon as they discovered and became convinced of the falsity of the aforesaid representations of plaintiff in regard to the water belonging to and with said land, they offered in good faith to rescind the entire contract of sale and purchase of the said premises between plaintiff and the defendants, made on the 10th day of March, 1888, as aforesaid, and for that purpose defendants made, executed, and acknowledged a good and sufficient deed for the reconveyance to plaintiff by them of the land and premises aforesaid, and on or about the 20th day of August, 1888, and before the commencement of this action, they tendered said deed to plaintiff, and offered to give and surrender to him the full, peaceable, and quiet possession of said premises, and every part thereof, together with the said certificates for the forty-five shares of stock in the Timber Ditch Water Company, being the identical certificates thereupon indorsed, and delivered by the plaintiff to the defendants as aforesaid; and defendants then and there demanded of the plaintiff a full rescission of the said contract of sale and purchase by and between the said plaintiff and defendants, and offered to restore to plaintiff all and every part of the said premises in as good state and condition as they were when defendants received the same, save and except such damage as the trees and other crops have suffered for want of water as aforesaid, and without any fault of defendants; and demanded of plaintiff the restoration and return to them of the full consideration paid on account of said sale and purchase, and of the notes and mortgage upon which plaintiff brings this suit; but to rescind the said contract the plaintiff then and there refused, and still refuses so to do, although well knowing that in equity and good conscience he ought to rescind the same." This was sufficient as to the land and water stock. It appears from the pleadings that the certificates of stock had been transferred to Wil-

son by an indorsement in blank. There does not appear to have been any transfer of the stock on the books of the company. This being so, an offer to redeliver the certificates to Hill was a sufficient tender of them. There was no direct allegation of a tender of the cord-wood or the cow. Counsel for appellant say there was no allegation of the value of the land or of the value of the personal property, and that the personal property not tendered might have been of the value of \$6,000. We can hardly believe cord-wood and cows must come high in San Bernardino county. But when we look at the evidence we find that the cord-wood and the cow were really no part of the consideration for the purchase or the mortgage, and that they, being on the ranch, were "thrown in" in the trade. We think the general allegation of an "offer to rescind the entire contract of sale and purchase," together with the specific allegations set out above, rendered the pleadings both sufficient. In the judgment rendered the Wilsons were required to account for or return all of the property received by them. The allegations and findings of fraud are fully sustained by the evidence, and the findings support the judgment. Some objections are made to certain rulings in the admission and exclusion of evidence, but we find no error in the record. The judgments and orders in both of the cases are affirmed.

88 Cal. 86

NAGLE V. CALIFORNIA SOUTH. R. CO. (No. 13,729.)

(Supreme Court of California. Feb. 16, 1891.)

CARRIERS—INJURIES TO PASSENGERS—ALIGHTING FROM TRAIN.

Plaintiff in an action against a railroad company for personal injuries had bought a ticket on defendant's road to his home, which was the third station from his starting point. At the third stop after the journey began, several passengers, bound for the same place as plaintiff, started up, one of them saying that it was their destination; and plaintiff, going onto the platform of the car, got off in the dark, and, after falling 15 feet into a canyon, discovered that the train had stopped on a trestle some distance from his station. No signal had been given for the stop, and it lasted only a minute or less, so that no one else had time to get off. One of plaintiff's witnesses testified that there had been a washout there; and it was not shown that it was so dark that plaintiff could not have noticed the canyon if he had taken the time to look. *Held*, that a nonsuit was properly granted.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; GEORGE PUTERBAUGH, Judge.

Deakin & Story, for appellant. *Hunsaker & Britt*, for respondent.

FOOTE, C. The plaintiff brought this action to recover damages for injuries caused him by the alleged carelessness and negligence of the defendant. After the introduction of the plaintiff's evidence, a jury having been waived, the defendant moved for a nonsuit, which was granted. From the judgment rendered in the premises, and an order denying a new trial, this appeal is taken.

The facts, as they appear in the evidence of the plaintiff, are that on Sunday night, April 15, 1888, he was traveling on the defendant's railroad. Had bought his ticket at San Diego for La Jolla, a station on that road. He had been on this journey before in the day-time, and knew that at La Jolla there was a platform to get out upon, and that it had a shed over it, and the ground was level around the station at that point. In going from San Diego to La Jolla before, he knew the train had only made three stops,—at Old Town, Morena, and La Jolla. There were five other persons with him on the present trip, passengers to La Jolla. He did not know whether there were lights about La Jolla and the station at night. The train stopped some time at Old Town to water or coal. It then stopped at Morena. After this it again stopped. He did not "know what for." Everybody got astir in the car, and "the men allowed this was La Jolla." There was a kind of rush; that is, of the men in the car who had to get off at La Jolla, thinking they were there. The man along-side of the plaintiff stood up. The latter sat still until the train came to a stop. The man said: "You had better get out quick; the train don't stop a minute." The plaintiff got out, and in doing so "walked right off, and went down a canyon, as our car was standing on a trestle-work." He did not know how long this was after leaving Morena, or how far this place was from La Jolla. He thought he was walking down the steps to "the platform," instead of which he went down the canyon. He fell 10 or 12 feet. Nobody else got out. He sprained his ankle, and suffered other injuries. On cross-examination he did not seem to be certain that the train did stop at Morena, or how long. When the whistle blew he did not see the conductor, the latter having taken up the plaintiff's ticket before the train stopped; nor did he see any of the trainmen when he walked off. The whistle was blown sharply, but how many times he did not remember. On redirect examination he knew that the train stopped twice after leaving San Diego before reaching the trestle; once at Old Town, and once at Morena. The plaintiff thought the distance from where he walked off to La Jolla "must have been a couple of miles." His brother, also a witness for him, stated that he might be "in the neighborhood of a mile;" it may be a little more or less; and that he had heard it was about four miles between Morena and La Jolla. He and the other men in company thought the stop was for La Jolla. There had been no warning that they were going to stop, or that they must keep their seats. "From habit of getting off at the third stopping place we made the move to get off there." On cross-examination he thought the distance to La Jolla from where the plaintiff stepped off was more than a mile. He heard no whistle, and the train stopped on the trestle perhaps a minute. At the time the train stopped neither conductor nor trainmen were in the car. Three of the company went out at one door of the car and three at the

other. Another witness for plaintiff testified that the night was rather dark. That the third stop, which they supposed to be La Jolla, was about midway between Morena and La Jolla; that is, about two miles from either place. He did not know what the train stopped for at the third point. It was "no stopping place at all. It was just simply a stopping place for the train." He got up to get off at a different door from the plaintiff, but did not get off. He thought it "pretty hard to look the length of the car and tell the parties and recognize them." He did not think the train stopped at the trestle over 15 seconds. It was just about time enough to come to a standstill and move on. "It only came to a standstill and moved." He "judged" the trestle was about midway between Morena and La Jolla. He heard none of the trainmen say it was La Jolla. There was no station called or mentioned by any of them. Another witness swore that the train stopped at Old Town; then at another little station. "After that they stopped where there had been a washout. They had been working there; and they never 'hollered' for a station. They kind of checked up there. It was dark. We started to get off. Mr. Nagle [the plaintiff] got off, and when he got off he fell. They started so quick that he, having some bundles to gather up, did not have time to get off." From all this it appears that the cause of the stoppage of the train was a proper one, that due care might be taken of the whole train and all the passengers on it. As the train was approaching a washout, where danger might exist, it was the duty of the conductor and trainmen to be at their several stations,—at the brakes and on the lookout,—to see that there was no injury likely to result in passing this dangerous spot on the road. They could not perform this in the short time of the stoppage, and also go through the cars to warn passengers not to get out; for this stoppage lasted at the most a minute, or, as a witness said, not more than "fifteen seconds." If they had acted as the plaintiff seems to contend they should, an accident had happened to the train, and injuries been received by the passengers, then the negligence of the defendant would have been apparent. It was evidently the habit—that of making the third stop at La Jolla—that induced the plaintiff and his companions to rush for the door, and the former to jump out so quickly as not either to attempt to look about and see if he was at La Jolla, or apparently to use any sort of precaution in seeking to ascertain at what kind of a place he was stepping off. It appears that no one else got off; and, conceding that the two persons immediately behind the plaintiff did not get off because he had stepped off into the canyon, yet it still appears that none of the three at the other door of the car got off, probably because they saw they were not at La Jolla, or that the place of the stoppage was not a proper place at which to get off. It does not appear to have been so dark but that a person by the proper use of his eyes might have dis-

tinguished a canyon lying immediately before him, 10 or 15 feet deep, from a level place, where there was a platform and shed over it, which were to be seen at La Jolla. Instead of attempting to do this, the plaintiff heedlessly jumped off the car, and could not have taken time to look about him, as it would appear. The defendant cannot be held to the responsibility of warranting the safety of the plaintiff at all events. *Treadwell v. Whittier*, 80 Cal. 585, 586, 22 Pac. Rep. 266. It is "responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and therefore for the slightest neglect." 80 Cal. 595, 22 Pac. Rep. 272. It was for the court, on the undisputed facts, to determine if the defendant was guilty or not of contributory negligence. *Glasecock v. Railroad Co.*, 73 Cal. 137, 14 Pac. Rep. 518. And even if the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff, this does not preclude a judgment "by way of nonsuit, whenever the evidence of the plaintiff so conclusively establishes a defense as that the court would grant a new trial in case of a verdict in his favor upon like evidence." *McQuilken v. Railroad Co.*, 59 Cal. 8. The plaintiff had no intimation from the trainman that this was his stopping place, or that he should get off; but got off apparently because some irresponsible person said it was La Jolla, and perhaps because of the habit of persons getting off there usually as the third stopping place from San Diego. He got off in the dark, when the best use of one's eyes is necessary; and we must suppose that his were good. He should at least have used them, acting, as he was, upon his own responsibility, with sufficient care to have "looked before he leaped." This is the rule, as we think, announced in *Flemming v. Railroad Co.*, 49 Cal. 257; *Glasecock v. Railroad Co.*, 73 Cal. 140, 14 Pac. Rep. 518. We think the judgment and order should be affirmed, and so advise.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

83 Cal. 106

DAVIS v. BAKER. (No. 14,023.)

(Supreme Court of California. Feb. 18, 1891.)

ATTACHMENT—SUFFICIENCY OF WRIT—POSTING COPY.

1. A writ of attachment cannot be held insufficient on appeal because of an alleged recital therein, where it is not shown by bill of exceptions, and the only thing that appears is an objection by counsel, in which he recites a portion of the writ.

2. The addition of the words "or thereabouts" after the amount of the demand in a writ of attachment does not render the proceeding void on collateral attack under Code Civil Proc. Cal. § 540, requiring writs of attachment to state "the amount" of plaintiff's demand.

3. Where a writ in attachment was posted on the side of a house next a street, the house being near a corner, and there being a vacant lot opposite the side of the house, and two witnesses testify that the notice could be easily and plainly

seen by passers-by, a finding that it was posted in "a conspicuous place," as required by Code Civil Proc. Cal. § 542, is warranted.

Commissioners' decision. In bank. Appeal from superior court, Butte county; G. G. CLOUGH, Judge.

Park Henshaw and Grey & Sexton, for appellant. *John Gale*, for respondent.

HAYNE, C. Suit to quiet title. Judgment for plaintiff. Defendant appeals. The parties stipulated that the only questions to be determined is whether a certain attachment, under which the plaintiff claims, was properly levied upon the lot in controversy. Upon the former appeal it was held that the return was *prima facie* sufficient. 72 Cal. 494, 14 Pac. Rep. 102. The defendant now urges two reasons why the levy should be held to be insufficient.

1. It is argued that the writ was insufficient in that it did not state "the amount" of the plaintiff's demand, as required by section 540 of the Code of Civil Procedure, but stated that the action was to recover \$620 "or thereabouts." We are inclined to doubt whether this question is open for consideration under the stipulation. Assuming that it is open, there is no foundation for it in the record. It appears that the writ was introduced in evidence, but it is not shown by the bill of exceptions. The only thing that appears is an objection by counsel, in the course of which he recites a portion of the writ. This is not a sufficient mode of showing a fact. If it be assumed to be sufficient, it only purports to be a part of the writ; *non constat*, but that the remainder of the writ was amply sufficient in the respect referred to. And if the fact was shown to be as the appellant says it is, we do not think that the words "or thereabouts," after the amount of the demand, renders the attachment proceedings void upon a collateral attack.

2. It is said that the evidence shows that the writ was not posted "in a conspicuous place," as required by section 542 of the Code of Civil Procedure. The finding is that the notice was posted in a conspicuous place; and the evidence shows conclusively that this was so. The house was near a corner formed by two streets, and on the east side was a vacant lot. The east side was the "long side." The notice was posted on this side, within five or six feet of the street. The contention is that it ought to have been posted on the front of the house. The sheriff testifies that "anybody could see it that would go by;" that "it was the most suitable place—conspicuous place—I could find;" and that it was the safest place to put the papers "so that they would stay placed." (Another witness testified that the papers posted could readily be seen; "no trouble to see them. One could scarce pass without seeing the papers, if they were looking at all.") There was no evidence to the contrary. The appellant says that the testimony of these two witnesses was materially weakened on cross-examination, but we do not think so. The statute does not require that the notice should be posted in "the most" conspicuous place, but only in a conspicuous place; but, if it

did, we should not be able to say that the evidence did not show that the place chosen was not as conspicuous as any other. We think that the judgment and order appealed from should be affirmed, with damages.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

88 Cal. 103

COLE V. SEGRAVES. (No. 13,839.)

(Supreme Court of California. Feb. 18, 1891.)

EJECTMENT—PLEADING—COMPLAINT.

1. A complaint in ejectment, filed December 4, 1889, which alleges that on December 20, 1888, plaintiff was the owner and in possession of the premises sued for, and "that on the 24th day of December, 1889, plaintiff being so seised and possessed, defendant wrongfully entered and ousted plaintiff from the possession thereof, and now withholds wrongfully the possession," is not objectionable on general demurrer as alleging ouster subsequent to the filing of the complaint, as it is evident that this was a clerical error merely, and is inconsistent with the allegation that defendant "now withholds," etc.

2. Where the complaint alleges that the demanded premises are in Susanville it is not objectionable because it does not allege that they are in Lassen county, where the action is brought, as the court will take judicial notice that Susanville is in Lassen county, under the provision of Code Civil Proc. Cal. § 1875, subd. 2, that courts take judicial notice of whatever is established by law.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Shinn & Masten, for appellant. *Spencer & Raker* and *Clarence A. Raker*, for respondent.

PER CURIAM. Ejectment. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. His demurrer having been sustained, and plaintiff declining to amend, final judgment was entered dismissing the action, and for costs. Plaintiff appeals. The complaint consists of two parts, in the first of which there is an attempt to set up a valid title in plaintiff to the demanded premises founded on a sale for delinquent taxes. The second part of the complaint contains the general allegations usual in actions of this character. Various objections are made to the validity of the tax-title first set out; but we find it unnecessary to pass upon the sufficiency of the facts alleged to constitute a good title. The second part of the complaint is sufficient in itself to show a cause of action, and the first part may be treated as surplusage. It is alleged that on the 20th day of December, 1888, plaintiff was the owner and in the possession of the demanded premises, and "that on the 24th day of December, 1889, plaintiff being so seised and possessed, the defendant wrongfully entered and ousted plaintiff from the possession thereof, and now withholds wrongfully the possession," etc. The complaint was filed December 4, 1889, and, as will be observed, the allegation is of an entry and ouster on the 24th day of December, 1889. This alle-

gation of an ouster subsequent to the filing of the complaint is relied upon as justifying the order sustaining the demurrer. But it is evident on the face of the complaint that there is a clerical error in this allegation, and that it should have read "1888" instead of "1889." The latter date is inconsistent with the other part of the same allegation that the defendant "now withholds." The most that can be said of this inconsistency is that it rendered the complaint ambiguous or uncertain, and the only way in which advantage could have been taken of it was by special demurrer on that ground. Upon general demurrer, controlling force should have been given in construing the complaint to the words "now withholds," which show an ouster prior to the filing of the complaint.

There was no demurrer on the ground of want of jurisdiction, but respondent claims the right to object to the complaint on that ground at any stage of the proceedings, and he calls our attention to the fact that there is no allegation in the complaint that the demanded premises are in Lassen county. But it is alleged that they are in the town of Susanville; and not only the superior court, but this court, takes judicial notice that Susanville is the county seat of Lassen county. Code Civil Proc. § 1875, subd. 2.¹

Judgment reversed, and cause remanded, with direction to the superior court to overrule the demurrer, and allow the defendant a reasonable time to answer.

88 Cal. 108

PERRI V. BEAUMONT. (No. 13,737.)

(Supreme Court of California. Feb. 19, 1891.)

APPEAL—SERVICE OF NOTICE—AMENDMENT.

Where an affidavit of service by mail states that the "within notice was deposited" in the post-office at a certain place, directed to respondent's attorneys at a specified place; that respondent's attorneys "reside" there, and appellant's attorneys "reside" at the former place; and that there "is" regular communication between the two places,—an amendment will be allowed to make the notice referred to more definite, and to show the residence of the respective attorneys at the date thereof.

In bank. Appeal from superior court, Kern county; R. E. ARICK, Judge.

Lamar & Rousseau, for appellant. *Haggin & Van Ness*, (*George C. Gorham, Jr.*, of counsel,) for respondent.

PATERSON, J. The affidavit of service by mail states that a copy of the within notice was deposited in the post-office at Sumner, Cal., postage thereon prepaid, addressed to Haggin & Eibble, attorneys for respondent, 45 Nevada block, San Francisco, Cal., on February 8, 1890; that said attorneys reside at San Francisco, and the attorneys for appellant reside at Sumner; and that there is regular communication by mail between the two places. The affidavit is uncertain as to the notice referred to, and, as it was made on the 10th of February, 1890, it fails to show the places of residence of the respective attorneys on

¹This section and subdivision provide that courts take judicial notice of whatever is established by law.

February 8th, and, strictly construed, is insufficient, (*Doerfler v. Schmidt*, 64 Cal. 265;) but as the defect is one arising, doubtless, out of a careless use of language, and the objection being rather technical, we deem it a proper exercise of our discretion to grant the appellant's request to file another affidavit of service. The court should be liberal in granting amendments which can cause the respondent no injustice, and which will secure to the appellant a hearing on the merits. If a sufficient affidavit of service is filed within five days from date hereof, the motion to dismiss will be denied; otherwise it will be granted.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; MCFARLAND, J.; DE HAVEN, J.; SHARPSTEIN, J.

88 Cal. 136

PEOPLE v. FOWLER. (No. 20,714.)

(Supreme Court of California. Feb. 25, 1891.)

PROSTITUTION—ABDUCTION—INFORMATION.

1. An information alleging that defendant unlawfully took away a certain unmarried female under the age of 18 years from the custody of her mother, without the latter's consent, and against her will, for purposes of prostitution, is sufficient under Pen. Code Cal. § 267, which provides that every person who takes away any female under the age of 18 years, "from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc., without alleging that the female's mother had "legal charge" of her person.

2. It is not necessary to allege that defendant knew that the female was under 18 years of age.

3. The misplacing of the concluding words of the information after instead of before a charge of prior conviction is immaterial, as it "does not tend to the prejudice of the substantial right of the defendant," within the meaning of Pen. Code Cal. §§ 960, 1258.

Department 1. Appeal from superior court, Santa Barbara county; B. T. WILLIAMS, Judge.

Carroll Cook and J. E. Foulds, for appellant. Walter B. Cope, Dist. Atty., and George H. Johnson, for respondent.

PATERSON, J. The information charges that the defendant, on the 12th day of June, 1889, "did willfully, unlawfully, and feloniously take away one Rosa Keep, then and there being an unmarried female under the age of 18 years, to-wit, of the age of 14 years, from and out of the custody of Maria Keep, her mother, without the consent and against the will of her said mother, for the purpose of prostitution." Section 267 of the Penal Code provides: "Every person who takes away any female under the age of 18 years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable," etc. The information follows the language of the statute, and is sufficient. It alleges all the acts and facts which the legislature has said shall constitute the offense, and is direct and certain, both as to the party charged and the particular offense charged. These are the tests of sufficiency in matters of averment. It was not necessary to allege that the mother had the "le-

gal charge" of the person of the girl. One who takes a minor female from the actual custody of her mother for the purpose of prostitution should not be heard to say that as between the mother and the father the latter may have had the better right to the custody of the child, and may have given his consent. So long as the child was in the actual custody of the mother, the latter was bound by every principle of law, humanity, and parental care to protect her person, and had the legal charge of her person within the meaning of the statute. Bish. St. Crimes, § 633.

It is claimed that the information is defective because it is not alleged that the defendant knew the girl was under 18 years of age. We think that under this statute the people are not bound to allege or prove that the defendant knew the girl was under 18 years of age. "The gist of the offense is the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution;" and one who does so acts at his peril, and cannot defend himself on the plea of ignorance as to the age of the child. Id. § 632. The law was intended to protect the family against the assaults of those who traffic in women for houses of prostitution,—to save the members thereof from sorrow and disgrace; and the court ought to be careful not to construe the statute so as to deprive it of any element of effectiveness in this regard. *People v. Demousset*, 71 Cal. 613, 12 Pac. Rep. 788. Appellant urges that "penal statutes are to be construed strictly in those parts which are against defendants, but liberally in those which are in their favor." Such is always the contention made, and too often followed; but it is no longer the rule. In former days, when the law-maker acted upon the idea that penal legislation was an important factor in shaping the morals of the people, many acts trivial in their consequences were declared criminal, and cruel punishments (whipping, and even death) were imposed on conviction of offenses which are now regarded as mere misdemeanors. The courts, as conservators of the natural and inalienable rights of the citizen, found it expedient and just in the administration of the law to strictly construe the provisions of penal statutes, and to resolve every doubtful question of construction in favor of the person charged. But the reason for such a rule of construction is no longer existent, and in this state it has been repudiated by express legislative enactment. Section 4 of the Penal Code provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of its terms, with a view to effect its object and promote justice."

The concluding words of the information are evidently misplaced, and should have been inserted before instead of after the charge of prior conviction, but such misplacement, being a matter of mere form, "does not tend to the prejudice of the substantial right of the defendant," and is therefore immaterial. Sections 960, 1258, Pen. Code; *People v. Biggins*, 65 Cal. 564,

4 Pac. Rep. 570. It doubtless occurred through the use of a blank information with the usual clause, *contra formam statuti*. The judgment is regular on its face, (section 1207, Pen. Code,) and the court properly took into consideration the prior conviction pleaded and confessed, as shown by the record. *Ex parte Young Ah Gow*, 73 Cal. 438, 15 Pac. Rep. 76; *People v. Meyer*, 73 Cal. 548, 15 Pac. Rep. 95. Other points made by appellant are not well taken, because the appeal is from the judgment only, and there is no bill of exceptions. Everything complained of may have been done with the consent or at the request of the defendant, in which event, of course, he could not be heard to complain. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

88 Cal. 146

HAGMAN v. WILLIAMS *et al.* (No. 13,971.)

(Supreme Court of California. Feb. 26, 1891.)

MECHANICS' LIENS—PLEADING—EVIDENCE—APPEAL.

1. Where the complaint in a suit to foreclose a mechanic's lien alleges that the claim for a lien was duly recorded, and states its contents substantially in the language of the statute requiring such claim, but the claim as recorded was inartificially drawn, and not in the language of the complaint, a denial in the answer that the claim contains the necessary averments is sufficient to raise an issue as to the alleged claim, though such denial is made on information and belief.

2. Where plaintiffs have introduced evidence that the work for which they claim a lien was well done, defendants are entitled to show that it was not done in a good and workman-like manner.

3. Error in excluding evidence may be considered on appeal, though the ruling was not specified in the bill of exceptions, since, under Code Civil Proc. Cal. § 650, it is not necessary that appellant should specify therein the particular errors of law on which he will rely.

Commissioners' decision. Department

1. Appeal from superior court, San Diego county; W. L. PIERCE, Judge.

Harris & Ward and A. G. Wooster, for appellants. *John M. Lucas*, for respondent.

BELCHER, C. This is an action to foreclose a lien for work and materials used in painting a house erected for the defendant Ellen L. Williams. The complaint states that the defendants were husband and wife; that Mrs. Williams owned a lot of land, and on a day named entered into a contract with certain builders to furnish all the materials and labor, and erect for her a dwelling-house on the lot; that the contractors commenced the construction of the house, and afterwards made a contract with the plaintiff and one Anderson, under and by which they were to furnish the materials and perform the labor of painting the house, and were to be paid therefor the sum of \$155; that upon the making of this contract Mrs. Williams promised and agreed with the painters that she herself would pay and guaranty payment of the sum of money to become due them under their contract, and would also pay them any and all further sums

which might become due them for extra work on the house; that the painters entered upon the performance of their contract, and fully performed and complied with all the conditions of the same, and at the request of Mrs. Williams furnished materials and did extra work; of the value of \$26; that the full amount due under the contract, and for extra work, which Mrs. Williams promised and agreed to pay, was \$181, of which sum \$107 had been paid, leaving still due and unpaid the sum of \$74; that the house was finished, and in due time the painters filed and had recorded a claim of lien, which was duly verified, and stated all the facts required by statute to be stated in such a case; and that subsequently Anderson duly assigned and transferred to the plaintiff all his claim and demand under the lien, and against the said property and defendants. The defendants, by their answer, denied that they, or either of them, promised or agreed to pay Anderson and Hagman for the work done under their contract, or to guaranty payment thereof, or to pay for any extra work in any manner whatever; denied that Anderson and Hagman, or either of them, fully performed all the conditions of their contract, or of any contract, mentioned in the complaint, or complied with the same; and on information and belief denied that the instrument filed and recorded by Anderson and Hagman as a claim of lien, "contains a statement of their demand, or any demand, with the names of the person or persons by whom they were employed, or of any employment, or to whom they furnished materials, or of any materials, with a statement of the terms, time given, or conditions of their contract, or of any contract." The case was tried, and all the facts were found by the court to be as alleged in the complaint. Judgment was then entered, foreclosing the lien and awarding the plaintiff \$50 as a reasonable attorney's fee, and costs, as prayed for in the complaint. The defendants moved for a new trial upon a bill of exceptions, which was duly settled and filed. The motion was denied, and they appealed from the judgment and order.

It is objected for respondent that the order denying the new trial cannot be considered, for the reason that the record contains no copy of the order. The objection cannot be sustained. The record shows that after the order was made a second bill of exceptions was settled and filed, setting out that the motion was made by the defendants, pursuant to their notice of intention to move for a new trial, on certain grounds stated, and that both the plaintiff and defendants appeared by their attorneys; that the first bill of exceptions and certain affidavits were used on the hearing, and then, that "the court, having heard the argument of counsel, and being fully advised, doth order that said motion for new trial be, and the same is hereby, denied." And the clerk certifies that the record contains correct and complete copies of the records and documents on file in the case, and, among others, of the last bill of exceptions, "including the order refusing a new trial." This was sufficient to meet the requirements of section 952 of the

Code of Civil Procedure. It is contended by appellants that the judgment should be reversed because of errors committed by the court in its rulings. The proceedings were as follows: On the trial the plaintiff offered in evidence his claim of lien, and the defendants objected to the admission of the paper, on the ground that it was "incompetent, irrelevant, and immaterial." The court overruled the objection, and admitted the paper in evidence, on the ground, as stated, that the answer contained no denials of the allegations of the complaint in regard to the claim of lien, but admitted each of them. The defendants excepted to this ruling, and thereupon counsel for plaintiff announced to the court that the offer of the lien in evidence was withdrawn, and the court ordered that it be considered withdrawn. No other or further evidence relating to the notice and claim of lien alleged in the complaint was offered by either party. Subsequently the plaintiff introduced evidence tending to show that the work alleged in the complaint was done in a good and workman-like manner, considering the quality and amount of material called for by the contract. When the defendants were making their case, they offered evidence to show that the work sued for was not performed in a good and workman-like manner. To this offer the plaintiff objected, on the ground of irrelevancy, incompetency, and immateriality, and the court sustained the objection, and excluded the evidence, defendants reserving an exception. The defendants then, when they had nearly closed their testimony, asked leave to amend their answer by making specific positive denials of each and every allegation of the complaint, relating to the contents of the alleged notice of lien, and by adding averments that the material used in painting the house was of inferior quality, and not such as was called for in the contract, and that the work was done in a bad and unworkman-like manner, and inefficiently, and that by reason of such inferior workmanship and material the defendants were damaged in the sum of \$100. The court denied the application to amend, and the defendants duly excepted.

1. The first ruling complained of was evidently based upon the theory that the denials in the answer as to the claim of lien were insufficient to raise any issue, because they were made upon information and belief. In this case, we think the learned judge of the court below mistaken. It is true that, where facts are alleged in a verified complaint which are presumptively within the personal knowledge of the defendant, he is not permitted to deny them upon information and belief, but must answer positively. *Humphreys v. McCall*, 9 Cal. 62; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. Rep. 844. Here the allegations were as to a written instrument which had been recorded in the recorder's office of the county, and they stated its contents substantially in the language of the statute which provides for the making and recording of such an instrument. Section 1187, Code Civil Proc. But an inspection of the paper shows at once that it was inartificially drawn, and not in the

language of the complaint. A question, then, might well arise as to whether or not it was sufficient to meet the requirements of the statute and to create a lien; and that such a question did arise is shown by the fact that counsel here earnestly insist, on one side, that it was wholly insufficient, and, on the other, that it was fully sufficient, to effect the purposes intended by it. Under these circumstances we do not think it can be said that, because the defendants might have seen and read the record, they must be presumed to have such knowledge of the facts alleged in the complaint as to require positive denials if they deemed them untrue. Our conclusion is that the denials on information and belief were sufficient to raise an issue as to the alleged claim of lien.

2. We also think the court erred in excluding the evidence offered by the defendants to show that the work sued for was not performed in a good and workman-like manner. The plaintiff had introduced evidence to prove that the work was well done, and it seems clear that the defendants had a right to disprove that fact if they could. It is objected for respondent that this point cannot be considered, because the ruling is not specified in the bill of exceptions, as an error upon which the parties would rely. But specifications of the particular errors of law on which the appellant will rely are not necessary in a bill of exceptions. Code Civil Proc. § 650; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. Rep. 403.

3. It is to be regretted that a case involving so small a sum should be permitted to occupy so much of the time of the courts, and as, in consequence of the errors above spoken of, it must go back for a new trial, it is proper to state that we have carefully examined the paper introduced in evidence by the plaintiff as his claim of lien, and are of the opinion that it should be treated and held to be sufficient to meet the requirements of the statute. A substantial compliance with the statute is all that is necessary. *Tredinnick v. Mining Co.*, 72 Cal. 78, 13 Pac. Rep. 152; *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. Rep. 772; *Jewell v. McKay*, 82 Cal. 144, 23 Pac. Rep. 139.

We advise that the judgment and order be reversed and the cause remanded for a new trial, with leave to the parties to amend their pleadings if they shall be so advised.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded.

(83 Cal. 132)

WHOLEY v. CAVANAUGH. (No. 14,079.)

(Supreme Court of California. Feb. 27, 1891.)

VENDOR AND VENDEE—QUITCLAIM—SCHOOL-LAND
CERTIFICATE OF PURCHASE.

1. Defendant's grantor executed an instrument by which he released and quitclaimed to defendant land on which he had only a school-land certificate of purchase, and by which he further agreed to perfect his title, and make defendant a good deed. Held, that the instrument

was a quitclaim deed, and conveyed all the grantor's interest, and that the agreement for a subsequent deed was only a covenant of further assurance.

2. In such case the subsequent issue of a patent to the grantor inures to defendant's benefit, and invests him with the legal title.

Commissioners' decision. In bank. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

James F. Faraber, for appellant. *H. B. Warren*, for respondent.

HAYNE, C. Ejectment; judgment for defendant; plaintiff appeals. Both parties claim through one Whitmire. In 1860, Whitmire, who then had only a school-land certificate of purchase, upon which 20 per cent. of the price had been paid, executed to one Coats an instrument, which is considered below, and Coats subsequently conveyed to the defendant. In 1878 the state issued a patent to Whitmire, who in 1884 made a deed to the plaintiff. The plaintiff's position is that, prior to the issuance of the patent, Whitmire had merely an interest which, while regarded as the legal title as against third persons, was not so regarded as against the state; that the legal title remained in the state until the issuance of the patent in 1878; that the instrument executed to Coats in 1860 was not a present conveyance, but only an agreement for a deed, and therefore did not pass the after-acquired title or any title; that, after receiving the legal title, Whitmire did not convey it to the defendant, but conveyed it to the plaintiff; and that, since the plaintiff has the legal title, he must prevail in ejectment. From this it is obvious that it is necessary to consider the effect of the instrument executed by Whitmire to Coats. The heading of this document in the transcript is "Agreement for a Deed." But it does not appear that the instrument itself was so called. It seems to be a mere characterization by the person who made the record on appeal. But, even if it were indorsed upon the document itself, it is clearly not a part of the instrument, and consequently would not affect its character. The material portions of the instrument are as follows: "This agreement, made and entered into this first day of November, 1860, by and between T. S. Whitmire of Shasta Valley, in the county of Siskiyou, state of California, the party of the first part, and Silas D. Coats of the same place, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, hath and hereby doth release and forever quitclaim unto the said party of the second part, and to his heirs and assigns and legal representatives, all that certain piece and parcel of land," (describing it.) If there were nothing else in the instrument, we think it clear that it would amount to a quitclaim deed. The operative words of such a deed are ordinarily "remit, release, and quitclaim;" but the omission of the first word is not material. The words "release and forever quitclaim" are sufficient. And it is

settled that a quitclaim deed conveys whatever title the grantor has. *Lawrence v. Ballou*, 37 Cal. 518; *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. Rep. 867. The appellant contends, however, that the effect of the instrument as a conveyance *in presenti* is destroyed by the following clause, viz.: "To have and to hold the same forever, subject to the following covenants, conditions, and agreements, to-wit: The said party of the first part, for himself, his heirs, and legal representatives, agrees to and with the said party of the second part, his heirs and legal representatives, to proceed and perfect his title to said granted section, which he has now commenced under the school laws of California, as fast as said laws shall or may require until his title thus commenced shall become perfect to an inheritance and unincumbered freehold therein; and upon the acquisition of said estate in said lands the party of the first part, for himself, his heirs and legal representatives, covenants and agrees to and with the said party of the second part, his heirs and assigns and legal representatives, to make out, sign, seal, execute, acknowledge, and deliver to the said party of the second part, his heirs, assigns, and legal representatives, a good and sufficient deed conveying said estate of inheritance free of incumbrance to so much of said quarter section above described, to the said party of the second part, his heirs, assigns, and legal representatives, the same to become operative upon the said party of the second part or his legal representatives paying or causing to be paid to the said party of the first part, or his legal representatives, within ten days thereafter, the sum of one hundred dollars." This, we think, is a covenant of further assurance, and does not impair the words of conveyance first quoted. The instrument was therefore a quitclaim deed, and operated as a present transfer of whatever interest the grantor then had. It is true that he did not then have the legal title as against the state, and that he did not make a deed to Coats or his grantee, after obtaining the patent, as his covenant bound him to do. But if his deed operated to pass the after-acquired title, no further assurance was necessary; and we think it so operated. As a general rule, a quitclaim deed does not have this effect. But it must be held to have this effect in this case, upon the authority of *Stanway v. Rubio*, 51 Cal. 41, which proceeds upon the ground that the title transferred by the patent relates back to the institution of the proceedings to acquire the government title, and subsequently inures to the benefit of the person to whom the holder of the certificate of purchase conveyed. If the plaintiff has any equitable rights he cannot maintain them upon a simple complaint in ejectment. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

88 Cal. 159

HAWTHORNE *et al.* v. SIEGEL *et al.* (No. 13,868.)

(Supreme Court of California. Feb. 28, 1891.)

TRESPASS—MEASURE OF DAMAGES—PLEADING—EVIDENCE.

1. Plaintiffs were in possession as lessees of a building which they used as a barber-shop, when, by reason of defendants' trespass, the building was rendered unfit for such purpose, and they were compelled to move, losing thereby a hot-water privilege which they had purchased. *Held*, that they were entitled to damages for loss of the water privilege, the value of permanent improvements abandoned, expense of removal, and loss in their business, under Civil Code Cal. § 3333, which gives the right to recover the amount that will compensate for the detriment "proximately caused" by the trespass.

2. In such case, an instruction that plaintiffs are entitled to such an amount as will compensate them for "all loss and harm" suffered by reason of their enforced removal, taking into consideration the length of time of the lease, and the time it had been enjoyed, and the value of such advantages as were a part of it, or grew out of their interest in it, is not erroneous as not confining the recovery to damages proximately caused by the trespass.

3. To show the loss in plaintiffs' business by such enforced removal it is competent to show the amount of business done before and after the trespass.

4. Where it appears that an amended complaint was not obnoxious to a demurrer sought to be interposed, defendants cannot complain because the court, after overruling a demurrer to the original complaint, instead of allowing another demurrer to the whole complaint as amended, limited it to the amendment.

5. After an answer has been filed to an original complaint it is not an abuse of the court's discretion to confine a second answer to amendments to the complaint, if there is no difference between the answers except with reference to the amendment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Stephen M. White, for appellants. J. O. Kaepfli, Baker & Long, and Will D. Gould, for respondents.

FOOTE, C. This action was brought to recover damages for trespass alleged to have been committed by the defendants in "breaking and entering" upon the premises held, used, and possessed by the plaintiffs under a lease, and "forcibly and unlawfully altering and changing the construction" of the premises "by lowering a portion of the ceiling" thereof, "and by closing up and obstructing the windows and gratings thereof, through which plaintiffs obtained light and air for their said premises." It was further alleged that these acts of the defendants rendered the premises "totally unfit and useless" for the purposes of their business, which was that of carrying on a barber-shop and bath-room; that they were thereby compelled to vacate the premises, and did vacate them, under this compulsion, on the 3d day of September, 1888, the lease not expiring until the 26th of April, 1891. The damages claimed were from the loss of the established trade and business of the plaintiffs; from that occasioned by having to abandon a portion of the permanent improvements which they had

made on the leased premises; from that resulting from the plaintiffs being compelled to abandon and lose the benefit of their leasehold interest; from that which they suffered by being deprived of the benefit of their agreement with a party who allowed them a hot-water privilege for the use of their barber-shop and bath-room; and by reason of expenses entailed on them in their enforced removal from the premises. The plaintiffs obtained judgment for \$500, a very much less sum than they claimed. From that, and an order denying a new trial, this appeal is taken.

The evidence certainly tended to show that the plaintiffs occupied and used the premises as they claimed, and that the trespass was committed by the duly-authorized agent of the defendant Siegel. The main argument of the defendant seems to be on the alleged erroneous ruling of the court as to the measure of damages recoverable in the action, in the admission of evidence, and in the instructions upon the matter which it gave, refused, or modified. In this connection the defendant urges that no damages could be recovered by the plaintiffs for the loss of the hot-water privileges, which they derived from the agreement with E. Durham, mentioned in the eighth paragraph of the complaint. If, as we think, the evidence tended to show that the plaintiffs were compelled to abandon their place of business by the trespass of the defendant, then they were entitled to recover whatever "amount will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civil Code, § 3333. If the evidence tended to show any detriment suffered by the plaintiffs in losing this hot-water privilege, and the loss thereof was proximately caused by the trespass complained of, the plaintiffs were entitled to be compensated therefor, and it was for the jury, under all the evidence, to say if they were entitled to any compensation, and, if so, how much. The evidence did show that the plaintiffs had such a privilege, and that they paid a certain amount of money therefor, and that it was of beneficial use to them. There is also evidence which tends to show that the cause of their leaving the premises was that the trespass complained of made their place of business unfit for the purposes for which they had leased, occupied, and possessed it. The trespass caused them to abandon the water privilege. The loss of the water privilege was one of the injuries resulting from this abandonment. This injury, then, was proximately caused by the trespass, and the plaintiffs were to be compensated therefor. We perceive no error in the eighth instruction given, nor in the evidence offered and admitted in support of the demand.

It is further urged in behalf of the appellants' contention that the instruction given by the court is at variance with section 3333 of the Civil Code, and misleading, in that it permits and directs the jury to take into consideration anything, however remote, which might appear to them

to indicate "loss or harm." The instruction reads as follows: "(9) The jury are instructed that if they believe from the evidence that the plaintiffs had a leasehold interest in the premises in question, and that by reason of the wrongful acts of the defendant said leasehold interest was rendered wholly or in part worthless to the plaintiffs, or that they were compelled to abandon the same, then the plaintiffs are entitled to such an amount as will compensate them for all loss or harm suffered thereby, taking into consideration the length of time of said lease and the length of time it had been enjoyed by the plaintiffs, and the value of such advantages as they may be satisfied by the evidence were a part of or directly grew out of said leasehold interest, but not including in this item anything for loss of hot-water rights or established trade and business." Fairly considered, this instruction announces to the jury that the damages recoverable by the plaintiffs for any loss suffered by them which rendered their leasehold interest wholly or in part worthless, occasioned by the wrongful acts of the defendant, must be measured by the whole duration of said lease under the terms thereof, and the length of time it had been enjoyed by them, up to the time of the reception of the injury, and by the value of such advantages as accrued to them under the lease, which grew directly out of their interest therein, but not to include anything which resulted from the loss of hot-water rights or established trade or business, and that these damages must be in such an amount as will compensate them for any such loss. This did not, in our judgment, direct the jury to give damages in their nature remote or speculative, but was confined to a verdict for such detriment only as was proximately caused by the wrongful acts of the defendant as affecting loss from the injury done alone to the leasehold interest held by the plaintiffs; and although, perhaps, the instruction is not so perspicuous and clear as it might have been, we see nothing in it misleading or conflicting with other instructions, which last most clearly kept before the jury the idea that they were to give no damages except such as were the proximate result of the injury done. And this will appear by a glance at the other instructions given.

It is further claimed that the court erred in instructing the jury that in estimating the damages done the plaintiffs they might consider the evidence concerning the expenses of the enforced removal of the plaintiffs from the premises to another place of business, and that regarding any damage which might result from the deprivation of the use of improvements abandoned by them. The defendant contends that these elements of damage were not recoverable. The argument in this connection appears to be that the plaintiffs could only recover for the benefits which they might have had if the defendants had permitted them to remain at their former place of business untraversed upon. But the plaintiffs were not, according to the tendency of their evidence, permitted to remain un-

molested, but were driven away by the wrongful acts of the defendants. Hence the former were entitled to recover whatever their loss might be of which the defendants' wrongful acts were the efficient cause. "The proximate cause is the efficient cause,—the one that necessarily sets the other causes in operation." *Insurance Co. v. Boon*, 95 U. S. 130. "That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." *Brady v. Insurance Co.*, 11 Mich. 425. Here the evidence on behalf of the plaintiffs tended to show that the trespass of the defendant, and his acts in accomplishing it, resulted in the plaintiffs having to leave their place of business, give up their leasehold interest, go to expense in moving their appurtenances, etc., lose the privilege which they had of hot water for baths and barber-shop, and in their having to go to another place of business less favorable or profitable, which entailed loss in their established trade and business, and having to lose the use of abandoned permanent improvements. The cause which sets all the rest in motion was the trespass; the operation of the subsequent agencies of loss were the result of this wrongful injury. Hence they proximately resulted from that trespass. To the first cause primarily all the damages resulting are to be attributed, although each item of damage was produced by some separate cause following the primary cause, and operating more immediately in producing the damages. *Insurance Co. v. Boon*, supra, citing *Insurance Co. v. Tweed*, 7 Wall. 44. Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action, but "are parts of the tort itself for which the cause of action is given." *Wood v. Currey*, 57 Cal. 210. No error is perceived in the rulings of the trial court as to the instructions just mentioned, or as to the evidence admitted on the points involved therein.

Further complaint is made because the trial court allowed a question to be put to one of the plaintiffs, as follows: "What is that leasehold worth to you?" If erroneous because it did not seek for the market value of that interest, it was harmless in view of the answer of the witness, which plainly indicated that the value of which he testified was the market value. The appellant contends that the court erred in allowing evidence to go to the jury as to the amount of business done by the plaintiffs before and after the alleged trespass. The complaint charged as one of the elements of damage resulting from the trespass that the plaintiffs had lost thereby their established trade and business. With a view to show what that loss was we think the evidence was admissible. "The best-considered cases agree that where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this ques-

tion evidence of the profits which he was actually making is admissible." Lambert v. Haskell, 80 Cal. 619, 22 Pac. Rep. 327.

The point is made that the defendant should have been allowed to demur to the amended complaint, and to file an answer thereto. While the trial was in progress, the plaintiffs asked leave to amend the fifth paragraph of their complaint. The request was granted. The amendment was made, and a copy of it served and filed. A recess was then taken by the court to allow the defendant to plead thereto. Upon the reassembling of the court the defendant presented, filed, and read a demurrer, which went to other matters besides the amendment filed by the plaintiffs. Previous to this the defendant had demurred generally to the complaint, before amendment, which was overruled for want of "presentation." We suppose this was intended to read "prosecution." The court refused to consider the demurrer to the amended complaint, except as directed to the amendment allowed to be made, and as to that overruled the demurrer. The defendant then asked leave to file an answer to the whole complaint as amended. This the court refused to allow, upon the ground that the only portion of the complaint which had been amended was the fifth paragraph thereof, and that the defendant might file an answer to that. Maintaining his right to answer the whole complaint and reserving his exception, the defendant answered the fifth paragraph of the complaint. It is true that "the amendment, together with the original amended complaint, constituted a new complaint, which superseded all other pleadings in the case." Thompson v. Johnson, 60 Cal. 295. But no reason is shown why the demurrer as filed should have been sustained on any of the grounds alleged therein, nor do we perceive that the amended complaint was obnoxious to that demurrer. The defendant was in no worse condition by the refusal of the court to consider anything but the demurrer as applicable to the amendment made to the complaint than he would have been had the court considered and overruled the demurrer as a whole.

As to the action of the court in refusing to allow the filing of an amended answer except to that portion of the complaint which had not been already answered, it does not appear that the answer proposed to be filed differed in any essential respect from the answer on file except with reference to that part answering the amendment of the fifth paragraph of the complaint; and that portion of the proposed answer was filed and considered. In the action of the court, therefore, as to these matters, there appears no abuse of discretion. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PEOPLE v. JOHNSON. (No. 20,711.)

(Supreme Court of California. March 2, 1891.)

CRIMINAL LAW—JUDGMENT—APPEAL—PRESUMPTIONS.

1. Defendant, who was charged with burglary and with a former conviction of grand larceny, both of which charges he denied by his plea, and against whom was rendered a verdict for burglary only, may be sentenced to imprisonment for both offenses, where, on the day of the trial, he withdrew his denial of the conviction of larceny.

2. Though the time fixed for pronouncing judgment was not at least two days after the verdict, as required by Pen. Code Cal. § 1191, defendant's failure to object to such time will be deemed an assent thereto, he having a right to waive the time allowed to elapse by the provisions of the Code.

3. Where the charge was not given in writing, it will be presumed, on appeal, unless the contrary is shown, that it was taken down by the phonographic reporter, as required by Pen. Code Cal. § 1093, subd. 6.

4. Where the information charges that the offense was committed in "the city and county of San Francisco," the place where it was committed need not be repeated in the judgment.

5. A judgment by which it is "ordered, adjudged, and decreed" that defendant be imprisoned, is sufficient in form.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Carroll Cook and J. E. Foulds, for appellant. George A. Johnson, Atty. Gen., for the people.

BELCHER, C. The defendant was charged in the information filed against him with the crime of burglary, and with a prior conviction of grand larceny. He was tried and found guilty of burglary in the second degree. Judgment was entered that he be imprisoned in the state prison for the term of 10 years. From this judgment he has appealed, but the record brought up contains no bill of exceptions and none of the instructions given to the jury. In support of the appeal it is argued that the defendant, as shown by the record, was arraigned only for the crime of burglary, and pleaded simply not guilty; that this plea put in issue every allegation of the information, and upon it he was tried and found guilty simply of burglary in the second degree; that, as there was no verdict as to the prior conviction, it could not be taken into consideration in pronouncing judgment, and hence, as the maximum term of imprisonment authorized by the statute in such a case was five years, (Penal Code, § 461,) the judgment was illegal and should be reversed. I is true that the record as originally filed in this court showed no admission by the defendant or finding as to the alleged prior conviction, but, on suggestion of a diminution of the record, an amendment duly certified was subsequently filed, showing that after the appeal was taken the trial court amended its record of the case *nunc pro tunc*, so as to show that on the day of the trial the defendant admitted the prior conviction set forth in the information, and withdrew his former denial thereof. The record, therefore, as now presented, does not support the argument. The de-

defendant clearly had the right at any time to withdraw his plea of not guilty to the charge of prior conviction, and to confess the same, and, having done so, the jury had nothing to say or find in regard to it. The verdict covered the only issue submitted to the jury, and upon it the court was authorized to affix the penalty, as it did, at 10 years' imprisonment. Pen. Code, § 666; *People v. Brooks*, 65 Cal. 300, 4 Pac. Rep. 11. It is also argued that the record affirmatively shows error, because it appears therefrom that the verdict was rendered on January 15, 1890, and the court thereupon appointed January 17th as the time for pronouncing judgment, and on the last-named day pronounced the judgment appealed from. It is said that, under section 1191 of the Penal Code, the time fixed for pronouncing judgment in cases of felony must be at least two days after the verdict, and that the minutes show that two full days could not have intervened. A sufficient answer to this point is that one found guilty of a felony may waive the time which the Code says must elapse between the verdict and sentence, and may consent that judgment be pronounced immediately. *People v. Robinson*, 46 Cal. 94. Here it does not appear that the defendant ever made any objection in the court below on account of this alleged shortness of time, and he must therefore be held to have assented to it. In *People v. Mess*, 65 Cal. 174, 3 Pac. Rep. 670, the same point was made, and, as we think, correctly held untenable. It is further said that the record shows affirmatively that an oral charge was given by the court to the jury, and that this was an error, calling for a reversal of the judgment. But the giving of an oral charge is not necessarily error. The statute says: "The judge may then charge the jury, and must do so on any points pertinent to the issue, if requested by either party; and he may state the testimony and declare the law. If the charge be not given in writing, it must be taken down by the phonographic reporter." Pen. Code, § 1093, subd. 6. Here it does not appear that the charge complained of was not given at the request of the defendant, nor that it was not taken down by the phonographic reporter. It will be presumed, therefore, that it was so taken down. The well-settled rule is that error is not to be inferred, but must affirmatively appear in the record. *People v. Huff*, 72 Cal. 117, 13 Pac. Rep. 168; *People v. Leong Sing*, 77 Cal. 117, 19 Pac. Rep. 254; *People v. Cline*, 83 Cal. 374, 23 Pac. Rep. 391.

Another point made for reversal is that the judgment was illegally pronounced, for the reason that the defendant was not informed by the court, or under its direction, of the nature of the charge against him, or of his plea or of the verdict. And it is said, under this head, that the minutes do not show that the judgment was pronounced in open court, or by any judge of the court, and that it cannot be seen therefrom whether there was any judge present, or whether the court had been or was opened. These objections are sufficiently met and answered by the recitals in the judgment itself, as shown by the

certified copy thereof in the record, which was sufficient to show that the judgment was pronounced in open court, and by the judge thereof, and to meet the requirements of sections 1200 and 1207 of the Penal Code.

It is further said that the judgment fails to show that it was pronounced for any crime committed within the jurisdiction of the court, and that it simply orders that defendant be punished by imprisonment, but does not direct that he be imprisoned, and hence is not such a judgment as is contemplated in criminal practice. There is nothing in these objections. The information charged that the offense was committed in the city and county of San Francisco, and it was not necessary that the judgment should state where it was committed. It was "ordered, adjudged, and decreed" that the defendant be punished by imprisonment in the state prison, and this was all that is necessary. We find no material error in the record, and advise that the judgment be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

83 Cal. 176

PEOPLE v. BARTON. (No. 20,712.)

(*Supreme Court of California.* March 2, 1891.)

CRIMINAL LAW—APPEAL—PRESUMPTIONS.

1. Though, on a conviction for burglary, the time appointed for pronouncing judgment was not at least two days after verdict, as required by Pen. Code Cal. § 1191, this is no ground for reversal where defendant made no objection at the trial.

2. Where the charge to the jury in a prosecution for felony was given orally, it will be presumed on appeal, in the absence of a contrary showing, that it was taken down by the phonographic reporter, as required by Pen. Code Cal. § 1093, subd. 6.

3. Though the judgment roll does not show that when judgment was pronounced defendant was informed by the court of the nature of the charge against him, of his plea, and of the verdict, conceding that these statements are required by Pen. Code Cal. § 1200, it will be presumed on appeal that they were made, when the contrary is not shown.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. McM. SHAFTER, Judge.

Carroll Cook and *J. E. Foulds*, for appellant. *W. H. Hart*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted by the jury which tried him of burglary in the first degree. He pleaded not guilty as to that charge, but admitted prior conviction of grand larceny, as charged in the information. The notice of appeal states that the appeal is taken from the judgment, from an order denying a motion in arrest of judgment, and from an order denying a motion for a new trial. But it nowhere appears that any such motions were ever made or acted upon. There is no bill of exceptions in the record. The first point made for a reversal of the judgment is that the time

appointed for pronouncing it was not at least two days after verdict, and is therefore in violation of section 1191 of the Penal Code. The defendant seems to have made no objection at any time to this action of the trial court, and under the decision of the appellate court in *People v. Mess*, 65 Cal. 174, 3 Pac. Rep. 670, the point made is without merit. It is further claimed that, the offense being a felony, error is shown upon the minutes of the court, in that it is there stated that the charge to the jury was given orally. It is true that subdivision 6, § 1093, of the Penal Code requires that, where the charge in such a case is not given in writing, it must be taken down by the phonographic reporter. But it is not made to appear here that it was not so taken down, and the presumption must be that it was. The defendant must show error affirmatively. *People v. Tonielli*, 81 Cal. 279, 22 Pac. Rep. 678; *People v. Carroll*, 80 Cal. 153, 22 Pac. Rep. 129; *People v. Marks*, 72 Cal. 46, 13 Pac. Rep. 149; *People v. Huff*, 72 Cal. 117, 13 Pac. Rep. 168; *People v. Leong Sing*, 77 Cal. 119, 19 Pac. Rep. 254; *People v. Cline*, 83 Cal. 377, 23 Pac. Rep. 391. It is said that the judgment was illegally pronounced, because it does not appear from the judgment roll that the defendant was informed, as he should have been, under section 1200, Penal Code, by the court, or under its direction, of the nature of the charge against him, or of his plea, or of the verdict. Conceding that it appears to have been held in *People v. Murback*, 64 Cal. 372, that these preliminary statements are necessary, and that they form no part of the judgment pronounced, yet it does not appear in the record that such statements were not made; and the presumption must be indulged that they were, unless the appellant has shown to the contrary, which he has not done. The prior conviction of larceny was confessed by the defendant. The jury then passed only upon the charge of burglary. "The judgment follows the verdict and confession of the defendant, and is in all respects regular," as we think. *Ex parte Young Ah Gow*, 73 Cal. 442, 15 Pac. Rep. 76. The admission of prior conviction of larceny here is not shown to have been brought out by any question of the court, but appears, so far as the record shows, to have been voluntarily made when the defendant was called on to plead. As before said, it is for the appellant who claims error to show it. We perceive no prejudicial error, and advise that the judgment be affirmed.

We concur: BELCHER, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(88 Cal. 169)

Ex parte IRWIN. (No. 20,793.)

(*Supreme Court of California.* March 2, 1891.)

CONVICTS—ESCAPE—COMMENCEMENT OF TERM.

Petitioner was sentenced to the state-prison for a term of nine years for grand larceny, and also for a term of five years for burglary, the latter term to begin at the expiration of the for-

mer. He escaped from prison during the first term, and on recapture was sentenced to serve a term of nine years for such escape, under Pen. Code Cal. § 105. That section provides that the term of imprisonment for the escape shall "commence from the time the prisoner would have otherwise been discharged from the prison." *Held*, that it did not commence until petitioner had served out both the former terms, less whatever credits he may have earned.

Department 1. *Habeas corpus.*

Carroll Cook, for petitioner. *W. H. H. Hart*, Atty. Gen., for the People.

PATERSON, J. The petitioner was convicted in the superior court of Sonoma county of the crime of grand larceny, and on the same day, and before sentence was pronounced in the first case, was convicted of the crime of burglary. He was sentenced by the court to serve a term of nine years in the state-prison in the grand larceny case, and in the burglary case the court imposed the sentence of five years in the state-prison, said term to commence at the expiration of the term of nine years imposed in the grand larceny case. His first term of imprisonment commenced on the 21st day of October, 1879, and he remained in the state-prison until August 21, 1880, when he escaped therefrom. He was captured, and again confined under the first judgment on the 9th day of November, 1880. Thereafter an information was filed against him in the superior court of Marin county for the crime of escaping from prison, and he was tried, convicted, and sentenced to serve a term of nine years, "said term of imprisonment to commence from the time he would otherwise have been discharged from said prison." Allowing the credits provided for by statute, the petitioner's first term expired not later than December 9, 1884, and if the term of imprisonment for escaping from the prison commenced to run at the expiration of the term which he was serving when he escaped, all of the terms of imprisonment imposed by the three judgments—allowing the credits provided for by statute, all of which it is admitted he has earned—have expired, and the petitioner is entitled to his discharge. Section 105 of the Penal Code provides that "every prisoner confined in the state-prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state-prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would have otherwise been discharged from said prison." The last clause of this section was added by amendment of the section in April, 1880, and plainly states that the term of imprisonment for an escape from the prison shall commence to run from the time that the prisoner would have been discharged from the prison if he had not escaped therefrom. The petitioner's term of imprisonment for the escape did not commence to run until he had served the 14 years imposed by the two judgments of the superior court, less credits allowed, because, except for his escape, he would not have been discharged from the prison until he had served out the full term im-

posed by the two judgments. The language of the section is unambiguous, and its meaning is clear. Petition denied.

We concur: HARRISON, J.; GAROUTTE, J.

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SWASEY v. ADAIR. (No. 13,173.)

(Supreme Court of California. March 3, 1891.)

EQUITABLE DEFENSES—TRIAL BY COURT—WAIVER.

1. In an action for the recovery of possession of personal property, an answer claiming that defendant is the owner of the property, and further setting up a counter-claim for damages for conspiracy and deceit, presents no equitable defense justifying the court in proceeding to try it in advance of a trial of the issues at law.

2. After the court had denied defendant's written application for a jury trial, failure to repeat the application did not waive defendant's right to such trial.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

John F. Burris and Jos. M. Kinley, for appellant. C. K. Royce, for respondent.

HARRISON, J. The complaint herein is in the ordinary form of an action for the recovery of the possession of certain personal property. When the cause came on for trial the appellant demanded a jury, and her application was denied by the court, "on the ground that the defense set up was an equitable defense, and should be tried by the court in the first instance." The correctness of this ruling is the principal error presented on this appeal.

It has been stated by this court in many cases that when the defendant interposes equitable and legal defenses to the complaint the proper rule of procedure for the court is to hear and dispose of the equitable defense before proceeding to try the issues of law. *Arguello v. Edinger*, 10 Cal. 160; *Estrada v. Murphy*, 19 Cal. 273; *Weber v. Marshall*, Id. 457; *Lestrade v. Barth*, Id. 671; *Martin v. Zellerbach*, 38 Cal. 319; *Fish v. Benson*, 71 Cal. 434, 12 Pac. Rep. 454. By making an equitable defense in such an action the defendant does not, however, lose any right which he would otherwise have to have the issues of law tried by a jury; nor does the court, by virtue of being called upon under the above rule to first hear and dispose of the equitable defense, acquire the right to pass upon all the issues in the case without a jury. It may happen in many cases that the result of the trial of the equitable defense will obviate the necessity of a trial of the legal issues. The trial may dispose of all of the issues in the case, or the equitable relief granted may be such as to prevent the trial of the issues at law, as was the case in *Bodley v. Ferguson*, 30 Cal. 512. But whenever the trial of the equitable defense does not have such result, and the issues at law remain undisposed of, these issues are to be tried in the same manner as if no equitable defense had been interposed. In *Arguello v. Edinger*, supra, the court says: "If upon hearing the evidence the court should determine there was ground for relief, it would enjoin the further prosecution of

the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issues upon the general denial." In *Weber v. Marshall*, supra, the court says: "The parties are entitled to a trial by jury upon the legal issues." In *Lestrade v. Barth*, supra, it is said: "The equitable defense should, therefore, be first passed on by the court, as according to the determination of the claim of the defendant to the relief he seeks will the necessity of proceeding with the action at law depend." In *Martin v. Zellerbach*, supra, the court says: "The more regular and orderly practice in such cases clearly is first to dispose of the equitable defenses set up in the answer. If these are found for the defendant it will obviate in most cases the necessity of trying the law side of the action, but, if found against the defendant, he still has the right to be heard on his other defenses." It has never been held, however, that every defense of an equitable nature that may be interposed to an action at law must be heard and determined by the court before proceeding to try the issues at law. Such a rule of practice would, in many instances, be inconvenient, and would tend to embarrass, rather than facilitate, the trial of the cause. The cases in which the rule has been laid down were cases in ejectment, in which the defendant asserted such a controlling equity as, if ripened into a decree, would prevent the plaintiff from asserting his legal claim. The equitable defense which is referred to in the rule is properly an equitable right of action existing in behalf of the defendant, which he might have asserted in an independent suit brought by him against the plaintiff for the purpose of enforcing such right, but which, under our system, he can also rely upon as a defense in an action involving the same subject-matter brought against him by the plaintiff. The party relying upon such equitable defense must, however, plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity. His answer, being the in the nature of a bill in equity, must contain all the essential averments of such a bill. He then becomes an actor with respect to the matters alleged by him, and his defense must be of such a character as may be ripened into a decree in his favor. *Estrada v. Murphy*, 19 Cal. 273; *Davis v. Davis*, 26 Cal. 39; *Carpentier v. Oakland*, 30 Cal. 443; *Bruck v. Tucker*, 42 Cal. 352. It is very clear upon an inspection of the answer in the present case that there was no equitable defense presented thereby which, within the foregoing principles, authorized the court to insist that it should be "tried by the court in the first instance," or that would justify the court in proceeding to try it in advance of a trial of the issues at law. Not only do the facts alleged fail to show such equitable defense, but it is with much force urged that the only issues presented by the answer are the title of the plaintiff to the property sued for, and its value. In the first portion of the answer the facts alleged present no other issue than the

claim of the defendant that she was herself the owner of the property, which is only an other mode of denying the plaintiff's title. *Thompson v. Thompson*, 52 Cal. 154. The "separate and distinct answer" which the appellant sets up under the head of "second count" is more in the nature of a counter-claim for damages arising from an alleged conspiracy and deceit practiced towards her by the plaintiff in connection with others. It further appears from the record that after the court had made the above ruling the appellant's attorney stated to it that he had no evidence to offer in support of the answer, excepting upon the question of the value of the property; and thereupon the court proceeded to the trial of the issues presented by the complaint. It was urged at the argument that, as the appellant did not, after such ruling, again demand a jury, she is now precluded from making an objection to the action of the

court. But it was not necessary that she should make any demand for a jury. This was secured to her by the provisions of section 592, Code Civil Proc., unless a jury trial should be waived by her in one of the modes prescribed in section 631, *Id.* Not only did she did not waive it in any of these modes, but she had filed a written demand for a jury, and this must be held to be a continued refusal to waive her right thereto. After the court had once denied her application it was not necessary for her to repeat the demand. The action of the court thereafter in proceeding to try the cause without a jury was under her exception. In view of what is stated above, this ruling of the court was erroneous, and for this error its judgment and order denying a new trial must be reversed; and it is so ordered.

We concur: PATERSON, J.; GAROUTTE, J.

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